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Frank Briscoe Incorporated v. NLRB

637 F.2d 946 (3d Cir.), January 6, 1981—247 NLRB 13

On petition to review Board Order

Before SEITZ, Chief Judge, HIGGINBOTHAM, Circuit Judge and SCHWARTZ, District Judge*

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SEITZ, Chief Judge: Frank Briscoe, Inc. (Briscoe) petitions for review, and the National Labor Relations Board (Board) cross-petitions for enforcement, of an order of the Board. The order of the Board is based on the finding that Briscoe violated section 8(a)(1) of the National Labor Relations Act (NLRA) when it refused to recall certain employees because some of them had engaged in protected, concerted activity by filing charges against Briscoe with the Equal Employment Opportunity Commission (EEOC). *See* 247 NLRB No. 6 (1980). We have jurisdiction under 29 U.S.C. § 160(e) & (f) (1976).

I.

Briscoe, a New Jersey corporation engaged in general contracting in the construction industry, was the general contractor for the construction of the multi-million dollar convention center in Pittsburgh, Pennsylvania. Briscoe employed between twenty and fifty ironworkers to work on the convention-center project, the number varying according to the working conditions at a given time. Pursuant to Briscoe's national collective bargaining agreement with the International Association of Bridge, Structural and Ornamental Workers (Union), the vast majority of these ironworkers were hired through the Union's hiring hall.[1]

During January and February of 1979, production problems plagued the convention-center project. The entire project was shut down during the second week of February because of poor weather conditions. On February 13, 1979, Ironworker Superintendent Jack Godwin informed Union Steward George Cook that certain workers would have to be laid off.

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Cook, accompanied by the general foreman, then went to a "shanty" where the ironworkers gathered before work. There, he read the names of twelve ironworkers, including Jeffrey, a trainee, who were to be laid off. According to Cook, he was instructed to tell the men that this was a general layoff, and that they would be recalled.

On February 14 and 16, four of the laidoff ironworkers, including Jeffrey, and a fifth ironworker who had been demoted but not laid off, filed charges of racial discrimination with the EEOC. Each of the five complainants is black. Two of these ironworkers filed charges on February 14, and the other three filed charges on February 16. Briscoe received notice of these charges on February 22 and 23.

After the layoff, each of the eight ironworkers involved in this unfair labor practice suit requested, either at the jobsite or at the Union hiring hall, that he be recalled when Briscoe began rehiring. Mr. Hanna, whose testimony the administrative law judge credited, is the Union's business representative in charge of referring workers to jobs from the hiring hall. He testified that temporarily laid-off ironworkers requesting to be recalled normally would be preferentially referred back to the job. However, Mr. Hanna testified that none of the ironworkers laid off on February 13 were referred back to the convention-center jobsite because he had been told by Briscoe's Job Superintendent that Briscoe "didn't intend to hire the men back and * * * as long as [the] discrimination charges [were] filed with the EEOC, if [Briscoe] did take some of the people back, then there would be definite grounds for discrimination." Mr. Hanna informed those ironworkers who requested to be recalled that he would not refer them back to the jobsite, because Briscoe would not recall any of the workers who had been laid off on February 13 as long as the EEOC charges were pending. According to Mr. Hanna, had it not been for Briscoe's refusal to recall these workers, he would have referred these workers back to the job.

Briscoe began hiring ironworkers again on March 5, hiring twenty-nine workers between that date and April 2. With the sole exception of Jeffrey,[2] none of the ironworkers laid off on February 13 was, or has since been, recalled.

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*Hon. Murray M. Schwartz, United States District Judge for the District of Delaware, sitting by designation.

[1] Under the national agreement with the Union, Brisco is not required to hire all its workers directly through the hiring hall, it also may accept on-the-job applications. However, since early March 1979, Briscoe has hired primarily through the hiring hall.

Eight of the workers, including three of the black ironworkers who had filed discrimination charges, brought an unfair labor practice charge against Briscoe for refusing to recall them because some of the workers had filed charges with the EEOC.[3] After conducting the hearing, the administrative law judge found that the black workers who had filed the EEOC charges had engaged in concerted activity protected under section 7 of the NLRB. Further, he found that Briscoe had refused to recall any of the ironworkers laid off on February 13 because some of them had filed EEOC charges. He concluded that this failure to recall the workers violated section 8(a)(1) of the NLRB. The Board affirmed the ruling, findings, and conclusions of the administrative law judge, and adopted his order with one minor modification. Briscoe petitions for review, and the Board cross-petitions for enforcement of this order.

II.

First, Briscoe argues that the record does not support the Board's holding that the ironworkers engaged in protected, concerted activity when they filed discrimination charges with the EEOC. Briscoe also argues that the Board erroneously relied on the "constructive concerted activity" doctrine enunciated in *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced* 388 F.2d 495 (2d Cir. 1967), which was rejected by this court in *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971).

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We have consistently held that to qualify as concerted activity, "it must appear at the very least that [the conduct] was engaged in with the object of initiating or inducing or preparing for group action or that it had *some relation to group action in the interest of the employees.*" *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (emphasis added). Determining whether particular conduct constitutes "concerted activity" is basically a factual inquiry. *See Edward Blankstein, Inc. v. NLRB*, 623 F.2d 320, 321 (3d Cir. 1980). We are bound to uphold the Board's determination if it is supported by substantial evidence on the record as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); 29 U.S.C. § 160(e) & (f) (1976).

The witnesses who testified before the administrative law judge concentrated on the reasons for Briscoe's refusal to recall the workers laid off on February 13, and thus their testimony is not directed to whether filing the EEOC charges was concerted activity. We believe, however, that the following evidence supports the Board's finding: (1) All five of the EEOC complainants filed charges within three days of the layoff (two of them filed on February 14, and the other three filed on February 16); (2) these complaints are similar in nature; (3) the complaints filed by the two trainees who had been laid off referred to discrimination against other trainees, and a third complaint alleged that the complainant had previously complained that Briscoe discriminated against blacks by not hiring enough trainees, thus indicating that the individual complainants intended to benefit workers other than themselves. *Compare Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009 (3d Cir. 1980) (employee refusing to work because unsafe conditions endangered not only himself but also other employees engaging in concerted activity) *with Northern Metal Co.*, 440 F.2d 881 (employee attempting to secure holiday pay only for himself not engaging in concerted activity).

Further, the testimony before the administrative law judge contains ample evidence that Briscoe lumped the charges together and viewed "the blacks" as a group with respect to those charges. The evidence that Briscoe clearly knew of the EEOC charges and viewed the complainants as a group distinguishes this case from *Tri-State Truck Service v. NLRB*, 616 F.2d 65, 71 (3d Cir. 1980) (employer "must have knowledge, or reason to know, that employee activities have coalesced into group action for mutual aid or protection"). After reviewing the record, we are satisfied that there is substantial evidence on the record as a whole to support the Board's determination that the ironworkers engaged in concerted activity by filing the EEOC charges.

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[2] Briscoe explains that Jeffrey was laid off on February 13 because of its mistaken impression that the collective bargaining agreement required that all trainees be laid off before any journeyman could be laid off. When Briscoe realized this mistake, it recalled Jeffrey on February 26.

[3] Seven of these workers, including two EEOC complainants, filed the unfair labor practice charge on April 20. An eighth worker, who also had filed an EEOC charge, was added to the unfair labor practice complaint at the beginning of the hearing before the administrative law judge.

Briscoe's argument that the Board impermissibly relied on the *Interboro* doctrine [4] by adopting the findings of the administrative law judge does not alter our conclusion. Although the administrative law judge cited *Interboro*, he did so in a footnote in which he correctly rejected Briscoe's contention that filing EEOC charges could benefit only other black workers because success could come only at the expense of the white workers. Further, *Interboro* was one of five cases cited by the administrative law judge in this footnote, and three of the other cases involved facts showing traditional concerted activity. Therefore, given the context of the reference to *Interboro* and the other cases cited, we are satisfied that the Board's finding of concerted activity is not based on the "constructive concerted activity" doctrine of *Interboro*.

Having found that substantial evidence supports the Board's conclusion that filing the EEOC charges constituted concerted activity, we must examine the Board's conclusion that this activity was

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protected under section 7. In order to be protected under section 7, the concerted activity must be "for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1976). Activities relating to conditions of employment are for "mutual aid or protection." We conclude that concerted activity directed toward ending alleged discriminatory employment practices falls within this standard, and thus deserves protection under section 7, at least as long as it does not violate another important principle of labor law, such as the principle of exclusive representation. *See e.g., Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 70, 95 S.Ct. 977, 988, 43 L.Ed.2d 12 (1975) (national labor policy embodying principles of nondiscrimination does not require an exception to the exclusivity principles of section 9(a)); *United Packinghouse Workers v. NLRB,* 416 F.2d 1126, 1135 (D.C. Cir.) ("racially integrated working conditions are valid objects for employee action"), *cert. denied sub nom., Farmers' Cooperative Compress v. United Packinghouse Workers,* 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179 (1969). The record amply supports the conclusion that the EEOC complainants, by seeking to end Briscoe's alleged discriminatory practices against other workers as well as against themselves, were acting for "mutual aid or protection," and thus were protected under section 7.[5]

III.

Next, Briscoe argues that the evidence on the record does not support the Board's finding that Briscoe refused to recall the ironworkers because some of them had filed EEOC charges. After reviewing the testimony presented to the administrative law judge, we are satisfied that substantial evidence supports the finding that Briscoe intended the February 13th layoff to be a temporary cutback because of poor weather, and that it later refused to recall the workers because of the pending EEOC charges. There was ample testimony that the weather at the time of the layoff was extremely poor; that Briscoe told Cook, the Union steward, to tell the laid-off workers that the layoff was temporary and that they would be recalled; and that Mr. Hanna, as well as the workers themselves, believed that the layoff was temporary. In fact, Briscoe's Job Superintendent admitted to the administrative law judge that he had represented to the Pennsylvania unemployment insurance authorities that the employees were laid off because of lack of work and not for cause. There was also ample testimony that Briscoe had informed Mr. Hanna, as well as some of the white workers laid off on February 13, that Briscoe would not recall any of the laid-off workers as long as the charges were pending, and that Briscoe could not recall any of the white workers because, if it did, then it would have to recall the blacks who had filed the EEOC charges.

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[4] On appeal, the Board disavows any reliance on *Interboro*, and concedes that *Mushroom Transportation Co.* controls the question whether there was concerted activity.

[5] Briscoe also argues that, by relying on the "presumption" of concerted activity derived from the *Interboro* line of cases, the Board erroneously shifted the burden of proof and required Briscoe to demonstrate the reason for its initial decision to lay off the workers, [illegible] be the issue in each of the EEOC charges. Briscoe thus appears to be arguing that the Board forced it to try the EEOC charges in an unfair labor practice proceeding. We disagree. Any shifting of the burden was not the result of this alleged presumption, but was the result of the Board's demonstrating that Briscoe had retaliated against the protected, concerted activity engaged in by these workers. Any duplication in what Briscoe will try to prove in the EEOC and the Board proceedings derives not from any attempt on the Board's part to try an EEOC charge, but from the fact that Briscoe's alleged nonretaliatory reason for not rehiring the workers, *i. e.* that they were poor performers, necessarily implicates the reason for the original layoff.

Moreover, a review of the record does not indicate that the evidence in support of the Board's finding is "overborne by evidence calling for contrary inferences." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S.Ct. 453, 455, 95 L.Ed. 479 (1951). The job-performance records that Briscoe sought to admit at the hearing to demonstrate poor work performance did not chart the performance of individual ironworkers, but only charted the performance of the four crews. Moreover, the workers who were laid off on February 13 did not all come from one crew. Thus, the job-performance records do not support Briscoe's contention that the ironworkers were laid off because they were poor workers. Therefore, we conclude that the finding of the Board, that Brisco refused to recall the workers because some of them had engaged in protected, concerted activity by filing EEOC charges, is fully supported on the record.

IV.

Finally, Briscoe argues that the only remedy available to the workers for Briscoe's refusal to rehire them in section 704(a) of title VII, 42 U.S.C. § 2000e-3(a) (1976) (prohibiting retaliation by an employer when an employee has opposed the employer's discriminatory practices or has participated in any title VII proceeding). We cannot determine whether Briscoe is arguing that the Board erred in finding that filing the EEOC charges was concerted activity protected under section 7, and thus that section 8(a)(1) of the NLRA was not implicated, or that section 704(a) of title VII is the exclusive remedy for retaliation against employees who oppose employer discrimination regardless of whether such opposition may also constitute concerted activity protected under section 7. We have already addressed and rejected the contentions that filing the EEOC charges was not concerted, protected activity, and that the Board erroneously relied on the "constructive concerted activity" doctrine enunciated in *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, *enforce* 388 F.2d 495 (2d Cir. 1967). Thus we will enforce the order of the Board unless section 704(a) of title VII provides the exclusive remedy for the ironworkers here involved.

Nothing in the text of title VII itself addresses the relation between section 704(a) and section 8(a)(1). However, the legislative history of title VII demonstrates that Congress intended to allow an individual to pursue rights independently under both title VII and other applicable statutes, including the NLRA. For example, in response to a suggestion that title VII would adversely affect rights under the labor laws, Senator Clark, one of the sponsors of the bill, introduced an interpretative memorandum that states:

> "Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. The procedures set up in title VII are the exclusive means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705. *Of course, title VII is not intended to, and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the [NLRA], the [Board] would not be deprived of jurisdiciton.* * * * [T]itle VII would have no effect on the duties of any employer or labor organization * * *, and these duties would continue to be enforced as they are now,"

110 Cong.Rec. 7207 (1964) (emphasis added). In adddition, the Senate defeated an amendment that would have made title VII the exclusive federal remedy for most unlawful employment practices. *See* 110 Cong.Rec. 13,650–52 (1964). Further when the Equal Employment Opportunity Act of 1972 (EEOA) was enacted, a similar amendment was rejected. *See* H.R.RepNo.92–238, 92d Cong., 1st Sess. 66 (1971) U.S.Code Cong. & Admin. News 1972, p. 2137 (minority views on H.R. 1746 ("charges of discrimination in employment conditions may still be brought under the [NLRA];" "our attempt * * * to make title VII an exclusive remedy * * * was rejected"). The Senate Committee Report on the EEOA provides that neither the "provisions regarding the individuals's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." S.Rep.No.92–415, 92d Cong., 1st Sess. 24 (1971). Thus the legislative history demonstates the title VII was intended to sup-

plement, not replace, existing methods of combatting employment discrimination. *See, e. g. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48–49, 94 S.Ct. 1011, 1019–20, 39 L.Ed.2d 147 (1974); *United Packinghouse Workers v. NLRB*, 416 F.2d 1126, 1133–34 n.11 (D.C. Cir.), *cert. denied sub nom., Farmers' Cooperative Compress v. United Packinghouse Workers*, 396 U.S. 903, 90 S.Ct. 216, (1969).

Moreover, judicial interpretation of both title VII and the NLRA supports the conclusion that certain conduct may be protected by both statutes, and thus an employee may resort to the remedies of either statute. For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66, 98 S.Ct. 2505, 2512–13, 57 L.Ed.2d 428 (1978), the Supreme Court noted that the " 'mutual protection' clause [of section 7] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." The Court then cited with approval several Board cases, including *King Soopers, Inc.*, 22 N.L.R.B. No. 80, 1975–76 N.L.R.B. Dec. (CCH) ¶ 16,631 (1976), in which the Board held that filing EEOC charges was protected, concerted activity, and that section 704(a) did not provide the exclusive remedy for retaliation. *See* 437 U.S. at 566 n.15, 98 S.Ct. at 2512 n.15 (not addressing question of what may constitute concerted activity). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (holding that an employee pursuing a grievance concerning racial discrimination to final arbitration does not forfeit his private cause of action under title VII); *Young v. IT&T*, 438 F.2d 757, 762 (3d Cir. 1971); *United Packinghouse Workers*, 416 F.2d 1126. We conclude that, when the Board finds that the conduct of employees constitutes concerted activity protected under section 7, and that the employer has refused to recall a group of employees because some of them were exercising these section 7 rights, the fact that some of the employees[6] also have a remedy under section 704(a) does not deprive the Board of jurisdiction.

We do not believe that the holding of the Supreme Court in *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), is inconsistent with our conclusion. In *Novotny*, the Court did not consider whether title VII provides the exclusive remedy when the same factual occurrence gives rise to violations of "two 'independent' right," *id.* at 378, 99 S.Ct. at 2352, which is the issue we address in this case. Instead, the Court held "that § 1985(c) may not be invoked to redress violations of Title VII." *Id.* Nor do we believe that the Court's holding in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 70, 95 S.Ct. 977, 988, 43 L.Ed.2d 12 (1975), supports Briscoe's suggestion that section 704(a) should be the exclusive remedy even when the employees' conduct is also protected by section 7 of the NLRA. On the contrary, we believe that *Emporium Capwell* supports our conclusion that section 8(a)(1) protects employee from employer retaliation for engaging in protected, concerted activity even when section 704(a) also provides protection. In *Emporium Capwell*, the Court held that the national labor policy of nondiscrimination did not protect the decision of a group of minority employees to bypass the grievance procedures of the collective bargaining agreement in favor of attempting to bargain directly with the employer in derogation of the exclusivity principles of section 9(a) of the NLRA. In reaching this conclusion, the Court recognized that "national labor policy embodies the principle of nondiscrimination as a matter of highest priority." *Id.* at 66, 95 S.Ct. at 986. Moreover, in rejecting the contention that to further this policy an exception should be made to the exclusivity principle, the Court reasoned:

> This argument confuses the employees' substantive right to be free of racial discrimination with the *procedures available under the NLRA for securing these rights.* Whether they are thought to depend upon Title VII or *to have an independent source in the NLRA,*[23] they cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA.

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[6] Although Briscoe argues that § 704(a) is the exclusive remedy for all the ironworkers laid off on February 13, it never addresses whether those ironworkers who did not file EEOC charges would have a remedy under tille VII. The record does not disclose whether they also "opposed" Briscoe's alleged racial discrimination and thus would be protected from retaliation by § 704(a). Because we reject Briscoe's contention that § 704(a) provides the exclusive remedy for an employer's retaliatory conduct that also violates § 8(a)(1), we need not address this issue.

Id. at 69, 95 S.Ct. at 988 (emphasis added) (in footnote 23, the Court cited *United Packinghouse Workers*, 416 F.2d 1126, which held that racially integrated working conditions are valid objects for employee action protected under the NLRA, and that title VII does not provide the exclusive remedy for employment discrimination).

Finally, we emphasize that we are not holding that all conduct protected by section 704(a) is necessarily protected by section 8(a)(1). As the Supreme Court stated in *Emporium Capwell*, even if section 704(a) protects the employees' conduct, "the same conduct is *not necessarily entitled to affirmative protection from the NLRA.*" 420 U.S. at 71–72, 95 S.Ct. at 989 (emphasis added). On the other hand, when employees engage in concerted activity for mutual aid and protection, which ordinarily would be protected by the NLRA, the mere fact that this concerted conduct was manifested in the form of filing EEOC complaints does not conver the employees' complaint under the NLRA into one exclusively under title VII. Therefore, we hold only that where employees engage in concerted activity protected under section 7, the fact that such conduct also may be protected from retaliation by section 704(a) does not deprive the NLRB of jurisdiction.

V.

We conclude that there is substantial evidence on the record to support the finding of the Board that the workers, by filing the EEOC charges, engaged in concerted activity protected by section 7. We also conclude that substantial evidence supports the finding of the Board that Briscoe intended the February 13 layoff to be temporary, and subsequently did not recall the workers because some of them had filed EEOC charges, thus violating section 8(a)(1) of the NLRA. Further, we find that the Board was not deprived of jurisdiction to remedy Briscoe's retaliation against the workers for exercising their section 7 rights merely because the workers who had filed the charges also could pursue a remedy under section 704(a).

VI.

Briscoe's petition for review of the order of the Board will be denied. The Board's cross-petition for enforcement of the order of the Board will be granted.

Murray M. Schwartz, District Judge, dissenting: I concur in two of the majority's conclusions: 1) that there is substantial evidence in the record to support the Board's finding that Briscoe in refusing to rehire the laid-off ironworkers retaliated against all of them because some had filed EEOC charges; and 2) that filing of charges was "concerted activit[y] * * * for mutual aid or protection * * *." [1] I part company with the majority when it assumes that such activity is *protected* concerted activity "under Section 7 [of the National Labor Relations Act ("the Act"), 29 U.S.C. § 157],[2] at least as long as it does not violate another important principle of labor law * * *." (Majority opinion p. 950).

In the instant matter Briscoe is charged with commission of an unfair labor practice under section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1),[3] in that it retaliated against laid-off employees by refusing to rehire because some of their number filed charges with the EEOC. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975), the employer was charged with an unfair labor practice under section 8(a)(1) by reason of its retaliatory firing of picketing employees. In that case the employees were assumed to be engaged in concerted activity for the purpose of collective bargaining over issues of employment discrimination. The Supreme Court did not automatically assume the activity was protected. Instead it posed the issue as whether "in light of the national policy against

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[1] The collective bargaining agreement is not part of the record in this case. At oral argument all counsel agreed this Court would have to treat the matter as it was handled before the Board, i.e., as concerted activity falling within the "mutual aid or protection" language of section 7 rather than the "collective bargaining" language of the same section. If there were an anti-discrimination clause in the collective bargaining agreement, Briscoe and the union would have arguably conferred jurisdiction upon the NLRB. *See Electrical, Radio, and Machine Workers v. NLRB*, 49 U.S.L.W. 2388 (D.C.Cir. Nov. 28, 1980). That question and another posed by the majority at its note 6 are not before this panel.

[2] Section 7 reads in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection. * * *

[3] Section 8(a)(1) provides:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

racial discrimination in employment, the National Labor Relations Act protects concerted activity by a group of minority employees to bargain with their employer over issues of employment discrimination." *Id.* at 52. Similarly, in the instant matter, the question this Court must answer is whether Congress intended that the National Labor Relations Act protect concerted activity by a group of minority employees who file charges with the EEOC when Congress expressly allocated adjustment or retaliation claims under Title VII to the EEOC.[4] The majority has answered the question in the affirmative. This separate opinion arises from the belief that this court should not permit the NLRB to arrogate to itself power Congress has placed elsewhere.

In recent years the Supreme Court has expressed considerable concern that employment discrimination matters be addressed in the appropriate forum. *See NAACP v. Federal Power Commission,* 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976); *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *see also International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Myers, Inc.,* 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976). It has demonstrated the same concern in assuring that Title VII is not used as a substantive ground for finding violations of other statutes.[5] *See Great American Federal Savings & Loan Association v. Novotny,* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Emporium Capwell Co. v. Western Addition Community Organization, supra.*

Notwithstanding Supreme Court concern, the question of whether Congress intended to give jurisdiction to both the EEOC and NLRB when there is employer retaliation due to the filing of EEOC complaints is one of first impression at the appellate court level. Included within this question are two important sub-issues: allocation of jurisdiction between two governmental agencies and whether an unfair employment practice, a substantive right created by Title VII, can be remedied by the NLRB under the guide of an unfair labor practice. A broad overview of the legislative history of the Title VII and the NLRA, an unwillingness to conclude that Congress intended two administrative agencies to have separate jurisdiction over the same act of employment discrimination, and controlling case law lead to the conclusion that the majority result is unacceptable.

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Careful scrutiny of the legislative history of Title VII cited in the majority's able opinion reveals it is of no aid. The issue before the Court is whether employer retaliation for filing charges with the EEOC is within the jurisdiction of the NLRB. Thus, any argument that passage of Title VII was not intended to strip the NLRB of whatever statutory authority it had over employment discrimination prior to passage of Title VII does not advance the inquiry.[6] The focus of this Court is narrow: whether a newly created unfair employment practice which did not and could not exist prior to passage of Title VII and for which a remedy was specifically provided in Title VII is also an unfair labor practice[7] under the NLRA.

Conversely, the legislative history of the National Labor Relations Act conclusively demonstrates the Congress did not intend for the NLRB to have an active civil rights role. *See generally* Axelrod and Kaufman, *Mansion House—Bekins—Handy Andy: The National Labor Relations Board's Role in Racial Discrimination Cases,* 45 Geo. Wash.L.Rev. 675, 682–88 (1977). When the Wagner Act of 1935 was debated, Congress paid scant attention to civil rights problems and summarily rejected concerns of the National Association for Advancement of Colored People and National Urban League. When

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[4] Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer * * * to discriminate against any individual * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[5] See *infra* pp. 956–957.

[6] The Title VII legislative history cited by the majority supports the proposition that passage of Title VII did not contract the jurisdiction of the NLRB, but does not address the issue confronting this panel—whether a newly created statutory right under Title VII should be a basis for an unfair labor practice charge. This is best illustrated by the language immediately preceding the excerpt from the interpretive Memorandum of Senator Clark cited in the majority opinion (Majority op. at p. 951). The missing language reads:

> it has been asserted that it would be possible to deny unions their representation rights under the National Labor Relations Act and the Railway Labor Act. This is not correct.

110 Cong. Rec. 7207 (1964).

[7] See note 1 *supra.*

Congress passed the Taft-Hartley Act,[8] it added prohibitions of certain union practices, but expressed rejected efforts to insert prohibitions aimed at remedying employment discrimination. Finally, when Congress considered the Landrum-Griffin Act,[9] which regulated internal union affairs, it rejected an amendment aimed at union discriminatory policies. 105 Cong. Rec. 15722–24 (1959).

Congress did not act to eliminate employment discrimination until 1964 when it passed Title VII. Responsibility for eradicating employment discrimination could have been lodged in the NLRB. Instead, a new Commission, the EEOC, was born. Similarly, Congress could have provided the EEOC with statutory implementation machinery like that of the NLRB. It did not. Political compromise resulted in an enforcement mechanism for Title VII vastly different from that of the NLRA.

Under Title VII

> [a]nyone aggrieved by employment discrimination may lodge a charge with the EEOC. That commission is vested with the 'authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in the discrimination charge.' Thus, the Commission itself may institute a civil action. If, however, the EEOC is not successful in obtaining 'voluntary compliance' and, for one reason or another, chooses not to sue on the claimant's behalf, the claimant * * * may demand a right-to-sue letter and institute the Title VII action himself without waiting for the completion of the conciliation procedures.
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> In the claimant's suit, the federal district court is empowered to appoint counsel for him, to authorize the commencement of the action without payment of fees, costs, or security, and even to allow an attorney's fee. Where intentional engagement in unlawful discrimination is proved, the court may award backpay and
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> order 'such affirmative action as may be appropriate.'

Johnson v. Railway Express Agency, supra, 421 U.S. 454, 458, 95 S.Ct. 1716, 1719, 44 L.Ed.2d 295 (1975). [citations omitted]. Thus, under Title VII the emphasis is on individual rights, conciliation and, if unsuccessful, filing of a law suit in the federal district court. "By contrast, once the General Counsel of the NLRB decides to issue a complaint, vindication of the charging party's statutory rights becomes a public function discharged at public expense, and a favorable decision by the Board brings forth an administrative order." *Emporium Capwell Co. v. Western Addition Community Organization, supra,* 420 U.S. at 72, 95 S.Ct. at 989.

The enforcement philosophies and mechanisms of the two statutes as recited above cannot be reconciled. Filing of an unfair labor charge will be an impediment to successful conciliation, irrespective of who prevails. Can we seriously attribute to Congress an intent to have the parties take part in the conciliation process at the same time they are engaged in an adversarial proceeding before the Board? Further, unless Congress explicitly so states, it is singularly inappropriate to attribute to that body an intent that an employer should be forced to appear before two administrative agencies for the same alleged act of employment discrimination. Implicit in the majority's holding is that Congress intended to apply inconsistent enforcement philosophies and irreconcilable statutory enforcement schema to the same episode of employment discrimination in instances where the same is not expressly covered in the NLRA. This untenable result is even more difficult to accept when it is remembered that the two statutes have completely different objectives. The NLRA seeks to minimize industrial strife by guaranteeing employees the most basic "collective rights" of industrial self-determination by "'encouraging the practice and procedure of collective bargaining'" through majoritarian rule and the principle of exclusive representation. *Emporium Capwell, supra,* 420 U.S. at 62, 95 S.Ct. at 984, *quoting* 29 U.S.C. § 151. Title VII, on the other hand, seeks to eradicate employment discrimination through exercise of rights by individual claimants.

On two occasions the Supreme Court has answered in the negative the question whether the substantive rights conferred by Title VII may be used as the basis for relief under other statutes. In *Great American Federal Savings & Loan Association*

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[8] Labor Management Relations Act of 1947, 61 Stat. 136 (1947).

[9] Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959).

v. Novotny, reversing this unanimous *en banc* court, it stated: "The right Novotny claims under section 704(a) did not even arguably exist before the passage of Title VII. The only question here, therefore, is whether the rights created by Title VII may be asserted within the *remedial* framework of § 1985(c)." 442 U.S. at 376–77, 99 S.Ct. at 2351. While preserving independently *based rights, whether the same be contractual, see Alexander v. Gardner-Denver Co., supra; International Union of Electrical, Radio & Machine Workers, Local 790 v. Robbins & Myers, Inc., supra,* or statutory, *see Johnson v. Railway Express Agency supra,* the Supreme Court forbade suit under section 1985(c). In *Emporium Capwell,* the contention was made that the "congressional policy of protecting from employer reprisal employee efforts to oppose unlawful discrimination as expressed in § 704(a) of Title VII" had to be a violation of section 8(a)(1) [10] of the NLRA or "the integrity of § 704(e) will be seriously undermined." 420 U.S. at 71, 95 S.Ct. at 989. The Supreme Court expressly rejected this invitation to make the substantive rights of Title VII a basis for an unfair labor practice charge stating that rights entitled to protection under section 704(a) of Title VII are "not necessarily entitled to affirmative protection from the NLRA." *Id.* at 71–72, 95 S.Ct. at 989–990.

The *Emporium Capwell* opinion also answered in the most direct language possible the issue that necessitates this dissent.

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"*Questions arising under Title VII must be resolved by the means that Congress provided for that purpose* * * *. What is said above does not call into question either the capacity or the propriety of the Board's sensitivity to questions of discrimination. *It pertains, rather, to the proper allocation of a particular function—adjudication of claimed violations of Title VII—that Congress has assigned elsewhere.*" *Id.* at 71, n.25, 95 S.Ct. at 989 n.25 [emphasis added]. The concluding language of the *Emporium Capwell* majority has gone unheeded by this panel's majority.

> In order to hold that employer conduct violates § 8(a)(1) of the NLRA *because* it violates § 704(a) of Title VII, we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature. This obviously, we cannot do.

Id. at 73, 95 S.Ct. at 990 [footnote omitted]. Given that the NLRA and Title VII have diverse objectives and vastly different enforcement philosophies and mechanisms for adjustment, it can be confidently predicted that today's decision will eventually involve this Court in conceptual difficulties which will only be resolved by a broad based retreat.

In summary, because the decision of the majority does violence to an overall view of the legislative history of the NLRA and Title VII, attributes to Congress the intent to expose an employer to two administrative agencies with conflicting statutory philosophies and mechanics of enforcement for the same unfair employment practice, and does not give the necessary fealty to the holdings of *Emporium Capwell Co. v. Western Addition Community Organization, supra,* and *Great American Federal Savings & Loan Association v. Novotny, supra.* I respectfully dissent.

NLRB v. International Credit Service, a Division of Lucas County Credit Bureau, Inc.

651 F.2d 1172 (6th Cir.), January 6, 1981–240 NLRB 715

On petition to enforce Board Order

Before Lively and Martin, Circuit Judges, and Markey, Judge*

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This case is before the Court on the application of the National Labor Relations Board for enforcement of its order issued against Intenational Credit Service, a division of Lucas County Credit Bureau, Inc., of Toledo, Ohio on February 12, 1979, and reported at 240 N.L.R.B. No. 102. The Board found the company violated Section 8(a)(5) and (1) of the Act by refusing to execute the collective bargaining agreement, by unilaterally implementing employee wage increases, by engaging in direct dealing with the employees, and by refusing to furnish within a reasonable time wage information requested by the Union. The order requires the company to cease and desist from engaging in those unfair labor practices, and from in any way interfering with, restraining, or coercing the employees in the exercise of the rights under the Act. Affirmatively the company was ordered to execute the written agreement.

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[10] While the emphasis throughout has been on Section 7 of the NLRA, Briscoe was charged with a violation of section 8(a)(1) which by its terms makes any concerted activity protected by section 7 an unfair labor practice. see notes 2 and 3, supra.

*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

The NLRB certified the Toledo Printing Pressman and Assistants' Union No. 55, an affiliate of the International Printing & Graphic Communications Union, AFL-CIO in March 1977. Negotiations on a collective bargaining contract began shortly thereafter. The Union's chief negotiator was Fred Larson, an International Representative. The employer was represented by the President of the company, J.W. Orrin. The record establishes that at the initial bargaining session Orrin acknowledged his authority to represent the company. He stated he chose not to have his attorney present. Orrin testified and claims here he made it clear that negotiations were not be considered final until his attorney had reviewed the contract. Mr. Larson testified that Orrin merely requested he be allowed to submit the final agreement to his attorney at the conclusion of the bargaining sessions.

After the negotiations were completed and Orrin was in possession of the contract and a set of office rules in the form of a separate document, incorporated by reference in the contract as requested by Orrin upon learning the office rules had been left out of the contract, the papers were sent to the attorney. The union members became impatient with the delay in signing the documents and threatened to strike. Orrin expressed concern over the contents of certain articles in the contract, stating some contained substantive terms not agreed upon during the negotiations.

Larson suggested wage increases be implemented to avert the strike, subject to approval by the employees. The employees rejected the wage increase. Orrin initiated the wage increase without employee approval. The employees went on strike. Orrin continued to refuse to sign the contract and the office rules. A meeting was held and the contract was reviewed point by point. Orrin continued to insist discrepancies existed and refused to sign.

The existence of an agreement is a question of fact, and it is the Board's

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function to determine whether the employer refuses to sign and honor the bargain produced by the negotiations. *N.L.R.B. v. Strong*, 398 U.S. 357, 361, 89 S.Ct. 541, 544, 21 L.Ed.2d 546 (1969); *N.L.R.B. v. Truckdrivers Union No. 100*, 532 F.2d 569, 571 (6th Cir. 1976), *cert. denied*, 429 U.S. 859, 97 S.Ct. 160, 50 L.Ed.2d 137 (1977); *Arco Electric Company v. N.L.R.B.*, 618 F.2d 698, 699 (10th Cir. 1980). We should enforce the Board's order if we find substantial evidence supports the finding that an agreement was reached. *Adams Potato Chips, Inc. v. N.L.R.B.*, 430 F.2d 90 (6th Cir. 1970). Upon careful review of the record, we do not believe that a final agreement was ever reached by the parties in this case. Discrepancies between notations made by Orrin and the agreement in its final form are too apparent to satisfy us that certain substantive terms in the contract are reflective of agreements made during the bargaining session. However, it is our further conclusion that the company did engage in the other unfair labor practices cited. We therefore deny enforcement of the order insofar as it directs the company to execute the written agreement, but enforce it in all other respects.

Texas Instruments Incorporated v. NLRB

637 F.2d 822 (1st Cir.), January 7, 1981—247 NLRB 253

On petition to review Board Order

Before CAMPBELL and BOWNES, Circuit Judges, and KEETON,* District Judge

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LEVIN H. CAMPBELL, Circuit Judge: In *Texas Instruments, Inc. v. NLRB*, 599 F.2d 1067 (1st Cir. 1979), we vacated and remanded that part of a decision of the National Labor Relations Board (Board) finding that Texas Instruments, Inc. (TI) violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) (1976), when it discharged six employees for disseminating information classified by the company as confidential. *See Texas Instruments, Inc.* 236 NLRB 68 (1978). Subsequent to our remand the

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*Of the District of Massachusetts, sitting by designation.

Board issued a Supplemental Decision and Order affirming its earlier order in the case. 247 NLRB No. 37 (Jan. 15, 1980). TI now petitions for review and reversal of the Supplemental Decision and Order, and the Board cross-petitions for enforcement.

I

The facts in the case are set out in our earlier opinion, 599 F.2d at 1069–70, but we partially restate them here in the interest of clarity.

The six employees whose termination triggered this litigation worked at Texas Instruments' plant in Attleboro, Massachusetts and belonged to a small group called the Union Organizing Committee. As members of the Committee, they sought to elicit support for unionization of the Attleboro plant by occasionally distributing union leaflets at the plant gates and by generally showing their support for the union. Prior to the present incident, the six employees had received satisfactory or good performance ratings and at least one was promoted. In May 1977, however, they ran afoul of TI's company security policy, which as applied in the present context is challenged as invalid.

As a major manufacturer of sophisticated electronic products which deals extensively with the Department of Defense, TI

> "has had, since 1960, a well developed internal security system, to deal adequately with defense security demands, to protect itself against those who would seek highly valued technological product and process information, and to safeguard certain managerial information including 'competitive or business intelligence'. There are two levels of classification: 'TI Strictly Private' and 'TI Internal Data'. The former is the more sensitive and is applied to all 'important TI information or material of a proprietary nature, the unauthorized use or disclosure of which could seriously impair the interests of TI'."

599 F.2d at 1069.

TI effectuates its classification program in part by means of a rule requiring immediate discharge for deliberate disclosure of "strictly private" material to unauthorized persons. See 599 F.2d at 1072; 247 NLRB No. 37, *supra,* slip op. at 4–5. A company handbook given to each employee lists "disclosure of classified or proprietary material to unauthorized persons" among the "major infractions [which] may be considered grounds for termination." TI's Personnel Manual provides that if such a security violation "was deliberate and resulted in compromise of information, immediate termination will result." The mandatory nature of the penalty for deliberate disclosure of classified information is borne out in practice. Testimony by company witnesses indicated that wilful (as contrasted with negligent) commission of a major infraction has regularly led to termination. In its Supplemental Decision, the Board found that "[d]uring the approximately 20 years that this security system has been in effect, [TI] has consistently applied this sanction [i. e., termination] in the five cases where it had been proven that such classified information was revealed." 247 N.L.R.B. No. 37, *supra,* at 5.

TI employees are generally apprised of this policy through the company handbook and staff and department meetings. In addition, the treatment of confidential information was apparently a frequent topic in a monthly company newspaper circulated among employees at the Attleboro plant.

Of present concern is the application of this security rule to certain wage information gathered and analyzed by TI. As a matter of corporate policy, TI seeks to make wages and benefits at each of its plants competitive with other employers in the area. To implement this policy the company conducts an annual area wage survey which solicits information from both union and nonunion employers about the number of persons they employ in specific job categories and their minimum, maximum and average rates of pay for each category. In seeking the cooperation of other employers, TI advises them that "all data will be treated with strict confidence."

TI compiles the wage information it receives into two reports. One report is distributed to the companies participating in the survey. It lists the average rate of pay for each job category at each company and identifies the companies only by code letters, thus ensuring the anonymity of the data. The other report is far more detailed and circulation of the few copies produced is restricted to a small number of high level TI Management personnel.[1] It comprises roughly fifty separate "wage recommendation sheets," one for each job category, that show the number,. as well as the minimum, maximum and average wage, of employees in that category at each company. The companies are identified by name and arranged on the sheets according to pay scale, with the highest-paying company listed first. Arrows in the right-hand margin of each sheet indicate TI's rank in the survey, the compensation staff's recommended wage increase for that job category and where the proposed increase would place TI in relation to the other companies. Counsel for TI stated in oral argument that the second report also contains information about company profitability, recent wage increases and the reevaluation of jobs, but this is not apparent from the record. This more extensive report is used by TI's top management to determine the company's wage schedule and has always been classified "TI Strictly Private"; indeed, every page of the report is stamped with this classification.

Sometime prior to May 25, 1977, a copy of the most recent version of this second, highly confidential wage survey report

> "was anonymously mailed to the Organizing Committee's post office box. Members of the Committee were never implicated in the mailing. After receipt of the papers, members of the Committee discussed the information; realized that it would be helpful in their attempts to unionize the company, inasmuch as organized plants were shown to be paying higher rates; and cut off the 'Strictly Private' label, reduced and reproduced in a leaflet two comparative tables of wages, one comparing rates for a grade 2–3 bench-worker at TI and sixteen other named plants and the other comparing rates for a grade 10 toolmaker at TI and 15 other named plants. Narrative material pointed to the moral:
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> > 'The key thing for setting the wages in this area is what the union shops are doing. Take G.E., for example, doing the same work we're doing but making well over $1.00 more an hour, because workers there have struggled over the years through their union for a decent wage. If it wasn't for these organized places paying better wages to bring the average up, we'd be down there with Balfours.' "

599 F.2d at 1070.

The leaflets were first distributed on May 25, 1977 at 6:30 a.m.. TI management personnel soon discovered that the material contained reproductions of two wage recommendation sheets. Augat and Balfours, two companies at or near the bottom of the wage survey tables, also became aware of the contents of the leaflet (the source of their information is not specified) and called TI on May 25 to express concern. The leafletting continued at 3:30 p.m.

> "and management representatives contacted four of the distributors, informing them that the leaflet contained 'Strictly Private' matter and warning them that
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> continued distribution would subject them to summary termination. They and others met in the evening. One of them testified, 'We discussed it and our decision was that if the company did have any rights in the matter, had any claim on the material or anything of that sort; then they would have confiscated the leaflet right on the spot or taken some kind of measures against us. And, since that hadn't happened, we decided to go out again the next day.' "

599 F.2d at 1070.

On the next morning, May 26, the leaflets were again distributed, notwithstanding renewed warnings. Later in the day

> "the six people who had been distributing the leaflets were interviewed and then suspended. Five days later TI concluded that evidence was lacking to implicate the employees in the original leak of the data, but that the six employees had wilfully disseminated classified materials and that company policy required immediate termination."

599 F.2d at 1070. The employees were suspended on May 26, and then terminated several days later. This unfair labor practice proceeding was subsequently initiated.

II

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[1] The ALJ, in his initial disposition of the case, indicated that only 16 copies existed apart from the one received by the Union Organizing Committee. 236 NLRB at 70.

The original disposition of the case by the administrative law judge (ALJ) and the Board is described in our previous opinion. *See* 599 F.2d at 1070–71. In remanding to the Board, we indicated that further proceedings were to focus "on the issues of the validity of the rule invoked by the company to justify the discharges, just as * * * in *Jeanette Corp. v. NLRB,* 532 F.2d 916 (3d Cir. 1976)." 599 F.2d at 1073. If the rule were found invalid under section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), then discharges pursuant to the rule would necessarily be violations of section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976).

> "This is so because the employer's asserted motivation—i.e., enforcement of a rule—must be in support of a rule not prohibited by labor law. If it is not it could not support a discharge even if the motivation to enforce the rule, a neutral not an anti-union objective, were the employer's only motivation for that discharge."

599 F.2d at 1072 (footnote omitted). *See Republican Aviation Corp. v. NLRB,* 324 U.S. 793, 805, 65 S.Ct. 982, 988, 89 L.Ed. 1372 (1945). We went on to state, however, that if the rule were found valid, then "the Board would face the task of assessing motive" in order to decide the propriety of the discharges. 599 F.2d at 1073. *See* Part IV, *infra.*

The *Jeanette* case cited in our previous opinion identifies three stages in assessing the validity of a company rule. Initially the NLRB carries the burden of establishing that the employer's conduct pursuant to a company rule could have adversely affected employee rights protected under section 7 of the NLRA, 29 U.S.C. § 157 (1976). Such a showing is sufficient to render the rule "prima facie violative of section 8(a)(1)" and the burden in the second part of the inquiry "falls on the employer to demonstrate 'legitimate and substantial business justifications' for his conduct." 532 F.2d at 918. Finally, if such justifications are forthcoming, the Board must " 'strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.' " 532 F.2d at 918, *quoting NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614 (1967) and *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33–34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027(1967). The test laid out in *Jeanette* is for the most part based upon an approach developed by the Supreme Court in the *Fleetwood Trailer* and the *Great Dane Trailers* cases, *supra.*[2]

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In a Supplemental Decision and Order issued following our remand the Board structured its reasoning to conform to the analysis in *Jeanette.* The Board first turned to the question whether "the employees, while leafleting [sic], were engaged in protected concerted activity." Determining that they were, the Board said,

> "It is clear that the employees, by engaging in such activity were encouraging collective action, to improve wages. This is evident from the wording of the leaflet, set out above, which indicates that the objective of the members of the Committee in disclosing the confidential wage data was to enforce their argument that only by means of a union could higher wages be assured. The wage information involved herein * * * [is] the type of data necessary to employees for making an informed decision about unionization."

247 NLRB No. 37, *supra,* slip op. at 8–9. Next, the Board reviewed the business justifications proffered by TI for its rule prohibiting disclosure of confidential information. It noted at the outset that

> "This is not a case of lack of evidence tending to justify the rule * * * . On the contrary, because of the highly technical and defense-related material it handles, [TI] has in general shown that it has serious security interests which it justifiably is seeking to protect. In view of these genuine security needs, and the fact that there is no evidence or claim that the rule was unlawfully pro-

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[2] In *Great Dane Trailers* the Supreme Court described two possible permutations of this analysis. First, where employer conduct is " 'inherently destructive' of important employee rights," the Board can find an unfair labor practice "even if the employer introduces evidence that the conduct was motivated by business considerations." 388 U.S. at 34, 87 S.Ct. at 1797. This case does not involve such a situation. See 599 F.2d at 1072 n.5. Second, "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.* Implicit in the discussion of these two situations is the existence of a third possibility: employer conduct that affects no employee rights. The Board in the present suit treated the case as an example of the second situation; as will be explained in Part III, *infra,* we feel the case is correctly decided as an instance of the third situation.

mulgated, [TI's] rule, on its face, appears to be valid."

Id, at 9. The Board therefore went on to examine TI's specific justifications for applying its rule to the particular conduct at issue in this case.

TI argued that the wage recommendation report obtained by the Committee was properly treated as confidential, and its dissemination was an adequate ground for discharging the employees, because TI had assured companies participating in the area wage survey that the information they provided would be kept confidential. The Board held that an unsolicited assurance of confidentiality "does not automatically cloak [the wage survey data] with such status" and found "little evidence that the breach of [TI's] pledge by its employees resulted in damage to TI's reputation * * * ." *Id.*, at 10.

TI also asserted that disclosure of the information in the wage recommendation report could result in competitive harm to the participants in the survey, including itself. In the first proceeding before the Board in this case the company offered this argument in justification of both the rule presently in question and a rule barring employees from divulging TI's own wage schedules to outsiders. As the Board pointed out in its Supplemental Decision, our earlier opinion upheld its initial determination that the latter rule was invalid since "TI, in mounting its annual wage survey, gives out its own wage data to every one of its competitors within a 25 mile radius." 599 F.2d at 1073–74. Based on that portion of our previous holding in the case and the finding of the Board upon remand that "it would be difficult for any competitor to utilize the limited information divulged by the handout to TI's disadvantage," the Board rejected this second business justification. *Id.*, at 11.

Finally, TI argued that the wage recommendation reports were properly treated as confidential due to their important role in management's formulation of TI's own wage schedule. The Board held that

> "this type of information (area wage surveys), is not automatically entitled to be withheld as confidential documents, especially when [TI] relies on them to determine its own wage rates. Moreover, TI itself breached the integrity of that alleged confidentiality by releasing similar information to its participating employers, and in selectively disclosing to its employees portions of its survey to support its position of a competitive wage scale."

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Id., at 12.

Having found the discharged employees' conduct to be an exercise of rights protected by section 7 of the NLRA, and having rejected TI's justifications for terminating the employees pursuant to its pertinent security rule, the Board concluded that "the analysis undertaken herein requires striking the balance in favor of the employees in exercising their Section 7 rights as opposed to the interest of the employer in enforcing its rule." *Id.* The rule as applied in this case was thus declared invalid, and the Board found it unnecessary to determine whether some other even more egregious motive caused the discharges.

III

We disagree with the Board's conclusion that TI was prohibited, as a matter of law, from enforcing its security rule with respect to conduct such as occurred here, *i.e.*, its employees' deliberate[3] disclosure of confidential wage survey material, gathered for management purposes and marked "strictly private," that had come to the employees' attention irregularly, outside proper channels. Contrary to the Board's ruling, we do not believe the employees' conduct as described was activity protected by the NLRA. It follows that TI's rule prohibiting deliberate disclosure of confidential company information, which the Board correctly held to be valid on its face, could be validly applied on these facts to prohibit and penalize dissemination of the information in question.

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[3] The Board has not argued that the employees' conduct here was other than deliberate and knowing. In its Supplemental Decision the Board describes the employees as having, "while engaged in organizational leafleting [sic], knowingly distributed material which contained classified wage survey information * * *." 247-NLRB No. 37, *supra*, slip op. at 1. The record shows that the anonymously mailed wage survey, each page of which was stamped "strictly private," was in the possession of the small Organizing Committee, to which the dischargees belonged, for approximately a month before it was used. All six employees were stipulated to have participated in one or more meetings at which the material was discussed and a decision made to incorporate it in an organizational pamphlet. Company witnesses testified that all six employees admitted, prior to discharge, that they knew the material was classified. All six employees had received TI's booklet, listing the rule against distribution of classified material and stating that violation thereof was a "major infraction" which may be considered grounds for termination." It was stipulated that five of the six discharged employees were present on May 25 at a meeting after the leafletting had commenced during which it was discussed that TI's officers had warned that the information was classified and the distributors' actions could result in discharge. Notwithstanding these warnings, the employees decided to continue to distribute the material, and leafletting proceeded the next day with all but one of the six, James Mallen, participating.

Conduct falls within the protection of the NLRA if it involves the exercise of a right guaranteed to employees by section 7 of the Act, 29 U.S.C. § 157. *See Fleetwood Trailer, Co., supra,* 389 U.S. at 378, 88 S.Ct. at 545; *Great Dane Trailers, supra,* 388 U.S. at 34, 87 S.Ct. at 1797; 29 U.S.C. § 158(a)(1). In its Supplemental Decision and in its brief to this court, the Board contends that the employees' dissemination of TI's confidential company information was an exercise of their right to exchange information about the benefits and drawbacks of self-organization and accordingly was protected under the NLRA. While it is true that the Supreme Court has recognized a right in employees to exchange organizational information as a necessary incident to "the right to self-organization" expressly guaranteed by section 7, *see NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 113, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945), it is also true that an abstract invocation of this right does not automatically shield an employee's acts from sanction under **830** a company rule. Not all conduct that can, in some general sense, be characterized as an exercise of a right enumerated in section 7 is afforded the protection of the Act. *See NLRB v. Local 1229, IBEW,* 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953); *Keosaian v. NLRB,* 630 F.2d 36, 38–39 (1st Cir. 1980); R. Gorman, *Labor Law* 296–317 (1976). For example, concerted activity that violates state or federal law, that irresponsibly exposes an employer's property to possible damage or that constitutes insubordination or disloyalty may be found to fall outside the scope of the NLRA even if undertaken in the interest of self-organization or collective bargaining. *See* R. Gorman, *supra,* at 311–17. We do not mention these examples as an exhaustive delineation of the contours of section 7, nor in order to capture the unique circumstances of the present case, but simply to suggest the proper approach to defining employee rights under the Act: rights under section 7 must in each instance be understood in relation to the concrete facts of a particular case. *See Fleetwood Trailer Co., supra,* 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614; *Great Dane Trailers, supra* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027; *Keosaian, supra,* 630 F.2d at 38–39; NLRB *v. Knuth Brothers, Inc.,* 537 F.2d 950, 953–57 (7th Cir. 1976). It is not enough to decide, as did the Board, that the discharged employees had a right to disseminate information in furtherance of their organizational goals; it must also be asked whether they had a right to distribute *this* information. Based on a variety of factors drawn from precedents of the courts as well as the Board, we find they did not.

As an initial consideration, the discharged employees would have had no right in the present context to have insisted upon receiving access to TI's wage recommendation reports.[4] This point was conceded by counsel for the Board in oral argument and is well established in case law. *See Decaturville Sportswear Co. v. NLRB,* 406 F.2d 886, 889–90 (6th Cir. 1969); *NLRB v. Clearwater Finishing Co.,* 203 F.2d 938 (4th Cir. 1953); *Southern & Western Lumber Co.,* 212 NLRB 668 (1974); *cf. Vitrionic, Inc.,* 183 NLRB 1067, 1077–78 (1970) (seeking information from employer to assist consumer boycott against it); *Montgomery Ward & Co.,* 146 NLRB 76 (1964) (seeking information related to employee grievance). Indeed, other cases go farther and indicate that the employees, once having stumbled across TI's confidential data, would have had no right knowingly to *use* the classified wage survey information, gathered by management solely for its own internal use, in their organizing activities. In its opinion in *Ridgely Manufacturing Co.,* 207 NLRB 193, 196–97 (1973), the Board states as a "rule of thumb" the proposition "that employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer's private or confidential records." *Accord NLRB v Florida Steel Corp.,* 544 F.2d 896, 897 (5th

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[4] This is not a case involving the right of a bargaining representative to request information needed for the proper performance of its duties in negotiating, administering or policing a contract. *See Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L.Ed.2d 333 (1979); *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–36, 87 S.Ct. 565, 567–68, 17 L.Ed.2d 495 (1967); ***Western Mass. Elec. Co. v. NLRB,*** 589 F.2d 42, 46 (1st Cir. 1978). An employer's duty to furnish information to his employees as defined in cases of this nature derives from the statutory duty to bargain. TI being nonunion, the duty to bargain is not implicated here.

Cir. 1977); *Bell Federal Savings & Loan Association,* 214 NLRB 75, 78 (1974).[5] It seems clear that the TI wage recommendation sheets anonymously mailed to the Union Organizing Committee came to the attention of the discharged employees outside the normal course of their employment.

A second factor to be considered is the confidential nature of the information in the wage survey report. This is not a case involving information gathered by the employees themselves; information already effectively released by the company; or information so generally known in the outside world as to be beyond protection,[6] *see News-Texan, Inc., v. NLRB,* 422 F.2d 381, 386 (5th Cir. 1970); *Southern & Western Lumber Co., supra,* 212 NLRB at 669; in which the information was readily accessible to employees, see *Southern & Western Lumber Co., supra,* 212 NLRB at 669; *Ridgely Manufacturing Co., supra,* 207 NLRB at 197; or in which nothing in the nature of the information suggested its confidentiality, *see Southern & Western Lumber Co., supra,* 212 NLRB at 669. *See generally* notes 3, *supra.* The data had been compiled through the efforts of TI's officials entirely or limited executive use. Certain of it, consisting of evaluations and wage recommendations by TI's staff, was internal to TI itself. The rest, while gathered from outside firms, had been specially compiled. TI clearly had a proprietary interest in its wage survey report. There was evidence that it cost TI around $10,000 to prepare the report, and that no similar compilation existed elsewhere. While TI's employees would certainly have had a right to disseminate any bits of the outside wage data they had obtained from outside sources, they had no right to appropriate their employer's confidential work product.[7] Each page of the company's report from which the discharged employees excerpted data for their leaflet was stamped "Strictly Private." And TI's employee manual and newspaper described TI's rule against disclosure of confidential information and the security system. In comparable situations, courts and the Board have held employees' use of confidential company information to be outside the protection of the NLRA. *See Florida Steel Corp., supra,* 544 F.2d 896; *Clearwater Finishing Co., supra,* 203 F.2d 938; *Vitrionic, Inc., supra,* 183 NLRB at 1078–79.

As a final consideration, we note the absence of evidence, even assuming this would be relevant, that the employees' organizing activities were somehow peculiarly dependent upon having access to the confidential information. *Cf. NLRB v. J. P. Stevens & Co.,* 563 F.2d 8, 24–25 (2d Cir. 1977), *cert. denied,* 434 U.S. 1064, 98 S.Ct. 1240, 55 L.Ed. 2d 765 (1978) (refusing to order company to disclose wage rates, job descriptions, and dates for hire for employees in context of organizing campaign and in absence of a showing "that the employees' ability to learn the advantages of self-organization is in any way dependent upon the union's access to such * * * information"). *Accord Textile Workers Union v. NLRB,* 388 F.2d 896, 906 (2d Cir. 1976), *cert. denied,* 393 U.S. 836, 89 S.Ct. 112, 21 L.Ed.2d 107

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[5] *Bell Federal Savings* can be read to define employee rights more narrowly than *Ridgely.* In *Bell,* the Board held that a switchboard operator's disclosure to a union official of the number of calls received by the company president from his attorney was not protected activity. The Board distinguished her action from the conduct of employees who use information obtained in the course of their work apparently on the fact that the information about the president's calls, though obviously gathered in her normal duties, was not "openly available" to employees in general. 214 NLRB at 78. The Board also noted that her conduct was "a breach of trust justifying discipline" and that the union could have obtained directly the name of the company's bargaining representative. These factors are discussed *infra.*

[6] The Board found that "TI itself breached the integrity of that alleged confidentially by releasing similar information to its participating employers, and in selectively disclosing to its employees portions of its survey to support its position of a competitive wage scale." This is an overstatement. The information disclosed to other employers pertained to wages, *see* 599 F.2d at 1073–74, but was anonymous and not detailed. *See* Part I, *supra.* Further, testimony by two TI employees would have supported a finding that on one occasion in January 1977, a single page was posted on a company bulletin board disclosing the pay scale for certain job classifications of six or seven of the participants in the area wage survey. It is not clear whether this emanated from a company source. The record thus does not indicate that TI at any time abrogated the confidential status of the detailed wage survey report it retained for internal use. In *Florida Steel Corp., supra,* 544 F.2d 896, partial and restricted release of confidential information did not make similar, but undisclosed information nonconfidential. 544 F.2d at 897–98 & n3. We believe the same to be true in this case.

[7] Mary Clinker, one of the discharged employees, testified that in an interview with TI management personnel prior to her discharge she challenged TI's concern with the disclosure of the wage material, claiming that she could have obtained the same information simply by calling friends employed at the companies participating in the wage survey. One of the interviewers, she stated, said in response, "[w]hen [she] called up and found out how much they were making, then [she] could go ahead and print it; but they had done the calling so [she] didn't have any right to print what they had done."

(1968). Through upon remand the Board found in the record no proof "that other means were 'readily available' to the employers here to acquire the same or similar data," it also pointed to no evidence suggesting that without the confidential TI information, the employees' organizing efforts would have been stymied. Reflective of the lack of dependency of the employees' organizing activities upon this material is the absence of any prior request therefor addressed to management. It may be true, as the Board argues, that "the distribution of leaflets setting forth the benchmark employers' wage rates and union status was * * * directly relevant to the Company employees' organizing campaign," but the conclusion does not follow, as the Board would have us decide, that disclosure of this particular compilation, put together by TI's management for its own purposes and secured from other firms upon promises of confidentiality, was therefore the exercise of an employee right and so "a most basic form of protected concerted activity." As we have already observed, *surpa,* not every activity in furtherance of self-organization is protected under section 7 of the NLRA. Even were we to assume—and we do not so hold—that the need for proprietary information might in pressing circumstances support a right on behalf of organizing employees to use that information, the facts of this case do not reveal any such circumstances.

To support finding an employee right in the present case that would trigger the protection of the NLRA, the Board argues that the discharged employees did not steal or misappropriate TI's confidential information. The presence or absence of subreption and misappropriation is certainly a significant factor in deciding whether employee conduct is a protected exercise of a section 7 right. *Compare News-Texan, Inc., supra,* 422 F.2d at 386, and *Southern & Western Lumber Co., supra,* 212 NLRB at 669, *with Florida Steel Corp., supra,* 544 F.2d at 897–98, *and Clearwater Finishing Co., supra,* 203 F.2d at 939, and *Vitrionic, Inc., supra,* 183 NLRB at 1078. However, this factor by itself is, at most, one element among many. Furthermore, the conduct at issue was by no means wholly innocent. The manner in which the employees received TI's wage survey report certainly suggested that the anonymous sender had obtained it through questionable means or was circulating it in breach of confidence. Nevertheless, they reproduced parts of the report in their organizing leaflet, being careful to cut from each page that they used the label "Strictly Private." [8]

Finally, the Board claims that disclosure of the confidential material "did not threaten any commercial harm to the Company." Such a consideration would be more appropriate to an inquiry into the employer's business justifications for its termination of the employees—a portion of the *Jeanette* inquiry which for present purposes we do not reach, *see infra.* Even, however, if commercial harm were relevant to the existence of and employee right under section 7, *see Knuth Brothers, Inc., supra,* 537 F.2d 950; *News-Texan, Inc., supra,* 422 F.2d 381; *Vitrionic, Inc., supra,* 183 NLRB 1067, its presence or absence would be but one factor; mere absence of resulting harm would not by itself demonstrate that the activity was protected.

Our examination reveals no basis sufficient to support a finding that the discharged employees' unauthorized and knowing use, in an organizing leaflet, of a confidential wage survey prepared by TI management for its own purposes, was the exercise of a right guaranteed by section 7 of the NLRA. As the employees' conduct was therefore not "protected activity," we need not go on to the other *Jeanette* criteria. That is, we need not review the Board's balancing, in light of the Act and its policies, of TI's proffered justifications for application of the rule on these facts, against a supposed invasion of employee rights. No such invasion of employee rights existed. Applied to the materials and to the conduct in question, the company security rule was valid.

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IV

In our previous opinion, we stated that if upon remand the rule were found valid, the Board would still face the task of assessing motive, *i.e.,* of determining whether the discharges were, in fact, prompted by infringement of the valid rule or were instead prompted by an impermissible anti-union purpose. 599 F.2d at 1073. *See also, NLRB v.*

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[8] In oral argument counsel for the Board claimed that this was necessary to fit the sheets onto the leaflet. An examination of the layout of the leaflet and the proximity on the wage sheets of the classification labels to the material reproduced in the leaflet would suggest that this was not the case.

Wilson Freight Co., 604 F.2d 712, 723 (1st Cir. 1979), *cert. denied*, 445 U.S. 962 (1980) 100 S.Ct. 1650, 64 L.Ed.2d 238. As on remand the Board decided that the rule was not valid, it never undertook an assessment of motive. Now, following our reversal of the Board, it must be asked if the rule, rather than an illegal anti-union purpose, was the true basis for discharge. This question requires consideration of another: should the issue of motive be remanded to the Board yet another time? We think not, on this record. We would conclude differently if there remained a genuine issue of fact to be decided. The record, however, discloses no substantial basis in fact on which the Board could reasonably reject TI's contention that the employees were discharged because of their violation of the confidentiality rule. Indeed, the Board has not argued for remand in the event its determination of invalidity is overturned; its arguments have been addressed solely to upholding that determination. In the circumstances, we believe the discharges must be held to be lawful.

In our previous decision, we mentioned two steps as being required in the analysis of an employer's motive.

> "The first is the determination that a significant 'bad', or anti-union, motivation contributed to the discharges. The second is the subsequent weighing of the employer's defense that a 'good' reason for the discharge existed and would have produced the discharge even in the absence of the bad reason."

599 F.2d at 1073 (footnote omitted). On the first point, the record contains only the most marginal evidence of a "bad" motivation. TI was openly opposed to unionization of its plants, but that, without more, would not offend the NLRA, nor support a finding of anti-union motive. *See NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 743-44—(5th Cir. 1979). While TI management personnel knew of the discharged employees' organizational activities, TI had given the employees good performance ratings, and had recently promoted one of them. There is no evidence of improper anti-union conduct, such as prior harassment of these or others on account of protected activities.

By contrast, there is persuasive evidence in the record that TI had a "good" reason for the discharges: the six employees had openly and knowingly violated a rule which not only prohibited disclosure of classified material but made such conduct a major infraction constituting grounds for discharge. The conduct of the employees in this case plainly fell within the purview of that rule. TI furnished considerable evidence of the seriousness with which it took its security program, and of its persistent efforts to enforce all aspects of it throughout its large organization. The record indicates that wage survey reports have for some time been treated as confidential by TI and that the one disseminated by the employees had its "strictly private" classification stamped on every page. Dissemination of the information was shown to be both knowing and deliberate. *See* note 3, *supra*. The rule, therefore, was clearly violated and under TI policy termination was the mandated penalty. This penalty is spelled out in company manuals and has been consistently pursued in fact. *See supra*. Without evidence of improper or inconsistent application of what has been determined to be a valid company rule, we can see no basis on which a supported finding could be made that the six employees would not have been fired but for their union activities. *See Eastern Smelting, supra*, 598 F.2d at 671. *Compare First Data Resources, Inc.*, 241 NLRB No. 114, slip op. at 14-15 (1979). The Board's discussion in its Supplemental Decision as to the presumed lack of harm resulting from disclosure of the wage survey information, *see* Part II, *supra*, does not supply the necessary quantum of evidence. In assessing motive

> "the factfinder is bound to weigh the employer's asserted justification with some delicacy and deference. 'It is important in cases involving business judgment that the Board not set up its own standard, and then conclude that, since the employer had another, it was ipso facto suspect.' *Eastern Smelting supra*, 598 F.2d at 673. The ALJ and the Board cannot dismiss an employer's justification entirely, as having no weight or substance at all. Rather there must be a weighing of the relative strengths of the good and bad motivations, not to determine how the Board would have behaved under similar circumstances but to determine what in fact motivated the employer."

599 F.2d at 1073. *See also Wilson Freight Co., supra,* 604 F.2d at 721–22; *Liberty Mutual Insurance Co. v. NLRB,* 592 F.2d 595, 603 (1st Cir. 1979); *Stone & Webster Engineering Corp. v. NLRB,* 536 F.2d 461, 467, (1st Cir. 1976) ("The Act was not intended to guarantee that business decisions be *sound,* only that they not be the product of antiunion motivation." (emphasis in original)). The breach of confidence at issue, whatever its ultimate effect in fact, is not patently trival. TI had a legitimate interest in protecting the integrity of its security system and in preserving an image of reliability among companies with which it dealt. *Compare First Data Resources, supra,* 241 NLRB No. 114, slip op. at 14–15. In the final analysis, there would be no way to uphold the Board to this record without giving to the discharged employees a perference over other employees who would be bound by TI's rule and could not claim the benefit of having engaged in organizational activities. While the NLRA protects against retaliation on account of union activities, it does not license activists to violate valid company rules with impunity. "Union membership is no guaranty against discharge." *Schwob Manufacturing Co. v. NLRB,* 297 F.2d 864, 871 (5th Cir. 1962), quoted in *Florida Steel Corp., supra,* 587 F.2d at 743.

The Board's petition for enforcement is denied and its Supplemental Decision and Order is set aside in whole.

NLRB v. Midland Ross, Inc.

653 F.2d 239 (6th Cir.), January 8, 1981—239 NLRB 1205

On petition to enforce Board Order

Before WEICK, KEITH and KENNEDY, Circuit Judges

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The National Labor Relations Board petitions for enforcement of two orders issued by the Board, one finding that defendant violated Sections 8(a)(3) and (1) of the Act by discriminatorily terminating employee Earl A. Rose for engaging in union activities; the second finding that defendant violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified union.[1] Both cases have been consolidated on appeal.

Midland Ross is an Ohio corporation engaged at its Louisville, Kentucky facility in the business of warehousing and distribut-

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ing plastic products. Earl Rose was hired in January, 1975, to work in the Louisville warehouse along with three other employees. In July, 1976, John Schneider, was hired as supervisor and plant manager and charged with making the warehouse run more smoothly and efficiently. Sometime in the fall of 1976, Schneider and Gerald Ose, Director of Marketing for the Material Handling Division, discussed reducing the number of warehouse personnel by one. The proposed budget for 1977 dated January, 1977, showed three instead of four warehousemen. The reduction was scheduled for implementation sometime in the second quarter of 1977. As the warehouseman with the least seniority, Rose would be the employee terminated.

On March 14, 1977, Schneider completed a morgage reference form for Rose answering the question "probability of continued employment" as "Good". About a week later, Dave Collier, the lead warehouseman, told Rose and two of the other warehouse employees that they were suspended for three days for tampering with another employee's time cards in violation of company rule 12. They appealed to Schneider at which time Rose remarked, "If we had a union in here, this kind of stuff wouldn't happen." Schneider reduced the suspension from three days to the balance of that afternoon.

On March 24, Ose sent Schneider a memo asking how the plan for reducing the warehouse employees by one was going.

Following the time card incident, Rose discussed organizing with two other warehousemen, Wood and Downs. Rose contacted, and arranged a meeting with the assistant to the president of local 89. Subsequent to this meeting, Rose passed out authorization cards at work where they were completed. The cards were signed on March 28, 1977. Schneider was notified three days later of the union's demand for recognition.

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[1] 239 N.L.R.B. 169 (1979) and 243 N.L.R.B. 179 (1979) respectively

On April 11, 1977, Rose went on vacation. Several days later he asked for and was granted two more vacation days although he was told that the company "needed him". When Rose called on April 18, 1977, to request several more vacation days he was told he was terminated for lack of work. Two days after Rose was terminated for lack of work, Wilbur Allison, the fourth warehouse employee, quit the warehouse after he was threatened with suspension. The stamping work performed by Allison was redistributed to the Dawson Springs facility after Allison quit.

Several discussions took place among Ose, Tom Bruser, Industrial Relations Manger, and George Gardner, Midland's labor counsel, between March 31 and April 15. On April 15, Schneider was told to proceed with the decision to terminate Rose.

On May 19, 1977, the Board conducted an election in a unit comprised of Midland Ross's five warehouse employees including Rose who had been terminated the month before. Midland Ross challenged Rose's ballot claiming that Rose was not an employee at the time of the election and thus was ineligible to vote. The Board disagreed and ordered Rose's ballot counted resulting in three votes for and two against the union. Midland Ross admits that it has refused and continues to refuse to bargain with the union certified as exclusive bargaining representative on January 29, 1979. The company argues that the Board's finding that Rose was improperly terminated for union activities is not supported by substantial evidence. Thus Rose was no longer an employee and ineligible to cast the vote which resulted in electing the union.

Midland Ross contends that there is no substantial evidence that it knew that Rose was active on behalf of the union. Although the evidence is not extensive, we hold that in view of the very small work force involved, Rose's statement "if we had a union", followed a week later by the union demand for recognition permits the inference that Midland Ross knew of Rose's union activities. This inference, when added to the timing of the discharge which

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occurred immediately after Schneider had stated that Rose was needed at work and had completed the mortgage information form stating the probability of his continued employment was good is substantial evidence that the discharge was due in part to his union activity, rather than the explanation offered by Midland Ross. Although we might well reach a conclusion different than that of the Board's, it's inferences are reasonable and thus entitled to affirmance by the Court.

Accordingly, the Board's application for enforcement of its orders is granted.

The Timken Company v. NLRB

652 F.2d 610 (6th Cir.), January 8, 1981—236 NLRB 757

On petition to review Board Order

Before ENGEL and KEITH, Circuit Judges, and CELEBREEZE, Senior Circuit Judge

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This case arises from the Timken Company's petition to review and set aside an NLRB order issued on June 7, 1978 and reported at 236 NLRB NO. 87. The Board filed a cross-appeal for enforcement of its order.

The Board found that the Timken Company maintained an employee handbook always in effect at the Company's Bucyrus Plant. It contained a section entitled "Your Conduct and Responsibilities" which states:

> As an employee of the Timken Company, you should not engage in any conduct or activity that interferes with your own work or that of any other employee or with plant operations or the maintenance of Company premises.

The handboook also proscribed:

> Soliciting for the purpose of collecting money for any purpose whatsoever on working time.
>
> * * * * *
>
> Violation of or disregard of good housekeeping practices, safe practices or safety, fire, plant protection, or other work rules or regulations. Careless or negligent use of Company property.

However, the Board found that Company employees frequently sold a variety of items at the plant on Company time and often sought signatures on petitions. No employees were disciplined for these activities.

On January 25, 1977, employees Nancy Clark, Roger Redden and Robert Fruehling arrived at the plant before their work shift and began to pass out literature on behalf of the UAW. Clark and Redden were distributing information just inside the entrance to one plant area and Fruehling just inside the entrance to another. When Company personnel noticed the union activity, Supervisors Charles Crall and Louis Meyers approached Clark and Redden and told them they would have to go outside to distribute and if they refused they would be suspended. Crall and Meyers approached Fruehling and told him the same thing.

On January 31, just after the Company allegedly prohibited union distributions in the plant, the union filed a petition with the Board for a representation election. Fruehling was principal organizer for his shift and obtained 50 to 60 signed cards. On April 6, the representation election was held and lost by a 657 to 469 vote.

About the end of April, employee Edward Pollack was having a conversation with Supervisor Charles White. Fruehling walked by and White said, "That's one fellow we don't need around here, a union pusher."

Fruehling was scheduled to work overtime on Saturday, May 7th. He called the plant at 8:00 A.M. and reported that he would be absent since he was going out of town. The guard who took the call routinely wrote this information on a form and gave it to Fruehling's supervisor. When Fruehling returned to work on May 9th, his supervisor asked him about where he had been on Saturday; Fruehling replied that he didn't want to say. His supervisor then filed a report with the Shift Superintendent Frank Lambert, with no recommendation for disciplining. Lambert found the report when he arrived at work on May 10th. He reviewed Fruehling's personnel file, which contained a "final written warning" issued in August 1976. However, as Lambert was aware, Fruehling had not been absent for any reason between August 1976 and the May 1977 incident. Lambert forwarded Orweiler's report to Plant Manager Robert Tull with an oral recommendation that Fruehling be discharged. Tull consulted with his superiors in the Company hierarchy including the Company's Director of Industrial Relations, before deciding what action to take. They concluded Fruehling should be discharged, and fired him on May 10th.

The Board found that the Company violated Section 8(a)(1) of the Act by impliedly prohibiting distribution of union literature in non-work areas within the plant building and by applying its rule concerning solicitation and distribution against union activity and not against other distributions. Further, the Board found that the Company violated Section 8(a)(1) by threatening reprisals against employees who engaged in union or other protected concerted activities. Finally, the Board found that the Company violated § 8(a)(3) and (1) of the Act by discharging employee Robert Fruehling for engaging in union activities. The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act. Affirmatively, the Board's order requires the Company to offer immediate and full reinstatement to Robert Fruehling, to make him whole for any loss suffered as a result of the Company's discrimination against him, and to post an appropriate notice.

It should be noted that the Board's ruling constituted a complete reversal of the ALJ's findings in this case

It is the opinion of the court that substantial evidence supports the Board's finding that employee Robert Frueling was discharged because of his union activities. However, we find that substantial evidence does not support the Board's finding that the Company violated Section 8(a)(1) of the Act: (1) by threatening its employees with reprisals if they engaged in union activity; (2) by applying its rule against solicitation by employees in a manner that had a disparate effect on union campaigning; or (3) that it modified its solicitation rule so that it unlawfully prohibited union solicitation in nonworking areas in the plant.

Accordingly, that portion of the Board's order requiring the reinstatement of Robert Fruehling and requiring the Company to make him whole for any loss suffered as a result of the Company's discrimination is hereby enforced. However, enforcement of the order in all other respects is denied.

CELEBREZZE, Senior Circuit Judge, would deny enforcement of the order and dissents.

Dallas Stage Employees Local Union 127 v. NLRB

633 F.2d 1195 (5th Cir.), January 9, 1981—247 NLRB 818

On petition to review Board Order

Before COLEMAN, Chief Judge, CHARLES, CLARK and REAVLEY, Circuit Judges

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REAVLEY, Circuit Judge: The Dallas local of the International Alliance of Theatrical Stage Employees (the International or IATSE) was charged with unfair labor practices under § 8(b)(1)(A) and (2) of the National Labor Relations Act,

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29 U.S.C. § 151 *et seq.*[1] The NLRB (the Board) found that the local's threat to recommend withholding of the International trademark if the employer hired a sound mixer who was not a union member was coercive within the meaning of the Act. Since the Union threatened only legal action in protecting the integrity of its trademark, the decision of the Board is unwarranted by law and contrary to other decisions of the Board. We set aside the Board's order.

There is no dispute over the facts. Mulberry Square Productions, a Dallas-based corporation engaging in the production and distribution of motion pictures, began hiring personnel for its upcoming motion picture, "The Double McGuffin" in August, 1977. Terrence Donnelly, the production manager, contacted Bernard Blynder at Blynder's home in Miami, Florida, concerning possible employment as sound mixer for the movie. Blynder indicated his interest in the job, and Blynder and Donnelly began to discuss details of the employment. Blynder told Donnelly that his union membership card had been suspended by the Miami local, and Donnelly informed him that his employment with Mulberry Square was conditional on getting the union card reinstated prior to production of the movie. In November 1977, Donnelly again called Blynder to finalize the employment agreement. He also inquired into Blynder's situation with the union and found that it remained unchanged.

In November of 1977, independent of the hiring of Blynder, Mulberry Square and the Dallas local of the International began negotiations for a new collective bargaining agreement. At the second bargaining meeting, held in late November or early December, Frank Duran, Mulberry Square's chief negotiator, submitted to the Union a list of the crew already hired for the production of "The Double McGuffin." Duran wanted to avoid any problems with the Union on this production and asked the Union's chief negotiator, E. W. Bradford, to look over the list to determine if there were any problems. At the next meeting, Bradford informed Duran that he has checked the crew list and, although Mulberry Square could hire whomever they wished, the Union had problems with two of the names on the list—one of which was that of Bernard Blynder. Bradford objected to Blynder's employment because he did not have a union membership card from an IATSE sound local. Duran, inexperienced in the film industry and in the collective bargaining process, asked about the consequences of hiring someone who was not a union member. Bradford explained that the International has a registered trademark or seal (the "bug") and that the International would permit the producer to place it on a film only if the union is satisfied that the film was produced entirely by IATSE members. Bradford further explained that if the "bug" is not on the film, IATSE projectionists might refuse to run the film or might run it improperly.

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[1] The relevant portions of the Act are these:

Section 7, 29 U.S.C. § 157 provides:

§ 157. Right of employees as to organization, collective bargaining, etc. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

Section 8, 29 U.S.C. § 158 provides, in pertinent part:

§ 158. Unfair labor practice

(a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of rights guaranteed in section 157 of this title.

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section * * *.

Blynder was unsuccessful in getting his union membership reinstated. Nevertheless, in later conversations with Bradford, Donnelly insisted on using Blynder as the sound mixer in the upcoming production. Bradford responded that Mulberry Square could hire whomever they wanted, but if they insisted on hiring Blynder, a nonmember, he would have to recommend to the International that the "bug" be withheld.

After all efforts to get Blynder's membership reinstated failed, Mulberry Square, fearful of the union withholding its seal, hired a union member to replace Blynder as sound mixer.

The NLRB charged the Dallas Local with unfair labor practices in violation of § 8(b)(1)(A) and (2) of the Act. A hearing was held before an Administrative Law Judge (ALJ), whose decision was adopted by the entire Board. The ALJ found that Bradford's threat to recommend that the International withhold the seal if Blynder was hired was coercive, causing Mulberry Square to discriminate against Blynder by discharging him because he was not a union member. We disagree.

The union seal or "bug" is a registered trademark of the International, and the International has the authority to grant or deny a producer the right to its exhibition. The International has the right to maintain the integrity of its trademark and issue it only when all of the production crew are union members. The local also has the right, if not the duty, to recommend to the International situations in which it feels the bug should not be issued. Although maintenance of the integrity of the seal has the purpose of promoting the employment of union members under union conditions, this activity is protected by the Act. *NLRB v. Circle Bindery, Inc.* 536 F.2d 447, 452 (1st Cir. 1976).

Admittedly, protection of the seal may not be used to justify illegal action on the part of the Union. In *NLRB v. Washington-Oregon Shingle Weaver's District Council (Sound Shingle Co.),* 211 F.2d 149, 151 (9th Cir. 1954), cited by the ALJ, the court held that the union was entitled to protect and even enjoin the unlawful use of its registered trademark, but could not engage in an unlawful secondary boycott to protect the trademark. Rather than threatening illegal activity, such as a secondary boycott, in the present case Bradford merely described or predicted action which the union was fully entitled to take. In response to Mulberry Square's request for information, Bradford indicated that if Blynder, a non-member, were hired, he would be compelled to recommend that the International withhold the bug. Upon further inquiry, he informed Duran of the possibilities of economic consequences to films lacking the bug. He did not tell Mulberry Square that they could not hire Blynder, and, in fact, carefully insisted that Mulberry Square could hire whomever they pleased. He did not threaten any action beyond the withholding of the bug.

A threat of legal activity by a union has never before been considered violative of the Act. In fact, the Board has consistently upheld a union official's honest statement that he intends to take lawful action as not violative of § 8(b)(1)(A) or (2). *See, e.g. Carpenters Local 2361 (Adams Insulation Co.),* 248 N.L.R.B. No. 59, 103 L.R.R.M. 1444 (1980) (letter threatening lawful informational picketing, not unlawful recognitional picketing, is not coercive within the meaning of the Act); *Lodge No. 199 of District 12, IAM (Baltimore Rebuilders), 235 N.L.R.B. No. 209, 98 L.R.R.M. 1270 (1978) (letter informing employees of lawful termination of participation by employer in union's pension plan as result of decertification of union not coercive).*

The Board asserts that *Motion Picture Studio Mechanics, Local 52, International Alliance of Theatrical Stage Employees and Moving Picture Operators v. NLRB (Michael Levee Productions, Ltd.),* 593 F.2d 197 (2d Cir. 1979) is applicable here. That case also involved the hiring of a sound mixer who was not a union member. There the union official threatened unknown action (of a kind "for me to know") upon the hiring of the non-member, and the threat was found to be coercive. In *Michael Levee* the union made no mention of withholding the bug, a legal activity, but threatened some unknown action intending to coerce and resulting in the employer's refusal to hire the non-member. Here the union threatened only lawful activity—withholding the bug—if Blynder was hired. Also, Mulberry Square had manifested an intent from the beginning to hire Blynder only if his union membership was reinstated.

The Board puts great emphasis on the numerous occasions on which Bradford repeated his threat to recommend withholding of the bug. In his opinion the ALJ indicated that had there been only one comment, the threat may have been acceptable under the Act. The Board apparently found this to be indicative of the union's motive, or intent, to keep Mulberry Square from hiring Blynder. We regard the Union's objective, whatever it may have been, as irrelevant. As long as a union limits itself to threats of *legal* activity, it may do so for whatever reason it chooses. *See Adams Insulation*, 103 L.R.R.M. at 1446. Under the Act, a union is entitled to make honest statements that it intends to do a lawful thing, especially in response to inquiry by the employer.

ENFORCEMENT DENIED.

NLRB v. Gulf States Canners, Inc.

634 F.2d 215 (5th Cir.), January 12, 1981—242 NLRB 1326

On remand from 585 F.2d 757

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges

PER CURIAM: We consider an application for enforcement of an order of the National Labor Relations Board which requires the respondent, Gulf States Canners, Inc., to bargain collectively with Local 891 of the International Brotherhood of Teamsters, the victor in a representation election held among production, maintenance and quality-control employees working for respondent at its facility in Clinton, Mississippi. Gulf States has refused to bargain as means of challenging the results of the election, which it argues was unfairly influenced through the purchase of gasoline for employees by union representatives.

This is the second application for enforcement in this matter; we denied enforcement of the first after holding that the board had incorrectly based its decision on a consideration of whether the union, in purchasing the gasoline, had intended to influence the outcome of the election. The cause was remanded so that the board could apply a legal standard based upon effect rather than intent: "* * * the assay should seek to find whether the questioned action by an election candidate had a tendency to influence the outcome of the voting." *N.L.R.B. v. Gulf States Canners, Inc.*, 585 F.2d 757, 759 (5 Cir. 1978). It was further noted:

> The tendency-to-influence test requires an examination of the challenged action in the light of all the relevant facts, including whether the size of the benefit bears a proper relationship to the actor's stated purpose in conferring it, the number of employees receiving the benefit, the views of the employees concerning the purposes of the payments, and the timing of the payments. *Id.*

The court stated that, as "the facts here are undisputed, and the application of the tendency to influence test presents strictly a question of law," no hearing would be necessary on remand.

The board has, on remand, complied with our instructions. Applying the tendency-to-influence test to the facts previously ascertained,[1] it concluded in a supplemental order that "the union's action in purchasing the gasoline for two eligible voters during its organizational campaign was not objectionable conduct and does not require setting aside the election herein."

In this election objection case, it is our duty to determine whether the board has acted within the "wide degree of discretion" entrusted to it by Congress in representation matters. *See N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 327, 91 L.Ed. 322 (1946). This court has noted that a decision by the board "warrants special respect," and that review is limited to "a determination of the reasonableness of the board's finding." *Contract Knitter, Inc. v. N.L.R.B.*, 545 F.2d 967 (5 Cir 1977). The employer bears a heavy burden of rebutting the presumption that "ballots cast under the safeguards provided by board procedures reflect the desires of the participating employees."

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[1] The relevant facts are summarized in the board's supplemental order of June 20, 1979, for which enforcement is sought:

> At the first union meeting, more than 1 month prior to the election, the union announced its offer to provide gasoline to employees who transported other workers to the union meetings and/or who campaigned on behalf of the union at their fellow employees' homes. After this meeting, one employee, designated as witness D in the regional director's report, requested gasoline from a union representative. According to witness D's account of this conversation, he asked, "Didn't you say you were buying gas?" to which the union representative replied, "No, I am not buying gas. I said if you knew of anyone who wanted to come to the meeting but didn't have a ride I would furnish the gas to get that person. Oh, do you want some gas?" Witness D at that point answered, "Yes," and the union representative said "Okay." The union representative then purchased approximately 12 dollars worth of gasoline for witness D. A week later, after the second union meeting, witness D approached the union representative and, as set forth in his affidavit, stated, "I need some gas," to which the union representative replied, "Okay, follow me." (At that time, the union representative again purchased approximately the same amount of gasoline for witness D). On this occasion, another employee, witness C, who had followed witness D and the union representative to the gas station, received approximately 7 dollars worth of fuel.

We cannot hold that the board abused its discretion in finding that the conduct alleged did not have such a tendency to influence the election that a new election is required. A simple showing of misconduct alone is not sufficient to mandate that result; the employer must also show that the acts "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of an election." *N.L.R.B. v. Gulf States Canners, Inc., 585 F.2d at 759. See also N.L.R.B. v. Sumter Plywood Corporation,* 535 F.2d 917, 920 (5 Cir. 1976); *N.L.R.B. v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5 Cir. 1969). The board was justified in holding that such an effect was not shown here.

ENFORCED.

Equitable Gas Company v. NLRB

637 F.2d 980 (3d Cir.), January 14, 1981—245 NLRB 260

On petition to review Board Order

Before ALDISERT, ROSENN and GARTH, Circuit Judges

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GARTH, Circuit Judge: This appeal requires us to review an order of the National Labor Relations Board which determined that the Petitioner, Equitable Gas Company, had refused to bargain over its decision to subcontract customer remittance work. We conclude that on this record, Equitable's subcontract with Mellon Bank was not a mandatory subject of collective bargaining, and therefore Equitable did not violate Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1976).

I

In order to increase its cash flow and save on overhead charges that might otherwise have to be passed on to consumers in a high energy cost context, Equitable entered into a contract with Mellon Bank on September 21, 1978, whereby, effective January 1, 1979, Equitable transferred to Mellon certain customer remittance work which theretofore had been performed by bargaining unit employees[1] in Equitable's Treasury Department. Prior to this transfer, Equitable had subcontracted out bargaining unit functions on several occasions, but at no time did these subcontracts result in any employee layoffs, although the bargaining unit jobs were eliminated.[2] Most significantly, in-house mail delivery has been permanently subcontracted to an independent company for the past nine years, resulting in the elimination of two bargaining unit messenger jobs. With regard to each subcontract, Equitable met with the union, informed the union of its decision to subcontract, and discussed the effects of the decsion upon bargaining unit employees. No objection or protest was over registered by the union respecting the contracting out of these collection functions.

The union, in turn, through negotiation of its collective bargaining agreements, had repeatedly, but unsuccessfully, sought to restrict Equitable's subcontracting right through collective bargaining. During negotiations in 1969—1970, 1971 and 1977, the union submitted to Equitable proposals which, if accepted, would have limited or prohibited Equitable from subcontracting any bargaining unit work. During the collective bargaining negotiations, these proposals were discussed, and in each instance were opposed by Equitable. Through the years, certain provisions in the collective bargaining agreements pertaining generally to transfers, lay-offs reassignments, probations, displacements, and the like, were negotiated and agreed to by the parties.[3] At no time prior to the 1980 collective bargaining agreement, however, did Equitable ever agree to a subcontracting clause in its collective bargaining agreement with the union.[4]

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[1] The International Brotherhood of Electrical Workers, Local Union No. 1956, AFL—CIO ("IBEW"), was and is the collective bargaining representative of about 320 Equitable employees, inlcuding the remittance clerks.

[2] The record reveals that the Mellon arrangement was one of a series of subcontracts made with various banks, including Mellon, to handle customer remittance work performed by IBEW bargaining unit employees. These previous arrangements were made when Equitable closed seven of its branch offices over a 13 year period.

Other subcontracts let by Equitable involved the performance of functions such as keypunching, drafting, clerical work, and field work dealing with investigations and the delivery of discontinuance notices.

[3] *See, e.g.*, Art. IV, Sections M, N, O of the 1977 Contract (A. 223-24)

Prior to Equitable's subcontract with Mellon, Equitable's remittance clerks physically opened the mail, separated the enclosed checks from the accompanying billing coupons, forwarded the coupons to the computer room for tabulation, and processed the remaining checks. After the clerks balanced the checks and coupons, they forwarded the checks to the cashier for deposit. The actual deposits were made in the bank the following day by a contract messenger service. Under this arrangement, Equitable could process in one day only sixty percent of the checks received on any given morning.

Under Equitable's arrangement with Mellon, customer remittances are forwarded directly to a "lock box" maintained by Mellon, where they are picked up by Mellon's employees, and processed throughout the night. The system is almost entirely automated,[5] resulting in an acceleration of at least two days in the processing of payments and crediting of deposits to Equitable's Mellon Bank account. The Mellon system is therefore superior to Equitable's former procedure in that it provides a more efficient service, resulting in an acceleration of, and increase in, Equitable's cash flow, as well as improved updating of customer accounts. This accelerated system provides Equitable with an additional $700,000 per day in available hard cash, which reduces Equitable's need to borrow money on the market.

Prior to entering into the Mellon subcontract, Equitable had four clerks processing remittances. One clerk position had become vacant early in August, 1978, and was not filled. The remaining three employees affected were transferred to other departments in Equitable. They obtained equivalent or higher paying positions by exercising their seniority rights as provided in the collective bargaining agreement. No other jobs were affected and Equitable did not lay off any employees as a result of the Mellon subcontract.

Representatives of Equitable met with the union on three separate occasions. On September 21, 1978, Equitable's Assistant Treasurer explained the advantages that would result from the arrangement with Mellon. On September 25, 1978, Equitable informed the Union that negotiations with Mellon Bank had taken six to eight weeks to complete and that the remittance work contract had been signed with Mellon on September 21, 1978. The following day, the IBEW filed charges with the NLRB.

On October 16, 1978, when Equitable met with the union for the third time, the IBEW requested a copy of the Mellon contract and relevant cost data so as to enable the union to make a bid for remittance work on behalf of Equitable's employees. Equitable's Assistant Personnel Director rejected the union's request, stating that Equitable was not interested in obtaining any other "bids" for the job, as the cost of the Mellon operation was not a factor in the company's decision. The union representative walked out of the meeting and subsequently refused to discuss the matter further.

On November 28, 1978, the Regional Director issued a complaint alleging that Equitable had violated Sections 8(a)(1) and (5) of the Act by failing to bargain over its decision to enter into the contract with Mellon, and by refusing to provide the union with a copy of the Mellon contract. A hearing was held on February 9, 1979, before an Administrative Law Judge.

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[4] Prior to the argument in this case but after the briefs had been filed, Equitable and IBEW entered into a new collective bargaining agreement, effective from June 26, 1980 through June 2, 1982. Equitable moved to dismiss the NLRB's cross-application for enforcement of its order on the ground that this new agreement includes a clause governing Equitable's right of subcontract work, and therefore Equitable claimed the dispute underlying the NLRB's present order had become moot. The contract now provides:

> The Company will not contract out work that is regularly and customarily performed by the regular employees covered by this bargaining unit if such contracting out would cause, as a direct and immediate result, the lay-off of regular employees.

We reject Equitable's argument that the issues presented to us on this appeal are moot. Equitable has not agreed, and indeed vigorously opposes, the concept that under the relevant collective bargaining agreement, its subcontracts were subject to mandatory bargaining. Moreover, although its 1980 agreement with the union, which comes before us only in the context of a motion to dismiss and not as part of the reocrd, precludes the practice of subcontracting if employees would be laid off, it is undisputed that the agreement here had no such provision. Furthermore, none of the remittance clerks whose work is now performed by the subcontractor Mellon have ever been laid off. Hence, there is a substantial difference between the circumstances giving rise to the Board's order and the company's present circumstances. In addition, the Board, in its Affidavit responding to Equitable's motion, asserts that the union at no time "traded off" its rights under the Board's remedial order so as to obtain the 1980 contractual concession from Equitable. We need not decide these issues, however, in light of our ultimate disposition.

[5] The letters are mechanically opened, after which an operator physically separates the checks from the coupons. This physical separation by the operator is the only manual aspect of the entire operation; all other procedures are automated. The final product received by Equitable from Mellon is a magnetic tape showing all of the collections and a handmade deposit ticket.

In his May 15, 1979 decision, the ALJ concluded that Equitable had violated Sections 8(a)(1) and (5) of the Act by not notifying the union prior to entering into the contract with Mellon, thereby depriving the union of an opportunity to bargain over Equitable's decision. The ALJ also determined that since Equitable had a duty to bargain over the contract, it should have provided a copy of the contract and the cost data sought by the union. The ALJ held that Equitable had committed independent Section 8(a)(1) and (5) violations by its refusal to supply this information. Moreover, although the ALJ declined to grant the General Counsel's request that Equitable be ordered to rescind its agreement with Mellon so as to restore the *status quo ante*, he entered a remedial order which required that Equitable bargain with the union over future decisions to subcontract work performed by its employees.

On September 24, 1979, the Board affirmed the findings and conclusions of the ALJ respecting the Section 8(a)(1) and (5) violations, but rejected his recommendation that a *status quo ante* order was inappropriate. The Board perceived "no undue hardship" to Equitable if the Mellon contract was voided (A. 6). It therefore modified the order entered by the ALJ and directed Equitable to reinstate its remittance clerk operation.[6]

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), provides, in pertinent part, that it is an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 * * *."[7] Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively. The Board charged that Equitable had violated both sections of the Act by refusing to bargain collectively over its contract with Mellon. Equitable concedes it did not bargain with the union when it entered into the Mellon contract, but maintains that it had no duty to do so.

II

Equitable's petition thus presents essentially one critical question: is there substantial evidence to support the Board's findings which resulted in its determination that the Mellon subcontract was a mandatory subject of bargaining?[8] Our inquiry must therefore initially focus on whether a subcontract of customer remittance work under the instant circumstances constitutes a mandatory subject of collective bargaining within the meaning of Sections 8(a)(1) and (5) of the Act. In answering that inquiry, we must evaluate Equitable's conduct in terms of the Act's purposes, those factors deemed relevant in determining the need to bargain over particular subcontracting agreements, and the particular facts and circumstances presented by the instant record.

A.

The Declaration of Policy set forth in Section 1 of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141 (1976), stresses the need to avoid "industrial strife which interferes with the normal flow of commerce." It goes on to state that a purpose of the Act is to "provide orderly and peaceful procedures for preventing the interference" by either labor or management with the legitimate rights of the other. The Supreme Court recognized the Act's emphasis on the "mediatory influence of negotiation" in the settlement of industrial disputes in its landmark decision, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210, 85 S.Ct. 398, 402, 13 L.Ed.2d 233 (1964). The court there addressed the subject of subcontracts as they impact upon collective bargaining principles.

In *Fibreboard*, the employer gave the union notice of its intention to subcontract all of its maintenance work upon the expiration of the then existing collective bargaining agreement. The company had determined that substantial savings would be effectuated by such an agreement. In granting the Board's petition for enforcement of its order to reinstitute the company's maintenance operations and to reinstate the employees who had been engaged in maintenance work, the Court held that subcontracting which involves "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is covered by the phrase "terms and conditions of employmemt", and is thus a mandatory subject of bargaining under Section 8(d) of the Act.[9] *Id.* at 215, 85 S.Ct. at 405. The Court, however, carefully articulated the parameters of its holding: "Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." *Id.* at 215, 85 S.Ct. at 405.

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[6] Board member Truesdale was in agreement with the ALJ on all aspects of the decision, including the remedy. He therefore would not have required Equitable to rescind the Mellon contract or otherwise restore the *status quo ante*.

[7] Section 157 prescribes, among other things, that employees shall have the right "to bargain collectively through representatives of their own choosing * * *." 29 U.S.C. § 157 (1976).

[8] Two other questions are presented in Equitable's petition. The answers to both depend upon our disposition of the primary question: was the subcontract a mandatory subject of bargaining? In Section III, *infra*, of this opinion, we address Equitable's refusal to supply a copy of its Mellon contract and underlying cost data to the union, which is the subject of the second question presented in Equitable's petition.

In light of our disposition, we need not reach the third question presented in Equitable's petition, which concerns the propriety of the Board's *status quo ante* order.

Notwithstanding this caveat in the Court's opinion, Justice Stewart, joined by two other Justices, filed a concurring opinion in which he took pains to limit his endorsement of the majority opinion of the specific facts presented in *Fibreboard.* He emphasized the need for protecting managerial discretion with regard to those "decisions which are fundamental to the basic direction of a corporate enterprise," Id. at 223, 85 S.Ct. at 409. Stressing the narrow holding of the Court, Justice Stewart, stated:

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> The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the court decide that subcontracting decisions are as a general matter subject to that duty.

Id. at 218, 85 S.Ct. at 407.

B.

Following the *Fibreboard* decision, both the Board and various courts, when faced with "closing" or "subcontract" issues in a Section 8(d) context, inclined toward an approach which weighed the employees' interests against those of the employer. *See, e.g., Westinghouse Electric Corp. (Mansfield Plant),* 150 N.L.R.B. 1574 (1965); *NLRB v. Royal Plating and Polishing Co., Inc.,* 350 F.2d 191 (3d Cir. 1965).

In *Westinghouse, supra,* the Board, one year after the Supreme Court's decision in *Fibreboard,* ruled that Westinghouse did not have to notify and consult with its union before contracting out work[10] that could be performed by its own employees. The Board, in emphasizing the need for flexibility in this area, set forth at least five relevant considerations which should be weighed in making such a determination:

> [B]earing in mind particularly that the recurrent contracting out of work here in question was motivated solely by economic considerations; that it comported with the traditional methods by which the Respondent conducted its business operations; that it did not during the period here in question vary significantly in kind or degree from what had been customary under past estab-

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[9] Section 8(d) of the National Labor Relations Act defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." 29 U.S.C. § 158(d) (1976).

In *Brockway Motor Trucks v. NLRB,* 582 F.2d 720, 725-26 (3d Cir. 1978), Judge Adams, writing for the Court, explained the content of a "mandatory subject of bargaining":

> A matter falling within the scope of Section 8(d)—namely, one involving "wages, hours, and other terms and conditions of employment"—is a mandatory subject of bargaining. In practical terms, the elaboration of the identity of mandatory subjects of bargaining is crucial, for such matters must be discussed in bargaining sessions before any unilateral action with respect to them is taken. If, for example, an employer proceeds on its own without submitting a mandatory subject to the bargaining process, it violates its duty under the NLRA, and its professed good faith in so doing will have no bearing upon the legality of its action. Moreover, if one party insists on the inclusion of such a subject in a collective bargaining agreement, the other party is obligated at least to discuss it. The converse of these propositions is also true. A permissive subject of bargaining need not be discussed at the bargaining table, and one party may not compel the other to address it as a condition of executing a collective bargaining agreement.

(footnotes omitted)

[10] Westinghouse contracted out the following work in the period covered by that proceeding:

> (1) about 400 maintenance subcontracts of which about 350 could have been performed by Respondent's maintenance employees; (2) about 800 contracts for tools and dies, most of which involved work within the capacities of employees in Respondent's tool-and-die department; (3) about 1,500 contracts awarded by the portable appliance division for the purchase of parts, of which 12 involved components previously manufactured at Mansfield; (4) about 5,000 contracts let by the major appliance department for purchase of components many of which could have been manufactured at the Mansfield Plant.

Westinghouse Electric Corp. (Mansfield Plant), 150 N.L.R.B. 1574, 1575 (1965).

> lished practice; that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings—for all these reasons cumulatively, [sic] we conclude that Respondent did not violate its statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions.

Id. at 1577.

Royal Plating, supra, involved a "plant closing" rather than a subcontracting arrangement. In that case, the court held that "an employer faced with the economic necessity of either moving or consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down." 350 F.2d at 196 (footnote omitted).

Thereafter, *Brockway Motor Trucks* v. *NLRB,* 582 F.2d 720 (3d Cir. 1978), traced the development and refinement of the *Fibreboard* doctrine through succeeding court decisions and Board interpretations. 582 F.2d at 727–731 Brockway has closed its Philadelphia facility, but had continued its operations in other areas. The court concluded that the determination as to whether an employer has a duty to engage in collective bargaining when shutting down a plant or a part of its operation, must "begin with the statutory commitment to collective bargaining and * * * proceed to balance the parties' interest in the decision at issue", focusing on the facts of each case. *Id.* at 731. The court in *Brockway* was unable to utilize this balancing approach, however, because it determined that the record lacked the firm, factual underpinning deemed necessary for such an analysis. Hence, for this reason, the majority opinion denied enforcement of the Board's order.[11]

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More recently, the balancing approach announced in *Brockway* was applied in *Electrical Products Division of Midland-Ross Corp. v. NLRB,* 617 F.2d 977 (3d Cir. 1980), another case involving the partial closing of a plant. In weighing the union's interest in protecting its members' livelihood against the employer's interest in implementing its economic decisions with minimal interference or financial loss, the court held that a duty to bargain about the partial closing existed. It did so after stressing that although the union might not have prevented the closing, it could have made suggestions to minimize the effect of the closing on the workers. No countervailing considerations on behalf of the employer had been shown which would have overcome the presumption in favor of a duty to bargain.

Thus, it is now settled in the jurisprudence of this Circuit that when issues of subcontracting and partial closings are confronted in the context of the National Labor Relations Act, an initial presumption arises that they are mandatory subjects of bargaining. Applying the balancing analysis formulated in *Brockway,* this presumption can be overcome only if it appears that the empoyer's interests outweight the union's interests in a given situation. *See Midland-Ross, supra,* at 982. With these principles in mind, we turn to the record in this case.

C.

The ALJ, concluding that Equitable had violated its duty to bargain, relied almost entirely upon the criteria articulated in *Westinghouse, supra.* Ostensibly, he sought to apply the factors considered in *Westinghouse,* and to relate them to the Equitable-Mellon arrangement. We have difficult, however, in accepting his analysis. First, having established the frame-work for his examination, the ALJ failed to address all of the factors as they are discussed in *Westinghouse.* Second, and of greater importance, the findings which he made, and which the Board affirmed, leading to the conclusion that the Equitable-Mellon arrangement was a mandatory subject of bargaining, are not supported by substantial evidence, and therefore cannot be sustained. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Westinghouse, as we have previously observed, does not support a duty to bargain where the employer's unilateral action in subcontracting satisfies the following five criteria: (1) the recurrent subcontracting is motivated solely by economic considerations; (2) it comports with the company's traditional methods of conducting its business operations; (3) it does not vary significantly from prior established practices; (4) it does not have a demonstrable adverse impact on employees in the unit; and (5) the union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

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[11] Judge Rosenn dissented, largely because he believed that *NLRB v. Royal Plating and Polishing Co., Inc.,* 350 F.2d 191 (3d Cir. 1965), was controlling in that the closing of Brockway's Philadelphia facility was solely for economic reasons; no employees were replaced with others; and no anti-union animus existed.

The First Three Westinghouse Factors

The first criterion mentioned in ***Westinghouse*** is that the employer be motivated solely by *economic considerations* in contracting out work on a *recurrent basis*. This subject was never addressed independently by the ALJ. The second factor identified in ***Westinghouse*** is that the subcontract arrangement comports with "the traditional methods" by which the employer conducts its business operations. 150 N.L.R.B. at 1577. The third criterion stated is that the subcontracting arrangement not "vary significantly in kind or degree from

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what had been customary under past established practices." *Id.* at 1577.

These three factors are interrelated, at least in the instant case, and we therefore deem it appropriate to discuss them together. The same evidence which relates to Factor No. 1, requiring an economic motivation on the part of Equitable for "recurrent contracting out of work", is relevant to Factor No. 2, Equitable's traditional methods of operation, and Factor No. 3, Equitable's past established practices.

It is undisputed that Equitable's decision to subcontract its remittance work to Mellon was wholly governed by economic concerns looking toward increased efficiencies and increased, as well as accelerated, cash flow. The Mellon procedure also resulted in accelerated and more current updating of customer accounts. Moreover, if the economic motivations emphasized in ***Westinghouse*** had been intended as a contrast to anti-union motivation, it is clearly evident that this implicit "criterion" has been satisfied as well, for the record discloses a complete absence of any anti-union animus on the part of Equitable. *See, e.g.* ***Brockway, supra; Royal Plating, supra.*** Although recent decisions of our court suggest that the existence of an economic motivation behind a major change in the direction of a company may not, in and of itself, justify absolving an employer of the duty to bargain, *see* ***Brockway, supra,*** 582 F.2d at 738–40; ***Midland-Ross, supra,*** 617 F.2d at 982–83, the presence of economic considerations is nevertheless an important factor to be weighed in balancing the interests of the employer and the union. *Cf.* ***Royal Plating, supra,*** 350 F.2d at 196 ("an employer faced with the economic necessity of either moving of consolidating the operations of a failing business has no duty to bargain with the union respecting its decision to shut down").

Nor is it disputed that the subcontracts let by Equitable for years prior to the Mellon arrangement were motivated by similar economic concerns, and indeed in no instance until the present one did the union ever contest Equitable's right to contract out the particular functions which were the subject of these subcontracts. Equitable emphasizes, that under these circumstances, the Mellon subcontract can hardly be characterized as a "new, unprecedented threat" to employees, as the ALJ characterized it (A. 16). The company points out that Mellon's subcontract was the sixteenth in a series of subcontracts made with various banks in connection with the performance of Equitable's customer remittance work. Equitable claims that in each of these instances, it followed identical procedures with respect to its notice to the union and its bargaining over the effects of the particular arrangement. The record supports Equitable's contention. Equitable's brief states:

> Moreover, it is uncontested that over the past fifteen years the Company has consistently contracted other bargaining unit work to outside companies and the identical procedure of notice and effects bargaining has been followed (A. 15, 102, 104). This subcontracting has routinely occurred "every day continuing on a daily basis" (A. 103–104), has involved various bargaining unit functions, such as key punching, drafting, clerical work and mail delivery, and has resulted in permanent removal of work from the bargaining unit (A. 99–100, 102, 218)

Brief for Equitable at 16.

The ALJ, while recognizing that "the appropriate bargaining unit . . . had not over the years been insulated from the subcontracting of work performed by its members" (A. 15), nevertheless sought to distinguish the Mellon arrangement from the previous Equitable subcontracts, and found that the Mellon subcontract involved a type of subcontracting that had not been customary under past established practice. He concluded that the Mellon arrangement posed a threat to unit employees "insofar as it represented the first instance where unit work was removed and classifications eliminated due to technological advance" (A. 16). We do not agree that the evidence supports this determination.

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As Equitable argues, and as the record discloses, Equitable's subcontracting practices through the years neither lacked in continuity nor were of a sporadic, recurrent nature.[12] To the contrary, the reduction of remittance clerk positions in Equitable's Treasury Department through subcontracting has been an ongoing process. Even apart from subcontracting of various bargaining unit functions on different occasions, Equitable had also entered into a series of subcontracts with various banks when it closed several of its branch offices, and had previously subcontracted its inhouse mail delivery operation, thereby permanently eliminating two bargaining unit messenger positions.[13] Moreover, the record reveals that the banks involved in the earlier fifteen subcontracts had developed a capacity for direct payment, (A. 91), which the Mellon subcontract entails.

Thus, our examination of the record fails to reveal substantial evidence supporting the ALJ's findings that Equitable's subcontracting operations were other than recurrent, that its decision to contract with Mellon varied significantly "in kind or degree from what had been customary under past established practice," *Westinghouse, supra,* 150 N.L.R.B. at 1577, and that the Mellon arrangement failed to comport with Equitable's "traditional methods by which [it] conducted its business operations," *id.* Indeed, the evidence is to the contrary, and in addition, it provides unequivocal support for Equitable's position that its motivation in entering the Mellon contract was dictated solely by economic considerations.

Westinghouse's Fourth Factor: Detrimental Impact on Employees

Although the Westinghouse decision does not single out any one of the five factors as being more significant than any other, a reading of subsequent subcontract cases impresses us that the most critical of the five criteria discussed in *Westinghouse* is the effect which the subcontract will have upon employees. *See, e.g., American Cyanamid Co. v. NLRB,* 592 F.2d 356 (7th Cir. 1979); *Brockway, supra; Western Massachusetts Electric Co. v. NLRB,* 573 F.2d 101, 106 (1st Cir. 1978); *Puerto Rico Telephone Company v. NLRB,* 359 F.2d 983, 987 (1st Cir. 1966); *District 50, United Mineworkers of America v. NLRB,* 358 F.2d 234 (4th Cir. 1966). Indeed, it appears that where there has been no adverse impact on existing working conditions an employer's decision to subcontract does not violate his obligations under Section 8(d) of the Act.

Here, the record clearly shows, and the ALJ accordingly found, that no layoffs resulted from the Mellon arrangement, which affected only three out of about 320 employees. The ALJ also found that the elimination of the remittance clerk jobs did not result in a diminution of earnings or loss of employment since the three affected employees were engaged by Equitable in other capacities, in which they received equal or greater salaries than they had formerly been paid.

Notwithstanding his findings that there were no layoffs and that the bargaining unit employees sustained no perceptible loss of employment or earnings, the ALJ found that the Mellon arrangement might generate a fear of future impairment of job opportunities. This "fear", which finds no expression in the record, led to the ALJ's conclusion that the employees suffered a significant detrimental impact by reason of the Mellon arrangement. His determination in this respect was predicated upon the nature of Equitable's past subcontracting expreience, and resulted in the ALJ concluding that Equitable's action, even if *layoff free,* should not be condoned if it "radiates against established employment interests in an unpredecented and fear inspiring fashion" (A. 15). We have earlier pointed out, however, that the ALJ's findings regarding Equitable's prior subcontracting experiences cannot be sustained, as

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[12] The ALJ found that Equitable's "overall practice of contracting out work in the instant bargaining unit was sporadic, compartmentalized, and something less than the oft-repeated, readily anticipated means of operation contemplated by the line of decisions following *Westinghouse.*" (A. 16)

[13] *See* note 2, *supra* and accompanying text for the particulars of Equitable's subcontracting history.

they are not supported by the record. Thus, the very predicate upon which the ALJ determined that Equitable's employees were adversely affected, is gravely flawed.

The record facts are contrary to the findings and conclusions of the ALJ that the employees suffered by reason of the Mellon contract. Absent evidence to support a "demonstrable adverse impact on employees in the unit", *Westinghouse, supra,* 150 N.L.R.B. at 1577, we refuse to speculate about future impairment of work opportunity where the evidence does not support any such fact or conclusion.[14] *See, District 50, UMW, supra.*

Although we concede that the determination of what constitutes a "demonstrable adverse impact" may be difficult to explain, we are satisfied that where findings, fully supported by the evidence, reveal that no layoffs have resulted from the subcontracting practice and no diminution of earnings or loss of job opportunities have occurred, it cannot be said that the impact upon the employees was demonstrably adverse.

Westinghouse's Fifth Factor: Opportunity to Bargain at General Negotiating Meetings

In adopting the *Westinghouse* analysis, the ALJ did not address directly the fifth factor discussed in *Westinghouse,*" . . . [did the union have] the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings * * *", *Westinghouse, supra,* 150 N.L.R.B. at 1577. The ALJ, however, did not focus on subcontracting as a bargaining issue in a negotiating context, but rather concentrated on whether the Union had "consciously yielded" or waived its right to insist on notice and bargaining. The ALJ's opinion addressing this issue reads:

> As for the negotiating history, the record merely discloses that during contract renewal sessions in 1969, 1971 and 1977 the Union proposed bans on the subcontracting of unit work. The proposals were discussed, though opposed by Respondent, and later dropped by the Union prior to entry of each succesive collective-bargaining agreement. Contrary to the Respondent, a Union's unsuccessful effort to obtain contract revisions imposing restrictions upon subcontracting greater than the duty of notification and consultation embodied in the Act, is not tantamount to a "conscious yielding." The more likely interpretation is that, in receding from a demand for more comprehensive restrictions, and joining an ultimate settlement of negotiations, the Union elected to rest upon its lesser statutory rights.[10] In sum, the Union's demands in past negotiations did not supplant the employees' right to the services of their representative with respect to Respondent's removal of unit work by sudden, unprecedented, unilateral action.
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> [10] The fact that the Union was afforded an opportunity during contract negotiations to bargain with respect to subcontracting, though relevant to an assessment of whether the *Westinghouse (Mansfield Plant)* decision is controlling, does not independently satisfy Board requirements for a "waiver" of statutory rights. Here, that decision has been deemed inapposite on other grounds.

(A.17). We, on the other hand, need not address the subjects of waiver or conscious yielding. Our analysis requires no more than an evaluation of the union's opportunity to bargain, as one factor to be balanced in the overall determination of whether this subcontract was a subject of mandatory bargaining.[15] *See Brockway, supra; Midland-Ross, supra.*

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[14] We have no occasion to decide whether Equitable's decision to subcontract with Mellon was solely an automation decision. Yet, we note that even where such automation decisions are unilaterally made by employers, it has been suggested by at least one commentator that the following standard shold be utilized to determine if such a decision requires bargaining within § 8(d) of the Act:

> [W]here a decision to automate will directly and foreseeably result in adverse impact on the bargining unit or its members, it should be a mandatory subject of bargining before its implementation. If adverse effects are neither immediate nor foreseeable, bargaining ought not be compelled.

(footnotes omitted) Comment, *Automation and Collective Bargaining,* 84 Harv.L.Rev. 1822, 1839 (1971).

Even under this standard, Equitable would not have been required to bargain with the union in light of the absence of evidence regarding a direct or foreseeable adverse impact on the bargaining unit or its members.

[15] The *Press Co. Inc.,* 121 N.L.R.B. 976, 977-78 (1958), sets out the doctrine to which the ALJ adverted:

> It is well established Board precedent that, although a subject has been discussed in precontract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8(a)(5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and the union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

Whether or not the ALJ's finding that the union had neither yielded nor waived its interest in subcontracting can be sustained is irrelevant in-

Continued

Westinghouse clearly sets out the manner in which this last factor affects the ultimate balance. *Westinghouse* states:

> * * * it is to be noted that no claim is made in this case that the Respondent has ever refused to honor a request for such bargaining; the sole issue before us is whether the Respondent transgressed its statutory obligation by not consulting with the Union about each of its thousands of annual subcontracting decisions which involved unit work. As one factor in the assessment of that specific issue, we take into account that the Union was in a position to, and in fact did, seek to negotiate adjustments in plant subcontracting policies. The relevant bargaining history thus shows, as already indicated, that the Union on three separte occasions sought contract language limiting the established subcontracting practice. Although discussion failed to produce agreement on such a provision, the Union did win agreement for improved benefits in the area of employment security. The fact that the Union does have an opportunity to bargain generally on request about Respondent's recurrent subcontracting practices, provides in our view a contributing, though not a controlling, reason for not imposing upon the Respondent the duty to bargain separately, at the decision-making level, about each of the thousands of individual subcontracts covering working that could be performed by its own employees.

As the ALJ recognized, the union in this case had sought prohibitions against the subcontracting of unit work during the contract renewal sessions in 1969–70, 1971 and 1977. In each instance, Equitable was successful in resisting these demands, and thus the collective bargaining agreement which governed the conduct of the parties during this dispute neither restricted nor defined the company's right to subcontract work without prior notice to the union.[16]

There is a striking similarity between the bargaining history of Equitable and its union, and the history reflected in the *Westinghouse* opinion. Both in Westinghouse and here, the unions sought to negotiate adjustments in plant subcontracting policies. In both situations, the unions, on three separate occasions, sought to limit through negotiation, the employer's subcontracting practices. In both situations, the unions won agreement under succeeding contracts for improved benefits. It is not unlikely that "the relinquishment of continuation of [these] restrictions may well [have] constitut[ed] the *quid pro quo* for some other contract objective." *International Brotherhood, Local 249 v. Western Pennsylvania Motor Carriers Association,* 574 F.2d 783, 789 (3d Cir.), *cert denied,* 439 U.S. 828, 99 S.Ct. 102, 58 L.Ed.2d 122 (1978).

We are aware, of course, that the opportunity to bargain is but one contributing factor to our overall analysis. Recognizing, however, that the union here, as in *Westinghouse* had, and continues to have, an opportunity to bargain generally respecting Equitable's subcontracting procedures, we find no reason to impose upon Equitable a duty to bargain separately about the instant Mellon subcontract.

D.

We have discovered no substantial evidence on our independent examination of the record which would support a finding that the Mellon subcontract constituted a significant variation from Equitable's past established practices, or that it was motivated by other than economic considerations. Most importantly, we have found no substantial evidence that the Mellon arrangement had a "demonstrable adverse impact" on employees in the unit. To the contrary, the evidence is otherwise. Finally, the evidence is uncontroverted that the union had the opportunity to bargain, and did bargain, about changes in Equitable's "existing subcon-

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sofar as a *Westinghouse* analysis is concerned. *Westinghouse* does not require an explicit waiver or a conscious yielding as a part of its formula. We observe that if it did, there would be far less need to assess or balance the other four factors identified in *Westinghouse.* As we read *Westinghouse,* it requires no more than an opportunity for the union to bargain generally about the employer's subcontracting practices. As we have stated in text, the union has exercised that opportunity since 1969, and indeed has finally succeeded in achieving its objective in the 1980 contract. See note 4, *supra.* Thus, in our view, the *Westinghouse* test as to this factor is less rigorous than the waiver test employed by the ALJ which, as we understand it, may exist as an independent ground for resolving a § 8(d) dispute. Because our analysis has proceeded along the *Westinghouse* track, a track which we believe the ALJ has also followed, we find no need to reach or decide any issue involving the union's waiver or "conscious yielding."

[16] Fortifying our conclusion that the subcontracting issue properly belongs on the bargaining table is the information we received after the record was closed in this case that the current agreement between the parties includes a subcontract clause. *See* note 4, *supra.*

tracting practices at general negotiating meetings. * * * ", *Westinghouse, supra,* 150 N.L.R.B. at 1577.

The *Brockway* and *Midland-Ross* decisions, however, instruct us that at least in a partial closing context, even where the motivation is purely economic, "there is an initial presumption * * * that a partial closing is a mandatory subject of bargaining." *Brockway, supra,* 582 F.2d at 735, *quoted in Midland-Ross, supra,* 617 F.2d at 982. *Brockway* has equated partial closing situations with subcontracting, and requires that the employees interests be balanced against those of the employer in order to resolve the duty to bargain. We need not devote extended discussion to such an analysis because we have already addressed each facet of the ALJ's findings which were adopted by the Board, and have found them wanting.

Although we recognize the employees' highly sensitive interest in job security, the record discloses that this interest has not been impaired. The record also shows that the employees have never been denied the right to be heard or negotiate over Equitable's subcontracting practices (*see* Section II C, *supra,* of this opinion). These two interests of the employees consequently have not suffered as a result of the Mellon arrangement. We acknowledge that the union has argued that bargaining over the Mellon contract would have permitted it to compete with Mellon insofar as costs of the remittance operation were concerned. Indeed, some suggestion appears that even though the expense would be substantial, a restructuring of the remittance office might have provided single-day banking if Equitable added a night shift and more armored car pickups.

The record, however, demonstrates that Equitable's concern has not been with costs [17] so much as it has been with increased efficiencies, updating of customer accounts, and the generation of a $700,000 daily cash flow. We cannot fail to recognize this concern when considering the operations of a gas company such as Equitable, in the context of our current energy difficulties.

As we have previously discussed, the record discloses no evidence of anti-union animus. It does disclose, however, a compelling motivation centered entirely on the economic considerations to which we have just adverted. It also discloses that this type of subcontracting practice has not been foreign to Equitable's operations.

On balance, therefore, we have no hesitation in concluding that the employer's interests in the benefits that accrued to it and to its customers from the Mellon arrangement far outweigh any interest which could be asserted by the three former employees of the remittance office.

III

The Board also affirmed the ALJ's conclusion that Equitable had committed an independent violation of Sections 8(a)(1) and (5) of the Act when it refused to furnish the union with a copy of the Mellon contract and underlying cost data relating to the arrangement. Our conclusion that the Mellon subcontract is not a mandatory subject of collective bargaining also disposes of these charges.

Information directly relevant to mandatory subjects of bargaining is regarded as "presumptively relevant", and must therefore be disclosed unless it is plainly irrelevant, *Western Massachusetts Electric Co., supra.* No obligation to provide information exists however, unless there is an obligation to bargain over the subject matter. *See International Shoe Company,* 151 N.L.R.B. 693, 699–700 (1965) (since union bargained away its right to require the company to negotiate transfer of work from bargaining unit, company is absolved from providing records pertinent to such a decision). Equitable therefore was not obliged to furnish the union with the information or document it sought. The Mellon contract and cost data information were neither presumptively relevant nor demonstrably germane to bargainable issues. *See Western Massachusetts Electric Co., supra,* 573 F.2d at 105, 107; *International Telephone and Telegraph Corp. v. NLRB,* 382 F.2d 366, 371–72 (3d Cir.), *cert. denied,* 389 U.S. 1039, 88 S.Ct. 777, 19 L.Ed.2d 829 (1967).

As the Court stated in *Western Massachusetts Electric Co., supra,* 573 F.2d at 110:

> Just as a union cannot compel an employer to bargain over subjects that fall outside the ambit of "wages, hours, and other terms and conditions of employment," it cannot bootstrap a demand

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[17] The Board's Brief admits that the record provides no reason to question Equitable's assertion that "the benefits it realizes from single-day banking make the comparative costs of processing bill payments at the bank or inhouse a relatively unimportant factor." Brief for Board at 17.

for information relating to these non-mandatory matters by its unilateral assertion of interest. Some action of the employer is necessary to make this kind of information relevant to bargaining.

Moreover, data regarding subcontracting costs where bargaining is not required, is relevant only when lower costs are urged by the employer as a motivating factor behind the subcontracting decision. Such a rule affords the union an opportunity to evaluate the Company's economic claims. *Western Massachusetts Electric Co., supra*, 573 F.2d at 107. *See also C-B Buick, Inc. v. NLRB*, 506 F.2d 1086, 1091 (3d Cir. 1974) (employer failed to bargain in good faith when it refused union's request for its financial data after employer had alleged it could not afford to accede to union demands).

As we have discussed in the preceding section of this opinion, the record here reveals that Equitable at no time asserted that the cost of contracting with Mellon to handle its customer remittance work was a factor in its subcontracting decision.

Thus, we do not agree with the ALJ's conclusion that the information and documents sought by the union were relevant. This being so, Equitable did not commit a violation of the Act by refusing to provide a copy of the Mellon contract or the cost data to the Union.

IV

Our conclusion that Equitable did not violate Sections 8(a)(1) and (5) of the Act by refusing to bargain over its subcontracting agreement with Mellon and by refusing to furnish the union with a copy of that agreement obviates any need to discuss the Board's *status quo ante* order which, by reason of our disposition, will be denied enforcement.

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Having reached the conclusions expressed in the foregoing discussion, we will grant Equitable's petition for review and deny the Board's cross-petition for enforcement.

NLRB v. Hudson River Aggregates, Inc.

639 F.2d 865 (2d Cir.), January 14, 1981—246 NLRB 192

On petition to enforce Board Order

Before FRIENDLY and OAKES, Circuit Judges, and OWEN, District Judge*

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OAKES, Circuit Judge: This case, having as its principal issue whether an employer was properly treated as a successor, is here on a petition by the National Labor Relations Board for enforcement of its order issued against Hudson River Aggregates, Inc. (HRA), on October 22, 1979. The Board, substantially adopting the recommended order of the Administrative Law Judge, directed HRA to cease and desist from certain unfair labor practices and to take affirmative steps to remedy its statutory violations. We grant the petition for enforcement.

FACTS

In early 1978 HRA bought two stone quarries, one each in Haverstraw and Tomkins Cove, New York, including the equipment and stockpiles, from Martin Marietta Aggregates, Inc. The contract of sale was executed on January 19, 1978, and the sale was closed effective March 1, 1978. HRA continued to operate the quarries in essentially the same manner as its predecessor had, with the exception of reactivating stone production at the Tomkins Cove quarry, which Martin Marietta had been using since 1975 simply for the sale of stockpiled stone. Because some of the equipment was in disrepair when Martin Marietta sold to HRA, production at the Haverstraw quarry did not begin until April 17, 1978.

For a period of at least thirty years, undisturbed by changes in the ownership of the two quarries, three separate units had represented the quarry employees. The truck drivers were represented by Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America; many of the other quarry employees were represented by Local 825, International Union of Operating Engineers, AFL—CIO. The third bargaining unit at the quarries, Laborers Local 60, is not a party to this litigation.[1] When Martin Marietta terminated production and sold the quarries to HRA, it had collective bargaining agreements with each of these three unions. Out of a total of 57 Martin Marietta employees, 33 were Engineers Local 825 members, 8 were Teamsters Local 445 members, and 16 were represented by Laborers Local 60. Jay Boyle, president of HRA, was provided with copies of the collective bargaining agreements prior to the closing.

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*Of the Southern District of New York, sitting by designation.

[1] On May 1, 1978, Laborers Local 60 petitioned the Board for an election. Action on that petition has been delayed pending the outcome of this unfair labor practices litigation.

HRA promised jobs to five of the drivers who had been employed by Martin Marietta. Nevertheless, when the business representative for Teamsters Local 445 called Boyle in late February and in early March to discuss representation of the drivers, Boyle said that he was not at that time prepared to discuss the matter and did not know whether he would ever be ready to do so.[2] Boyle said that his plans were not formalized and that the quarries might not open for a year. However, Boyle soon hired as plant superintendent the same person who had previously worked as superintendent for Martin Marietta and had a thirty-three-year history of employment at the Haverstraw and Tomkins Cove quarries. And between March 13 and March 17 Boyle hired four rank and file employees, none of whom had previously worked at the quarries. The president of Teamsters Local 854, an industrial union which at that time did not represent any employees of quarrying operations, notified Boyle on March 17 that the union had obtained authorization cards from these four employees and sought representative status. With only four employees on the payroll, Boyle immediately recognized Teamsters Local 854 as representative of all his employees and, after almost two weeks of contract negotiation during which no additional employees were hired, executed a three-year collective bargaining agreement with the union on March 28, effective April 1. The agreement contained a union security clause requiring all HRA employees to be members of Teamsters Local 854.

Almost immediately after execution of this agreement, HRA began hiring in earnest. The supervisory personnel remained essentially unchanged: of the four foremen hired, three had previously held supervisory positions and one had been a mechanic with Martin Marietta. On April 3 the company also hired 29 rank and file employees, 27 of whom were former Martin Marietta employees—18 members of Engineers Local 825 and 9 members of Laborers Local 60. One of the foremen advised these employees that they would lose their jobs if they did not sign Teamsters Local 854 authorization cards.[3]

On April 10, however, Engineers Local 825 informed Boyle that it in fact represented a majority of HRA's employees and asked the company to bargain. Boyle refused, saying the HRA employees were already represented by Teamsters Local 854. Also on April 10 the company hired one additional employee, who had not previously worked for Martin Marietta. And on April 17 the company hired 9 more men, 2 of whom were former Martin Marietta employees represented by Engineers Local 825, and 7 of whom had not worked for Martin Marietta. Thus, by the time production began at the Haverstraw quarry on April 17, HRA ahd hired a total of 43 employees, 29 of whom were former Martin Marietta employees—20 members of Engineers Local 825 and 9 members of Laborers Local 60. By November of 1978, HRA's work force had grown to 92 employees.

The five former drivers for Martin Marietta, to whom HRA had promised jobs, were not called in for work when production began on April 17. Instead, their jobs were filled by five new employees, hired that day, who had not previously worked at the quarries. Therefore, on April 17 Teamsters Local 445 filed charges against HRA with the Board, alleging unlawful discrimination against the five former Martin Marietta drivers and refusal to bargain. Teamsters Local 445 picketed HRA, and was subsequently joined by engineers Local 825, which also filed unfair labor practice charges against HRA. The picketing ended six weeks later, and the company hired the five drivers.

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[2] HRA argues that testimony by the business representative for Teamsters Local 445, William Comiez, is illogical, is contradicted by Boyle's testimony, and is not worthy of belief. However, the Administrative Law Judge found that Comiez's testimony was not substantially contradicted by Boyle, and credited Comiez. Of course, a determination of credibility by an administrative law judge who has heard the witnesses' testimony is entitled to great weight and will be overturned only when the evidence to the contrary is very strong. *NLRB v. Bausch & Lomb, Inc.* 526 F.2d 817, 822 (2d Cir. 1975).

[3] Again, HRA argues on appeal that the foreman denied the allegations. But the Administrative Law Judge credited the testimony of three of the employees over that of the foreman, and we accept this determination by the examiner who heard the testimony.

The Board found that HRA had violated sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), by refusing to hire the five drivers, for the purpose of avoiding recognition and bargaining with Teamsters Local 445. Accordingly, the Board ordered HRA to make whole these employees for loss of pay suffered because of this discrimination. The Board further found that HRA had violated sections 8(a)(1), (2), and (3) of the Act, 29 U.S.C. §§ 158(a)(1)-(3), by prematurely recognizing Teamsters Local 854, and sections 8(a)(1) and (2), 29 U.S.C. §§ 158(a)(1)-(2), by threatening employees if they did not sign Teamsters Local 854 authorization cards. The Board ordered the company to withdraw recognition from Teamsters Local 854 and to reimburse employees for fees and dues withheld from their pay pursuant to the union security clause. Finally, the Board found that HRA had violated sections 8(a)(1) and (5), 29 U.S.C. §§ 158(a)(1), (5), by refusing to bargain with Engineers Local 825 and Teamsters Local 445, and ordered the company to recognize these unions as exclusive bargaining representatives of their respective units.

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DISCUSSION

The Board properly found HRA to be a successor employer to Martin Marietta and therefore required to recognize and bargain with Engineers Local 825 and Teamsters Local 445. Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Under the successorship doctrine, when a new employer takes over a business, but the employees' bargaining unit remains appropriate, the successor employer must recognize and bargain with the incumbent union. *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 281, 92 S.Ct. 1571, 1579, 32 L.Ed.2d 61 (1972). Relevant factors in determining whether a new employer is a successor, for purposes of bargaining obligations, include whether new employer is using the same supervisory personnel, equipment, and facilities as its predecessor, whether it is producing the same goods, and whether there is a substantial identity in the work force before and after the change in ownership. *See Service, Hospital, Nursing Home and Public Employees Local 47 v. Cleveland Tower Hotel, Inc.*, 606 F.2d 684, 687 (6th Cir. 1979); *IUEW v. NLRB*, 604 F.2d 689, 694 (D.C.Cir. 1979); *NLRB v. Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 6–8 (1st Cir. 1978). Successorship inquiries are very much related to the specific factual situation, *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union*, 417 U.S. 249, 256, 94 S.Ct. 2236, 2240, 41 L.Ed.2d 46 (1974); *Burns*, 406 U.S. at 274, 92 S.Ct. at 1575, and continuity in the identity of the work force is one of the most important considerations, *see Howard Johnson*, 417 U.S. at 263–64, 94 S.Ct. at 2243–44; Cleveland Tower, 606 F.2d at 687; *Nazareth Regional High School v. NLRB, 549 F.2d 873, 879 (2d Cir. 1977).*

The Board in the instant case found that HRA is carrying on essentially the same business as its predecessor Martin Marietta did. HRA is performing the same quarrying operations on the same premises, using former Martin Marietta supervisors and equipment, and with employees performing essentially the same tasks as they did when the quarries were owned by Martin Marietta. Admittedly, HRA purchased a new stone crusher and planned to reactivate stone production at the Tomkins Cove quarry, where production had been halted in 1975, but a change in the scope of a business by a new employer does not, in itself, affect a successorship determination, *see IUEW v. NLRB*, 604 F.2d at 694; *Middleboro Fire Apparatus*, 590 F.2d at 8; *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1141 (7th Cir.), cert. denied, 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 65 (1974). Rather, "[t]he essential inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer of ownership." *IUEW v. NLRB*, 604 F.2d at 694. The Board's finding that HRA's contemplated expansion of its production capacity did not alter the nature or structure of the enterprise is supported by substantial evidence and therefore will not be set aside. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488–91, 71 S.Ct. 456, 464–46, 95 L.Ed. 456 (1951); *NLRB v. Bausch & Lomb, Inc.*, 526 F.2d 817, 822 (2d Cir. 1975).

Once it is established that HRA is continuing its predecessor's operations essentially unchanged, then the primary consideration becomes whether a majority of HRA's employees were formerly employed by Martin Marietta. This determination turns on which date is selected for examining the composition of HRA's work force.

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The Board chose April 17 as the appropriate date, for that was when normal production at the Haverstraw quarry began, with a representative complement of 43 employees, which is comparable to the number employed by Martin Marietta when it sold the quarries to HRA. Indeed, the usual date selected for determining the bargaining obligations of a successor employer is the time of transfer of the business, when full operations begin. *NLRB v. Ideal Laundry Corp.*, 422 F.2d 801, 804 (10th Cir. 1970) (per curiam); *see Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674 (9th Cir. 1980) (successor employer's duty to bargain commences once it is clear that he intends to hire a majority of his work force from the ranks of his predecessor's employees), *petition for cert. filed*, 49 U.S.L.W. 3373 (U.S. Nov. 6, 1980) (No. 80-735); *cf. Lammert Industries v. NLRB*, 578 F.2d 1223, 1226 & n.5 (7th Cir. 1978) (employer must bargain with union when employees represented by the union are transferred to a new plant, even though the employer plans expansion and more employees subsequently are hired; "appropriate point of analysis is ordinarily the date the new facility opened and began full operations").

HRA argues, however, that its bargaining obligations should not have been determined until it reached its "full complement" of employees, more than six months later, in November 1978. It is true that the Supreme Court in *Burns* noted that in some situations.

> it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit.

406 U.S. at 295, 92 S.Ct. at 1586. But we do not believe that an employer may always delay its bargaining obligations until it has expanded its business to the proportions contemplated when it purchased the enterprise. Although HRA contends that it did not hire a "full complement" of employees until November 1978, we have found no decision postponing determination of a successor employer's bargaining obligation for so long an interval following the commencement of its operations. *Cf. Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609, 614 (9th Cir. 1977) (emphasizing that time at which successor employer held to have hired "full complement" was less than sixty days after it commenced operations). In this case, where HRA was not rebuilding a collapsed operation, but rather starting up the business essentially as it was when sold by Martin Marietta—though concededly HRA had plans for expansion—we think that the Board properly found that the 43 employees at work on April 17 were a representative complement of HRA's work force.

Certainly, the point at which a successor employer has hired a sufficient complement of workers for determining the employer's bargaining obligations will vary from case to case. *In NLRB v. Pre-Engineered Building Products, Inc.*, 603 F.2d 134 (10th Cir. 1979), where the successor employer took over a collapsed business and had to rebuild both production demand and work force, the court held that bargaining obligations should not have been determined when the employer had hired only four employees. Because the predecessor employer had employed as many as 41 employees, the successor, according to the court, should have been allowed to hire more employees before its bargaining obligations were set. Indeed in that case, the successor had not taken over an enterprise in full operation, but rather was trying to rebuild a defunct business. *See also Pacific Hide*, 553 F.2d 609 ("full complement" can be determined only by considering the facts in each case; held that employee complement of 10 was not sufficiently representative, but that employee complement of 19—just one more than the predecessor's work force—which was reached a short time after the successor began its operations, was representative).

HRA took over an on-going business, continuing its operations essentially unchanged. The Board, in an effort to balance the objective of selection of a bargaining representative by the maximum

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number of employees with the objective of employee representation as early as possible, *see Pre-Engineered Building Products*, 603 F.2d at 136, decided that the April 17 start-up date was controlling. We agree that April 17 was an appropriate date to use for determining HRA's bargaining obligations. On that date, of the 43 employees, 20 were formerly members of Engineers Local 825, 9 were formerly members of Laborers Local 60, and 14 were, as far as the record shows, unaffiliated.[4] Since 5 of the 43 employees were truck drivers, the Board was justified in concluding that the 20 workers who were previously members of Engineers Local 825 constituted a majority of the persons employed as operating engineers on April 17. As a successor employer, HRA should have recognized and bargained with that union.

HRA has challenged the appropriateness of the three bargaining units at the quarries, asserting that a single, plant-wide unit is proper. However, the Board found the historic units to be appropriate, and this conclusion in supported by evidence in the record. The Board is given broad discretion to determine appropriate bargaining units, 29 U.S.C. § 159(b), and that determination will not be disturbed unless found to be arbitrary, *see South Prairie Construction Co. v. Local 627, International Union of Operating Engineers,* 425 U.S. 800, 805–06, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (per curiam); *IUEW v. NLRB,* 604 F.2d at 695–96; *Wheeler-Van Label Co. v. NLRB,* 408 F.2d 613, 616 (2d Cir.), *cert. denied,* 396 U.S. 834, 90 S.Ct. 90, 24 L.Ed.2d 84 (1969). The bargaining unit approved by the Board need not be the *most* appropriate unit, only *an* appropriate unit. *MPC Restaurant Corp. v. NLRB,* 481 F.2d 75, 78 (2d Cir. 1973). And a successor employer's duty to bargain does not depend on prior Board election and certification of the incumbent union. Bargaining obligations are the same whether the union is certified by the Board or voluntarily recognized by the employer. *See* 29 U.S.C. §§ 158(a)(5), 159(a); *IUEW v. NLRB,* 604 F.2d at 695; *NLRB v. Movie Star, Inc.,* 361 F.2d 346, 351 (5th Cir. 1966).

As for the five former Martin Marietta drivers, assured of jobs with HRA but then allegedly discriminated against because of their membership in Teamsters Local 445, we uphold the Board's finding of violations of sections 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1), (3); *see Howard Johnson,* 417 U.S. at 262, n.8, 94 S.Ct. at 2243 n.8; *Bausch & Lomb,* 526 F.2d at 821–22, as supported by substantial evidence in the record. Had these five drivers been on the job on April 17, the date selected for determining HRA's bargaining obligations, Teamsters Local 445 would have represented a majority of the employees in its unit, since there was no evidence that HRA intended to utilize more than 6 hauling units, and therefore HRA also violated sections 8(a)(1) and (5), 29 U.S.C. §§ 158(a)(1), (5), by refusing to recognize and bargain with Teamsters Local 445.[5]

Though HRA's position seems to be that its bargaining obligations should not have been determined until November 1978, it rather inconsistently asserts that it was proper for it to recognize and bargain with Teamsters Local 854 in March 1978, with only four employees on the payroll and before production had even begun. We affirm the Board's determination that premature recognition of Teamsters Local 854—that is, before HRA had hired a representative complement of employees—violated sections 8(a)(1), (2), and (3) of the Act, 29 U.S.C. §§ 158(a)(1)–(3). *See NLRB v. Forest City/Dillon-Tecon Pacific,* 522 F.2d 1107, 1108 (9th Cir. 1975). We also agree with the Board that HRA's threats to enforce the union security clause, contained in an agreement executed by a union which was not a legitimate representative of the employees, violated sections 8(a)(1) and (2), 29 U.S.C. §§ 158(a)(1)–(2).

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Because the findings of the Board are supported by substantial evidence, we grant the Board's petition for enforcement of its order.

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[4] Of these 14 employees, none of whom had worked for Martin Marietta, 5 were truck drivers, hired in place of the 5 Teamsters Local 445 drivers who had been promised jobs with HRA.

[5] Of the 92 employees on the job in November 1978, 58 had not worked for Martin Marietta, though there is no evidence in the record as to what jobs these employees perform and therefore it is unclear into which of the three bargaining units each of these employees fit. Since the operations at the quarries are essentially unchanged, however, and the three unions have represented their respective bargaining units at these quarries for more than 30 years, it should not be difficult for HRA and the unions to determine which employees are members of which bargaining units. If they cannot do so, either the employer or the unions may file a unit clarification petition with the Board. While this might seem at first glance to be putting the cart before the horse, the problem was brought about by the employer's own conduct.

NLRB v. Local 58, International Brotherhood of Electrical Workers, AFL-CIO

638 F.2d 36 (6th Cir.), January 16, 1981—241 NLRB 1202

On petition to enforce Board Order

Before LIVELY and MARTIN, Circuit Judges, and CECIL, Senior Circuit Judge

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PER CURIAM: This case is before the Court on application of the National Labor Relations Board for enforcement of its order issued April 22,

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1979 against Local 58, International Brotherhood of Electrical Workers, AFL-CIO, reported at 241 N.L.R.B. No. 197. The Board found the Union violated the prohibition against secondary boycotts imposed by Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.

On November 1, 1977, Goossens, Inc. agreed to act as general contractor for construction of the Ukranian Community Center in Warren, Michigan, assisted by several subcontractors. The project site superintendent for Goossens anticipated possible labor problems because both union and nonunion contractors were working on the site. Signs were posted at each of the two entrances to the job site specifying who was to use which entrance. The Union placed a picket line at the main or general gate entrance. The picketers carried placards stating that one of the nonunion subcontractors, R-B & Sons Electric, was paying less than the prevailing rate for area. R-B notified the Union by mailgram that they should confine picketing activities to the entrance assigned to them. The Union continued to picket the entrance designated for use by R-B and the other nonunion employees.

The controlling factor in determining the legality of picketing is not its effect, but its object. *Local 761, Electrical Workers v. N.L.R.B.*, 366 U.S. 667, 672-674, 81 S.Ct. 1285, 1288-90, 6 L.Ed.2d 592 (1961). If an object of the picketing is to bring pressure upon a neutral employer, then the activity is secondary and unlawful. We think the Union could have communicated its dissatisfaction with R-B's wage rates to R-B employees and suppliers in a meaningful way by using the entrance assigned to them. In this way the neutral employers and their employees would not have been involved so directly. We also agree with the Board that there is no merit to the Union's contention that it was not properly notified to use the reserved entrance.

The order of the Board will be enforced.

NLRB v. Armour-Dial, Inc.

638 F.2d 51 (8th Cir.), January 19, 1981—245 NLRB 959

On petition to enforce Board Order

Before ROSS, Circuit Judge, GIBSON, Senior Circuit Judge, and NANGLE, District Judge*

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FLOYD R. GIBSON, Senior Circuit Judge: This case is before the court on application of the National Labor Relations Board (Board) for enforcement of its order issued on September 28, 1979, citing Armour-Dial, Inc. (company) for unfair labor practices in violation of sections 8(a)(3) and (1) of the National Labor Relations Act.[1] The compa-

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ny manufactures meat products and has a collective bargaining agreement with Local 617 of the Amalgamated Meatcutters and Butcher Workmen, AFL-CIO[2] (union). The Board's order arises out of a suspension of the union's executive committee. The order requires the company to cease and desist from unfair labor practices, to provide members of the executive committee with back pay, to expunge from its records all written reprimands issued to these employees, and to post an appropriate notice.

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*The Honorable John F. Nangle, United States District Judge, Eastern District of Missouri, sitting by designation.

[1] The pertinent parts of those sections of the Act provide:

§ 8. Unfair labor practices

(a) it shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

(Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations * * * and to engage in other concerted activities for * * * other mutual aid or protection * * *.")

[2] The name of the union was changed to United Food and Commercial Workers International Union, AFL-CIO, on June 7, 1979.

We conclude that enforcement of that order should be denied.

The facts are not in dispute. Article 21.2 of the contract between the company and the union, in effect at all relevant times, provided that: "[S]hould trouble of any kind arise in a plant, there shall be no strike, stoppage, slowdown, suspension of work or boycott on the part of the Union or its members or the employees * * *."

The company, for several years, obtained meat products from Iowa Beef Processors (IBP). In March 1977, a sister local of the union was engaged in a strike against one of IBP's plants. On March 30, union president, Ernest Nelson, and another union official, Norman Reed, met with company officials and stated that they did not want the company to handle IBP products because of the strike at the IBP plant. The company refused the union's request.

In June, on two separate occasions Nelson told company officials that he was going to tell the employees not to handle Iowa Beef products. The plant manager then distributed a notice to all employees that the company planned to continue purchasing Iowa Beef products; that neither the company nor the union could legally refuse to do business with Iowa Beef; that the union could not legally refuse to work under the circumstances; and that if there was a work refusal, "appropriate disciplinary action" would be taken. Repeated requests from the union to stop handling Iowa Beef products and repeated refusals by the company followed.

On November 4, when an Iowa Beef truck arrived at the company's loading dock, union president Nelson informed company officials that the employees were "not going to handle [the products] any longer." Company officials attempted to show Nelson that it was economically necessary for the company to purchase Iowa Beef products. Throughout the morning, Nelson spoke with various union representatives, at both the local and international levels. He persisted in his refusal to have the Iowa Beef products unloaded.

Union vice-president Buechel arrived at the plant shortly after noon and went to work. At about 2:00 p.m., Nelson and Buechel met with company officials, who told Buechel what had happened during the morning and repeated their claims of the economic necessity of handling Iowa Beef products. No agreement was reached. Finally, a company official stated that he was going to take Nelson and Buechel to the dock and order the forklift operators to unload the Iowa Beef truck. The company official continued that if they refused he would order Buechel, a qualified forklift operator, to unload the truck. Buechel said that he would refuse if asked. After additional discussion, Nelson indicated that the truck probably could be unloaded if a meeting between the union and the company officials were scheduled. Such a meeting was scheduled and, shortly thereafter, the Iowa Beef truck was unloaded.

On the following Monday, company officials, met with Nelson, Buechel, Norman Reed, chief steward, and Janet Stokke, Kenneth Stokke and Gerald Stromberg, members of the union executive committee. The company officials expressed their belief that the union officials had an obligation to prevent any work stoppage. The union officials, through president Nelson, expressed their intention to continue refusing to handle Iowa Beef products. The meeting ended.

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On Tuesday, November 8, the plant manager held up an Iowa Beef delivery while he circulated another notice to all employees stating the company's position on refusals to handle Iowa Beef products. Sometime during the morning of November 9, the Iowa Beef truck arrived at the loading dock. At about 10:30 a.m., there was a meeting between several company officials and the entire union executive committee. Nelson reported that the union's position had not changed. The plant manager read a lengthy statement which reiterated the company's position that the company had an obligation and an economic need to conduct business with Iowa Beef and that the union could not engage in strikes or slowdowns. The meeting was adjourned.

At the loading dock, the dock foreman instructed a forklift operator to unload the Iowa Beef truck but he refused. The foreman then brought the forklift operator to a conference room where several company officials and the union executive committee, with the exception of Buechel and Ken Stokke, were convened. Employee Morris was asked to unload the Iowa Beef truck. He refused. The union officials were asked to instruct Morris to unload the truck. The union officials complied but

Morris persisted in his refusals. Morris was asked why he was refusing. He replied, "I believe the Union has told you why." Morris was asked what he meant by that, but union president Nelson interjected, "Don't badger the witness." Morris was then told that he was suspended.

The company officials proceeded to ask three members of the union executive committee to unload the Iowa Beef truck. They each refused, stating that they were not qualified forklift operators. The meeting ended, to be reconvened at about 12:30 p.m. At this time, the union representatives were told that they were suspended pending further investigation.

A notice was then distributed to the employees, notifying them of a telegram sent to the union demanding their intervention to stop the illegal work stoppages and contract violations, and notifying the employees of the union committee members' suspension. The notice also made reference to secondary boycott charges which the company had filed against the union.[3] Within a few minutes of the time company officials began to distribute the letter, the employees walked out on strike.

Union president Nelson received a ninety-day suspension. Vice-president Buechel received a thirty-day suspension. Union executive committee members Reed, Stromberg, Janet Stokke and Ken Stokke received nine-day suspensions. Forklift operator Morris was also suspended.

A complaint against the company was issued on January 4, 1978. The complaint charged that the action of the forklift operators in refusing to unload the IBP trucks was not instigated by Nelson or the committee and that the company's action discriminated against the union officials solely on the basis of their position with the union. The administrative law judge (ALJ) found that the company had violated the National Labor Relations Act in its suspensions of Reed, J. Stokke, K. Stokke, and Stromberg, but dismissed the complaint insofar as it alleged that the suspensions of Nelson and Buechel were discriminatorily motivated. The NLRB adopted the ALJ's decision except for that portion which found that Buechel's suspension was not in violation of the Act because of Buechel's direct refusal to unload the IBP truck, if asked to do so. Thus, the Board held that, with the exception of President Nelson's suspension, the suspensions of the union officials violated the Act. We disagree, and therefore deny enforcement of the Board's order.

It is axiomatic that an employer may not discipline an employee merely because he or she holds a union office. *Pontiac Motors Division, General Motors Corp.*, 132 N.L.R.B. 413, 415 (1961). Union office embodies the essence of protected concerted activities. *See General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), *enforced*, 535 F.2d 1246 (3d Cir. 1976). However, there is a crucial distinction between discipline which is imposed because of union affiliation or office and discipline which is imposed for acts, otherwise punishable, which were committed or omitted while exercising union affiliation or office. *See Gould, Inc. v. NLRB*, 612 F.2d 738, 733 (3d Cir. 1979). Here, the union executive committee members were suspended not because of their status as union officers but because of their acts and omissions to act while holding union office.

The executive committee members attended meetings wherein the union president made threats of work stoppages if the company did not stop handling IBP products. These threats were illegal under section 8(b)(4) of the N.L.R.A. If employees who were not union officials had come in to threaten a work stoppage under these circumstances, they too could have been, and, we assume, would have been disciplined. To decide other than we do today would shield union officers from disciplinary measures to which they would otherwise be subject. This would be "neither fair, logical nor just." *Gould, Inc. v. NLRB*, 612 F.2d 728, 733 (3d Cir. 1979).

Furthermore, we agree with the Seventh Circuit's reasoning in *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979). There the court refused to enforce an order of the Board which held that

> disciplining union stewards and a union officer more severely than rank-and-file employees for participation in an unlawful strike was inherently destructive of important employeee rights and hence a violation of §§ 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158-

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[3] The union later entered into a settlement agreement with respect to the charges by posting a declaration of its intention not to force, encourage, or condone Iowa Beef Product slowdowns or work stoppages in the future.

.(a)(3) and (1), regardless of business justification and absence of anti-union motivation.

The *Indiana & Michigan Electric* court analyzed relevant Board decisions and stated:

> Until recently the Board has recognized that the higher responsibilities of union officials justify disciplining them more severely than rank-and-file members for participating in unprotected activity. A divided Board shifted to the contrary view in *Precision Castings Co.*, 233 N.L.R.B. No. 35 (1977), and *Gould Corp.*, 237 N.L.R.B. No. 124 (1978).

599 F.2d at 230. (Footnote omitted.)

The court continued: "As the Board said in [its prior] cases, union officials are subject to 'an even greater duty than the rank-and-file employees to uphold [the contract] provisions.' " 599 F.2d at 231. And finally:

> Differentiating between union officers and rank-and-file in meeting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights.

599 F.2d at 232 (footnote omitted.)

The only two circuits which have been faced with applying the Board's principles enunciated in *Precision Castings Co.* and *Gould Corp.*, to the effect that union officials should not be held to a higher standard than rank-and-file union members in avoiding contract violations, have declined to do so. *Indiana & Michigan Electric Co. V. NLRB, supra; Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979). The Board distinguishes those two cases from the case at bar in the following manner:

> In those cases, the Board held that union officials who merely participate in work stoppages with other employees may not lawfully be disciplined if the criterion for the discipline is their union status and not their misconduct as employees. Here, none of the four officials participated in or induced the work stoppages.

Board's Decision and Order, dated September 28, 1979, *cited in* the Board's Brief, p.

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17, n.4. We cannot agree with the Board's conclusion that the union executive committee members did not participate in or induce the work stoppage in this case. Their presence at the meetings between the union and the company, coupled with their acquiescence in the union's position as espoused in those meetings by President Nelson, does constitute participation in and inducement of the work stoppage which followed. The executive committee lent active support to Nelson's threats, and it would be naive to think that they were not furthering the union's intent to foster an illegal boycott under the direction of the union president, Nelson. The role the committee played in inducing the work stoppage will not be overlooked even though the committee members chose to communicate their support in a non-verbal manner. The message coveyed to the company, in the actions taken and not taken by the committee members, was as clear as President Nelson's position, which was articulated in their presence.

The executive committee members acted in concert with their spokesperson, Nelson. Together they fomented the illegal work stoppage and together they should bear the consequences.

ENFORCEMENT DENIED.

NLRB v. Bartlett-Collins Company

639 F.2d 652 (10th Cir.), January 19, 1981;
certiorari denied 452 U.S. 96–237 NLRB 770

On petition to enforce Board Order

Before DOYLE, MCKAY and SEYMOUR, Circuit Judges

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SEYMOUR, Circuit Judge: The American Flint Glass Workers of North America, AFL-CIO, filed an unfair labor practice charge alleging that Bartlett-Collins Company violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5),[1] by insisting upon the use of a

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[1] These sections provide:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Continued

court reporter to transcribe negotiations as a precondition to collective bargaining. The National Labor Relations Board found the Company's action a violation of those sections. The Board ordered the Company to cease insisting to impasse on the presence of a court reporter during negotiations and interfering in any like manner with the Union's effort to bargain on behalf of the Company's employees. Pursuant to section 10(e) of the Act, 29 U.S.C. § 160(e), the Board seeks to enforce its order. We grant enforcement.

I.

A.

Background

In June 1974, the Board certified the Union as collective bargaining agent for the Company's employees. After seven bargaining sessions, the Union filed unfair labor practice charges against the Company. The Administrative Law Judge (ALJ) found the Company in violation of section 8(a)(5) of the Act for refusing to bargain in good faith in the Union.

Thereafter, the parties met on July 29, 1976 for further negotiations. At the outset of the meeting, Harold E. Mueller, the Company's attorney and chief negotiator, announced the presence of a court reporter to ensure an accurate transcript. Mueller stated this was necessary in view of the prior unfair labor practice proceeding "in which there was some question about the accuracy of testimony concerning what had transpired at bargaining meetings." Rec., vol. I, at 116. The Union attorney, John M. Keefer, objected to the procedure. He felt a court reporter was unnecessary and costly and that his presence woud create a courtroom atmosphere, induce unnecessary speech making, and frustrate negotiations. After considerable wrangling, the Union proposed that the sessions be tape-recorded and later transcribed. The Company continued to insist upon a court reporter. After forty minutes of argument, the Union agreed to the use of the court reporter for that day's meeting, but continued its objection to his presence at future meetings.

B.

Events giving rise to the instant proceeding

No further negotiations were held until after the Board, on June 13, 1977, affirmed the ALJ's decision that the Company had refused to bargain in good faith. *See Bartlett-Collins Co.*, 230 N.L.R.B. 144, 96 L.R.R.M. 1581 (1977). On June 27, 1977, the parties agreed to meet in July for further negotiations. In a June 30 letter, Mueller informed Keefer that the Company intended to have an impartial court reporter transcribe all bargaining sessions, with the record binding on all parties. The Company offered to bear the entire expense. The letter stated that the Board decision, which allegedly rested upon credibility determinations, coupled with the possibility of further review of the Company's bargaining conduct by the Board and the courts, made an accurate record of the negotiations imperative.

In a July 8 letter, Keefer renewed the Union's objections to the Company's insistence on the presence of a court reporter at negotiating sessions.[2] As an alternative, Keefer proposed that each party be free to record bargaining sessions with its own recording equipment and to transcribe the recordings. The company rejected this counterproposal and continued to insist on recording of negotiations by a certified court reporter as a prerequisite to further bargaining. The Union filed the instant unfair labor practice charges on July 15, 1977, alleging the Company had violated sections 8(a)(1) and (5) of the Act by insisting to impasse on this matter. The Board agreed. *See Bartlett-Collins Co.*, 237 N.L.R.B. 770, 99 L.R.R.M. 1034 (1978).

On appeal, the Company argues enforcement should be denied because (1) the Board improperly

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"* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

29 U.S.C. § 158(a)(1), (5).

[2] The objections were based on the belief that the presence of a court reporter "at the bargaining table tends to interfere with and unduly impede negotiations and frank discussions between the parties," and would cause several members of the negotiating committee "feelings of discomfort, tension and reluctance to state their views" because they are not accustomed to proceedings where stenographic transcripts are made. Rec., vol. I, at 169.

found use of a court reporter during negotiations to be a nonmandatory subject of bargaining, and (2) the Board misconstrued the dispute to be whether a record should be made instead of simply how the record should be made.

II.

A.

The duty to bargain under Borg-Warner

Section 8(a)(5) of the Act states that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees * * *." 29 U.S.C. § 158(a)(5). Section 8(d) defines collective bargaining, in pertinent part, as

> "The performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."

Id. § 158(d). In *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958), the Supreme Court read these two provisions together as "establish[ing] the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment * * *.'" The Court held that the "duty is limited to those subjects, and within that area neither party is legally obligat-

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ed to yield * * *. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Id.* (citation omitted); *accord, Fibreboard Paper Products Corp.* v. *NLRB* 379 U.S. 203, 210, 85 S.Ct. 898, 402—403, 13 L.Ed.2d 233 (1964).

Thus, the Court has divided bargaining proposals into two mutually exclusive categories, mandatory and nonmandatory subjects of bargaining. It is "lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without." *Borg-Warner*, 356 U.S. at 349, 78 S.Ct. at 723. The good faith intentions of the insisting party do not affect how the proposal is categorized. The Court specifically stated in *Borg-Warner* that good faith does not entitle a party to insist upon nonmandatory subjects as a pre-condition to agreement. See *id.*

B.

Application of the Borg-Warner standard

The Board concluded that the demand for the presence of a court reporter to record negotiations is not a mandatory subject of bargaining and that insistence to impasse on this issue is a violation of the Act. *Bartlett-Collins Co.*, 99 L.R.R.M. at 1035-36. The Company attacks this finding as improper. It contends that neither the language of the Act nor policy considerations warrants the Board's interpretation.

In reviewing a Board decision as to whether an issue constitutes a mandatory bargaining subject, we must give "considerable deference" to the Board's judgment. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 99 S.Ct. 1842, 1848, 60 L.Ed.2d 420 (1979). Congress delegated to the Board "the primary responsibility of marking out the scope of * * * the statutory duty to bargain," *id.* at 496, 99 S.Ct. at 1848, and the classification of bargaining subjects " 'is a matter concerning which the Board has special expertise.' " *Id.* at 495, 99 S.Ct. at 1848 (quoting *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 686, 85 S.Ct. 1596, 1600, 14 L.E.2d 640 (1965)).

Enforcement of Board orders is denied when they have "no reasonable basis in law," are "fundamentally inconsistent with the structure of the Act," or "attempt to usurp major policy decisions properly made by Congress." *Ford Motor Co.*, 441 U.S. at 497, 99 S.Ct. at 1849. But if the Board's construction "is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Id.; accord, Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 176 (3d Cir. 1980).

The Board's decision that the presence of a court reporter during collective bargaining is a nonmandatory subject of bargaining is not vulnerable on any of these grounds. We cannot say the decision was without reasonable basis in law. The Board grounded its conclusion on the reasoning that the issue of a court reporter during negotiations does not

> "fall within 'wages, hours, and other terms and conditions of employment.' Rather these subjects are properly grouped with those topics defined by the Supreme Court as 'other matters' about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse. The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours, and other terms and conditions of employment.'"

99 L.R.R.M. at 1036.

While the Company argues that recording of bargaining sessions is not a threshold matter because it is such a part of the fabric of bargaining that it constitutes a term and condition of employment, we disagree. There is "no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees." *Latrobe Steel Co.*, 630 F.2d at 176. It does not "settle an aspect of the relationship between the employer and employees." *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971). Nor does it have a "direct, significant, relationship to wages, hours or terms or conditions of employment. A mere remote or incidental relationship is insufficient." *NLRB v. Massachusetts Nurses Association*, 557 F.2d 894, 898 (1st Cir. 1977). *Accord, NLRB v. Columbus Printing Pressmen & Assistants' Union*, 543 F.2d 1161, 1165—66 (5th Cir. 1976); *Seattle First National Bank v. NLRB*, 444 F.2d 30, 33 (9th Cir. 1971). Although there may exist some preliminary matter that is so inextricably interwoven with the substance of a contract that it constitutes a term or condition of employment, we need not decide that issue. It is clear the presence of a court reporter is not such a matter.

Nor is the Board's ruling fundamentally inconsistent with the structure of the Act or a usurpation of Congressional authority. The purpose of the Act is to foster collective bargaining and the resolution of industrial disputes. *See* 29 U.S.C. § 151; *Fibreboard Paper Products Corp.*, 379 U.S. at 211, 85 S.Ct. at 403. It would undermine the policy of the Act to allow negotiations to break down over a threshold procedural issue such as this one. *See Latrobe Steel Corp.*, 630 F.2d at 177. It would create a tool of avoidance for those who wish to impede or vitiate the collective bargaining process. *See St. Louis Typographical Union*, 149 N.L.R.B. 750, 57 L.R.R.M. 1370, 1371 (1964) (Fanning and Brown, concurring). Too often negotiations would flounder before their true inception. *Id.*

The Company argues that no honest bargainer can be disadvantaged by the recording of bargaining sessions. However, the Board and numerous experts in the field of labor relations believe that the presence of a court reporter "has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." *Bartlett-Collins Co.*, 99 L.R.R.M. 1034, 1036 n. 9. *See also Reed & Prince Manufacturing Co.*, 96 N.L.R.B. 850, 28 L.R.R.M. 1608, 1610 (1951), *enforced on other grounds*, 205 F.2d 131 (1st Cir.), cert. denied, 346 U.S. 887, 74 S.Ct. 139, 98 L.Ed. 391 (1953). It may cause parties to talk for the record rather than to advance toward an agreement. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1036 n. 9. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations. *See. id.* When a court reporter is demanded over objection, bargaining is likely to begin on a discordant note. *See Reed & Prince Manufacturing Co.*, 28 L.R.R.M. at 1610. The request may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement. *See St. Louis Typographical Union*, 57 L.R.R.M. at 1372 (Fanning and Brown, concurring). In sum, the process of "informed persuasion," *NLRB v. Insurance Agents' Internationa Union*, 361 U.S. 477, 490, 80 S.Ct. 419, 427, 4 L.Ed.2d 454 (1960) (quoting Cox, *The Duty to Bargain in Good Faith*, 71 Harv.L.Rev. 1401, 140 (1958)), may be supplanted by the concern fo being a careful litigant.

The Company argues that recording bargainin sessions provides important benefits. It speeds bar gaining by freeing parties of the burden of note taking. It helps the parties in later construing and applying the final agreement. It is a source for the Board and courts to refer to in the event of litigation. And it allegedly promotes responsibility in bargaining by minimizing idle chatter, filibustering and intemperate behavior. In support of these contentions the Company notes that all of the Board's formal proceedings are transcribed.

Recording of bargaining sessions does have some positive aspects, but their value is not as great as the Company asserts when the recording is done over the objection of a part.[3] Making a verbatim tran-

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script does not necessarily facilitate party interpretation of a labor contract and Board resolution of refusal-to-bargain charges. The parties remain "free to discuss points outside of the bargaining room and even while in bargaining sessions they are free to make 'off the record' statements." *NLRB v. Southern Transport, Inc.*, 355 F.2d 978, 984 (8th Cir. 1966). Thus, the parties could continue to haggle over the meaning of the contract. In unfair labor practice proceedings, the Board would still be required to take testimony and make findings of fact as to what occurred when the parties were not speaking on the record. Moreover, the temperate and responsible bargaining the Company asserts would follow from the use of a court reporter may simply reflect a stultified process of negotiations and posturing for the record instead of the spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires.

The Company's analogy to recording of formal Board proceedings is misplaced. The purposes of collective bargaining and those of the judicial process are not the same. Court reporters are an integral part of an adjudicatory hearing because they facilitate the main goal of adjudication, ascertaining the truth. Collective bargaining, on the other hand, "cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 488, 80 S.Ct. at 426. Agreement is the result of, among other things, the relative economic power of the opposing parties, reason, public opinion, accommodation, and persuasion. *Id.* at 489–90, 80 S.Ct. at 427. The pursuit of truth and justice is not always the guiding beacon in collective bargaining. The goal of ascertaining with 100 percent accuracy what was said in negotiations may be subordinate to other concerns, such as ensuring peaceful resolution of industrial disputes.

The number of cases in which bargaining parties resort to adjudication and in which resolution depends upon an accurate record of the bargaining process is small in comparison to the number of labor contracts negotiated. This fact supports the reasonableness of the Board's conclusion that any advantages from stenographic recording of negotiations are outweighed by the negative effects on the bargaining process of allowing one side to insist upon the presence of a court reporter.

There is not universal acceptance of this position. *See Southern Transport, Inc.*, 355 F.2d at 982–83; Modjeska, *Guess Who's Coming to the Bargaining Table?*, 39 Ohio St.L.J. 415 (1978). But the critical inquiry is whether the Board's conclusion is a reasonable one. Under the deferential review accorded the Board in its " 'special function of applying the general provisions of the Act to the complexities of industrial life,' " *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975) (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 1149–1150, 10 L.Ed.2d 308 (1963), all that is necessary is that its construction of what is mandatory bargaining subject "is not an unreasonable or unprincipled" one. *Ford Motor Co.*, 441 U.S. at 497, 99 S.Ct. at 1849. The Board has more than met that standard.

The reasonableness of the Board's construction is not altered because it reverses its previous rulings. The Board candidly admits that in prior cases it has, in effect, treated the issue of the presence of a court reporter as a mandatory subject of bargaining. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1035. The Board formerly applied a good faith standard in deciding if a negotiating party's insistence to impasse on the presence of a court reporter at bargaining sessions constitutes an unfair labor practice.

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[3] Also exaggerated in the Company's argument are the negative implications of the Board's holding. The Company contends that the ultimate effect of the Board's order is that no record of bargaining can be made, not even notes, memoranda, or minutes. The argument is frivolous. The Board limited its ruling to situations in which a party insists to impasse on the presence of a court reporter during negotiations or the use of a device to record those negotiations. *See Bartlett-Collins Co.*, 99 L.R.R.M. at 1036.

See, e. g., Reed & Prince Manufacturing Co., 28 L.R.R.M. 1608 (1951).

It is not improper for the Board to change its position. Rather, it is appropri-

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ate for the Board to do so when its accumulated experience demonstrates that change is warranted:

> "The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. 'Cumulative experience begets understanding and insight by which judgments * * * are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.' "

NLRB v. Weingarten, Inc., 420 U.S. at 265-66, 95 S.Ct. at 967-968 (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349, 73 S.Ct. 287, 290, 97 L.Ed. 377 (1953)). As long as the new position is fully explained and is a fair and reasoned one within the scope of the Board's authority, the Board may substitute it for a prior ruling. *See id.* 420 U.S. at 267, 95 S.Ct. at 968; *Latrobe Steel Co.*, 630 F.2d at 177.

Nor can we agree with the Company that this new ruling violates judicial precedent. The case relied upon by the Company, *NLRB v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966), did speak favorably of stenographic recording of bargaining sessions, but this was in relation to the court's decision that the insisting party's demand had been made in good faith. The Eighth Circuit did not consider whether the matter constituted a mandatory subject of bargaining. The only other circuit court addressing this issue found the use of a stenographer at bargaining sessions to be a nonmandatory subject of bargaining. *See Latrobe Steel Co. v. NLRB*, 630 F.2d 171 (3d Cir. 1980). In fact, the Third Circuit relied upon the Board's decision in this case in so ruling.

III.

The Company asserts that the Board's finding of an unfair labor practice was improper because the issue between the parties was *how* the record of bargaining was to be made, not *whether* one should be made at all. Apparently, the Company is alleging that both parties were insisting on some means of recording and that the Board unfairly blamed the breakdown in negotiations on the Company.

This argument is without merit. The record makes clear that only the Company insisted on recording the bargaining sessions. In the July 29, 1976 meeting, counsel for the union repeatedly objected to the presence of a court reporter. Finally, after forty minutes of wrangling, he agreed to the use of one for that meeting but he continued his objection regarding future meetings. In setting up the guidelines for the July 1977 meetings, the Company again introduced a demand for stenographic recording of the bargaining sessions. The Union continued its objection to the procedure. It was only "in the spirit of compromise" that the Union suggested electrical recording of the proceeding.

Even if the issue thereby became simply how to record, it was the Company that went to impasse. The Union made a counterproposal to the Company's demand for stenographic recording, but the Company was unwilling to budge, declaring that a court reporter's transcription was a precondition to further bargaining. Under these circumstances, the Board was justified in finding the Company failed to bargain in good faith.

Enforcement of the Board's order is granted.

Brown & Root, Inc. v. NLRB

634 F.2d 816 (5th Cir.), January 19, 1981—246 NLRB 12

On petition to review and cross-application for enforcement of Board Order

Before Wisdom, Rubin and Sam D. Johnson, Circuit Judges

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Per Curiam: The National Labor Relations Board found that two Brown & Root employees were unlawfully discharged for engaging in concerted activity and ordered the employer to offer them immediate reinstatement and to compensate them for any lost earnings. We conclude that the NLRB's findings were supported by substantial evidence in the record considered as a whole and its legal conclusions were correct. Therefore, we enforce the Board's order.

Wayne Landry and Karl Ockmond worked for Brown & Root as journeymen pipefitters. On the morning of January 23, 1979, a crew of approximately twenty pipefitters, including Landry and Ockmond, were working on a dock that extended into the Mississippi River. Although some of the testimony was contradictory in other regards, all agreed that the wind was blowing a fine mist of rain from the direction of the river. Ockmond, who was operating an electric drill, and several other employees complained to a foreman about the hazards of working with electrical equipment in wet weather. Responding to the workers' complaint, the foreman requested that a safety supervisor inspect the dock area and evaluate the workers' safety. The supervisor inspected the equipment and concluded that it was safe to continue working.

Later that morning, the mist became a heavier rain shower. Ockmond, Landry and most, if not all, of the crew ceased work and sought shelter. Subsequently, the foreman came into the shelter to which the employees had retreated and ordered them to resume working. Amid some grumbling, most of the workers obeyed the instruction. Landry and Ockmond, however, refused to return to work. The foreman promptly fired both of them. The Board affirmed the finding of the Administrative Law Judge that Landry and Ockmond would have returned to work had the rain abated to the light drizzle or mist in which they had worked earlier that morning.

Brown & Root does not dispute any of the findings of fact made by the Administrative Law Judge and adopted by the Board. It contends, however, that the Board was incorrect, as a matter of law, in concluding that the actions of Landry and Ockmond were concerted activities protect-

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ed by Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, and that their discharges violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1).

Employees' activities are protected by Section 7 if they might reasonably be expected to affect terms or conditions of employment. The Supreme Court long ago established that employees' activities are protected when, as a concerted protest, they refuse to work in what they preceive to be unsafe or uncomfortable conditions. *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962). The twenty members of the crew, by seeking shelter from what they thought were unsafe working conditions, were engaged in protected Section 7 concerted activity. The quality of the work stoppage as concerted activity was not altered when, in the face of their foreman's demand, all the employees except Ockmond and Landry returned to work in the rain.

It is, of course, possible to construe the evidence in a different light. The employer contends that Ockmond alone refused to work, that this was an individual refusal to obey orders and that Landry joined only because he feared that he would become ill. There was, however, substantial evidence to support the view that the two were acting in concert. For concerted action to exist, Section 7 does not require a minimum sized congregation. Two individuals acting together to improve working conditions are acting in concert and are protected by Section 7. Because Ockmond and Landry were engaged in concerted activity, their discharges violated Section 8(a)(1) which makes it unlawful to interfere with, restrain or coerce employees engaged in protected activities.

In addition to the usual cease and desist order, the Board ordered Brown & Root to offer Ockmond and Landry immediate reinstatement and to make each of them whole for any earnings lost from their date of discharge. Brown & Root contends that the back-pay award was inappropriate because the employees had not sought reinstatement.

It is not our function to fashion remedial measures. That duty rests upon the Board, and we defer to its determination of the proper remedy for unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271, 1283 (1941). The Board found that the work stoppage engaged in by Ockmond and Landry did not amount to a strike but a protected concerted activity that did not amount to a general work refusal. If found that they stood ready to return to work after the adverse weather conditions abated. It concluded that, in the face of the unlawful discharges, requests for reinstatement would have been wholly ritualistic and that Brown & Root was obligated to offer reinstatement to the employees without awaiting a demand for reinstatement by Ockmond and

Landry. *See Evergreen Helicopters, Inc.*, 223 N.L.R.B. 317, 319–20 (1976), *enf'd*, 564 F.2d 1293 (9th Cir. 1977); *N.L.R.B. v. Southern Greyhound*, 426 F.2d 1299, 1303–4 (5th Cir. 1970). This appears to be a rational determination, well within the remedial latitude afforded the Board.[1]

Accordingly, the Board's order is ENFORCED in all respects.

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[1] Because these employees were not strikers, we do not consider the propriety of the new remedial principle announced by the Board in *Abilities & Goodwill, Inc.*, 241 N.L.R.B. No. 5, 100 L.R.R.M. 1470 (1979), *enforcement denied on other grounds*, 612 F.2d 6 (1st Cir. 1979). *See also N.L.R.B. v. May Sales & Equipment Co.*, 626 F.2d 567, 573–75 (7th Cir. 1980). In those cases, the Board ordered employers to pay lost wages to unlawfully discharged striking employees from their date of discharge despite the absence of a request for reinstatement.

NLRB v. Half-Century, Inc. d/b/a Holiday Inn of Niles, Michigan

652 F.2d 612 (6th Cir.), January 21, 1981—241 NLRB 555

On petition to enforce Board Order

Before KEITH, BROWN and JONES, Circuit Judges

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Petitioner, National Labor Relations Board, seeks enforcement of its bargaining order, the Board having found that respondent, Half-Century, Inc. d/b/a Holiday Inn of Niles, Michigan, was guilty of an unfair labor practice in that it improperly refused to bargain with a union with respect to the employees of the respondent. The Board's decision and order are reported at 241 N.L.R.B. No. 101.

The respondent, Half-Century, purchased this Holiday Inn on December 19, 1977, and at that time there was an existing contract with Local 103 of the involved union. Respondent concedes that, under the Act, it had the duty as a successor to bargain with the union as a representative of its employees although it was not bound by the existing contract which would not have expired for eighteen months. Respondent at the outset advised the employees that they would have all rights provided for in the past contract with some additional advantages with respect to taking their meals at their place of work.

During the period from the purchase of this property by respondent and down to the issuance of the complaint by the Board for alleged failure to bargain on April 4, 1978, there was considerable contact between the president of respondent and a representative of the union. There was not, however, any actual bargaining between them with the result that on February 9, 1978, the union filed an unfair labor practice charge with the Board alleging refusal to bargain. The complaint issued, as stated, on April 4, 1978.

On April 7, 1978 a representative of respondent and a representative of the union met for bargaining purposes, and respondent indicated a willingness to sign a contract with the union that had been negotiated with the prior employer. The representative of the union, however, indicated that the union was unwilling to go along with the old contract and certain changes would have to be made. These negotiations continued on April 19, 20 and 21, 1978, with respondent continuing to offer to sign a contract containing the terms of the existing contract, but the union refused, both sides making some concessions as the negotiations went on.

On April 28, 1978, employees of respondent presented to it a petition, signed by two-thirds of the employees, asking that the union cease to be their representative. Upon receiving this petition, the employer, the respondent, broke off negotiations with the union.

The Administrative Law Judge and the Board found that respondent had committed an unfair labor practice by refusing to bargain by the time the union filed such charge with the Board.

After consideration of the arguments, the briefs, and the entire record in this cause, we have reached the conclusion that the bargaining order should not be enforced. In the first place, in order to support a bargaining order, there must be a clear request by the union to bargain and a refusal to bargain by the employer. Under the circumstances presented here, we do not believe that there is substantial evidence to support the Board's contention that there was a refusal to bargain by the respondent.

We are also of the opinion that a bargaining order would be particularly inappropriate under all the circumstances presented here because it is without dispute that after respondent had begun its bargaining with the union, offering to sign a contract with the terms of the past one with some improvement from the point of view of the employees, and while such bargaining negotiations were going on from day to day, the employees of respondent presented a peti-

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tion, signed by two-thirds of the employees, indicating that they no longer wanted the union to represent them. There is no finding by the Board and no contention made that such indication by the employees was in any way induced by the respondent. There is also no finding by the Board that the bargaining that occurred in April was not conducted in good faith. We do not believe it would be appropriate to enforce a bargaining order as between this respondent and the union when, during the period that bargaining was taking place between them, the employees on their own volition made the decision to terminate the union's representation of them.

It is therefore Ordered and Adjudged that the enforcement order of the Board be and the same is hereby denied.

Seligman and Associates, Inc. v. NLRB

639 F.2d 307 (6th Cir.), January 21, 1981; rehearing denied April 30, 1981; certiorari denied October 5, 1981—240 NLRB 110

On petition to review Board Order

Before Weick and Boyce F. Martin, Jr., Circuit Judges and Nixon, District Judge*

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Boyce F. Martin, Jr., Circuit Judge: This case is before the Court on the petition of Seligman and Associates, Inc. for review of an order of the National Labor Relations Board and on the Board's cross-application for enforcement of the order.

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The unfair labor practices at issue here arose out of organizing activities by Local 79, Service Employees International Union, AFL-CIO and by various employees at apartment complexes managed by Scott Management Company, an unincorporated division of Seligman. On December 8, 1976, the union filed a petition for an election in a unit of all maintenance men, custodians, caretakers, and groundsmen employed at the 21 apartment projects managed by Scott. In a separate proceeding, Scott contended that this was not an appropriate unit and also that assistant managers at larger complexes were supervisors and not within the unit. After an extensive hearing, the Regional Director filed a decision on May 3, 1977 sustaining the unit. Scott's request for review of that decision is still pending before the Board because the Regional Director suspended proceedings when the union demanded a bargaining order without an election in the unfair labor practices case which is the subject of this appeal.

The consolidated unfair labor practice charges concern the company's actions during the period in which the organization activities occurred. Adopting the finding and conclusions of the Administrative Law Judge, the Board found, *inter alia:* that Scott was an employer, within the meaning of the Act, of the employees at the 21 apartment projects; that Scott violated § 8(a)(1) of the Act by discharging David and Susan Younce for engaging in protected concerted activities, and by threatening employees with replacement by independent contractors because of the employees' union activities; and that Scott violated § 8(a)(3) and (1) by discharging Clarence Goold because of his union activities. Finally, the Board affirmed the finding that the employees comprised an appropriate unit but that a bargaining order was not justified because the union did not show that it represented a majority of the employees in the unit.

The Board's order requires Scott to cease and desist from the unfair labor practices found, to reinstate and make whole the discharged employees, and to post notices at each of the 21 apartment projects it manages.

Scott contends on appeal that the Board erred in finding that an employer-employee relationship exists between Scott and these employees and that the employees comprised an appropriate unit. It argues that these findings were unnecessary and prejudicial to the company's pending appeal in the representation case, that they were improperly based on the record and decision in the representation case, and that they are not supported by substantial evidence. We think each of these arguments is without merit.

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*Honorable John T. Nixon, United States District Judge for the Middle District of Tennessee, sitting by designation.

Scott argues that in light of the Board's denial of the requested bargaining order, it should have abstained from determining whether there was an appropriate unit. It is clear that Scott sought to remove the unit determination issue, which is the subject of its pending appeal in the representation case, from consideration in this unfair labor practices case. The Administrative Law Judge addressed the question, however, and our function is to decide whether his unit determination is supported by substantial evidence. The issue was relevant to the Board's request for a bargaining order and was fully litigated below. That the decision on the request for a bargaining order did not require a unit determination is of no concern to this Court.

The admission of the transcript and exhibits of the hearing in the representation case was not error. The Board need not permit complete relitigation of the unit determination issue. See *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, 365 F.2d 898, 905 (D.C. Cir. 1966). The Administrative Law Judge stated that she was not bound by the Regional Director's decision, and Scott was expressly permitted to call witnesses to testify with respect to the appropriateness of the unit.

The Board's findings of an employer-employee relationship and an appropriate unit are supported by substantial evidence in the record. There is ample evidence of Scott's full and centralized control over the em-

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ployees and that the employees have the common interests necessary to comprise an appropriate unit. Moreover, we agree with the Board that the multicomplex unit would not be rendered inappropriate even if the complex owners are separate joint employers. *See Archdiocese of Philadelphia, et al.*, 227 N.L.R.B. 1178. In addition, we find that the inclusion of the assistant mangers in the unit is supported by substantial evidence.

Scott further contends that three of the unfair labor practices found by the Board are not supported by substantial evidence. We disagree. As for the threats made by Marjorie Wrobel, we find it irrelevant that she was friendly with the employees she spoke to and that she eventually married one of them. Section 8(a)(1) prohibits any conduct, friendly or not, which interferes with the free exercise by employees of their rights under the Act. The other two contested findings are firmly supported by the consistent pattern of hostility toward the protected activities by manager Saunders.

Scott also contends that the claims of the Younces that they were illegally discharged are barred by the statute of limitations, by express waiver, and by the doctrine of estoppel. We disagree. Personal service of the charge upon Manager La-France at Eureka Townhouses within the six month limit constituted sufficient and timely service upon Scott. *See N.L.R.B. v. Clark*, 468 F.2d 495 (5th Cir. 1972). We also agree that the prior withdrawal of the same charge does not constitute a waiver thereof, and we find no waiver of the claim in the record. Finally, we find no reason to invoke the equitable doctrine of estoppel to preclude the Younces from filing the charge a second time.

Finally, the Board's reinstatement order has not been mooted by Scott's partial compliance with it. In addition, we find no reason to conclude that the order to post notices at all of Scott's apartment projects is improper.

Accordingly, the order of the Board should be enforced.

Six Flags Over Mid-America, Inc. v. NLRB

638 F.2d 59 (8th Cir.), January 21, 1981—246 NLRB 682

On petition to review Board Order

Before HEANEY, Circuit Judge, GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge

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PER CURIAM. This case is before the Court upon the petition of Six Flags Over Mid-America, Inc., to review and set aside a bargaining order of the National Labor Relations Board. The Board has filed a cross-application for enforcement and the International Union, United Plant Guard Workers of America, has intervened on behalf of the Board. We enforce the order of the Board.

On November 20, 1978, the Union filed with the Board a Petition for Certification as collective bargaining representative for a small group of security guards at Six Flags' amusement park in Eureka, Missouri. On January 18, 1979, an election was held among the employees; six ballots were cast for the Union and seven against. The Union filed objections, which were resisted by Six Flags on several grounds. In a report issued on February 14, 1979, the Board's Regional Director overruled some of the Union's objections and directed that a hearing be held on others. Before the hearing could be held, however, Six Flags and the Union entered into a stipulation setting the first election aside, and a rerun election was scheduled.

About three weeks prior to the rerun election, Six Flags sent its employees a letter notifying them of the stipulation and the impending second election. The letter explained that the stipulation was entered

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in order to expedite matters and was not an admission of wrongdoing on the part of Six Flags. Shortly after they received the letter, several guards gathered in their lounge at work. At that time, two Union adherents, Gerald Walters and John Rodden, referred to the letter as, in essence, an admission of guilt by Six Flags.

The rerun election was held on March 15, 1979; the Union won by a vote of six to five. Six Flags objected to the election, primarily on the basis of the statements of Walters and Rodden. The objections were overruled by the Board and the Union was certified. Nevertheless, Six Flags refused to bargain with the Union and, pursuant to a charge filed by the Union, the Board's General Counsel issued a complaint alleging that Six Flags had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) & (5). Six Flags asserted that its refusal to bargain was justified because the Board had improperly overruled its objections to the rerun election. The Board rejected Six Flags' contentions, however, ruling that the conduct of Walters and Rodden was unobjectionable because it was not attributable to the Union and because it was not the type of conduct that would warrant setting aside the election. The Board then issued the bargaining order that is the subject of the dispute in this case.

Six Flags bases its case for reversing the Board on a series of National Labor Relations Board rulings involving union or employer attempts to mischaracterize Board action or otherwise abuse the Board process in order to influence the outcome of an election. *See, e.g., Kinney Shoe Corp.,* 105 L.R.R.M. 1093 (1980); *Gulton Industries—Femco Division,* 240 N.L.R.B. 546, 100 L.R.R.M. 1321 (1979); *Formco, Inc.,* 233 N.L.R.B. 61, 96 L.R.R.M. 1392 (1977); *Dubie-Clark Co., Inc.,* 209 N.L.R.B. 217, 85 L.R.R.M. 1322 (1974).

We agree, however, with the administrative law judge's conclusion that the cases relied upon by Six Flags are clearly distinguishable from this case. Here, the statements were made at an informal gathering of employees and were a natural response to the employer's letter. They were in no real sense characterizations of Board action, but were, as the administrative law judge found, "clearly expressions of personal opinion easily recognizable by the electorate as such, and were readily susceptible of evaluation by the employees, all [of] whom had a copy of [Six Flags'] letter to assist that evaluation." Moreover, Walters and Rodden, though they supported the Union, cannot be considered Union agents for purposes of evaluating the conduct in question here. Their personal opinion on Six Flags' motivations must not be viewed as Union efforts to improperly influence the election. It would simply not be possible to monitor the personal, informal expressions of every employee who happens to have pro or anti-union inclinations.

Accordingly, the application to enforce the bargaining order of the National Labor Relations Board is hereby granted.

Randall, Burkart/Randall Division of Textron, Inc. v. NLRB

638 F.2d 957 (6th Cir.), January 22, 1981—240 NLRB 263

On petition to set aside Board Order

Before KEITH and MERRITT, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

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MERRITT, Circuit Judge: This case concerns objections of petitioner Randall, Burkart/Randall Division of Textron, Inc. (Randall) to various aspects of a decertification election held in its Blytheville, Arkansas plant. In September and early October 1977 the union representing the employees at the plant engaged in a strike because of its inability to negotiate a new collective bargaining agreement.

Randall hired replacement workers, and outbursts of violence occurred during the strike. On October 21, 1977, five days after the strike was settled, an employee petitioned for decertification of the union as the bargaining representative at the plant. At that time the union represented the two units of employees at the plant—the tool and die unit with eighteen employees, and the production and maintenance unit with approximately 700 employees. Pursuant to a Stipulation for Certification upon Consent of Election approved by the Regional Director of the National Labor Relations Board, the election was held on November 16, 1977. The union lost representation of the tool and die unit but won the production and maintenance unit by a vote of 333 to 285, with 69 eligible voters not casting ballots. Randall filed six objections several days later, and after investigation in December 1977 the Regional Director overruled the objections in their entirety. In March 1978, after Randall filed exceptions to the Regional Director's decision, the Board ordered hearings concerning two of Randall's original objections and adopted the Regional Director's decision overruling the other four. In June 1978 after a hearing, the Hearing Officer recommended that the two objections be overruled and the union be certified. In August the Board adopted the Hearing Officer's findings and certified the union.

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Randall refused to bargain upon request from the union and was then charged with engaging in unfair labor practices in violation of the National Labor Relations Act. In January 1979 the NLRB granted summary judgment against Randall, stating that it would not relitigate issues raised in a prior representation proceeding absent special circumstances or newly discovered evidence. The Board issued an order requiring Randall to bargain with the union. Randall seeks judicial review of the order, pursuant to 29 U.S.C. § 160(f), and the Board has filed a cross-application for enforcement of its order under 29 U.S.C. § 160(e). This court has jurisdiction because Randall's main place of business is in Cincinnati. 29 U.S.C. § 160(f).

We begin by recognizing that the NLRB has been entrusted with a broad range of discretion in supervising representation elections and establishing their procedures. Thus, generally the role of a reviewing court is limited to determining whether that discretion has been abused and whether the Board's findings are reasonable. *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), *cert. denied*, 416 U.S. 986, 94 S.Ct. 2390, 40 L.Ed.2d 763 (1974); *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172, 180 (6th Cir.), *cert. denied*, 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967). The party—here Randall—that seeks to overturn an election bears the heavy burden of demonstrating that it was not fairly conducted. *Harlan #4 Coal Co., supra*, at 120; *NLRB v. Bostik Div., USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975).

Randall's appeal rests upon three of its original objections—numbers one, two, and six. We have no trouble in upholding the Board's decision concerning objection two, in which Randall contends that union agents engaged in campaign activities on the day of the election in the "no-electioneering" zone at Randall's plant. Such activities have been considered violations of NLRB rules of a magnitude requiring the vacating of election results. *Michem, Inc.*, 170 NLRB 362 (1968); *Vitronic, Inc.*, 183 NLRB 1067 (1970). The Hearing Officer, however, found that the union agents engaged in no improper conduct. In doing so, she weighed conflicting testimony of various witnesses brought by both parties and explicitly made a credibility resolution in favor of the union's witnesses. Such a resolution is entitled to great weight by a reviewing court. This court has stated that "[t]he Board's choice between two conflicting views may not be set aside even though the court would justifiably have made a different choice had the matter been before it de novo," *NLRB v. Bendix Corp.*, 299 F.2d 308, 310 (6th Cir.), *cert. denied*, 371 U.S. 827, 83 S.Ct. 47, 9 L.Ed.2d 65 (1962), and that "[i]f [the Hearing Officer's] finding was supported by substantial evidence on the record considered as a whole, the reviewing court is not free to substitute their judgment." *Westchester Plastics of Ohio, Inc. v. NLRB*, 401 F.2d 903, 907 (6th Cir. 1968). Randall has not satisfied the burden necessary to overturn the finding of the Hearing Officer on this issue.

Objection six is that the misconduct throughout the "critical period" prior to and during the election resulted in the election's being held in "an atmosphere of coercion, confusion and fear" and "totally destroyed the effective exercise by the employees of the right to vote." The Hearing Officer and the Board considered evidence concerning events in the "critical period," restricted to the time from the filing of the decertification petition through the completion of the election. The Board found that Randall's evidence described only innocuous and isolated events insufficient to support the charge that the election was held in an atmosphere of coercion and confusion, and insufficient to require vacating of the election. On review, when looking at events in the defined critical period, we find that the Board's determination is supported by substantial evidence.

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Randall argues, however, that the Board improperly restricted the critical period in refusing to consider pre-petition events. Acknowledging that the NLRB has established a rule, for the purpose of administrative convenience, against considering pre-petition activities, *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961), Randall argues that the rule is not absolute and that it should not have been followed in this case, in which the effects of the violent strike that preceded the petition influenced the election. Despite the *Ideal Electric* rule, the Board does consider pre-petition conduct on occasion, but only when there is significant post-petition conduct related to or continuing from pre-petition events. *Parke Coal Co.*, 219 NLRB 546 (1975). To consider whether evidence of pre-petition events is to be admitted, the Board must consider the nature of post-petition conduct. If that conduct was insignificant or consisted of isolated incidents, it would be pointless for the Board to burden the hearing with additional evidence concerning pre-petition matters. The Board did not act in a capricious or arbitrary manner in declining to admit and consider pre-petition conduct in this case, because the later conduct was of a minor nature. The casual relationship urged by Randall is weak.

Randall's position is weak also because it consented in early November, shortly after the strike terminated, to hold the election only two weeks thereafter. Aware of the recent violence, it had ample opportunity to consider whether the ill effects of those events would dissipate in so short a time. A later election date could have been requested. To accept Randall's subsequent complaints would be to permit it to gamble in agreeing to an election, knowing that it need not accept results it later found unsatisfactory. This would encourage careless decisionmaking at the time elections are planned, would undermine the significance or representation elections as determinative events, and would encourage reliance upon protracted post-election remedies.

The most difficult issue concerns objection one, in which Randall claims that the procedures established by the NLRB agents to conduct the elections were not followed, resulting in an atmosphere of confusion and fear at the polls. Randall now objects both to the Board's refusal to grant an evidentiary hearing on this objection and to the Board's decision on the merits overruling the objection. One of Randall's main arguments is that the NLRB abused its discretion, violated its own regulations, and ignored several prior holdings of this court because it failed to have the full record transmitted to it from the Regional Director and thus failed to have the full record before it when deciding this issue. The Board reviewed the objection solely on the basis of the Regional Director's report and Randall's exceptions thereto, failing to have transmitted to it the various affidavits accumulated by the investigating Board agent upon which the Regional Director's report was based.

The regulations that the Board has allegedly violated are found at 29 C.F.R. §§ 102.68 and 102.69(g). Together they state that stipulations, documentary evidence, transcripts of oral arguments before the Regional Director, exhibits, affidavits, etc., are all considered part of the record to be transmitted to the Board. This court has on several recent occasions condemned the NLRB's practice of refusing to have the full record transmitted, for, even if it does not expressly violate the regulations, the practice allows the Board greater opportunity to abuse its discretion and complicates the problems faced by the reviewing court. *Prestolite Wire Div. v. NLRB*, 592 F.2d 302 (6th Cir. 1979); *NLRB v. RJR Archer Inc.*, 617 F.2d 161 (6th Cir. 1980); *NLRB v. Curtis Noll Corp.*, 634 F.2d 1027 (6th Cir. 1980).

The present case, however, is distinguishable from the *Prestolite* line of cases. Hearings in this case were held concerning

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objections two and six, at which Randall submitted evidence concerning matters relevant to objection one. The evidence for objection six, in fact, the Hearing Officer concluded, was "coextensive" with that for objection one, for they both concerned conditions and alleged misconduct during the election. In deciding that the evidence failed to support Randall's other objections, the Hearing Officer in effect came to the same conclusion for objection one. Unlike *Prestolite,* whose circumstances provided no alternate method for the aggrieved party to supply evidence and construct the record necessary for review, the present case allowed Randall overlapping opportunities to do so. Therefore, granting Randall yet another opportunity to present the same evidence would serve no purpose but delay.

Randall argues that the Board nonetheless improperly decided that a hearing on objection one was unneccessary. Review of this question is governed by *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), cert. denied, 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967). In that case this court held that according to the applicable regulations in a consent election (such as the one challenged by Randall), the Board need order a hearing only when "substantial and material factual issues" are raised. *Id.* at 177, quoting 29 C.F.R. § 102.69(f). The court continued:

> In order to raise "substantial and material factual issues," it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Director. [Citations omitted.] It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion.

Id. at 178.

This test is not met in the present case. Review of the Regional Director's report on objection one reveals that he accepted as true much of the testimony favorable to Randall or held that it was unnecessary to choose between conflicting testimony. Regardless of how the evidence was viewed, it failed to support Randall's assertions, which were held therefore to be without merit. In addition, Randall's exceptions to the Regional Director's decision on objection one fail to raise "substantial and material factual issues." Many of the exceptions challenge the conclusions or interpretations of fact made by the Regional Director, and according to the *Tennessee Packers* such exceptions do not support a request for a hearing. Randall did present some exceptions challenging specific factual findings. These, however, were either insignificant to the point that reconsideration of those claims could not affect the outcome, or unsupported by specific evidence that would urge "a contrary finding or conclusion," as required by *Tennessee Packers.* In *NLRB v. Bata Shoe Co.*, 377 F.2d 821 (4th Cir.), *cert. denied,* 389 U.S. 917, 88 S.Ct. 238, 19 L.Ed.2d 265 (1967), upon which Randall relies, the employer presented specific evidence of more severe procedural irregularities that demonstrably affected the election results. Randall, in contrast, in this as in the other issues, fails to support its claims with anything more than general assertions that the election must have been adversely affected.

Finally, we hold that on the merits of objection one Randall has failed to satisfy the burden necessary to overturn the Board's conclusion. Randal described various events at the election—pushing threats, and foul language among the voters, disruption of the voting schedule, an initial failure t provide for two lines of voters, and an instance o a Board agent's becoming flustered—to support it assertion that the election was held in an atmosphere of confusion and fear. The Regional Director, however, found that the evidence failed t demonstrate that these occurrences interfered wit the voters' exercise of free choice or inpugned th integrity of the election. The Board upheld the Regional Director. This decision does not constitute

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an abuse of discretion, and we, therefore, will n disturb it.

Having found no merit to the arguments presen ed by Randall, we deny its petition to set aside t NLRB's order. The Board's cross-petition for forcement of the order is granted.

Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB

Haddon House Food Products, Inc. and Flavor Delight, Inc. v. NLRB

640 F.2d 392 (D.C. Cir.), January 26, 1981;
rehearing denied February 28, 1981; certiorari
denied October 5, 1981—242 NLRB 1057

On petitions to review Board Order

Before LUMBARD, Senior Circuit Judge for the United States Court of Appeals for the Second Circuit, and MIKVA and GINSBURG, Circuit Judges

Opinion for the Court filed by Circuit Judge MIKVA

MIKVA, Circuit Judge: Haddon House Food Products, Inc., is a small wholesale distributor, owned and managed by one Harold Anderson. Flavor Delight, Inc., is an even smaller spice company, owned and managed by his son, David Anderson. Together, the two companies are the Employer in this proceeding seeking review of an order of the National Labor Relations Board (Board).

On November 13, 1975, Local Union 115 of the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Union) commenced an organization drive among the employees of the Employer. On the following morning, two employees who had been active in the Union drive were summarily fired, as were two other employees who had signed Union authorization cards. Later that same day, three other card-signers were laid off.

The conflict triggered by these events formed the basis of a complaint issued by the Board's general counsel, charging a number of violations of the National Labor Relations Act (Act). After a hearing, an Administrative Law Judge (ALJ) found that the Employer was guilty of an "outrageous and pervasive" system of unfair labor practices. Although the ALJ found that the Union had never obtained authorization cards from a majority of the employees in the bargaining unit, he nevertheless recom-

mended that the Board issue a bargaining order because the Employer's conduct had been so pervasive and coercive that a fair election could not be held in the foreseeable future. The Board accepted and extended the ALJ's findings of unfair labor practices, but was sharply divided on the bargaining order remedy recommended by the ALJ, and ordered instead a variety of alternative remedies.[1] The Union and the Employer each petitioned for review, and the Board cross-petitioned for enforcement. For reasons set forth in this opinion, we are prepared to enforce the Board's order only if one of the remedies proposed therein is modified.

I. UNFAIR LABOR PRACTICE FINDINGS

There is little dispute that the conduct engaged in by the Employer to abort the Union's organizing effort was egregious and effective. The Employer promised benefits to induce the employees to avoid the Union, and both threatened and carried out discharges and layoffs as a penalty for union activity. After the fired workers began picketing, the Employer initially offered them reinstatement.[2] When they sought to accept the offer, after a few days' delay, the strikers were met by security guards and dogs who denied them entrance to the plant. While the ALJ did not consider the denial of reinstatement an unfair labor practice, the Board did. This is the only unfair labor practice finding challenged on appeal,[3] and we conclude that there was ample evidence in the record to sustain the Board's determination.

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[1] *Haddon House Food Products, Inc.*, 242 N.L.R.B. No. 180, 101 L.R.R.M. 1294 (1979). Members Murphy, Truesdale, and Penello formed a majority in refusing to issue a bargaining order. Members Truesdale and Jenkins and Chairman Fanning formed a majority in favor of the order for which enforcement is sought here. Member Murphy opposed some of the union access remedies imposed, while Member Penello criticized the breadth of the remedial order in general terms.

[2] The Board found that the Employer had "sent literally a barrage of letters and telegrams to individual discriminatees and to the employees striking in support." Joint Appendix [hereinafter cited as J.A.] 47. The Employer later informed strikers "that their 'suspensions' were rescinded and directed them to report to work by November 28," or, in some cases, December 1. *Id.* Some of these letters were received after the deadline had passed, and others were never received.

[3] The Employer does not appeal from the findings that it unlawfully discharged or laid off seven employees, as mentioned above; that an eighth was fired for merely chatting with the picketers; that two employees were subjected to slightly veiled threats of discharge; and that the company president promised a pay increase in order to quell unionism shortly after the first seven firings.

Unfair labor practice strikers—those whose absence from the workplace is prompted by employer conduct that is found to constitute an unfair labor practice—are entitled to reinstatement if they make an unconditional offer to return to work. *N.L.R.B. v. International Van Lines,* 409 U.S. 48, 93, S.Ct. 74, 34 L.Ed.2d 201 (1972). The ALJ found that the strikers' offer was conditional because they had resolved not to return unless they were *all* taken back. The Board, however, found that the Employer's reason for denying reinstatement had nothing to do with that condition; indeed, the Employer was unaware of any condition when the employees sought to return. The Employer denied them reinstatement, the Board found, because they had not met the deadline set in the Employer's offer of reinstatement. Reinstatement conditioned on such a deadline is not the reinstatement to which these employees were entitled under the Act.

The testimony in the record amply supports the Board's finding that the Employer denied reinstatement because its deadline had not been met. And the law amply supports the Board's conclusion that, having denied reinstatement for invalid reasons of its own, the Employer cannot now claim that a subjective resolve of the strikers, never communicated to the Employer, robbed the employees' return of its unconditional nature. The actual basis of the Employer's conduct is determinative. *See, e.g., Lodges 743 & 1756, International Association of Machinists v. United Aircraft Corp.,* 534 F.2d 422, 458 n.61 (2d Cir. 1975), *cert. denied,* 429 U.S. 825, 97 S.Ct. 79, 50 L.Ed.2d 87 (1976); *Snow v. N.L.R.B.,* 308 F.2d 687 (9th Cir. 1962).

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The Board's unfair labor practice rulings were well-founded. Indeed, the record convinces us that the Employer's conduct constituted "a well-orchestrated antiunion campaign that featured repeated and egregious violations * * * of the Act," J.A. 59 (concurring opinion of Chairman Fanning and Member Jenkins). The hard question is how to remedy such conduct in the case at bar.

II. THE MINORITY STATUS OF THE UNION

Where a union has enjoyed the support of a majority of the employees in the bargaining unit, the Board's remedies for serious employer misconduct frequently include an order directing the Employer to bargain with the union. In the instant case, however, the record does not support the Union's contention that it has achieved majority status. The parties agree that the Union had obtained twenty-seven authorization cards signed by employees. The Board found that there were more than fifty-three workers in the bargaining unit, so that twenty-seven cards cannot demonstrate majority support.

The ALJ had found at least fifty-nine employees in the unit. The Board concluded that the ALJ had counted three employees twice, and so found that there were at least fifty-six employees in the unit. Our own inspection of the record suggests that a fourth employee may have been counted twice.[4] Even so, the Union was at least one card short of majority status.

The Union claims that these figures include three other employees who should have been excluded from the unit because they were supervisors within the meaning of the Act. We turn to that contention.

Section 2(3) of the Act excludes from the statutory definition of employee "any individual employed as a supervisor." 29 U.S.C. § 152(3) 1976). Section 2(11) in turn defines supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1976). This court has reminded litigants that application of this definition requires an attentive eye to the realities of the workplace and not a "wooden reading," since [a]lmost any employee 'directs' other employees in some fashion at some time." *Food Store Employees Local 347 v. N.L.R.B.,* 422 F.2d 685, 690 (D.C.Cir. 1969). Moreover, accurate estimation of supervisory status is a factual judgment facilitated by the expertise of the Board, and "[t]he substantial evidence standard

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[4] The fourth employee is Albert Romano, *compare* J.A. 31 *with* J.A. 805. The ALJ and the Board were willing to exclude arguendo a number of possible unit members, including alleged supervisor Paul Papp and his daughter Paula. This left the ALJ with 59 employees, J.A. 32, corrected by the Board to 56, J.A. 50 n.7.

for review of agency fact determinations * * * takes on special significance where the issue lies so squarely within the Board's ambit of expertise." *Oil, Chemical and Atomic Workers v. N.L.R.B.* 455 F.2d 237, 241 (D.C.Cir. 1971), *cert. denied.* 404 U.S. 1039, 92 S.Ct. 713, 30 L.Ed.2d 730 (1972) (citation omitted).

We begin with the Union's challenge to the Board's finding that Angelo Patelo is not a Flavor Delight supervisor. The record shows that, although he is paid more than some fellow employees, other rank-and-file workers earn more than he does. While he occasionally communicates orders from management, he does not have other supervisory, disciplinary, or hiring powers. He performs manual work side by side with other employees. These are hardly the

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facts on which the Board's determination can be overturned. The same is true regarding John Morrow, the Employer's oldest employee and one who may have had some authority at some time in the past. Partly because of his age, Morrow has trained another employee, Paul Masi, to take over his major responsibilities. The ALJ concluded that whatever authority Morrow had once exercised was now exercised by Masi, and that such authority did not suffice to make either of these men a supervisor.[5] Finally the Union challenges Michael Diamond as a supervisor; the Board found that, although he may have routed some trucks on occasion, he was essentially serving as a truck driver. In each of these instances, the Board's conclusions on a record of conflicting claims are well within the measure of the substantial evidence test.

In addition, the Union has challenged that inclusion in the unit of Paul Berman, son of the general supervisor Jack Berman. As the Union pointed out at oral argument, it is difficult to identify the qualities that distinguish Paul Berman from an executive's daughter who was ruled ineligible for inclusion in a bargaining unit in a recent Board case. *See Pandick Press Midwest, Inc.*, 251 N.L.R.B. No. 58, 105 L.R.R.M. 1161 (1980). Certainly neither the ALJ nor the Board relied on any factor that would assist us in reconciling these decisions. While every case turns on its own facts, the Board cannot apply distinctions whimsically. It is not necessary, however, to decide whether this employee should be a unit member, since there are fifty-four workers in the unit even if he is excluded. The Union had cards from only twenty-seven, and half a unit is not a majority. *See N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 581 n.2, 89 S.Ct. 1918, 1923 n.2, 23 L. Ed.2d 547 (1969). We agree with the Board that the Union never demonstrated the majority status under the Act that would make a bargaining order appropriate under Board precedents. We must therefore go on to consider the entire gamut of remedy issues presented by this case.

III. THE BOARD'S REFUSAL TO ISSUE A BARGAINING ORDER

The ALJ recommended that the Board order the Employer to recognize and bargain with the Union, despite the fact that the Union had never demonstrated majority status. The ALJ found this remedy necessary because he saw no "rational expectation that a fair election among the employees can possibly take place in the foreseeable future." J.A. 36. He may be right, and the Employer's conduct may have so poisoned the well that traditional democratic processes of election and designation by authorization cards are no longer viable options. But the Board has never issued a bargaining order in favor of the union without a showing that, at least at one time, the union had the support of a majority of the employees in the unit, and the Board was unwilling to order such relief in this case. We uphold the Board's refusal.

There is language in one Supreme Court opinion suggesting that the Board's power of fashion remedies might extend to such an order, this dictum appears in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), where the Court approved the Board's practice of issuing bargaining orders when the majority support of a union, as demonstrated by a showing of authorization cards, had been dissipated by serious unfair labor practices. The Court's discussion of remedial options made reference to three categories: category three included violations not serious enough to warrant a bargaining order because an election could still be held; category two included conduct tending "to undermine majority strength and impede the election process;" and category one included conduct so "outrageous" and pervasive" that a fair and reliable election would be impossible. The Court held that the Board could impose a bargining order in category two cases if a card majority had been shown, and mentioned without

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[5] Masi, it may be noted, was a union adherent, and was considered a unit member by the Union, and challenged by the Employer. It all depends on whose supervisor is being gored.

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apparent disapproval a Fourth Circuit dictum suggesting that bargaining orders in category one cases would not require a majority showing. 395 U.S. at 613–14, 89 S.Ct. at 1939–40. Since that time, commentators have hotly debated the extent of the Board's power in category one cases.[6]

As indicated above, the Board has never granted such a bargaining order. The Board Members announced different rationales for their restraint in this case, and the Union focuses on their disagreement as necessitating a remand. Two Members of the Board agreed with the ALJ that a bargaining order was necessary. Two other Members were of the opinion that, while such an order might be appropriate in some circumstances, this was not such a case. Finally, Member Penello did not believe that the Board was ever authorized to issue a bargaining order in favor of a union that had never obtained the adherence of a majority. Since his was the determinative vote, the Union argues that the Board did not fully exercise its judgment, and asks us to remand the case to the Board after holding that Member Penello has been misled by an error of law. This request is, of course, premised on our agreeing that a bargaining order is proper for a minority union in some cases. We are not so sure we agree, and, in any event, are not prepared to fill in the interstices of *Gissel* on the facts of this case.

It is true that Member Penello, in providing the vote necessary to the majority decision on this point, opined that the Board should never order an employer to bargain with a minority union. In stating his views, he referred to his opinion in *United Diary Farmers Cooperative Association*, 242 N.L.R.B. No. 179, 101 L.R.R.M. 1278(1979), remanded, 633 F.2d 1054(3d Cir. 1980).[7] In that exposition, he explored the subject at length, emphasizing his belief that the majority rule principle of section 9(a) of the Act was too fundamental to be sacrificed. He insisted that his fellow Members' resolution of the conflict between majority rights and remedial needs was fraught with danger for employee freedom of choice. He claimed that the congressional intent expressed in the statute precluded bargaining orders for minority unions and, as his arguments demonstrate, this perceived legislative policy judgment coincided with his own.

In an appropriate case this court may have to confront squarely the dilemma raised by Member Penello. This is not, however, a confrontation to be precipitated hastily, involving as it does the danger of unjustifiably imposing a bargaining representative against the will of the employees. The free choice of the employees is best determined through the inexorable logic of a secret ballot election. The Supreme Court has recognized that "the election process ha[s] acknowledged superiority in ascertaining whether a union has majority support," *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301, 304, 95 S.Ct. 429, 431, 42 L.Ed.2d 4659 (1974). Where employer misconduct has destroyed the possibility of a free election, the Court has approved the Board's reliance on authorization cards as "the most effective—perhaps the only—way o assuring employee choice," *Gissel*, 395 U.S. at 602 89 S.Ct. at 1934. But for a government body t bypass the employees altogether, and impose a bargaining representative merely on the basis of it own assessment of the employees' needs, woul pose a serious threat to employee freedom c choice.

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We do not believe that such a conundrum shou be resolved, even preliminarily, in the abstract. W are being urged to decide this important questic merely in order to remand this case to the Boa so that Member Penello can restate in slightly d ferent terms the concerns that he has already e pressed. We decline to do so. The Board has suf ciently articulated its conclusion that, whether not this remedy may be justified in some hypothetical situation, a majority of the Board agrees that it is not appropriate in this case.

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[6] *See, e.g. United Dairy Farmers Cooperative Ass'n v. N.L.R.B.*, 633 F.2d 1054 at 1065–66 (3d Cir. 1980), and authorities cited.

[7] On review, the Third Circuit, without lengthy discussion of the necessity for a remand, held that the Board *did* have the power to issue bargaining orders to minority unions "if the employer has committed such 'outrageous' and 'pervasive' unfair labor practices that there is no reasonable possibility that a free and uncoerced election could be held." At 1069. The court reserved judgment on whether the power existed even "when there is no reasonable possibility that the union would have attained an election majority but for the action of the employer," obs ing that in the present case, "a reasonable possibility exists." *Id.* n.16. do not share that court's confidence that the Board's authority broad, and we are not persuaded that the Board's decision was predic wholly on the nonexistence of this legal authority.

IV. THE BOARD'S REMEDIAL ORDER

We turn at last to the actual remedies imposed by the Board. The Employer challenges most of these as improper or unneccessary. Before reaching the merits of the Employer's arguments, we must consider whether a procedural obstacle bars the Employer from raising them.

A. *The Procedural Hurdle*

When the Board rejected the ALJ's recommendation of a bargaining order, it substituted an extensive list of alternative remedies. Neither the general counsel nor the Union as charging party had taken exception to the ALJ's failure to impose these remedies. When they finally appeared in the Board decision, the Employer did not petition for reconsideration.

The Board argues that this court is precluded from hearing the Employer's objections, even though these remedies were imposed sua sponte by the Board, because section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e) (1976). It has been observed that this requirement "affords the Board the opportunity to bring its labor relations expertise to bear on the problem, so that [the court] may have the benefit of its opinion when we review its determinations." *N.L.R.B. v. Allied Products Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). And it has been held that mere sua sponte adoption of a remedy does not in itself amount to the "extraordinary circumstances" required by the statute, because reconsideration is available at the Board level. *Id.* at 655.

We think that the plight of this Employer is different, however, because the Employer's objections to Board-designed remedies became entangled with the Union's petition for review of the Board decision and the Board's cross-petition for enforcement. The Board issued its decision on June 12, 1979, and the Union filed its petition for review with this court on June 14. Once the Union's petition was filed, the Board became obligated to file the record with the reviewing court, and that court acquired jurisdiction to enforce the Board's order. Act § 10(f), 29 U.S.C. § 160(f) (1976). Once the record was filed, our jurisdiction became exclusive, and the Board no longer had any authority to reconsider its decision without a specific remand from this court.

If an employer is barred from presenting his objections to the reviewing court in such circumstances, then the court faces a Hobson's choice between enforcing the Board order without contest, and remanding the case in its entirety to give the employer an opportunity to make the ritual application for reconsideration. The unfairness of the former course is evident, and the inefficiency of the latter course would prevent the Union from seeking review until the Employer has exhausted his administrative remedies. We do not believe that such a jurisdictional conflict between the court and the Board was intended by Congress, and we find it inconsistent with orderly judicial review. We consider it preferable to hold that, after sua sponte adoption of new remedies by the Board, the filing of a petition for judicial review by another aggrieved party can constitute the extraordinary circumstances that "preven[t] a matter which should have been presented to the Board from having been presented at the proper time." *N.L.R.B. v. Allied Products Corp.*, 548 F.2d at 654. We point out that the Union filed its petition first in this case;

our holding is limited to this sequence, and might be different if the Employer had successfully engaged in the all-too-frequent race to the courthouse.

B. *The Board's Remedial Powers*

The Board's choice of remedies is entitled to a high degree of deference. Congress was aware at the time of the Board's creation that the tangled employer-employee disputes arising from the substantive commands of the Act would demand a body with broad remedial powers. Section 10(c) of the Act directs the Board to issue an order requiring guilty parties "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement * * * as will effectuate the policies of the Act." 29 U.S.C.

§ 160(c)(1976). With that kind of mandate, it is not surprising that the Supreme Court has consistently stressed that the Board's remedial power "is a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964). In fashioning its remedies, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32, 89 S.Ct. 1918, 1939 n.32, L.Ed.2d 547 (1969).

In the present case, the ALJ concluded that "the unfair labor practices to which this Respondent resorted to kill off the union campaign with finality—violent and outright discharge of seven persons within hours of the birth of the union campaign—were 'so outrageous and pervasive'" that extraordinary measures were needed. J.A. 36. The Board agreed that the violations were "numerous and egregious," J.A. 47, but balked at the bargaining remedy the ALJ had proposed. It then undertook the difficult task of formulating a set of remedies tht would restore the employee confidence necessary to permit a free and untrammeled representation decision.

The Board imposed a series of remedial actions, designed to reassure interested parties of their rights and to assist the employees in hearing the Union's side of the story despite the "lingering atmosphere of fear" the Employer had created. J.A. 51. None of these actions are unprecedented; some are quite traditional. Yet, in the circumstances of this case, the efficacy of any one of the remedies standing alone is doubtful. We should not be quick to conclude that the presence of some remedies renders others superfluous. The Supreme Court has directed that the Board's order "not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964) (quoting *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943)).

Nevertheless, the Employer attacks the entire remedial scheme, arguing that it is not J.P. Stevens & Co., and that only a record of hardened recidivism could justify so much affirmative action. But an employer who strikes the first blow hard enough may not need to strike another. The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct; the crucial factor is the effect of that conduct on the employees.[8]

Turning to the individual remedial steps ordered, we find that they can be loosely grouped into two classes: access remedies and notice remedies. The access remedies are designed to assist the Union in communicating with the employees, and to assist the employees in hearing the Union's side of the story without fear of retaliation. The notice remedies are intended to inform the employees of their statutory rights and the legal limits on the Employer's conduct, and to reassure them that further violations will not occur. We address each class of remedies in turn.

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C. *Access Remedies*

The Board ordered the Employer to grant the Union access to company bulletin boards and other posting places for a two-year period, to make available to the Union a list of the names and addresses of its current employees, to give Union spokesmen reasonable access to nonwork areas during nonwork periods, to grant the Union equal time if the Employer convenes its employees for a "captive audience" speech on union representation, and to allow the Union to make one 30-minute preelection speech if there is a Board election involving the Union. The Employer makes two general arguments against this set of remedies. The first is that access remedies of any kind are unwarranted, because the record demonstrates that the Union successfully engaged indirect employee solicitation without interference by the Employer. This argument flies in the face of the Board's findings that the Employer had fired employees for their union activities, warned workers not to associate with union adherents, and fired one employee for chatting with members of the picket line.

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[8] When this court, in *Textile Workers v. N.L.R.B.*, 475 F.2d 973 (D.C. Cir. 1973), directed the Board to take into account the recidivist history of J.P. Stevens & Co., it was not to punish the employer but to assess the effect on employees of milder remedies in view of a history of obstinate resistance. The case does not support a policy of indulgence toward first offenders.

The Employer next cites *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), and its progeny,[9] as authority for the proposition that the Employer's property rights preclude union access to the property unless there are no other reasonable means of reaching the employees. But none of these cases deal with the *remedial* power of the Board; they only seek to determine when an employer's denial of access to his property can itself be deemed an unfair labor practice, *see Decaturville Sportswear Co. v. N.L.R.B.*, 406 F.2d 886, 889 (6th Cir. 1969).

Some of these remedies are severe, but they are not new departures. *See, e.g., Oil, Chemical and Atomic Workers v. N.L.R.B.*, 547 F.2d 575 (D.C. Cir 1976), *cert. denied*, 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977) (bulletin boards); *Food Store Employees Local 347 v. N.L.R.B.*, 476 F.2d 546 (D.C. Cir. 1973) *rev'd on other grounds*, 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974) (names and addresses); *Montgomery Ward & Co. v. N.L.R.B.*, 339 F.2d 889 (6th Cir. 1965) (right to reply to captive audience speech); *N.L.R.B. v. Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290 (5th Cir. 1971) (pre-election speech).[10] We cannot say that they constitute "a patent attempt to achieve ends other than those which can fairly be used to effectuate the policies of the Act."

D. *Notice Remedies*

The Employer concedes the propriety of requiring posting of copies of the Board's notice at the Employer's premises. But the Employer challenges every other remedial step designed to communicate the contents of that notice to interested parties, and to reassure them that their rights will be respected. The Employer objects to mailing copies of the notice to employees and former employees at their homes, finding it duplicative and punitive. This objection need not detain us long. "An employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be as able to absorb its meaning and hence to understand his legal rights as one who reads it at home in a more leisurely fashion." *J.P. Stevens & Co. v. N.L.R.B.*, 380 F.2d 292, 304 (2d Cir.), *cert. denied*, 389

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U.S. 1005, 88 S.Ct. 564, 19 L.Ed.2d 600 (1967). Even more demanding than the needs of current employees are the needs of the former employees who were the direct victims of the Employer's violations; posting the notice at the plant hardly serves to communicate its contents to them.

The Employer also objects to the requirement that the notice be reprinted in appropriate company publications. Such an order is not an innovation. *See, e. g., N.L.R.B. v. Weirton Steel Co.*, 183 F.2d 584 (3d Cir. 1950). The Board deems it necessary to convince the employees that the Employer has adopted an official policy of complying with its legal obligations, and it is certainly within the permissible range of Board options.

The same response must be made to the Employer's objection to the requirement that the Board notice be reprinted in newspapers of general circulation in the vicinity. Neither the concern about unfavorable publicity nor the expense would justify the court in overturning this aspect of the Board order. As the First Circuit has observed,

> The further requirement that the notices be published in all newspapers of general circulation helps insure that all interested persons will receive notice * * *. Moreover, where the violations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in "a warming wind of information and, more important, reassurance."

N.L.R.B. v. Union Nacional de Trabajadores, 540 F.2d 1, 12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 736, 50 L.Ed.2d 750 (1977) (citations omitted).

A more serious objection raised by the Employer concerns the Board requirement that the Haddon House president, Harold Anderson, personally read a copy of the notice to an assembly of the employees. The Employer urges that such a requirement is degrading and "demonstrates that the Board is intent on its design to humiliate and embarrass the Petitioner." It is true that the Board's powers are limited to remedial, and not punitive, orders. But we do not think that the record justifies any suspicion that the Board has displayed a vindictive animus toward the Employer, and we must view the order as remedial, not punitive, if it can reasonably be said to effectuate the purposes of the Act.

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[9] In addition to *Babcock & Wilcox*, the Employer cites *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972); *N.L.R.B. v. Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971); *Diamond Shamrock Co. v. N.L.R.B.*, 443 F.2d 52 (3d Cir. 1971), and *Hutzler Bros. v. N.L.R.B.*, 105 L.R.R.M. 2473 (4th Cir. 1980).

[10] As the Board in this opinion found it "unnecessary to consider *at this time* * * * what might happen if another union intervenes in an election proceeding involving Respondent and Charging Party," J.A. 52 n.11 (emphasis added), we need not analyze the access portions of the order from the point of view of a hypothetical second union.

Unlike other circuits, this court has never enforced a Board public reading order. We find it necessary, therefore, to examine in some detail the history of the oral notice requirement. This inquiry leads us to conclude that public reading by management is a permissible remedy, but that the Board has gone too far by singling out Harold Anderson as the individual who must perform the reading.

The Board's original rationale for oral reading by management was to ensure effective communication of the substance of the notice, and these provisions were often justified by employee illiteracy. In the earliest cases, oral notice provisions were enforced without comment. *Jackson Tile Manufacturing Co.,* 122 N.L.R.B. 764 (1958), *enforced,* 272 F.2d 181 (5th Cir. 1959); *Taylor-Colquitt Co.,* 47 N.L.R.B. 225 (1943), *enforced,* 140 F.2d 92 (4th Cir. 1943). But in *N.L.R.B. v. Laney & Duke Storage Warehouse Co.,* 369 F.2d 859 (5th Cir. 1966), a court refused to enforce such a provision. In *Laney & Duke,* the ALJ had ordered the employer to read the notice to any employee who requested it, but the Board had expanded this to require a reading to all employees, singly or collectively, whether or not requested. The Fifth Circuit denied enforcement because it considered this remedy "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *Id.* at 869. This decision did not, however, preclude other panels of the Fifth Circuit from enforcing public reading orders where the illiteracy of the employees appeared to require it. *N.L.R.B. v. Bush Hog, Inc.,* 405 F.2d 755 (5th Cir. 1968); *N.L.R.B. v. Texas Electric Cooperatives, Inc.,* 398 F.2d 722 (5th Cir. 1968).

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Meanwhile, the Second Circuit developed a compromise device: the Board order was modified to permit reading of the notice by either the employer or a Board representative, at the option of the employer. The court was satisfied that such a reading "still guarantees effective communication of the Board's order to the Company's employees." *J.P. Stevens & Co. v. N.L.R.B.,* 380 F.2d 292, 305 (2d Cir.), *cert. denied,* 389 U.S. 1005, 88 S.Ct. 564, 19 L.Ed.2d 600 (1967). The Board acquiesced in such a modification in a subsequent case, acknowledging that a public reading by a Board representative sufficed to effectuate the policies of the Act. *Textile Workers v. N.L.R.B.,* 388 F.2d 896 (2d Cir. 1967), *cert. denied,* 393 U.S. 836, 89 S.Ct. 112, 21 L.Ed.2d 107 (1968). Finally, the Board itself adopted the Second Circuit's strategy, including this option in its own orders. *See J.P. Stevens & Co.,* 167 N.L.R.B. 258 & n.2 (1967), *enforced in relevant part,* 406 F.2d 1017 (4th Cir. 1968).

This court, however, has viewed public reading requirements with far more suspicion. In *International Union of Electrical, Radio & Machine Workers v. N.L.R.B.,* 383 F.2d 230, 232–33 (D.C.Cir.1967), *cert. denied,* 390 U.S. 904, 88 S.Ct. 818, 19 L.Ed.2d 871 (1968), we rejected a public reading by the employer as "inappropriate to achieve the sought-after goal of dissemination of information concerning employees' rights." The court did acknowledge that a public reading order might be appropriate in some circumstances, but found its disadvantages outweighed the usefulness of "yet a fourth promulgation of the order" in that case. *Id.* at 232. It also rejected the alternative of a reading by a Board representative because that could diminish the Board's apparent neutrality, and "creat[e] a problem more severe than the one it supposedly solves," *Id.* at 233 n.5.

Notwithstanding this court's reluctance, other circuits generally approved the public reading order once the Board representative option became routine. *See J.P. Stevens & Co. v. N.L.R.B.,* 441 F.2d 514 (5th Cir.), *cert. denied,* 404 U.S. 830, 92 S.Ct. 69, 30 L.Ed.2d 59 (1971); *Marine Welding and Repair Works, Inc. v. N.L.R.B.,* 439 F.2d 395 (8th Cir. 1971); *J.P. Stevens & Co. v. N.L.R.B.,* 406 F.2d 1017 (4th Cir. 1968). The dormant issue of readings by the employer himself was revived, however, when the Board began to advocate public reading of the notice for other purposes. The Fifth Circuit has praised the public reading order as "an effective but moderate way to let in a warming wind of information and, more important, reassurance," *J.P. Stevens & Co. v. N.L.R.B.,* 417 F.2d 533 (5th Cir. 1969), and it is this reassurance function that the Board has recently emphasized to justify the requirement of a reading by management itself.

In *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, 11 n.14, 101 L.R.R.M. 1278 n.14 (1979), *remanded on other grounds*, 633 F.2d 1054, (3d Cir. 1980), the Board acknowledged judicial doubts about the propriety of such an order, but concluded that the company itself must give its employees "reassurances that this campaign will end." In the present case, the Board also invoked this rationale to justify its order of a public reading without the Board representative option. Given this different function, it is obvious that a reading by a delegate of the Board rather than by management would not be sufficient.[11]

The Board's remedy is admittedly strong medicine. But in the context of the severely chilling environment created by this Employer's unfair labor practices, we cannot say that it was superfluous to the cure. This is not a mere "additional" promulgation of the notice's contents, but rather a deliberate attempt to alleviate the workers' fears about the Employer's intentions. The reading can do little to disrupt the already strained relationship between the Employer and the Union, and it may be of substantial benefit to the employees. Whether or not this hope is realized, we cannot say that the Board was wrong to make an effort in that direction. This court acknowledged in *International Union of Electrical, Radio & Machine Workers* that there were conceivably cases where the need for the remedy would outweigh its oppressiveness and justify the public reading order. We believe that this is such a case.

One feature of the public reading order is highly unusual, however, and presents a special problem for enforcement by this court. That is the requirement that the notice be read by a specified individual—Harold Anderson, the president and owner of Haddon House. We are aware of only one other case in which the Board singled out a particular individual to perform the reading, and we observe that in the ensuing enforcement action a procedural obstacle preventing the court from reaching the merits of the employer's challenge.[12] *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, 101 L.R.R.M. 1278 (1979), *remanded*, 633 F.2d 1054 (3d Cir. 1980). In *United Dairy Farmers*, the Board emphasized the personal participation of the respondent's president in numerous unfair labor practices. He had

> personally announced that employees would have to become "independent contractors" in order to continue driving for Respondent; threatened to close the plant rather than deal with a union; and interrogated employees concerning their organizational activities. As it is clear that Respondent's unlawful campaign emanated from the top, so, too, must reassurances that this campaign will end come from the top.

242 N.L.R.B. No. 179 at 11 n.14, 101 L.R.R.M. at 1281 n.14. The Board had also found that it was the president who had warned an employee that violence would ensue if the union were voted in, and had previously threatened to fire union supporters.

It is unnecessary for us to decide whether the circumstances of the *United Dairy Farmers* case, or any circumstances whatsoever, could justify the startling innovation of a Board reading order directed at a specified individual. For even the justification the Board attempted in *United Dairy Farmers* is absent in this case. The Board did not make a careful analysis of the necessity for Harold Anderson to undertake the reading, and the record suggests no such necessity. Of all the unfair labor practices found by the Board, the only one personally performed by Anderson was his promise of benefits as an inducement to avoid the Union. Although this may accurately be categorized as a "fist inside the velvet glove" violation, it was other members of management who carried out firings, made veiled threats to employees, and warned of the consequences of talking with union adherents. Indeed, the Board's opinion does not indicate any unusual need for Harold Anderson to participate personally in the public reading—the ALJ had not recommended it, and the Board only stated that the employees "will personally be assured by Respondent's highest ranking representative that those rights will be respected." J.A. 53.

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[11] We also continue to doubt the propriety of having a Board representative perform the reading. *See International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, 383 F.2d at 233 n.5.

[12] As in the present case, the remedy was added by the Board sua sponte after it rejected the ALJ's recommendation of a bargaining order. The remedies were not challenged before the Board, and the court would not permit the employer to attack them on review. The "exceptional circumstances" issue was not discussed, and the court did not specify the order of filing. *United Dairy Farmers Cooperative Ass'n v. N.L.R.B.*, 633 F.2d 1054 at 1064 (3d Cir. 1980).

It is quite likely that a personal assurance from the chief executive officer of a company will have a marginally greater impact than one coming from some other official of lesser rank. But the negative aspects of the order overwhelm the marginal benefit. Such specificity is uniquely oppressive on the individual singled out, and the lack of particularized need may create the misimpression that the Board is seeking to punish an uncooperative respondent. When the remedial value is as slight as it is in this case, we think that the hardship outweighs the benefit to an extent similar to that condemned in this court's prior decision in *International Union of Electrical, Radio & Machine Workers.* Giving due regard to personal dignity and the limitations on the Board's discretion, we think such a specific reading order is unjustified. We will enforce this provision of the Board order only if it is modified to require the Employer to "have a responsible officer of Respondent read" the Board notice.[13]

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V. CONCLUSION

The Board has long struggled to accommodate the interests of employers and employees while assuring free choice of bargaining representatives. When one side or the other destroys the balance and creates a climate inimical to an untrammeled selection process, Congress intended the Board to exercise broad discretion in fashioning a remedy. The remedies chosen may or may not be sufficient to the task, but the Board is entitled to try all reasonable measures. The boundaries within which the Board may reasonably exercise its discretion will vary with the severity of the conduct and the needs that conduct creates.

We uphold the Board's findings and its decision to withhold a bargaining remedy. We hold that, in the peculiar procedural posture of this case, the Employer is entitled to challenge the Board's remedial choices, but with one exception we uphold those choices as within the bounds of the Board's discretion. On the present record, for the reasons we have explained, we are willing to enforce the public reading requirement, but we conclude that the Board has shown no need for singling out the Employer's president to perform it.

It is so ordered.

NLRB v. Leavitt J. Cofer, Eunice Cofer, and Travelodge International, Inc. a partnership d/b/a Marysville Travelodge

637 F.2d 1309 (9th Cir.), January 26, 1981—233 NLRB 527

On petition to enforce Board Order

Before WRIGHT, WALLACE and FERGUSON, Circuit Judges

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WALLACE Circuit Judge: The National Labor Relations Board (the Board) seeks enforcement of its order directing Leavitt J. Cofer, Eunice Cofer and Travelodge International, Inc. (Travelodge), a partnership, to reinstate four dismissed employees, with back pay, and to bargain with Hotel Restaurant Employees & Bartenders Union, Local No. 49 (the Union). The issues are: (1) whether the Board properly exercised its discretionary jurisdiction, (2) whether there is substantial evidence in the record considered as a whole that the employees were dismissed for engaging in protected activity, and (3) whether the bargaining order was appropriate. We answer all three questions in the affirmative, and enforce the order.

I

In September 1974, the Cofers and Travelodge executed a standard form joint venture agreement, the purpose of which was "the joint operation of a motel known as the Marysville Travelodge," located in Marysville, California. The Cofers and Travelodge each have a 50% interest in the motel.

The Cofers employed William and Dorothy Loy as managers of the motel. On February 25, 1976, the motel employed six maids, one maintenance man, and a temporary painter. That morning Mr. Loy assigned maid Nora K. Chavez to train new maid Valerie Ketcham. Training of new maids was a task normally performed

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[13] The Board order also requires Harold Anderson to sign the notice personally. That provision raises entirely different issues, and has not been challenged by the Employer. It will be enforced without modification.

by head maid Norma Keffer. Shortly before noon, Keffer asked Mrs. Loy why Chavez had been assigned to train Ketcham. Mrs. Loy replied that she did not know because Mr. Loy had made out the work assignment sheet that morning. Keffer asked Mrs. Loy why the motel was not paying the other maids $2.20 per hour, as that amount was posted on a minimum wage notice on the motel bulletin board. Mrs. Loy responded that she felt that the maids were receiving the correct rate of pay. Keffer then asked Mrs. Loy for the telephone number of the Travelodge "headquarters." According to Keffer's testimony she also told Mrs. Loy that "we were going to go to the Labor Board because we were tired of what was going on." Mrs. Loy told Keffer that she could pick up the Travelodge telephone number later. Keffer then returned to work.

Keffer, Chavez, and maid Sharon Watts decided at noon to go to the "Labor Board." However, they were unable to find a listing for "Labor Board" in the telephone book. They did find a listing for the Union and decided to go to the Union office after work. At the end of the day, Keffer, Chavez, and Watts left together in one car. Mrs. Loy testified that she thought that the three maids were going to the "employment office" to check on the minimum wage. At the Union office all three maids signed applications for membership which designated and authorized the Union to represent them for collective bargaining purposes. That evening, maid Ellen Reynolds, who had not worked that day, signed an identical application for membership.

The administrative law judge (ALJ) found that Mr. Loy called Keffer the next day to tell her to stay home for a few days to cool off. Also on the morning of February 26, Chavez and Watts called in, as was customary, to find out if they were scheduled to work that day. They were told that there was no work. Keffer, Chavez and Watts continued to call in on a daily basis for several days and each day were told that they were not needed.

On February 29, Keffer confronted Mr. Loy. They discussed the conversation between Keffer and Mrs. Loy of February 25, and, according to Keffer, whom the ALJ credited, Mr. Loy said "we don't need the Labor Board brought into here. I have enough problems of my own." At 9:00 a.m. on March 1, Mr. Loy told Keffer that she was "fired" for "personal reasons * * * for upsetting one of my maids."

Later in the morning of March 1, Keffer, Chavez, Watts, and Reynolds went to the California State Unemployment Development Department and filed claims for unemployment. The forms were mailed to the motel on March 1. Mr. Loy's written response to the unemployment claim was that each employee had been fired because "work unsatisfactory." Reynolds, who had not worked on February 25, worked on February 26, 27, 28 and March 2. On March 3, when she called in to inquire whether there was work that day, Mr. Loy told her "that he had got an unfavorable card from the employment office on me, and for me not to return to work."

On the morning of March 1, Webb talked to Mr. Cofer by telephone. It is undisputed that Webb identified himself as a representative of the Union and indicated that he was calling on the behalf of four maids at the motel. Cofer responded that Loy was in charge of the maid situation and that Cofer would stand by Loy's decisions.

The ALJ found violations of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act). 29 U.S.C. §§ 158(a)(1), 158(a)(5). The Board adopted the findings and conclusions of the ALJ. It ordered reinstatement of the maids with back pay. It also ordered the employer to bargain with the Union.

II

It is undisputed that the Board has statutory jurisdiction over the motel under 29 U.S.C. § 160(a). *See NLRB v. Reliance Fuel Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed. 2d 279 (1963). The Board may, however, decline to exercise jurisdiction at its discretion, under certain circumstances. 29 U.S.C. § 164(c). Pursuant to this grant of discretion, the Board has established a jurisdictional yardstick for the hotel industry of $500,000 annual gross income. *Floridian Hotel of Tampa*, 124 N.L.R.B. 261 (1959). This amount would not be met by the motel itself or by the motel together with the other ventures of the Cofers. The Cofers and Travelodge stipulate, however, that it is met if Travelodge and the motel are counted as a single employer. The issue is, therefore, whether the Board properly considered the annual gross income of Travelodge and the Cofers together in order to meet the Board's self-imposed jurisdictional restraint.

In similar fact situations, the Board has applied four factors in deciding whether to treat closely related concerns as a single employer: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *21st Annual Report of the NLRB*, 14–15. *See NLRB v. Transcontinental Theaters, Inc.*, 568 F.2d 125, 129 (9th Cir. 1978); *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 905 & n.4 (9th Cir. 1964), *ceret. denied*, 379 U.S. 961, 85 S. Ct. 649, 13 L.Ed2d 556 (1965). The Cofers and Travelodge argue that because these factors were not specifically found, the Board has no jurisdiction. The question is not so easily decided. "It is settled law that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion, * * * and is not a question for the courts, * * * in the absence of extraordinary circumstances, such as unjust discrimination * * *." *NLRB v. Carroll—Naslund Disposal, Inc.*, 359 F.2d 779, 780 (9th Cir. 1966) (per curiam) (citations omitted). Therefore, the proper review standard is abuse of discretion. To determine whether there has been an abuse of discretion, however, we must be able to follow the agency's reasoning. To this end we have held that "[a]gencies * * * are required to explain departures from agency policies or rules so that a reviewing court is able to determine if the agency was acting in a reasoned, deliberate manner." *Bob's Big Boy Family Restaurants v. NLRB*, 625 F.2d 850, 852 (9th Cir. 1980). In the present case, the Board failed to mention its four single employer factors. It is not clear, however, that the Board ever intended these factors to constitute a rule for partnership cases such as the present one. The ALJ and the Board apparently did not believe the rule applied and did not find it useful to refer to the four factors in this case. There was no impediment in doing so as the evidence relied upon by the ALJ and the Board is sufficient to satisfy each of the four factors. We conclude that the question of departure from an accepted rule, as in *Bob's Big Boy*, does not arise.

The Board's decision certainly provides a sufficient basis for us to find that the Board acted in a reasoned, deliberate way. The Board relied heavily upon the joint venture agreement between the Cofers and Travelodge. The agreement provides that the "parties hereto jointly own the management rights of said motel * * *." If the Cofers breach any provision of the agreement, Travelodge "shall have the immediate right to assume sole management of said motel * * *." Moreover, "[n]o leases or contracts whatsoever shall be entered into by any party on behalf of the joint venture without the prior written consent of [Travelodge]." The joint venture agreement also required the Cofers "to follow the procedures set forth in the Operations Manual published by [Travelodge] * * *. No variation from these standards and procedures is permitted without the prior written consent of [Travelodge]." The Operations Manual contains the following section entitled "UNION NEGOTIATIONS" which is of particular significance for the single employer issue:

> Do not enter into any negotiation with any union agent or representative until you have conferred with the Legal Department and the Personnel Manager [of Travelodge]. Obtain only the name, address and phone number of the representative for the union, and do not allow any
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> union agent to show you too much in the way of documentation, since there are notice requirements which could later work against the corporation in an arbitration proceeding. Advise the union agent or representative that it is necessary for you to contact the Corporate Headquarters and that someone will be contacting him in the near future.

It is hard to imagine any one fact more supportive of a single employer determination for purposes of Board jurisdiction than a contractual requirement that the corporate partner be consulted prior to any union dealings by the local partner. Together with the numerous other indications of the close connection between the Cofers and Travelodge that were spelled out by the Board, this union negotiation provision provides a sufficient justification of the finding of single employer status to enable us to determine that the Board was acting in a reasoned, deliberate manner. Therefore, we find no abuse of discretion in the Board's jurisdictional determination.

III

The Board found that the decision to fire Keffer, Chavez, and Watts was made because they went together after work to lodge a complaint about pay, presumably to a government agency. The Board found that Reynolds was fired because it became clear to the Loys that Reynolds had joined the concerted action aimed at a pay increase. The review standard for these findings is substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477–91, 71 S.Ct. 456, 459–66, 95 L.Ed. 456 (1951).

We conclude that this test is met. The evidence includes: (1) the timing of the firings, *see NLRB v. Tri-State Stores, Inc.,* 477 F.2d 204, 206 (9th Cir. 1972), *cert. denied,* 414 U.S. 1130, 94 S.Ct. 868, 38 L.Ed.2d 754 (1974); (2) failure to advise the employees of the reason for their discharge, *see A. J. Karjewski Mfg. Co. v. NLRB,* 413 F.2d 673, 676 n.2 (1st Cir. 1969); and (3) evidence tending to contradict the employer's explanation of the firing. The contention of the Cofers and Travelodge that Keffer was fired at noon on February 25, before any mention of going to the "Labor Board" is not credible in light of the fact that Keffer worked that afternoon. The claim that bad work was the motivation for the firings is not supported by the evidence.

Under section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). Section 7 provides in part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." 29 U.S.C. § 157.

We conclude that when employees join together to seek higher wages from a government agency administering the minimum wage laws, they are engaged in concerted activity for the purpose of mutual aid within the terms of section 7. *See Gibbs Die Casting Aluminum Corp.,* 174 N.L.R.B. 75 (1969). Keffer's statement that they were going to the "Labor Board" suggests that the firing was punishment for intended communication with the Board. Because of the overriding public interest in ensuring unimpeded access to the Board, this possibility increases the seriousness of the violation. *See NLRB v. Industrial Union of Marine & Shipbuilding Workers,* 391 U.S. 418, 424 88 S.Ct. 1717, 1721, 20 L.Ed.2d 706 (1968).

The concerted activity of Keffer, Chavez, Watts, and Reynolds does not fall within any of the judicially recognized exceptions to section 7. *See NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17, 82 S.Ct. 1099, 1104, 8 L.Ed.2d 298 (1962). We therefore conclude that the section 7 rights of Keffer, Chavez, Watts, and Reynolds were infringed by their terminations, in violation of section 8(a)(1).

IV

The Cofers and Travelodge argue that no bargaining order should issue because the

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Board erred in finding that a bargaining demand was made by Union agent Webb. We disagree.

We need not decide whether a bargaining demand or a section 8(a)(5) [1] violation is a condition precedent for a bargaining order in this case, *see NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969) (*Gissel*), because we conclude that the Board's findings of a bargaining demand and section 8(a)(5) violation are supported by substantial evidence in the record considered as a whole.

Webb's account of his conversation with Cofer on March 1 seems to describe an attempt to bring Cofer to bargain on the strength of the four union cards, a majority, on the issues of reinstatement, wages, hours, and conditions. This interpretation of Webb's account was developed by the attorney for the Cofers and Travelodge. On cross-examination the following exchange occurred:

Q: You indicated that on March 1, you called Mr. Cofer, or somebody who identified himself as Mr. Cofer.

A: Yes, I did.

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[1] Under section 8(a)(5) it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5). Section 9(a) provides for exclusive representation "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a).

READEX best copy available

Q: And in essence requested to bargain on behalf of the employees of Marysville Travelodge.

A: (Witness nods affirmatively.)

Webb and the ALJ both seem to have understood Webb's conversation with Cofer as constituting a request to bargain. The ALJ indicated that he found Webb's account believable.

We must, however, also examine evidence running counter to the Board's conclusion on a factual matter. *Universal Camera Corp. v. NLRB, supra,* 340 U.S. at 487–88, 71 S.Ct. at 463–64. Cofer's account of the telephone conversation with Webb includes a statement that there was no bargaining request made. The ALJ found that Cofer's specific account of the conversation, however, was compatible with an inference that a bargaining request was intended. We conclude that the finding of the ALJ and the Board that a bargaining demand was made on March 1 is supported by substantial evidence in the record considered as a whole.

We also conclude that the record supports the Board's finding that the Cofers and Travelodge violated section 8(a)(5) by refusal to bargain. This finding is supported despite the fact that Webb did not press the Cofers or the Loys to bargain after March 1. The firing of all four Union members, as the ALJ found, made it futile to seek voluntary recognition.

Travelodge and the Cofers argue that no bargaining order could issue in this case because the conduct alleged to undermine the possibility of a fair election occurred prior to the time that the Cofers or Loys knew that the Union was involved. *Gissel* indicates that "the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful." *Gissel, supra,* 395 U.S. at 603, 89 S.Ct. at 1934.

The argument of the Cofers and Travelodge is weakened by the ALJ's finding that Reynolds was not terminated until March 3—two days after Cofer was made aware that four maids had signed Union authorization cards. The record supports this finding. We need not, however, rely upon the fact that this part of the unfair labor practice was done with awareness of the Union's organizing activities, because we conclude that the three firings carried out without awareness of the role of the Union would support the issuance of a bargaining order.

The concerted activity in this case was a single process of employee self-organization. The fact that after its initial phase it acquired the sponsorship of an already existing union is incidental. A bargaining

order could have been issued to protect the organizing activity of the maids had they taken all actions themselves. They do not lose protection under the Act because they affiliated their own organization with an existing union. The Loys knew of the concerted activity that constitued the early phase of the organizing "drive" before deciding on any of the dismissals. Therefore, the bargaining order does not conflict with the Supreme Court's language in *Gissel.*

The Cofers and Travelodge also argue that there is no evidence to suggest that the preferable alternative of a free representation election would not be possible here. Whether a free election would be possible is determined by the circumstances that existed when an election was held or could have been held, not by the circumstances that exist when enforcement is under consideration before this court. Otherwise, "employers would gain a great incentive to refuse to recognize a bona fide bargaining demand in hopes that a delay would terminate the difficulty." *NLRB v. Tri-State Stores,* 477 F.2d 204, 207 (9th Cir. 1972), *cert. denied,* 414 U.S. 1130, 94 S.Ct. 868, 38 L.Ed.2d 754 (1974) (*citing NLRB v. L. B. Foster Co.,* 418 F.2d 1, 4 (9th Cir. 1969), *cert. denied,* 397 U.S. 990, 90 S.Ct. 1124, 25 L.Ed.2d 398 (1970)). Therefore, we must review the Board's bargaining order with respect to a unit over half of whose employees had recently suffered illegal dismissals, and whose reinstatement was then ordered. We know of no cases in which a bargining order has not been enforced following an unfair labor practice so severe in terms of its impact on the employees and in terms of the percentage of employees affected. Moreover, we must give great deference to the Board in reviewing a bargaining order:

> The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease and desist order with the posting

> of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." *NLRB v. Logan Packing Co.*, 386 F.2d at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.

Gissel, supra, 395, U.S. at 612 n.32, 89 S.Ct. at 1939 n.32. We cannot accord the Board's judgment this special respect and deny enforcement to the bargaining order on the facts of this case.

ENFORCED.

NLRB v. Proler International Corporation

635 F.2d 351 (5th Cir.), January 26, 1981—242 NLRB 676

On petition to enforce Board Order

Before WISDOM, AINSWORTH and GEE, Circuit Judges

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WISDOM, Circuit Judge: Proler International Corporation is a scrap iron salvage company. Its Houston plant employs between 200 and 250 persons. During the first six months of 1978 Proler workers filed a number of complaints with the National Labor Relations Board against the company arising out of a strike and a union organizational campaign. After a two-day trial, an administrative law judge determined that the company had committed a variety of unfair labor practices—including threats, interrogations, and discriminatory discharges—in violation of section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3). The Board adopted the ALJ's findings with some minor exceptions and ordered the company to cease and desist from interfering "in any other manner" with the rights of its employees, to reinstate with back pay all discriminatorily discharged employees, and to post appropriate notices at its plant. The Board now seeks enforcement of these orders. We enforce in part, vacate in part, and remand to the Board for further factual findings.

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I.

Around eight in the morning of January 18, 1978, about 20 Proler truckdrivers met in the company conference room to discuss their complaints about workings conditions with a company vice-president, Sam Oliver. Oliver stated that he was only a vice-president, not the owner, and that he could not negotiate with the employees at that time. He advised them to return to work or go home, and left the room. The employees went across the street to a roadside diner where they constructed picket signs and discussed the future strategy to be pursued. Within an hour, Oliver went to the diner and talked with the leader of the group, Leroy Stubbs, in an effort to convince the men to return to work. As Oliver left he told Stubbs that unless the men returned to work by 10:30 they would lose their jobs. Oliver and the striking employees continued to communicate with each other for the remainder of the day, and even met once again in Oliver's office. The drivers did not return to work that day and did not unconditionally offer to return to work until January 31, 1978.

The ALJ concluded the Oliver's statement was a discriminatory discharge of the striking truckdrivers that converted what was an economic strike into an unfair labor practice strike. He recommended immediate reinstatement for all the truckdrivers as well as back pay to be computed as of January 31, the date of their unconditional offer to return to work. The Board adopted the findings, but modified the recommended order in one respect. Reversing a thirty-year practice, it ordered that the back pay remedy be computed from the date of the discharge, rather than the date of the offer to return to work.[1] Because we conclude that the Board's finding of a discharge is not supported by substantial evidence and that the strike was not converted into an unfair labor practice strike, we must vacate this part of the Board's order and remand for further findings.

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[1] This new remedy was first announced in *Abilities and Goodwill, Inc.*, 241 N.L.R.B. No. 5, 100 L.R.R.M. 1470 (1979), *enforcement denied on other grounds* 1 Cir. 1979, 612 F.2d 6, and has now been approved by at least one circuit. *NLRB v. Mars Sales & Equipment Co.*, 7 Cir. 1980, 626 F.2d 567, 574. Because we have concluded that no discharge occurred on January 18, we need not address the propriety of this new remedy and of course intimate no view on that issue.

The Board and the company hotly dispute whether or not Oliver used the word "fired" in his statement telling the drivers to return to work by 10:30 on the morning of the strike. This dispute focuses on the wrong question. The question is not what specific language was used but whether the language was such that it led the workers reasonably to conclude that they had been fired. *NLRB. Ridgeway Trucking Co.*, 5 Cir. 1980, 622 F.2d 1222, 1224. There is no evidence in the record that the men considered themselves discharged after the 10:30 deadline passed. The little evidence that exists concerning the driver's later actions points the other way. Several of them met with Oliver again later in the afternoon. Furthermore, the men sent two mailgrams that afternoon in which they referred to themselves as "employees engaged in concerted activity" and asked for further meetings with management the next day. Similarly, there is no indication that the company considered the men discharged. No final checks were delivered to the men, nor were letters of termination sent. The one statement of Oliver is the sole piece of evidence relied on by the Board. The statement was undoubtedly a threat, which is in itself an 8(a)(1) violation, but it is not enough evidence, when viewed in light of the whole record, to support the Board's conclusion that the threat was actually carried out.

The conclusion that the strike was not converted to an unfair labor practice strike follows from the conclusion that no discharge occurred on January 18. It is undisputed that the walkout began in protest of working conditions and was an economic strike. For an economic strike to be converted to an unfair labor practice strike, the employer's unfair labor practice must be a contributing factor in causing or prolonging the strike. *NLRB v. Moore Business Forms, Inc.*, 5 Cir. 1978, 574 F.2d 835, 840; *NLRB v. Birmingham Publishing Co.*, 5 Cir. 1959, 262 F.2d 2, 9–10. The employees did not consider themselves discharged. Their continued strike therefore could not have been in protest of their discharge. Similarly, although it is conceivable that they may have been protesting the threat of discharge conveyed by Oliver, there is no evidence to support that notion. No one testified to that effect and apparently none of the picket signs carried by the striking employees listed either the threat of discharge or the supposed discharge as a grievance. There must be evidence of a casual link between the unfair labor practice and the strike. *Cagle's, Inc. v. NLRB*, 5 Cir. 1979, 588 F.2d 943, 950. Since none exists here, the strike remained an economic one.

Discharges may nevertheless have occurred when the strikers unconditionally offered to return to work on January 31. Economic strikers are entitled to immediate reinstatement upon their unconditional offer to return to work, unless the employer can show substantial and legitimate business justifications for refusing to rehire them; employees not rehired at that time are considered discriminatorily discharged. *NLRB v. Fleetwood Trailer Co.*, 1967, 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614. Because this case was tried solely on the theory that the strike had been converted to an unfair labor practice strike by the supposed discharge on January 18, neither party offered proof concerning who was not reinstated and whether there were substantial business justfications for the company's failure to reinstate. We therefore remand this case to the Board for further findings on these issues. Those employees found by the Board to have been refused reinstatement without just cause will of course be entitled to the usual reinstatement and back pay remedy.

II.

In response to a successful union representation election and the union activity that ensued, the company undertook a variety of actions found by the Board to be violations of sections 8(a)(1) and (3) of the Act. With one exception, we affirm the Board's findings.

A.

On two successive days in February 1978, shortly after the successful union representation election, Earl Ramey, an employee of the company, and his girl friend, Felippa Torres, a former employee, invited several other employees to restaurants away from the plant site. Ramey voiced strong antiunion sentiments and urged the employees to sign a petition asking for another election. Torres served as his translator for the Spanish-speaking employees. The Board found that Ramey and Torres were agents of the company and that their promotion of a decertification petition thus violated the Act.

This Court has held that "[s]ection 8(a)(1) of the Act makes it unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union-repudiating document, particularly where the solicitation is strengthened by the express or implied threats of reprisal or promises of benefit." *NLRB v. Birmingham Publishing Co.*, 5 Cir. 1959, 262 F.2d 2, 7. If the actions of Ramey and Torres can be attributed to the company, they violated the Act. A company can be held accountable for unfair labor practices even if they are committed by persons other than management personnel if the company has taken steps that lead its employees reasonably to conclude that those persons were acting on behalf of manageament. *Helena Laboratory Corp. v. NLRB*, 5 Cir. 1977 557 F.2d 1183, 1187. There is substantial evidence to indicate that the company took such steps and that Ramey and Torres were acting on behalf of the company: the company paid for the lunches; the company paid the employees for the time spent; the company provided at least one automobile to transport employees to the restaurants where the luncheons were held; Ramey wore a supervisor's

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white hard hat and was thought to be a supervisor by at least one employee; and, after one luncheon, Ramey gathered several of the employees in the personnel office of the company, in the presence of the company's attorney, to obtain their signatures for a revote petition. We arrirm the Board's conclusion that the actions of Ramey and Torres violated the Act.

B.

In May and June of 1978, Cesar Navarro, one of the company's personnel officers, was involved in four incidents cited by the Board as unlawful threats and interrogations. The first incident occurred at a plant safety meeting held at a time when strike rumors were in the air. Several employees present at the meeting testified that Navarro told the employees that those who participated in a strike would be fired. Other employees testified that he used the word "replaced". The ALJ credited the testimony of those who said that Navarro used the word "fired" and held that the statement was a threat in violation of § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). The company's sole objection to this finding is that the ALJ's credibility choices were unsound. Credibility resolutions are peculiarly within the province of the trial examiner and the National Labor Relations Board and are entitled to affirmance unless inherently unreasonable or self-contradictory. *NLRB v. Standard Forge and Axle Co.*, 5 Cir. 1969, 420 F.2d 508, 510, *reh'g denied*, 427 F.2d 344, *cert. denied*, 400 U.S. 903, 91 S.Ct. 140, 27 L.Ed.2d 140. *See NLRB v. Florida Medical Center*, 5 Cir. 1978, 576 F.2d 666, 671. We can find no such contradictions.

The second incident involving Navarro was a conversation he had with a crane operator named Melchor Ortega. Ortega's unrebutted testimony was that Navarro questioned him generally about the Union's organizational activities and warned him that if any employee induced other employees to join the Union it might endanger their jobs. Such threats of reprisals for union support are prohibited by § 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 1969, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547; *NLRB v. Laredo Coca Cola Bottling Co.*, 5 Cir. 1980, 613 F.2d 1338.

Again, after hearing that employee Howard Predom had filed charges against him with the NLRB, Navarro advised Predom that whether or not the charges were sustained, Predom would lose his job. The Act forbids such coercive actions by employers against employees who file unfair labor practice charges with the Board. *See Nash v. Florida Industrial Commission*, 1967, 389 U.S. 235, 238–39, 88 S.Ct. 362, 366, 19 L.Ed.2d 438, 442; *cf.* 29 U.S.C. § 158(a)(4).

Finally, the Board concluded that a conversation between Navarro and employee Ofelia Ortiz was an unlawful interrogation. Navarro approached Ortiz and two other women in their work area in the plant and introduced himself as the new personnel director. As he was leaving he asked the women whether they were going to attend a union meeting scheduled for later in the day. When Ortiz answered that she was unsure, Navarro stated that if she did attend she should not sign any papers because the union would be lying to them.

We are unable to agree with the Board that this conversation amounted to an unlawful interrogation. An employer has a constitutional right to express his opinions about a union, and this right is explicitly recognized in § 8(c) of the Act. 29 U.S.C. § 158(c). That section states that an expression of opinion cannot constitute evidence of an unfair labor practice if it contains no threat of reprisal or force or promise of benefit. The statements made by Navarro to Ortiz expressed his opposition to the union, but conveyed no threats. *See NLRB v. Gissel Packing Co.*, 1969, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547; *Delco-Remy Division, General Motors Corp. v. NLRB*, 5 Cir. 1979, 596 F.2d 1295, 1311. The question concerning whether the women were going to attend the union meeting merely prefaced the later remarks. The question occurred at the end of an otherwise routine conversation, it took place in the employees' work area, it was apparently not aimed at determining whether the **356** women actually supported the union, and it was not part of a larger campaign of interrogation waged by Navarro to determine which employees were union sympathizers. These factors serve to distinguish this situation from the cases cited by the Board.

Except for the Ortiz incident, the Board's conclusions concerning Navarro's unfair labor practices are affirmed.

C.

Roy Perkins was one of the drivers who participated in the January strike. He was not reinstated until March 22. A week later he was discharged, allegedly for destruction of company property, after he was seen by Herman Proler, executive vice-president of the company, driving a truck with a flat tire. The Board concluded that the company's stated reason for discharging Perkins was a pretext and that Perkins's union activities were the sole reason for his discharge. The usual remedy of reinstatement with back pay was ordered. The company contends that the Board's finding of unlawful motivation is not supported by substantial evidence. More specifically the company argues that there was no evidence that the person who made the discharge decision was aware of Perkins's union activities.

Proof of unlawful motivation can rarely be adduced other than by circumstantial evidence. It is not surprising, then, that the Supreme Court, in a decision handed down shortly after the passage of the National Labor Relations Act, concluded that knowledge and unlawful motivation can be proven solely on the basis of circumstantial evidence. *See NLRB v. Link-Belt Co.*, 1941, 311 U.S. 584, 597, 61 S.Ct. 358, 365, 85 L.Ed. 368. There is enough circumstantial evidence here to support the Board's conclusion. Perkins had participated in the strike and had been returned to work only a week before he was discharged. At the time of the incident, Herman Proler saw Perkins holding a union handbill, so he undoubtedly knew of Perkins's union affiliation. When he was discharged, Perkins was told by the company's chief dispatcher that he had been seen by the "wrong man". Finally, and most importantly, the tire itself was not damaged; the flat was fixed and the tire was put back into service within several days. Perkins's reinstatement with back pay is affirmed.

III.

The company objects to the language of the Board's cease and desist order which bars the company from "in any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed under § 7 of the Act". The company did not raise this objection to the order before the Board, however, and the Supreme Court has held that this failure bars the company from raising the issue now absent extraordinary circumstances. *NLRB v. Ochoa Fertilizer Corp.*, 1961, 368 U.S. 318, 322, 82 S.Ct. 344, 347, 7 L.Ed.2d 312; *see* 29 U.S.C. § 160(e). The company has not attempted to show, nor can we find, any extraordinary circumstances.

For the foregoing reasons, we ENFORCE the Board's cease and desist order, the order reinstating Roy Perkins with back pay, and the order to post an appropriate notice as modified to reflect our decision. We VACATE its order of reinstatement with back pay for the workers involved in the January strike and REMAND for further determinations concerning whether discharges occurred on January 31, 1978.

NLRB v. W. Carter Maxwell, d/b/a Pioneer Concrete Co.

637 F.2d 698 (9th Cir.), January 26, 1981; rehearing denied March 9, 1981—241 NLRB 264

On petition to enforce Board Order

Before **Duniway**, **Tang** and **Canby**, Circuit Judges

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Canby, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order against an employer, W. Carter Maxwell. The order is based upon findings by the Administrative Law Judge and the Board that Maxwell violated §§ 8(a)(3) and (1) of the National Labor Relations Act by discharging an employee, Cantrell, and violated § 8(a)(1) of the Act by requesting another employee, Bower, to deliver Maxwell a copy of the written statement that Bower had submitted to the Board during its investigation of Cantrell's discharge. Finding the decision of the Administrative Law Judge and the Board supported by substantial evidence, we enforce the order. Because we base our decision entirely on the § 8(a)(1) violations, which are sufficient to support enforcement, we need not reach the § 8(a)(3) issue.

1. *Factual Background:*

Employer Maxwell has been engaged since 1950 as a sole proprietor in the business of producing and selling ready mixed concrete. At the time this case arose he employed five drivers, one of whom was Cantrell. The company was run on an informal basis. The drivers were not required to punch time cards and were paid for 40 hours per week, 52 weeks per year, whether they were working or sick or rained out. All of the drivers averaged less than 40 hours work per week.

Since 1960 Maxwell has had a collective bargaining agreement with Local 980 of the International Brotherhood of Teamsters (the Union). The standard agreement in force at the time in question provided that employees were to be paid time-and-a-half for work in excess of eight hours per day. At Maxwell's plant, however, this provision of the agreement had been wholly ignored ever since it came into force. Instead of paying overtime rates on those few occasions each year when drivers were required to work in excess of eight hours per day, Maxwell gave them compensatory time off on following days. No complaint concerning this practice had ever been made to the Union, even though Union representatives regularly visited Maxwell's plant. It seems clear that all of the drivers except Cantrell were quite content with a compensation system that benefited them more on balance than strict adherence to the collective bargaining agreement would have.

2. *Cantrell's Discharge:*

Cantrell was the only employee who had complained about Maxwell's failure to pay overtime rates and he had done so several times since 1970. On each occasion Maxwell had simply told him to take compensatory time off. On May 4th, 1977, Cantrell worked about an hour overtime and after work went to Maxwell and said he wanted to be paid for the hour at the overtime rate. According to the findings below the meeting was "acrimonious and probably involved some shouting." At the conclusion of the interchange, Cantrell asked Maxwell if he (Cantrell) was fired, and Maxwell answered in the negative and then stated, "I guess we can work out something perhaps under the table." In context, this statement referred to an arrangement regarding overtime.

On the following day, May 5th, Maxwell called Cantrell into the office after work and told him, "There just is no point in trying to continue here, it is not going to work. Why don't you quietly go on and look for another job. I will not do anything to hurt your unemployment pay." Another heated argument followed again probably with some shouting, after which Maxwell handed Cantrell a check representing either accrued pay or severance pay.

Cantrell subsequently filed a charge with the Board based upon his discharge. A complaint issued and the Administrative Law Judge found that Maxwell had violat-

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ed §§ 8(a)(3) and (1) of the Act by discharging Cantrell "at least in substantial part" because of his attempt to enforce the overtime provisions of the collective bargaining agreement. The Board relied solely on that determination in upholding the decision of the Administrative Law Judge regarding Cantrell's discharge.

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees" in the exercise of their rights to engage in collective bargaining and other concerted activities for the purpose of collective bargaining. Maxwell does not argue that Cantrell's request for overtime pay was not a protected activity. *See NLRB v. Adams Delivery Service, Inc.*, 623 F.2d 96, 100 (9th Cir. 1980). The central question in this case, therefore, is whether Cantrell was fired because of his attempts to be paid overtime as provided in the agreement or for some other reason not protected by the Act. If substantial evidence in the record considered as a whole supports the decision of the Board, we must enforce it. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S.Ct. 456, 463–464, 95 L.Ed. 456 (1951).

Maxwell contends that he fired Cantrell because Cantrell shouted at him and not because of his attempts to enforce the agreement. He points to the fact that Cantrell had complained about overtime previously without retaliation by Maxwell. We find substantial evidence in the record to support a contrary determination. The Administrative Law Judge was justified in concluding from Maxwell's own testimony that he had decided to discharge Cantrell when he called him into the office on May 5 and that the reason for the discharge was Cantrell's insistence upon the overtime arrangement guaranteed by the collective bargaining agreement. Because Cantrell was fired for trying to enforce the collective bargaining agreement, his discharge violated § 8(a)(1) of the Act.[1]

3. *Maxwell's Request for a Copy of Employee Bower's Statement to the Board:*

After Cantrell filed the unfair labor practice charge with the Board, Maxwell asked Bower, another employee, for a copy of the statement Bower had made to the Board. Maxwell did not advise Bower that no reprisals would be taken against him if he refused to deliver the affidavit. Maxwell made no showing that he needed the statement or any part of it for purposes of trial preparation. Bower agreed to obtain the statement for Maxwell, and Maxwell produced a typed letter of request which Bower signed. A copy of the statement was mailed by the Board to Bower, and he delivered it to Maxwell. The Administrative Law Judge found that Bower could not have refused the request, and concluded that the request therefore violated § 8(a)(1) of the Act. The Board concurred in that finding.

Because there is no suggestion in the record that Bower was unwilling to cooperate with Maxwell, we understand the ruling of the Administrative Law Judge and the Board to be that a request for an employee's statement to the Board is a *per se* violation of § 8(a)(1) in the absence of assurances to the employee that there will be no retaliation for refusal and of a showing by the employer that the statement is needed for the employer's trial preparation. Some courts appear to have adopted such a rule. *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830, 86 S.Ct. 69, 15 L.Ed.2d 74 (1965); *Retail Clerks International Association v. NLRB*, 373 F.2d 655 (D.C.Cir. 1967); *NLRB v. General Stencils, Inc.*, 438 F.2d 894 (2d Cir. 1971); *see Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 133 (5th Cir. 1964). Other courts have not endorsed a *per se* rule, but have held that the lawfulness of an employer's request for an employee's statement to the Board depends upon the balancing of circumstances that may suggest coercion against the employer's need for the information. *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976); *Robertshaw Controls Co., Lux Time Division v. NLRB*, 483 F.2d 762 (4th Cir. 1973). The latter position is analogous to the rule of this circuit that the permissibility of interrogation of employees about union activities depends upon whether the totality of the circumstances indicates restraint or coercion of employees in the exercise of their § 7 rights. *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977); *NLRB v. Silver Spur Casino*, 623 F.2d 571, 584–85 (9th Cir. 1980); *but see NLRB v. Port Vancouver Plywood Co.*, 604 F.2d 596, 599 n.1 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). This circuit has not however, ruled on the issue now presented.

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[1] We do not consider whether the Board applied the proper standard to decide whether the discharge violated the Act. Maxwell did not raise this issue before the Board or on appeal to this court. Therefore, under § 10(e) of the Act, 29 U.S.C. § 160(e), and 29 C.F.R. § 102.46, we may not consider the question. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10, 99 S.Ct. 1123, 1129 & n.10, 59 L.Ed.2d 333 (1979); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 350, 73 S.Ct. 287, 290, 97 L.Ed. 377 (1953); *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378, 389 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979).

Faced with an open question we adopt the rule that an employer violates § 8(a)(1) *per se* by requesting an employee's statement to the Board without assuring the employee that no reprisals will follow from refusal, and without showing that the requested statement is needed for trial preparation and that the request does not go beyond those needs. We believe that any less stringent rule presents too great a risk of interference with the Board's enforcement of the Act. We find strong support for this conclusion in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S., 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), where the Supreme Court held that prehearing statements made by empolyees to the Board were exempt from disclosure under the Freedom of Information Act. The Court dealt at some length with the damage that disclosure of employee statements would cause to the administration of the Act:

> The most obvious risk of "interference" with enforcement proceedings in this context is that enployers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not to testify at all.
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> * * * * *
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> The danger of witness intimidation is particularly acute with respect to current employees-whether rank and file, supervisory, or managerial over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted.
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> * * * * *
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> Furthermore, both employees and nonemployees may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated.

Id. at 239-4040, S.Ct. at 2325.

We believe that an employer's direct request to an employee for the employee's statement to the Board presents the same dangers of influencing testimony or chilling prehearing statements that the Supreme Court described in *Robbins.* The possibility that an employer's request will have a coercive effect on testimony is even present when the employee's statement is favorable to the employer for "those known to have already given favorable statements are then subject to pressure to give even more favorable testimony." *Id.* at 240, 98 S.Ct. at 2325. Even more damaging to the administration of the Act is the general chilling effect that is caused by permitting employer requests not directed at trial preparation. If an employee knows that his statements may become available to his employer, he is certainly less likely to make a candid statement to the Board. *Wellman Industries, Inc. v. NLRB,* 490 F.2d 427, 431 (4th Cir.), *cert. denied,* 419 U.S. 834, 95 S.Ct. 61, 42 L.Ed.2d 61 (1974); *NLRB v. National Survey Services, Inc.,* 361 F.2d 199, 206 (7th Cir. 1966); *Texas Industries, Inc. v. NLRB,* 336 F.2d 128, 133 (5th Cir. 1964). The employee may even refuse to make a statement at all. *Robbins, supra,* 437 U.S. at 240, 98 S.Ct. 2325. Any such chilling effect is bound to interfere with the Board's enforcement of the Act. The Board may not initiate proceedings against an employer on its own motion. It must rely upon complaints made by individual employees and labor unions to uncover unfair labor practices. Moreover, a rule preventing employers from requesting statements except for purposes of trial will provide protection for employees in the vast majority of Board proceedings which are concluded without the necessity for trial. *Id.* at 241, 98 S.Ct. 2326.

For these reasons, we conclude that it violates § 8(a)(1) of the Act for an employer to request from an employee a copy of that employee's statement to the Board without assuring the employee that no reprisals will follow from refusal, and without showing that the requested statement is needed for trial preparation and that the request does not go beyond those needs. *NLRB v. Winn-Dixie Stores, Inc.,* 341 F.2d 750, 752-53 (6th Cir.), *cert. denied,* 382 U.S. 830, 86 S.Ct. 69, 15 L.Ed.2d 74 (1965); *Retail Clerks International Association v. NLRB,* 373 F.2d 655, 658 (D.C.Cir.1967). We believe that this rule provides sufficiently for the employer's legitimate interest in defending himself against those charges that do come to trial. We note also the Board's own rules accommodate this interest of the employer by giving him access to statements of employees who become witnesses against the employer. 29 CFR § 102.18(b). In the present case, however, there was no showing that the requested information was needed for trial preparation nor was there any assurance against reprisal. We therefore uphold the decision of the Administrative Law Judge and the Board that the request violated § 8(a)(1) of the Act.

4. *Jurisdiction of the Board:*

Employer Maxwell contends that his business is essentially local and that its effect on interstate commerce is *de minimis*. The record indicates that in the year preceding trial Maxwell's business purchased goods, materials and supplies valued in excess of $6,000 which originated outside of the state of California. Maxwell relies on *Groneman v. International Brotherhood of Electrical Workers, Local 354,* 177 F.2d 995 (10th Cir. 1949), which held that the use of $6,000 worth of material shipped in interstate commerce was insufficient to support the jurisdiction of the Board. This decision, however, seems to stand alone and is contrary to the others in this circuit and elsewhere. For example, in *NLRB v. Inglewood Park Cemetery Association,* 355 F.2d 448 (9th Cir.), *cert. denied, sub nom. First Congregational Church v. NLRB,* 384 U.S. 951, 86 S.Ct. 1572, 16 L.Ed.2d 548 (1966), this court held that $3,000 worth of interstate purchases was not *de minimis* and did support jurisdiction. *Accord: NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229 (7th Cir. 1962) ($2,000 sufficient); *Von Solbrig Hospital, Inc. v. NLRB,* 465 F.2d 173 (7th Cir. 1972) ($1925 sufficient).

It is true that this court refused to uphold jurisdiction in *Hiatt v. Schlecht,* 400 F.2d 875 (9th Cir. 1968), where the record showed only that the employer during the years in question had used $5600–$8000 of plumbing fixtures assumed to have been originally produced in other states. In view of Congress's intent to exercise the full extent of its commerce power in the National Labor Relations Act, *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963); *NLRB v. Children's Baptist Home,* 576 F.2d 256, 258 n.1 (9th Cir. 1978), the ruling in *Hiatt* may be substantially eroded by the later decision of *Daniel v. Paul,* 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969). In any event, we find *Hiatt* distinguishable from the present case. While neither case disclosed any direct purchases by the employer from out-of-state sellers, the evidence now before us shows far more effect on intermediate commerce than that presented by the meagre record in *Hiatt*. Maxwell was shown not only to have purchased $6000 worth of goods originating in other states, but the particular goods were identified and shown to have been handled only by the importer before being delivered to Maxwell. A $1920 order of cement was procured by a local dealer from an out-of-state supplier and was delivered to Maxwell without the importer's having operated on or modified the goods in any way. Large insurance policies written by out-of-state companies were taken out on the business by Maxwell through local agents. In view of this record, we cannot say that a labor dispute in Maxwell's enterprise does not "affect commerce" within the expansive meaning of § 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a).

5. *Deferral to Arbitration:*

Employer Maxwell suggests that the Board should have deferred its decision in favor of an arbitration proceeding to which the parties had agreed, but which they had not pursued to a conclusion. While the Board does have discretion to defer to an arbitration award, *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), this court has held that it may not defer the decision of the statutory charge unless the arbitral tribunal has clearly decided the unfair labor practice issue. *Stephenson v. NLRB,* 550 F.2d 535 (9th Cir. 1977). The Board was therefore justified in going forward with the present proceeding. *See NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965).

6. *Conclusion:*

The decision of the Administrative Law Judge and the Board regarding both violations of § 8(a)(1) is supported by substantial evidence. Enforcement is ordered.

Westvaco Corporation d/b/a Westvaco Gauley Woodyard v. NLRB

639 F.2d 189 (4th Cir.), January 27, 1981—249 NLRB 20

On petition to review Board Order

Before BRYAN, Senior Circuit Judge, and WIDENER and MURNAGHAN, Circuit Judges

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MURNAGHAN, Circuit Judge: Collective bargaining sessions took place between Westvaco Corp., as employer at the Company's Gauley Woodyard situated in the vicinity of Rupert, West Virginia, and the certified exclusive bargaining representative, the United Paperworkers International Union. Heavy equipment operators, woodsmen and truck operators constituted the bargaining unit.

Bargaining took place over an extended period beginning on August 29, 1977 and concluding in February or March, 1979. The certification election date was September 10, 1975, and certification occurred on March 2, 1976. The election had been close, having been decided by the resolution of one contested ballot. The employer had unsuccessfully asserted that the certification was improper and that it, consequently, was relieved from the obligation to bargain. We enforced the NLRB order directing that bargaining take place. *Westvaco Corp. v. NLRB*, 562 F.2d 50 (4th Cir. 1977) (decision without published opinion).

On April 4, 1978, the NLRB closed the file on the enforcement proceeding on the grounds that Westvaco had satisfactorily complied with the order. The closing was conditional, however, and subject to reopening if the present status of compliance should not continue. On April 5, 1978, the Union signified that it had no objection to the closing "as long as the present state of compliance continues," and stated that bargaining was in progress.

Negotiations terminated on receipt in or about March 1979 by the employer of a petition signed by a majority of the bargaining unit employees stating that they did not want the Union to represent them.

The Administrative Law Judge concluded that Westvaco had engaged in sham or surface bargaining rather than comply with its obligation to bargain in good faith. The NLRB agreed and affirmed an order requiring Westvaco to bargain collectively in good faith.

A search of the record and of the ALJ and NLRB opinions has led us to conclude that the evidence establishes that good faith, albeit hard-nosed bargaining was conducted by Westvaco. It took and stood firm on several positions as to which the ALJ would have preferred to have seen some relaxation. Good faith negotiation does not, however, compel a party to agree to a proposal or to make a concession. "Where two opposing negotiators steadfastly refuse to budge from their respective positions, it can hardly be inferred from this alone that either acted in bad faith." *NLRB v. Stevenson Brick and Block Co.*, 393 F.2d 234, 238 (4th Cir. 1968).

The ALJ, in short, indulged in suspicions and suppositions, yet had no substantial basis other than the fact of failure by the parties to reach agreement. Legitimate reasons existed for the positions of the employer, who was able to conclude negotiations with the same exclusive bargaining representative for other nearby units. The efforts of the ALJ to explain away the facts which compellingly supported Westvaco's case are simply contrived and unconvincing. The NLRB Order is not supported by substantial evidence.

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Accordingly, we deny enforcement.

ENFORCEMENT DENIED.

Zeiglers Refuse Collectors, Inc. v. NLRB

639 F.2d 1000 (3d Cir.), January 27, 1981—248 NLRB 1166

On petition to review Board Order

Before ADAMS, GARTH and SLOVITER, Circuit Judges

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GARTH, Circuit Judge: In this case, certain employees who favored and backed a union, threatened their co-employees with physical violence if they did not vote for that union in the representation election. The Hearing Officer found this conduct created an atmosphere of fear and reprisal which warranted setting aside the election. The National Labor Relations Board summarily rejected the Hearing Officer's findings and concluded that the threats constituted no more than "mere campaign bravado." The Board refused to set aside the election and certified the union as the exclusive representative of the employees. Because we find the Board's decision unsupported by substantial evidence, we grant Zeigler's petition for review and we deny the Board's cross-petition for enforcement.

I.

Zeiglers Refuse Collectors, Inc. ("Zeiglers") operates a refuse collecting business, including a Rear Load Division located in York, Pennsylvania. As of September 15, 1978, the date of the representation election, the Rear Load Division employed thirty eligible employee-voters.

The drive to unionize Zeigler's was initiated by employee Russell Knight. Sometime in the summer of 1978, he spoke with officials of Chauffeurs, Teamsters, and Helpers Local 430, affiliated with the International Brotherhood of Teamsters; and subsequently began soliciting support for the union among his co-workers. On July 26, 1978, Local 430 filed a petition with the Board seeking a representation election among the rear load drivers of Zeiglers' York facility. The election was held September 15, 1978, and the union won by a vote of 16 to 14.

Zeiglers raised four objections to the election: employees with close ties to Local 430 had coerced fellow employees to vote for the union, and Local 430 had acquiesced in this activity; the atmosphere of coercion had prevented the holding of a free election; the union illegally had required certain employees to pay twenty dollars as a pre-condition to signing a union authorization card; and union officials illegally had interrogated and polled employees. The Regional Director recommended that a hearing be held only on the first two claims: union sponsorship of coercion and the claim that a coercive atmosphere prevented a free election. He found that the allegations concerning the illegal interrogation were insufficient as a matter of law. The Board adopted the Regional Director's recommendations.

A hearing was held on February 21, 1979 before a Hearing Officer. Five employees of Zeiglers, two members of Zeiglers' management, and two officials of Local 430 testified. On April 9, 1979, the Hearing Officer issued his report recommending that, because of the coercive atmosphere which pervaded the September 15 election, a new election be held. This conclusion was based upon his finding that five incidents of coercive conduct took place. In approximate chronological order, these incidents are:

1. Employee Glenn Null testified that a few months prior to the election, Russ Knight, another employee, when handing out union authorization cards told a group of employees which included Glenn Null, Rick Chappell and Martin Morth-

land, that if they did not sign the cards, they would not work for the employer any longer.[1] Knight then requested a twenty dollar contribution from each of these workers. (App. at 289).

2. Russ Knight, Barry Leisenring and Larry Leisenring approached employee Martin Morthland about a week before the election, and informed him that employees who didn't give $20.00 and sign union authorization cards were going to "get their asses kicked." (App. 108, 289).

3. About a week or two before the election, employee Charles "Pee Wee" Preston, a 6′7″, 250 pound ex-Marine, approached Rick Chappel (5′8″, 145 pounds) at the employee lunch wagen. Preston said to Chappell: "I heard you are voting no for the union" to which Chappell responded: "Whoever told you that is a liar." The Hearing Officer found that Chappell's response was motivated by his desire to avoid any trouble with Preston. Preston then warned: "Well you had better be voting for the Union if you know what is good for you." The Hearing Officer found that Chappell understood this statement to be a threat upon his physical well-being, and not a prediction of the benefits of unionization. (App. at 290).

4. A day before the election Preston walked over to employees Glenn Null (5′7″, 140 pounds) and James Oleweiler and asked them if they were "going to vote no or yes for the Union." When neither responded, Preston threatened Null and Oleweiler that if they knew what was best for them, they would vote for the Union. (App. at 82, 290).

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[1] Chappell testified to the same effect as Null. In addition, Chappell claimed that another employee, Mo Leisenring, was also present when the statement was made. The Hearing Officer credited Null's and Chappell's testimony. (App. at 289)

5. On election day, during the time the polls were open, Preston approached Null and Chappell at a spot forty feet from the polling place about five minutes before these two employees voted. According to Null, Preston stated: "What are you voting, yes or no. If you vote no for the Union; me, Russ Knight and Barry Leisenring gets fired; we are going to kick your ass." Chappell remembered Preston saying: "When you go in there to vote, you had better vote for the Union or else you know what is going to happen." (App. at 290). The Hearing Officer found that Null and Chappell provided an accurate account of the incident.

The Hearing Officer held that these five threats created an atmosphere of fear which rendered the holding of a fair election impossible. He found this coercive atmosphere to be pervasive, because accounts of these threats were also circulated among the rank and file, and because reports had spread that Preston had threatened other employees as well.[2] He thus recommended that a new election be held, despite finding that none of the threats could be attributed to Local 430.

On appeal, the Board refused to accept the Hearing Officer's recommendation. Instead, in its decision of September 27, 1979, it certified Local 430 as the representative of the employees in the Zeiglers unit. The Board's analysis, in its entirety, is as follows:

> We do not accept the Hearing Officer's recommendation and find that, even assuming the correctness of the Hearing Officer's factual findings and credibility resolutions,[2] the Employer has not demonstrated a sufficient factual foundation for the setting aside of the election.
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> [2] We do not accept the Hearing Officer's finding that Martin Morthland's recantation on cross-examination should not be credited. Morthland expressly denied that employees Knight and Barry and Larry Leisenring intimidated him with physical threats 1 week before the election. Furthermore, Morthland impeached his credibility by substantially wavering on the approximate date of the threatening encounter. The Hearing Officer speculates that Morthland recanted only in order to end his "ordeal" on the stand, but that is only
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> speculation and no basis for rehabilitaing [sic] Morthland.
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> The Hearing Officer finds "only minimal evidence concerning Petitioner's knowledge or participation in threats against employees concerning how they were going to vote." Furthermore, the most severe threats he attributes to pro-union employees are: If employees did not sign authorization cards, "they would not work for the Employer anymore"; "Whoever didn't give $20.00 and sign union authorization cards was going to 'get their asses kicked' "; "You had better be voting for the Union if you know what is good for you"; "If you vote no for the Union; me, Russ Knight and Barry Leisenring gets fired; we are going to kick your ass."
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> We do not agree with the Hearing Officer that the above gives rise "to a pervasive sense of apprehension among prospective voters." [3] Inasmuch as the Hearing Officer has found "minimal" evidence connecting these campaign incidents with the Petitioner in any way, and such incidents did not relate directly to the election vote or create a general atmosphere of fear and confusion, we find that there is no basis for setting aside the election.[4] We shall, therefore, overrule the Employer's Objections 1 and 2, and shall order that the Petitioner be certified.
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> [3] E. g., *Price Brothers Company,* 211 NLRB 822 (1974).
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> [4] The Hearing Officer incorrectly relies on *Sonoco of Puerto Rico, Inc.,* 210 NLRB 493 (1974), and *Diamond State Poultry Co., Inc.,* 107 NLRB 3 (1953), in support of his conclusion that the election ought to be set aside. In both those cases the election environment was pervaded by immediate and serious physical coercion. In the instant case, there was no violence—only generalized verbal threats which, unlike the Hearing Officer, we do not consider "numerous"—of the character familiar to the playgrounds as well as the shop. The alleged intimidators in this case engaged in mere campaign bravado and "heated statements" reflecting an "overzealous partisanship rather than meaningful threats." *American Wholesalers, Inc.,* 218 NLRB 292 (1975).

In order to obtain judicial review of the Board's decision, Zeiglers refused to bargain with Local 430.[3] Local 430 filed an unfair labor charge, alleging Zeiglers had violated Section 8(a)(5) of the Act by refusing to bargain with a certified representative. In an order dated April 16, 1980, the Board entered summary judgment for Local 430. Zeiglers petitions for review of that order and the Board cross petitions for enforcement. Our review of this order also brings before us the underlying order of January 22, 1979 which affirmed the dismissal of the charge of an illegal collection of a $20 fee [4] and the Board's order of September 27, 1979, which reversed the Hearing Officer's recommendation to hold a new election.[5]

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[2] Only inadmissible hearsay evidence was introduced to prove that these threats were actually uttered.

[3] *See, e. g., NLRB v. Savair Mfg. Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), *Aircraft Radio Corp. v. NLRB,* 519 F.2d 590, 591–92 n. 2 (3d Cir. 1975).

[4] The claim of illegal polling is not raised on appeal.

II.

The purpose of holding representation elections is to provide a means whereby workers may fairly and freely choose their bargaining representative if indeed they want one. *See NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327–328, 91 L.Ed. 322 (1946). A representation election should be "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948) *quoted in Monmouth Medical Center v. NLRB*, 604 F.2d 820, 824 (3d Cir. 1979). The Board has an obligation to insure that an election is held "under such conditions as will be conducive to the sort of free and untrammeled choice of representatives contemplated by the Act." *Methodist Home v. NLRB*, 596 F.2d 1173, 1183 (4th Cir. 1979). *Cf. Marshall v. Local Union 12447, United Steelworkers of America*, 591 F.2d 199 (3d Cir. 1978) (In election of local union officials, Section 401(b) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481(b) (1976) requires union to take every reasonable precaution to ensure voting secrecy).

We concede that the goal of "laboratory conditions" cannot always be satisfied. Not every election that fails to achieve perfection should be set aside, otherwise the employees' choice of a representative might never be accomplished, because a never-ending series of challenges to elections could be foreseen. Though we are reluctant to accept less-than-perfect conditions in the election process, we will do so, but only where no coercive conduct has poisoned the fair and free choice which employees are entitled to make. Hence, extreme care must be taken that the laboratory conditions have not become so tainted that employees may have based their vote not upon conviction, but upon fear or upon any other improperly induced consideration. The Board and the courts have emphasized that the existence of a coercive atmosphere, regardless of how such an atmosphere came about, is the critical fact upon which the Board should focus in determining whether a fair and free election was impossible. *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953); *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1348 (1st Cir. 1971). Thus, if it is determined that a substantial possibility existed that the threats affected the outcome of the election, a new election must be held.

In determining whether a fair and free choice by the employees was impossible the Board must consider many factors. These include: the number of the threats, the severity of the threats and whether those threatened were put in fear, the number of workers threatened, whether the threats were made close to the election and whether they persisted in the minds of the employees at the time of the election, whether the reports of the threats were widely circulated, whether the effect of pro-union threats were cancelled out by pro-management threats, the closeness of the vote, *Monmouth Medical Center v. NLRB*, 604 F.2d 820, 823 n.4 (3d Cir. 1979), and whether the threats can be attributed to the union or the management, *see e. g., Price Bros. Co.*, 211 NLRB 822, 823 (1974). *See also Campbell Prods. Dept.*, 623 F.2d 876 (3d Cir. 1980). The Board must examine the record, determine the weight to be accorded each factor, and applying its experience, arrive at a final, articulated decision supported by substantial evidence.

A.

Zeiglers and the Board are in strenuous disagreement over whether the coercive threats that were made here can be attributed to the union. Both the Hearing Officer and the Board concluded that they could not. We agree.

None of the workers who uttered the threats, including Pee Wee Preston and Russ Knight, held any position in or conferred by the Union. *See NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976); *NLRB v. Urban Telephone Corp.*, 499 F.2d 239 (7th Cir. 1974). Nor does the record reveal any express impropriety committed by a union official. The only evidence that appears is that the president of Local 430, responded to Pee Wee's remark that he (Pee Wee) would physically intimidate those who were not in favor of unionization, by stating that such behavior was unacceptable.[6] There was no showing that

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[5] *See* note 2 *supra*.

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the union knew of any improper acts or that it failed to repudiate them. *Certain-Teed Prods. Corp. v. NLRB*, 562 F.2d 500, 510 (7th Cir. 1977). Thus, even though Preston and Knight became by their own acts, self-appointed emissaries of the union, and even though we recognize a broad principal-agent standard under 29 U.S.C. § 152(13),[7] we conclude, as did the Hearing Officer and the Board, that the threats cannot be attributed to the union.

However, we do not find the factor of union responsibility to be pivotal. It is merely one of many factors the Board must appraise in determining whether a fair and free election was impossible. Nor have other decisions accorded controlling weight to this factor. *Methodist Home v. NLRB*, 596 F.2d 1173, 1183 (4th Cir. 1979); *Sonoco of Puerto Rico, Inc.*, 410 NLRB 493, 494 (1974); *Steak House Meat Co.*, 206 NLRB 28, 29 (1973); *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953).[8] In *Methodist Home*, 596 F.2d at 1183, the Fourth Circuit wrote:

> If the conduct, though that of a mere Union adherent and not that of a Union agent or employee, is sufficiently substantial in nature to create a general environment of fear and reprisal such as to render a free choice of representation impossible, then it will require the voiding of the election. This was forcefully stated in *Home Town Foods v. N.L.R.B.* (5th Cir. 1967) 379 F.2d 241, 244, *reh. denied and reh. en banc denied* 416 F.2d 392 (1969):
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> "We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. As of the Board has once said, 'The important fact is that such conditions existed and that a free election is hereby rendered impossible.' "

Similarly the Board explained in *Diamond State Poultry*, 107 NLRB at 6:

> The issue before the Board is whether the election was conducted under such circumstances and under such conditions as were conducive to the sort of free and untrammeled choice of representatives contemplated by the Act. We hold that it was not. The election was held in such a general atmosphere of confusion and fear of reprisal as to render impossible the rational, uncoerced selection of a bargaining representative. It is not material that the fear and disorder may have been created by individual employees and non-employees and that their conduct cannot be attributed either to the Employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible.

(footnote omitted)

The Board asserts that its determination that the union did not participate in the threats must be given great weight because workers are less likely to be intimidated by threats that do not bear the imprimatur of the union, and that ordering a new election will not deter the improper conduct of third parties. *See NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086 (2d Cir. 1969); *Orleans Mfg. Co.*, 120 NLRB 630 (1958). Thus, in *Staub Cleaners, supra*, the Second Circuit found the union-third party distinction soundly based when applied to an anonymous rumor that had circulated among the employees. The court stated that prejudicial remarks

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[6] The relevant portion of the Hearing Officer's opinion dealing with this subject reads:

> Based on the testimony of Rick Chappell, I find that Charles Preston in the presence of Petitioner's President, Kenneth Stocker, and Organizer, Bruce Keener, told the employees at the meeting that if the Petitioner needed more support to win the election, he would resort to physical intimidation to find out who was voting against the Petitioner. He then threatened to use force to change the votes of those employees who did not currently support the Petitioner. It is noteworthy that Chappell also credibly testified that Kenneth Stocker immediately told Preston "no, we don't want any of that stuff around here". Thus, the Petitioner made it clear that it did not approve of Preston's "organizing" techniques. There was no evidence to demonstrate that the Petitioner had reason to believe that Preston or any other employee would fail to abide by Stocker's admonishment of Preston.

Chappell during the hearing testified, however, that President Stocker laughed after having told Preston "No we don't want any of that stuff around here." (App. at 151-52, 290-91).

[7] "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 152(13) (1976).

[8] In *Methodist Home*, the Fourth Circuit remanded for an evidentiary hearing as to whether a purported joke involving the threatened use of a knife required that the election to be set aside. The Board in *Sonoco of Puerto Rico* and *Diamond State Poultry* set aside an election because of four threats of physical violence similar to those uttered during the election in question here. In *Steak House*, on several occasions one employee threatened a 16-year-old employee with bodily harm, and on one occasion threatened to kill him, if this employee voted against the union.

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emanating from non-authoritative, anonymous sources are more lightly regarded than those backed by the union, and that setting aside the initial election would not deter these third parties from again acting improperly in a future election campaign.

We are more persuaded by former Chief Judge Aldrich's observations which appear in *Cross Baking Co. v. NLRB*, 453 F.2d 1346 (1st Cir. 1971). In that case two employees of the company assaulted two other employees of the company because the latter workers refused to support the union. Word of this incident was heard about the plant. Ultimately, it was held that the Board was justified in refusing to set aside the election on this evidence because the "principal actor" who committed the assault was thereafter almost immediately discharged. The incident was remote in time from the election, and no further incidents occurred in the months before the election. In discussing the fear engendered among employees by coercion of this kind, Chief Judge Aldrich wrote:

> We agree with the Board, but we do not agree with certain arguments it advanced in this court. Von Dreden [the employee chiefly responsible for the assault] was the principal in-plant union advocate. The Board regards it important that she was not shown to be a paid union agent. The question, however, is not the culpability of the union, but whether an atmosphere of fear and coercion was created in fact. *See Home Town Foods, Inc. v. NLRB*, 5 Cir., 1967, 379 F.2d 241, 244; *Shoreline Enterprises of America, Inc. v. NLRB*, 5 Cir., 1959, 262 F.2d 933, 942. It does not follow that fear would be less effective if it had an unofficial origin. Indeed, we can visualize situations where it might be more effective. If union officials instigated violence, anti-union employees might gain adherents to get rid, once and for all, of a belligerent union by voting against it, whereas if the atmosphere was the product of co-employees, the rest of the employees might feel they were going to be left with a disagreeable situation whatever should happen in the election, and hence had best learn to live with it. In any event, we agree with the earlier position of the Board that, regardless of whether coercive acts are shown to be attributable to the union itself, "[t]he important fact is that such conditions existed and that a free election was hereby rendered impossible." *Diamond State Poultry Co.*, 1953, 107 N.L.R.B. 3, 6.

Id. at 1348.

Here, the fact that Pee Wee Preston was not a union agent does not make his threats of physical violence any less intimidating. The sources of the threats and rumors at Zeiglers during this time were also well known. Yet, the union apparently did not keep a close watch on the election campaign; it sent no official into the workplace; and indeed the record does not disclose that the various union officials were aware that threats had been made, even though in at least one instance a union official was present when the use of threats was suggested. Although we cannot hold the union legally responsible for the coercive conduct, we question whether the union should not have taken a more active role in preventing the excesses of its supporters once it became aware that employee adherents were contemplating physical threats as a means of assuring a union victory.

B.

Having found the union not responsible for the threats made by Preston and his colleagues, does not complete our task. The Board and the courts have acknowledged that even though the threats made were not attributable to the union, an election will nevertheless be set aside where the conduct created a general atmosphere inimical to the employees' exercise of a free and fair choice. The only distinction recognized in the statement of this standard is that less weight is accorded to conduct of third parties (such as Preston and Knight in the instant case) than to the conduct of the employer and the union. This standard has been expressed as follows:

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> It has long been established that, while conduct not attributable to either party to an election may be grounds for setting aside the election, less weight is accorded to such conduct than to the conduct of the parties. In such circumstances, however, the Board has set aside elections where the conduct created a general atmosphere among voting employees of confusion and fear of reprisal for failing to vote for or to support the Union.

Steak House Meat Co., 206 NLRB 3, 4 (1973) (footnotes omitted)

Thus, we still must determine under the stated standard whether substantial evidence supports the Board's findings and conclusions. The Board as we have noted rejected the Hearing Officer's findings of coercion and ruled that the election should be upheld.

In our substantial evidence review, we must address the Board's unexplained perfunctory rejection of the Hearing Officer's findings. In *Eastern Engineering & Elevator Co. v. NLRB*, 637 F.2d 191 at 197 (3d Cir. 1980) this court wrote:

> In our review of the Board's order, the statute furnishes our basic direction: the reviewing court treats as conclusive the factual determinations in a Board decision if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(f). That the responsibility of fact finding is placed on the Board and not on the hearing judge, however, does not end our inquiry. The Supreme Court has directed us to recognize that an ALJ's findings of fact constitute a vital part of the whole record that the court must review. These findings "are to be considered along with the consistency and inherent probability of testimony. The significance of his report * * * depends largely on the importance of credibility in the particular case." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 [71 S.Ct. 456, 468–469, 95 L.Ed. 456] (1951). We must "recognize that evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Id.*

Our review is particularly demanding when the Board has rejected the credibility determinations of the examiner that were based in large part on demeanor evidence. *See Eastern Engineering, supra,* at 197–198. Judge Wallace of the Ninth Circuit wrote in *Penasquitos Village Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977) (Wallace, J. opinion announcing the judgment of the court), an opinion discussed with approval in *Eastern Engineering*, at 197–198 that evidence in the record that alone might amount to substantial evidence and therefore support the Board's decision, may be insufficient when the trial examiner, on the basis of the witnesses' demeanor, made credibility determinations contrary to the Board's position.

The Hearing Officer here was in the best position to determine the atmosphere of the workplace during the election campaign. He could observe whether the workers who were threatened appeared to have been scared, and whether, in light of their mental state and physical stature, they were likely to have been influenced by the threats. The Hearing Officer could also make the "front line" determination as to whether the threats were in fact intimidating, and even more so, whether the persons making the threats were themselves frightening. The Board in reviewing a cold record was in a less knowledgeable position to decide these issues, particularly where the inquiry focused on subjective fears and subjective reactions.[9]

The Hearing Officer in this case found that there had been at least five separate incidents of coercion. In recommending a new election he expressly considered the following facts: numerous employees had been threatened, the threats were serious, involving physical violence and loss of jobs; that these threats, particularly those made by Pee Wee Preston, created fear in the minds of those threatened; that reports of the threats were widely circulated, and that rumors of other incidents of physical coercion had swept Zeiglers. Implicit in his discussion of these facts is that he deemed it significant that four of the five incidents occurred within a week or two of the election, and that the two most egregious threats took place respectively on the day before the election, and on the day of the election. He concluded after analyzing all these circumstances that a fair and free election had been made impossible.

These findings made by the Hearing Officer are amply supported in the record. Even the Board concedes that four out of the five incidents of coercion occurred. A reading of the transcript reveals that Null and Chappell were scared by the threats; and that they sincerely believed that they would be beaten up by Pee Wee if the union lost the election.

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[9] Placing a greater burden on the Board when it rejects the findings of the trial examiner also serves institutional values. A Hearing Officer who has his well-reasoned factual findings overridden by the Board in a brief conclusory manner, as the Board did in this case, may in the future, be inclined to write less thorough and detailed opinions.

Chappell testified that he considered Pee Wee's statement that he, Chappell, had better vote for the union if he knew what was good for him, to be a threat that Pee Wee would beat him up. (App. at 124, 136). This threat scared him and caused him to fear Preston. (App. at 139). When asked to explain, he appropriately remarked, "Well if you have a guy standing over you that is a couple feet taller than you and bigger than you, I think you would be a little scared, too." (App. at 139–40).

Chappell also described Preston's statement on election day, as being a threat (App. at 124). He testified that he was only half-scared by this threat because Mo Leisenring, who had two baseball bats in the back of the truck, would help protect him, as would Null.

Null also interpreted this election day threat literally: if the union lost, and Knight and Preston were fired, Knight and Preston would "kick his ass." (App. at 86, 88). Null claimed that he was "not really" afraid, because Mo Leisenring was present, but qualified this statement by adding "unless I was by my own self see, I didn't know if he was going to get other friends or not. See, like people does like that [sic]. They try to get their other friends and stuff * * *." (App. at 87).

Null also considered Preston's statement made to Oleweiler and to him the day before the election, to be a threat. Again he claimed that he was "not really afraid", though he quickly added, "[y]ou know, he might beat me up, but—" (App. at 84). In general, Null testified that he really thought he would be physically harmed by Preston if he voted against the union. (App. at 105). He indicated on re-cross examination that his testimony that he had not been really afraid when threatened could not be taken too literally:

Q. You did testify that you were not afraid of Mr. Preston. Isn't that true?

A. Kind of, I'm kind of afraid of him, you know, like I said, he could beat me. I don't know.

Q. But, you were not afraid of him. You would fight him.

A. I wouldn't fight him. I would get all my brothers. He is a little too big for me.

(App. at 106).[10]

The record also reveals that Null and Chappell were small in stature, unsophisticated,[11] and thus likely to be influenced by Pee Wee and his coercive warnings. Finally, the election was close—a switch of one vote would have altered the outcome. This record gives us good cause to believe that the coercive conduct which the Hearing Officer found gave rise to a substantial likelihood that the outcome of the election was affected. *See NLRB v. Staub Cleaners, Inc., supra,* 418 F.2d at 1088.

In its decision, the Board claimed that it assumed "the correctness of the Hearing Officer's factual findings and credibility resolutions."[12] The Board did not accept however, the examiner's factual findings that a general atmosphere of fear and confusion existed. It overruled this conclusion of the Hearing Officer because it concluded that the threats were not attributable to the union and because there were "only generalized verbal threats * * * of the character familiar to the playground as well as the shop * * * [the threats were] mere campaign bravado and 'heated statements' reflecting an 'overzealous partisanship rather than meaningful threats.'" The Board also remarked that it did not consider the threats numerous and that they did not relate directly to the election vote.

It is true that the Board is said to be possessed of expertise in many aspects of the labor field. But that expertise cannot suffice as a substitute of evidence. In the complete absence of any evidence that threats made by a 6'7", 250 pound union adherent to co-workers of substantially slighter dimensions were "mere campaign bravado", we are not inclined to accept the Board's speculative characterizations. Indeed, under our standard of review, we are precluded from so doing.

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[10] Thus the Board engages in sophistry when it states in its brief that the threat "Well, you had better be voting for the union if you know what is good for you" is "susceptible of the interpretation that union representation would be good for the employees because it would better their wages and working condition." (NLRB brief at 20). This interpretation not only fails to recognize the significance of demeanor evidence, but more importantly, it is belied by the reactions of those threatened.

[11] Null was only 17 years old at the time of the election (App. at 72); Chappell's age is not revealed by the record, though he also appears to have been young.

[12] In its footnote 3 the Board refused to accept the Hearing Officer's finding that Morthland had been threatened because he had recanted, and because he wavered substantially as to the date of the encounter. It appears to us that the Hearing Officer was better able than the Board to judge whether Morthland's recantation was sincere. Looking at the cold record it is difficult to determine why Morthland changed his testimony. We have more confidence in the Hearing Officer who observed Morthland on the stand and in the Hearing Officer's evaluation, than we have in the Board's assessment which suffers from its failure to be present during the hearing. Although Morthland was inconsistent, there is little indication that he was fabricating the account of his threats. Morthland's testimony is not key to our resolution; even if we accept his discrediting by the Board, our decision would remain the same.

This record is completely devoid of any evidence which could lead to a conclusion that Pee Wee Preston did not intend to carry out his threats as he had expressed them. "When fear and threats of violence are present, the employees' state of mind is precisely the question at issue." *Cross Baking, supra,* at 1348. In this case the Hearing Officer, who saw both the threatened employees and those accused of threatening, found that Chappell and Null understood Preston's warnings to be threats upon their physical well-being. In finding that the statements made by Knight and Preston created an atmosphere of fear and that accounts of these threats circulated freely among Zeiglers' employees, the Hearing Officer also found that these threats did not have an isolated impact but gave rise to a pervasive sense of apprehension among prospective voters. Yet, at no time has the Board addressed these findings.

Nowhere in the testimony or in the Hearing Officer's opinion is there even a suggestion that Preston's statements "We are going to kick your ass" and "You had better be voting for the union if you know what is good for you" were deemed to be jokes, mere bravado, or an outpouring of overzealous partisanship. *See Methodist Home v. NLRB, supra; NLRB v. Bostik Div. USM Corp.,* 517 F.2d 971 (6th Cir. 1975).[13] To the contrary, the evidence and the findings are unequivocal: these were meaningful threats, having the obvious aim of coercing employees to vote for the union or otherwise suffer physical harm. *Sonoco of Puerto Rico, Inc,* 210 NLRB 493, 494 (1974).

For reasons that we have previously discussed, we also do not attach the same significance as the Board to the fact that these threats are not attributable to the union. Nor do we accept the Board's conclusion that five documented incidents are not numerous when there are only thirty employees. Finally, we are at a loss to understand the Board's statement that the threats, such as "If you vote no for the union; * * * we are going to kick your ass," did not directly relate to the election vote. At least three of the five threats could not have been more specifically aimed at influencing the election.[14]

Our independent review of the record has fully satisfied us that there is no evidence whatsoever which supports the Board's decision. On the other hand, we find more than ample evidence to support the findings of the Hearing Officer. In this respect we have accorded the Hearing Officer's determination which was based on a first-hand impression of the witnesses' demeanor, the weight to which it is entitled. *See Eastern Engineering, supra.* We find it difficult to understand how, in the context of this record, the Board could find that this election should be sustained. We are of the opinion that "the character of the conduct was so aggravated as to create and atmosphere of fear and reprisal which rendered a free expression of choice of representation impossible, and thus destroyed the laboratory conditions of the election." *Sonoco of Puerto Rico, Inc., supra* at 494.[15]

III.

Having conclude that no evidence supports the Board's order we will grant Zeiglers' petition for review, order the September 15, 1978 election to be set aside, and deny the Board's cross petition for enforcement.

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[13] In *Bostik,* there was evidence in the record "that the 'threats' were not considered or intended seriously and had no inhibiting effect on the voters." *Id.* at 973. There was evidence that two of the employees involved in several of the incidents always kidded and joked with each other "and that the employee to whom the abusive language was directed 'kind of laughed.' " *Id.* The Hearing Officer there concluded that this interplay had not created an atmosphere of fear of coercion. In contradistinction to *Bostik,* here there is no evidence that the threats were made in jest (Neither Null nor Chappell was a friend of Preston) and the Hearing Officer here found that these threats had created an atmosphere of fear and coercion.

[14] The Board also failed to take into account the closeness of the vote, that four of the threats were made within a week or two of the election, and that reports of these and other threats, circulated among the workforce.

[15] The company, relying on *NLRB v. Savair Mfg. Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), has also claimed that the union's requirement that the employees pay a non-refundable $20 fee before being allowed to sign union authorization card interfered with employee free choice. Both the Regional Director and the Board found such a requirement would not justify setting an election aside. We have grave doubts that *Savair* would prohibit the practice in question here. However, in light of out disposition, which sets aside the election because an atmosphere of fear and reprisal made a fair and free election impossible, we do not reach or decide this issue.

NLRB v. Michigan State Building and Construction Trades Council, AFL-CIO

660 F.2d 1095 (6th Cir.), January 29, 1981

On petition to enforce Board Order

Before LIVELY, Circuit Judge, and PHILLIPS and PECK, Senior Circuit Judges

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Michigan State Building and Construction Trades Council, AFL-CIO (the "Union"), having filed its Statement to the Court and having filed its consent to the entry of this Order, as expressed in the "Union's Consent to the Entry of Order", it is hereby ORDERED that the judgment of May 13, 1975, be and hereby is implemented as follows:

The Union, its officers, agents, representatives, successors and assigns shall:

1. Cease and desist from restraining or coercing in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, the employees of John F. Lawhon, Inc., R-B and Sons, Inc., George Lynn Construction Company, Inc., or any other employer or person engaged in interstate commerce or an industry affecting interstate commerce, either through its own officers, agents, or demonstrators, or any labor organization as may be acting in common cuase with it, by participating in, directing, authorizing, ratifying, condoning or causing any of the following:

a. Verbally threatening employees or their families with physical harm.

b. Intimidating persons by the use or display of firearms, knives or other weapons.

c. Damaging or threatening to damage any person's property.

d. Threatening to engage or engaging in mass picketing.

e. In any other manner, or by any other means, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following action:

a. Comply in all respects with the judgment filed on May 13, 1975, the contempt adjudication filed on April 22, 1977, and this order, which is in addition to and not in limitation of the earlier judgment and adjudication, and not in any way, by action or inaction, engage in, induce, encourage, permit, or condone any violation of said judgment, adjudication or order.

b. Immediately post in conspicuous places in the Union's business offices and all places where notices to employees and members are customarily posted for a perior of sixty consecutives days, copies of the attached notice signed by an appropriate officer on behalf of the Union, and alongside, a copy of this order; and maintain such notices and orders in clearly legible condition throughout the posting period and insure that they are not altered, defaced, or covered by any other material.

c. Provide sufficient copies of said signed notice to the Regional Director for the Seventh Region, Patrick V. McNamara, Federal Building, 477 Michigan Avenue (Room 300), Detroit, MI 48226, for posting at the offices of the employers named above, if such employers be willing.

d. Have said notice read by the presiding officer at the next regularly scheduled

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convention of the Union following entry of this order. The Union shall give the Regional Director at least two weeks' notice to permit a Board Agent to attend the reading, at the option of the Regional Director.

e. Forthwith require each Officer and Business Agent of the Union to read this order and to signify in writing that he or she has read this order. Duplicate copies of the aforesaid acknowledgements shall promptly be furnished to the Regional Director.

f. File separate sworn statements with the Clerk of this Court and a copy thereof with the Regional Director of the Seventh Region of the Board in writing upon termination of the posting period, and again upon compliance with paragraph 2d above, showing what steps have been taken by the Union to comply with the Courts directives.

In order to insure that there is compliance with the terms of the Court's orders

IT IS FURTHER ORDERED that upon a violation of this Order by the Union, its officers, agents and representatives, including Eugene D. Tolot, this Court hereby increases the compliance fine against the Union to the amount of $6000 for each and every future violation of any of the provisions of the judgment adjudication or this order.

Upon failure of the Union to comply with any of the aforesaid judgment, contempt adjudication and this order, this Court reserves jurisdiction to issue attachment against the Union and any officer or agent responsible for the non-compliance and take such further action against them and grant the National Labor Relations Board such further relief as is adjudged reasonable, just, and necessary to assure compliance with the judgment, contempt adjudication and this order.

NLRB v. Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc.

635 F.2d 492 (5th Cir.), January 30, 1981

On action to find in civil contempt

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and RANDALL, Circuit Judge

AINSWORTH, Circuit Judge: This case arises out of the long and troubled attempts of Croft Metals, Inc.,[1] and the Southern Council of Industrial Workers, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, to negotiate a collective bargaining agreement covering the employees at the Company's McComb, Magnolia and Osyka, Mississippi, plants. The Union won a represenation election held on July 1, 1971. Three years later, the National Labor Relations Board in two separate proceedings found that the Company had refused to bargin with the Union and ordered it to cease and desist from that refusal. 210 NLRB 1007 and 210 NLRB 1019 (1974). This court enforced the Board's orders in 1975, noting that it was "a close case," with misconduct on the part of the Union as well as the Company. *N.L.R.B. v. Bancroft Manufacturing Co.*, 516 F.2d 436, 439 (5th Cir. 1975), *cert, denied* 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976).[2] In May 1977, the Board once again brought the matter to this court, charging that the Company had defied the 1975 orders and should be held in civil contempt. That dispute was settled by a consent order stipulated to by the Board and the Company and dated January 13, 1978. In June 1978, the Board charged that the Company had failed to abide by the 1978 consent order, and this court referred the matter to a Special Master for consideration.[3] We now have the Master's report and proposed order before us for decision.

The Master's report comprehensively discusses eleven major issues, most of them factual. First, he found that the Company had violated the 1978 consent order by failing to reinstate the practice of paying Christmas bonuses. The consent order required that the Company, "if requested by the Union, [reinstate] its former practice of paying Christmas bonuses to leadmen and leadwomen, subject to further negotiations about its discontinuance." The Master found that the Union had requested reinstatement of the bonuses for 1978 and that the Company did not reinstate the practice for that year. The Master also found that the Company unilaterally changed the morning break time of certain employees in violation of the consent order's prohibition against "making unilateral changes in wages, hours and working conditions, and other terms and conditions of employment." In so finding, the Master accepted the testimony of employees that the change came in April 1978, after the consent order was issued, rather than earlier. The Master additionally concluded that the Company violated the requirement of the consent order that it rescind the merit evaluation system unilaterally instituted in November 1978. He found that the Company had initially agreed to rescind the new system but that it did not reinstate the old system and took several months to institute the system the parties later agreed upon. Finally, the Master found that the Company violated the consent order by refusing to grant merit increases to unfair labor practice strikers upon their reinstatement. The Company had argued that the merit increases need not be given to the employees because they were not present to be evaluated at the time the merit increases were

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*Judge of the United States Court of Claims, sitting by designation.

[1] In addition to Croft Metals, Inc., the respondents in this proceeding include several Croft subsidiaries and two corporate officers.

[2] The case reported at 516 F.2d 436 enforced the Board's order reported at 210 N.L.R.B. 1007. This court also enforced the Board's other order (210 NLRB 1019) in an unreported decree No. 74–3101 (May 7, 1975).

[3] Special Masters in cases like this one are selected from a list supplied by the Chief Hearing Examiner of the Civil Service Commission. The persons on the list are administrative law judges not connected with the NLRB. Judge Cecil L. Cutler. Jr., the Special Master in this case, is an Administrative Law Judge of the Occupational Safety and Health Review Commission.

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given. The master, noting that over 99 percent of the nonstriking employees had received a merit increase during the period of the strike, concluded that the strikers would have received an increase but for the strike, and were therefore entitled to the merit increase upon reinstatement. The Master also found, contrary to the Board's allegations, that the Company had not violated the order by refusing to bargain over job classifications, by failing to pay employees for an extra day off preceding a holiday, by failing promptly to mail out notices required by the order, and by transferring work to other plants. After thoroughly examining the record, the report and the briefs, we hold that the Master's resolution of these factual issues was not clearly erroneous and we therefore adopt his findings. *See N.L.R.B. v. J.P. Stevens & Co., Inc., Gulistan Div.*, 538 F.2d 1152, 1160 (5th Cir. 1976).

The other two issues discussed by the Master—whether the Company refused to bargain after March 10, 1978, and whether two officers of the Company should be held in contempt—are primarily leal determinations, so the clearly erroneous standard does not apply. *N.L.R.B. v. Alterman Transport Lines, Inc.*, 587 F.2d 212, 220 (5th Cir. 1979). Nevertheless, we agree with and adopt the Master's findings of fact and conclusions of law in this regard. The company does not deny that it refused to bargain after March 10, 1978, but contends that its refusal was justified since the parties had reached an impasse. " 'Impasse' within the meaning of the federal labor laws presupposed a reasonable effort at good-faith bargaining which, despite noble intentions, does not conclude in an agreement between the parties." *N.L.R.B. v. Big Three Industries, Inc.*, 497 F.2d 43, 48 (5th Cir. 1974). A determination of whether an impasse exists requires examination of what kept the parties from reaching an agreement. The Master found that the Company and the Union would have reached an agreement if they had resolved one final issue, the arbitrability of merit increase determinations. We cannot as a matter of law hold that the Company's refusal to concede on this one issue constituted bad-faith bargaining, and we therefore agree that an impasse existed. *See N.L.R.B. v. Crockett-Bradley, Inc.*, 598 F.2d 971, 975 (5th Cir. 1979). The Master is also clearly correct in finding that Joseph Bancroft, Chairman of the Board of the Company, and Jean Kuyrkendall, the Executive Vice President, should be held in contempt along with the Company; neither the Board nor the Company contests the Master's finding in this regard.

Finally, the Master recommends that we not assess costs and attorney's fees against the Company "in view of the finding of no liability as to five of the charges * * *." Master's report at 70. Although the Board is correct in its assertion that the denial of some of its charges does not require us to deny assessment of costs against the Company, we agree with the Master that in a case like this one where all parties, including the Board, have engaged in questionable tactics,[4] and the costs have been increased by delays which occurred through the fault of neither party, it is best to let each party bear its own costs.

It is therefore ORDERED AND ADJUDGED that respondents, Croft Metals, Inc., and its subsidiaries, Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., and Lemco Metal Products, Inc., and Joseph Bancroft and Jean Kuyrkendall, are in civil contempt for having violated the order of this court of January 13, 1978. We hereby adopt and incorporate by reference the Special Master's Recommended Final Order set out in the Appendix.

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APPENDIX

It is ORDERED that respondents shall purge themselves of civil contempt by:

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(a) Fully complying with and obeying this Court's judgments of May 7, 1975, and August 14, 1975, and order of January 13, 1978, and not in any way by action or inaction, committing, engaging in, inducing, encouraging, permitting, or condoning any violation of the said judgments and order;

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[4] The Master found that "the Board's attitudes and tactics have not always been characterized by impartiality and fairness, and its demands upon the Company, at times, could be termed as 'nit-picking.' " Master's report at 67. He also found that the "overall expenses in this case were unnecessarily increased due to some lack of harmony and cooperation existing between counsel for the parties as well as unanticipated delays which occurred through no fault of either party." Master's report at 71.

(b) Immediately reinstating the former practice of paying Christmas bonuses to leadmen and leadwomen, as previously requested by the Union, and making whole all leadmen and leadwomen for any monetary losses they may have suffered by reason of the Company's failure and refusal to reinstate the 1977 or subsequent Christmas bonuses, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court; to continue the practice of paying Christmas bonuses subject to further negotiations about its discontinuance;

(c) If requested by the Union, immediately reinstating the former morning break schedule for glass department employees at its Magnolia facility which existed prior to the April 1978 unilateral change in schedules;

(d) Immediately restoring the *status quo ante* by resuming operations on line one of the Series 20 Department of the Magnolia facility which it unilaterally shut down on about April 14, 1978, and the two second shift lines of the Series 800 Department of said facility which it unilaterally shut down in about April and May 1978; immediately offering to reinstate to their former positions all employees whom it unilaterally transferred to other jobs and departments as a result of the aforesaid shutdowns and the unilateral shutdown of the first shift in the Series 1400 Department from mid-April to about early May 1978, without prejudice to their seniority and other rights and privileges; making all of the aforesaid employees whole for any loss of earnings suffered by reason of their transfers, together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to further review by the Court;

(e) Immediately rescinding the oral merit performance evaluation system or any other employee evaluation system unilaterally instituted since January 13, 1978, and immediately instituting the evaluation system agreed upon by the parties during bargaining on about March 9, 1978; and making all employees whole for any loss of earnings suffered by reason of the Company's unilateral actions with respect to employee evaluations or its reneging on its agreement to implement a new evaluation system together with interest thereon, the amounts, unless agreed upon, to be fixed by the Board, subject to review by the Court;

(f) Immediately, upon the Union's request, returning to the process of bargaining collectively in good faith with the Union as the exclusive representative of the Company's employees in the appropriate unit until there is full agreement or it is clear that a bona fide impasse has been reached, and if any such understanding is reached, embodying such understanding and all the terms thereof in a signed agreement, recognition not to be withdrawn from the Union without further order of the Court;

(g) Immediately, upon the Union's request, proceeding with officials of the Union to set an initial bargaining date, not to exceed fifteen (15) days from the entry of the adjudication, and thereafter proceeding to bargain for no less than two consecutive days per week during regular business hours until all contract proposals have been considered and action taken in relation thereto;

(h) Filing sworn reports signed by the Company and Joseph Bancroft and Jean Kuyrkendall, and by the Union representatives with the said Regional Director, every (30) days showing in detail the nature and course of bargaining in summary form and appending thereto any minutes, proposals, counterproposals, and any written communications between the Union and the Company with respect to such bargaining. If

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either party has exceptions to the contents of the joint summary, separate additional reports setting forth differences may be filed;

(i) Treating all those employees who went on strike on January 16, 1977, or thereafter, as unfair labor practice strikers, and according such employees all the rights to which unfair labor practice strikers are entitled, including credit for a ten cent ($.10) merit wage increase found to have been awarded non-strikers during the period of the strike; and making said former strikers whole for any loss of earnings suffered by reason of the Company's failure to accord them all the rights to which unfair labor practice strikers are entitled, including its denial of credit for a merit increase of ten cents ($.10) per hour together with interest thereon;

(j) Refraining from making unilateral changes in wages, hours, and working conditions including layoffs and transfers of employees and transfers of bargaining unit work, work breaks, and other terms and conditions of employment; failing to give the Union adequate notice of such contemplated changes and failing to bargain in good faith with respect thereto;

(k) Refraining from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act;

(*l*) Immediately posting in conspicuous places in its McComb, Mississippi, offices, and all places where notices to employees are customarily posted at its Magnolia, Mississippi, facility, and at all of its other manufacturing facilities, for a period of sixty (60) consecutive days, copies of this contempt adjudication and of an appropriate notice in the form to be supplied by the Board and signed by Joseph Bancroft, individually and as chairman of the board of directors and chief executive officer of the Company, and by Jean Kuyrkendall, individually and as executive vice president of the Company, which states that the Company, Joseph Bancroft, and Jean Kuyrkendall have been adjudicated in civil contempt of this Court for violating and disobeying and failing and refusing to comply with this Court's judgments and subsequent order, and that the Company, Joseph Bancroft, and Jean Kuyrkendall will forthwith undertake the action ordered in purgation in the earlier order and this contempt adjudication, said notices, together with a copy of the order and this contempt adjudication to be maintained in clearly legible condition through such posting period, and insuring that they are not altered, defaced, or covered by any other material;

(m) Immediately duplicating at its own expense, signing by Joseph Bancroft or Jean Kuyrkendall, and mailing copies of the notice and the contempt adjudication to each of its present employees and to each of its former employees employed since the entry of the Court's order of January 13, 1978, and providing to the Director of the Fifteenth Regional Office of the Board a list of the names and addresses of all employees and former employees to whom said documents were mailed, together with proof of mailing;

(n) Requiring each officer, director, and supervisor of the Company, and any individual or agent authorized by the Company to negotiate on its behalf, to signify in writing, under oath, that he or she has been furnished with a copy of the contempt adjudication and of the Court's judgments of May 7 and August 14 1975, and order of January 13, 1978; and that he or she has read and understands such decrees, and that he or she will conduct himself or herself in all respects consistent with the terms thereof and will in no way by action or inaction, engage in, induce, encourage, permit, or condone any violation of these decrees of the Court. Copies of the aforesaid acknowledgments shall be furnished by the Company to the Regional Director of the Board's Fifteenth Regional Office;

(*o*) Filing a sworn statement with the Clerk of this court and a copy thereof with the Director of the said Regional Office within fifteen (15) days after the entry of the adjudication in contempt and again at the end of the posting period showing what

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steps have been taken by the Company and Joseph Bancroft and Jean Kuyrkendall to comply with the Court's directions;

(p) Preserving and making available to the Board for inspection and copying, all books and records necessary or useful in determining whether there has been compliance with the provisions of the purgation order, and necessary or useful to analyze the amounts of backpay due employees or former employees thereunder.

II

The Company shall pay the amount of fifty thousand dollars ($50,000) for its past non-compliance with the provisions of the Court's Order of January 13, 1978, of which it has been found in contempt.

III

To assure a cessation of the violations of the Court's judgments of May 7, 1975, and August 14, 1975, and to assure compliance with the Court's order of January 13, 1978, and with this contempt adjudication, this Court hereby imposes a daily fine for non-compliance against the Company in the amount of two thousand five hundred dollars ($2,500) and in the amount of five hundred dollars ($500) against Joseph Bancroft and Jean Kuyrkendall and any other individual who, with knowledge of this order, acts in concert and participation with the Company, Joseph Bancroft and Jean Kuyrkendall to violate this order. The assessment of such fines shall commence 15 days from the entry of the foregoing order and continue so long as the respondents fail to comply with any of the provisions of this order.

IV

Upon the failure of respondents to purge themselves of civil contempt, the Court reserves jurisdiction to issue attachment against them and any officer or agent of the Company responsible therefor, as well as to substantially increase the amount of compliance fines, and the Court shall take other and further action, and grant such other and further relief as may be adjudged just, reasonable, and necessary to assure compliance with the Court's previous judgments and order, and as this proceeding in civil contempt may require.

NLRB v. Marine Machine Works, Inc.

635 F.2d 522 (5th Cir.), January 30, 1981—243 NLRB 1098

On petition to enforce Board Order

Before Ingraham, Gee and Tate, Circuit Judges

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Ingraham, Circuit Judge: Pursuant to section 10(e) of the National Labor Relations Act (the Act) 29 U.S.C. § 160(e) (1976), the National Labor Relations Board (the Board) seeks enforcement of its order issued on August 6, 1979, against Marine Machine Works, Inc. (Marine).[1] The Board based its order, issued upon a stipulated record, on its conclusion that Marine violated section 8(a)(1) and (5), 29 U.S.C. § 158(a)(1), (5) (1976), of the Act by unilaterally withdrawing from a multiemployer bargaining unit after negotiations had begun but after the parties had reached impasse, and by refusing to execute the collective bargaining contract agreed upon by a union and the multiemployer association. The Board accordingly entered a cease-and-desist order requiring Marine to comply with the terms of the collective bargaining contract and to make whole any employees who suffered loss as a result of the violation. We enforce that order.[2]

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I.

The facts in this case are not in dispute. Marine was a member of the Galveston Area Repairers Council (the Council), an employer association that engages in multiemployer collective bargaining with the International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) on behalf of its employer members. The relevant activities all occurred in 1978. On January 18 the Council and the Union commenced negotiations for a new contract to replace the existing one due to expire on January 24. After an extension of the contract until January 26, the contract expired without the parties reaching an agreement on a new one. On January 26 the employees of the Council's member employers voted to reject the Council's contract proposals. On January 27 the employees went out on strike.

Negotiations continued during the strike. On February 20 the employees again rejected contract proposals put forth by the Council elected to remain on strike. On March 6, while the negotiatisns between the Council and the Union were at an impasse, Marine by formal notice withdrew its membership in the Council and so advised the Union by letter. Marine explicitly based its withdrawal on the fact of impasse. Marine also expressed its willingness to negotiate with the Union on an individual basis and invited the Union to suggest dates on which such negotiations might be held. On March 10 the striking employees voted to accept the Council's contract proposals and to end the strike. The new multiemployer agreement became effective on March 10, 1978, for a term of three years. On March 14 Marine refused to sign the new multiemployer contract and continued to refuse to abide by its terms and conditions.

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[1] The Board filed its application for enforcement on December 4, 1979. On January 18, 1980, the court granted the motion of D&P Investment Co., Inc. for leave to intervene. D&P sought intervention because of its potential obligation, as a successor to Marine, for remedying any unfair labor practices committed by Marine. The Board has not formally charged D&P with any liability and D&P does not admit to being a successor to Marine for purposes of derivative liability. D&P asserts that it filed an intervenor's brief since the allegedly defunct Marine failed to make any defense to the Board's order. We, of course, express absolutely no opinion on any of these matters.

[2] On February 11, 1980, following Marine's failure to file an answer to the Board's application for enforcement of its order, the Board moved for judgment by default. On March 6, 1980, the court ordered the Board's motion carried with the case. In the light of intervenor D&P Investment Co.'s able defense on the merits of this case, and considering that the Board may look to D&P for remedial compliance with its order, we now deny the Board's motion for judgment by default.

The Board's decision that Marine violated sections 8(a)(1) and (5) of the Act, with respect to both the unilateral withdrawal and the refusal to execute the contract, flowed from its conclusion that Marine's putative withdrawal from the Council on March 6 was unlawful. Before the Board, the General Counsel contended that the occurrence of a bargaining impasse does not constitute an unusual circumstance that will justify an employer's unilateral withdrawal from multiemployer bargaining once negotiations have begun. Marine argued that case law in this circuit and others establishes that impasse is indeed a sufficient condition to exonerate a withdrawal that would otherwise violate the Act. The parties before this court press these same arguments. Thus, the question we must decide is whether unilateral withdrawal by a member employer from a multiemployer bargaining unit solely because of impasse constitutes a refusal to bargain in violation of sections 8(a)(1) and (5) of the Act. We hold as a matter of law [3] that it does.

II.

Our resolution of this issue requires consideration of the Board's policy toward and rules governing multiemployer bargaining. The Board has consistently held that employers may not, absent unusual circumstances, withdraw from multiemployer bargaining units once negotiations have commenced, *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958). Prohibiting such withdrawals contributes to the stability of multiemployer units and prevents the use of the scope of the bargaining unit as a bargaining lever to secure an economic advantage for one side over the other. *See NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005, 87 S.Ct. 711, 17 L.Ed.2d 544 (1967). This furthers the substantial public interest served by multiemployer bargaining, which the Supreme Court has characterized as a "vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 95, 77 S.Ct. 643, 647, 1 L.Ed.2d 676 (1957).

The Board, however, has not taken an inflexible position on this matter. Under the Board's ground rules laid out in *Retail Associates* any party—employer or union—is free to withdraw from the multiemployer unit prior to the date set for renegotiation of an existing contract or before the parties begin negotiations toward a new contract. Once the parties begin negotiations, however, a party may withdraw only if unusual circumstances exist or if both the union and the employer's association agree to the withdrawal.

By allowing unlimited wihdrawal prior to the start of negotiations, the Board gives each party an opportunity to go its separate way at a time when the withdrawal will not substantially jeopardize the multiemployer bargaining process. The Board also protects a party's interest in striking its own individual bargain by refusing to certify a union as representative of employees in a multiemployer unit unless the employers have explicitly agreed to such a unit or a history of multiemployer bargaining demonstrates implicit agreement.[4] Also, the Board protects the employer's interest in bargaining on an individual basis by refusing to bind an employer to multiemployer bargaining absent evidence of clear and unambiguous consent to inclusion in the multiemployer bargaining unit.[5]

Conversely, after negotiations have begun, the parties are required to honor their commitment to the process of multiemployer bargaining, which they freely elected. Thus, the Board then allows withdrawal only if mutual consent is given or in the presence of a limited number of unusual circumstances. One such circumstance exists when a company faces extreme financial pressures, such as impending bankruptcy. Another unusual circumstance justifying unilateral withdrawal is when the multiemployer unit becomes extremely fragmented, for example, though several withdrawals occurring by mutual consent. Significantly, however, the Board has repeatedly and explicitly held that impasse is not an unusual circumstance justifying unilateral withdrawal.

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[3] There were no facts, either elemental or inferential, to be found in this case. The Board decided the case on stipulation of facts entered into by all parties. Thus, the standard of substantial evidence on the record as a whole mandated by § 10(e) of the Act, 29 U.S.C. § 160(e) (1976), for appellate review of findings of fact is not the appropriate standard in this case. *Cf. NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961) (Friendly, J.) (question whether an employer who has made a valid collective bargaining agreement with a Board-certified union and who then recognizes another union during the period of contract-bar protection thereby violates the Act is question of law).

[4] *See, e.g., Milwaukee Independent Meat Packers Ass'n,* 223 N.L.R.B. 922, 924 (1976); *Rock Springs Retail Merchants Ass'n,* 188 N.L.R.B. 261, 261–62 (1971); *Broward County Launderers & Cleaners Ass'n,* 125 N.L.R.B. 256, 257 (1959); *Chicago Metropolitan Home Builders Ass'n,* 119 N.L.R.B. 1184, 1186 (1957).

[5] *See, e.g., McAx Sign Co. v. NLRB,* 576 F.2d 62, 66–68 (5th Cir. 1978), *cert. denied,* 439 U.S. 116, 99 S.Ct. 1021, 59 L.Ed.2d 75 (1979); *NLRB v. Beckman, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *Taylor Motors, Inc.*, 241 N.L.R.B. No. 113 (Apr. 3, 1979).

The Board has previously argued before this court that impasse should not be considered an unusual circumstance. *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974). In *Hi-Way Billboards*, we stated that we were impressed by the cogency of the Board's reasoning on this point. We declined to enforce the Board's order in that case, however, because while we felt that the Board's position would be fair in protecting the interests of the union and the companies' employees, we were not convinced that it would be fair to the employers in the unit. The unfairness, however, did not inhere in the Board's position that impasse does not constitute an unusual circumstance under its *Retail Associates* rules. Rather, the perceived unfairness was the result of another aspect of those rules, namely, that the Board permitted a union to negotiate separate final agreements with individual employer members of the multiemployer unit. We felt that this was tantamount to allowing the union to withdraw from the multiemployer unit, at least with respect to those individual employers. For the Board to then deny to the other employers a similar right of unilateral withdrawal did not accord with the Board's espoused commitment to applying to both employers and unions the same rules concerning the right to withdraw. *See generally Evening News Association*, 154 N.L.R.B. 1494, 1495–97 (1965), *enforced sub nom. Detroit Newspaper Publishers Association v. NLRB*, 372 F.2d 569 570–71 (6th Cir. 1967).

In the last two years, the Board has issued a series of decisions, including its decision in the instant case, dealing with attempted withdrawals from multiemployer units.[6] In these decisions, the Board has specifically addressed the concerns articulated by this court in *Hi-Way Billboards* and has clarified its prior decisions in the light of those concerns.[7] First, the only separate agreements that the Board will permit are temporary or interim agreements pending the outcome of negotiations in the multiemployer unit.[8] Second, the execution of a final separate agreement by a union and an individual employer of the multiemployer unit is violative of section 8(b)(3), 29 U.S.C. § 158(b)(3) (1976), by the union and of section 8(a)(5) by the employer, unless all parties—the union the employer, and the employer association—consent to the agreement.[9]

III.

With the above modifications, the Board has reaffirmed its position that withdrawal at impasse violates the employer's duty to bargain under section 8(a)(5) of the Act. The Board now asks us to reconsider our position taken in *Hi-Way Billboards*, in the light of the Board's recent clarifications of its *Retail Associates* rules. We have undertaken that reconsideration and we conclude that the Board has wisely weighed the competing policy concerns.[10] The Board's rules

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[6] *See, e.g., Tobey Fine Paper of Kansas City*, 245 N.L.R.B. No. 181 (Sept. 28, 1979), *application for enforcement docketed*, No. 79–1840 (8th Cir. Oct. 4, 1979); *Callier's Custom Kitchens*, 243 N.L.R.B. No. 143 (Aug. 6, 1979), *enforced on alternate ground*, 630 F.2d 595 (8th Cir. 1980); *Charles D. Bonanno Linen Serv.*, 243 N.L.R.B. No. 140 (Aug. 6, 1979), enforced, 630 F.2d 25 (1st Cir. 1980).

[7] These same concerns have been expressed by other circuits as well. *See NLRB v. Independent Ass'n of Steel Fabricators*, 582 F.2d 135, 146 (2d Cir. 1978); *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 482–83 (3d Cir. 1975); *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.), *cert. denied*, 423 U.S. 898, 96 S.Ct.191, 46 L.Ed.2d 25 (1975); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1172, 1174 n.1 (8th Cir. 1972).

[8] The Board properly distinguishes between interim separate agreements and final separate agreements. Since interim agreements create only temporary arrangements pending the outcome of the group negotiations, ordinarily they do not fragment or destroy the multiemployer unit. Permanent agreements, on the other hand, may well do so, since they are not dependent on the outcome of the group negotiations but rather establish terms and conditions of employment different from those established in the group contract. Thus, while interim separate agreements are legitimate economic weapons in the multiemployer contest, final separate agreements are not. *See Callier's Custom Kitchens*, 243 N.L.R.B. No. 143 (Aug. 6, 1979); *Charles D. Bonanno Linen Serv.*, 243 N.L.R.B. No. 140 (Aug. 6, 1979).

[9] *Callier's Custom Kitchens*, 243 N.L.R.B. No. 143 (Aug. 6, 1979), *enforced on alternate ground*, 630 F.2d 595 (8th Cir. 1980); *Charles D. Bonanno Linen Serv.*, 243 N.L.R.B. No. 140 (Aug. 6, 1979), *enforced*, 630 F.2d 25 (1st Cir. 1980); *Teamsters Union Local No. 378 (Olympia Automobile Dealers Ass'n)*, 243 N.L.R.B. No. 138 (Aug. 6, 1979), *application for enforcement docketed*, No. 79–7683 (9th Cir. Dec. 26, 1979).

[10] Following its recent clarification of its *Retail Associates* rules, the Board has met with some success in requesting other circuits to undertake this same reconsideration. *NLRB v. Charles D. Bonanno Linen Serv.*, 630 F.2d 25 (1st Cir. 1980), *enforcing* 243 N.L.R.B. No. 140 (Aug. 6,

Continued

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balance an individual party's legitimate interest in striking its own separate bargain against the parties' and the public's legitimate interest in achieving the benefits afforded by continued multiemployer bargaining, including avoiding the industrial strife likely to result from frustration of the bargaining process. In reaching this balance, the Board is treating both unions and employers equally and fairly. The Board permits each to use all available economic weapons in aid of reaching an overall settlement. On the other hand, the Board prohibits each from taking action that is destructive of the multiemployer unit: unions may not seek to negotiate separate permanent agreements with employers, and employers may not withdraw from the unit and seek separate permanent negotiations with the union. This result is well within the Board's broad discretion to resolve the inevitable questions arising in the multiemployer bargaining context. *See NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen),* 353 U.S. 87, 96, 77 S.Ct.643, 647, 1 L.Ed.2d 676 (1957). Accordingly, the application for enforcement is granted.

ENFORCED.

Pet, Incorporated v. NLRB

641 F.2d 545 (8th Cir.), January 30, 1981; rehearing and rehearing en banc denied April 3, 1981—244 NLRB 96

On petition to review Board Order

Before BRIGHT, HENLEY and MCMILLIAN, Circuit Judges

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HENLEY, Circuit Judge: Pet, Incorporated filed a secondary boycott charge alleging United Steelworkers violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) (1976). The National Labor Relations Board dismissed Pet's complaint, and Pet appeals. This court has jurisdiction pursuant to 29 U.S.C. § 160(f) (1976) because the alleged violations took place in and around St. Louis, Missouri.[1]

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Pet is a large, diversified conglomerate enterprise with plants and retail stores located throughout the United States. It currently has twenty-seven operating divisions, each engaging in separate and distinct lines of business. In the mid-1970s, most of the divisions were segregated for administrative, operational and fiscal accounting purposes into four "groups." Division presidents report directly to their respective "group" presidents, who in turn report directly to Pet's president.

Responsibility for long range planning, major capital expenditures, and other general management functions rests with Pet's Office of the Chief Executive, comprised of Pet's president and three executive vice presidents. Group presidents file monthly reports with Pet's president. The reports give forecasts of future earnings, discuss items such as industry trends and plant safety, and give analyses of variances in the forecasted (as compared with actual) sales and earnings.

The NLRB found that the divisions of Pet have a good deal of autonomy:

> The various divisions of Pet operate essentially as independent business entities. No division exercises any determination, control, or influence over the administration or operation of any other division. Each division maintains a separate financial system and bank account from which it pays employees; prepares its own budget and financial statements; sets its profit targets; and pays its own bills, including payments to the Pet corporate office for reimbursement of services rendered by it. Policies regarding product line, pricing, and advertising, as well as market strategies, are determined by the divisions. Division presidents are vested with complete authority

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1979). *Contra, H&D, Inc. v. NLRB,* —— F.2d —— (9th Cir. 1980), *denying enforcement* of 240 N.L.R.B. No. 161 (Mar. 3, 1979).

[1] While this appeal was pending the basic labor dispute was settled and a new labor contract between Pet's subsidiary, Hussmann Refrigerator, and the Steelworkers was negotiated. Although the basic alleged offending conduct has terminated, at least for the time being, we are persuaded that the appeal is not moot. *NLRB v. Raytheon Co.,* 398 U.S. 25, 90 S.Ct. 1547, 26 L.Ed.2d 21 (1970); *Local 1976, Carpenters v. NLRB,* 357 U.S. 93, 97 n.2, 78 S.Ct. 1011, 1015 n.2, 2 L.Ed.2d 1186 (1958); *Local 74, United Brotherhood of Carpenters v. NLRB,* 341 U.S. 707, 715, 71 S.Ct. 966, 970, 95 L.Ed. 1309 (1951); *NLRB v. Modine Mfg. Co.,* 500 F.2d 914, 916 n.4 (8th Cir. 1974); *Terminal Freight Handling Co. v. Solien,* 444 F.2d 699, 704–05 (8th Cir. 1971), *cert. denied,* 405 U.S. 996, 92 S.Ct. 1246, 31 L.Ed.2d 465 (1972).

over the day-to-day operation of their respective divisions and are accountable for their divisions' profitability. They have complete authority over division labor relations and employment policies for represented and unrepresented employees and can negotiate, execute, and administer collective-bargaining agreements without prior approval from Pet's corporate offices.

A good part of Pet's business is in the area of the manufacture of food products. The products include milk, ice cream, Whitman's Chocolates, Pet-Ritz Frozen Pies, Downy Flake Frozen Breakfast Foods, Easy Jacks, Hot'N Buttery Waffles, and Funsten Nuts. Pet operates a grocery product group of divisions which produce, sell, and distribute Compliment Cooking Sauces, Heartland Cereal and Evaporated Milk, Sego Diet Food, and Musselman Fruit Products. Two of Pet's subsidiaries manufacture canned shrimp and oysters; another subsidiary manufactures Mexican food products.

Pet has operations in addition to the food products. These include plastics and label manufacturing, public warehousing and distribution, and Stuckey's and 905 stores.

Hussmann, a wholly owned subsidiary of Pet, manufactures commercial refrigeration equipment, display cases, shelving, checkout counters, and other commercial and industrial equipment. Hussmann is one of the four "groups" discussed earlier, and consists of three "divisions." It has a plant in Bridgeton, Missouri, which is part of one of these divisions. United Steelworkers (the Union) represents fifteen hundred employees of this plant. The Union does not represent any employees of Pet or its other subsidiaries; or any other Hussmann employees.

When the collective bargaining agreement covering the Bridgeton employees expired on May 1, 1977 the Union commenced an economic strike. On October 21, 1977 the Union's president announced at a press conference in the St. Louis area that, in support of the strike at the Bridgeton plant,

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he was calling for a "national boycott by our 1.4 million member union of Pet, Inc., food products, their retail store outlets, and commercial refrigeration equipment."

Beginning on November 9, 1977 the Union placed advertisements in local newspapers advising the public of the Union's strike against Hussmann's Bridgeton plant, noting that Hussmann is owned by Pet, and requesting the public to boycott Stuckey's and 905, and to refuse to buy any product of Pet. The advertisements listed seventeen products of Pet.

In October and November of 1977 the Union distributed handbills in the St. Louis area. The handbills contained the same message as the newspaper advertisements. The Union issued boycott instructions which provided that no boycott material should be distributed in the vicinity of a retail establishment owned by Pet or selling Pet products. Furthermore, no one was to interfere with the entrance or exit of workers or others under any circumstances. The handbilling activity conformed to these instructions at all times.

Pet filed unfair labor practice charges against the Union with the NLRB, alleging that the Union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) (1976), by calling for the consumer boycott. The section provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *
>
> Provided * * *, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to

perform any services, at the establishment of the employer engaged in such distribution.

Pet argues that the handbilling and other publicity constituted restraint and/or coercion within the meaning of subparagraph (ii) of Section 8(b)(4) of the act because it was directed against "neutral" persons—Pet and its subsidiaries. Pet further contended that the publicity proviso offered no immunity to the Union's activities because Hussmann was not a "producer" of the "products" of Pet or its subsidiaries.[2] Finally, Pet argued that a finding that the Union's conduct was unprotected by the publicity proviso would not conflict with the first amendment.

The NLRB found that the Union's activities were protected by the publicity proviso. The Board expressly refrained from deciding (1) whether Pet and its subsidiaries were "neutral" persons as to the controversy between Hussmann and the Union; (2) whether the activities constituted "coercion" or "restraint"; or (3) whether a finding that the activities were not protected by the proviso would conflict with the first amendment.

On appeal Pet asserts that the Board erred in concluding the Union's activities were protected by the proviso because

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Hussmann is not a "producer" of the products of Pet and its subsidiaries. Pet further contends that the findings of fact of the NLRB and the law are clear enough that this court can decide in Pet's favor the three issues that the NLRB declined to decide.

We first consider whether the Union's conduct fell within the proviso, or, more specifically, whether Hussmann is a "producer" of the products of Pet. Both the Board and fedeal courts have given the term "producer" a broader meaning than manufacturer or processor.

In *Lohman Sales Co.*, 132 NLRB 901, 48 L.R.R.M. 1429 (1961), a union struck a company which was engaged in the wholesale distribution of cigarettes, other tobacco products, and candies. The striking employees distributed handbills in front of stores which stocked products that Lohman distributed, advising the public of the strike and requesting the public not to purchase tobacco products or candy at the stores. Before the NLRB Lohman contended that it did not produce the products, but only handled products manufactured by others, and thus the proviso should not apply to the union's handbilling. The NLRB rejected this contention and dismissed the complaint, stating:

> [L]abor is the prime requisite of one who produces. A wholesaler, such as Lohman, need not be the actual manufacturer to add his labor in the form of capital, enterprise, and service to the product he furnishes the retailers. In this sense, therefore, Lohman, as the other employers who 'handled' the raw materials of the product before him, is one of the producers of the cigarettes distributed by his customers. A contrary view would attach a special importance to one form of labor over another and attempt to isolate fabricators of products from those who otherwise add to its value.

132 NLRB at 907, 48 L.R.R.M. at 1432 (emphasis omitted).

Lohman Sales Co. was approved by the Supreme Court in *NLRB v. Servette, Inc.*, 377 U.S. 46, 55, 84 S.Ct. 1098, 1104, 12 L.Ed.2d 121 (1964). *Servette* also was a case in which the primary labor dispute was with a wholesaler, and the union asked the public not to purchase the merchandise the wholesaler distributed. The Court stated:

> The proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded * * *. It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor * * *. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress.

The term 'produced' in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as 'produced, manufactured, mined, handled, or in any other manner worked on * * *,' 29 U.S.C. § 203(j), and has always been held to apply to the wholesale distribution of goods.

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[2] Pet did not contend that the Union's publicity asking consumers not to patronize 905 stores violated Section 8(b)(4)(ii) because 905 and Hussmann may be related as distributor and producer within the meaning of the proviso. After the strike commenced, 905 stores purchased Hussmann equipment manufactured at the Bridgeton plant form an independent distributor.

377 U.S. at 55–56, 84 S.Ct. at 1104.

In *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir. 1966), enforcing 150 NLRB 467, 58 L.R.R.M. 1019 (1964), *cert. denied*, 384 U.S. 1002, 86 S.Ct. 1924, 16 L.Ed.2d 1015 (1966), there was a strike at a television station. The union requested sponsors not to advertise on the station during the strike. The union later passed out leaflets, naming those sponsors who continued to advertise on the station. The Ninth Circuit held that the union's handbilling activity was protected by the proviso, and that the station was a "producer" of the products and services it advertised. The court noted the incongruity of regarding the television as a producer of services such as banking, inasmuch as the proviso refers to products which are "distributed" by another employer. The court stated that "the Supreme Court has spoken in such broad terms in *Servette* that we think the

incongruity * * * may not control the ultimate decision." 356 F.2d at 436.

Although all of the three cases discussed above support a broad reading of the proviso, we do not regard them as dispositive of the present case. *Lohman Sales Co.*, *Servette* and *Great Western Broadcasting* all found that the primary was a "producer" when the primary was directly involved in the promotion and/or distribution of products of the secondary.[3] In all three cases, the primary worked on specific products. In the present case Hussmann does not work on any specific products of Pet.

In spite of the absence of any direct relationship of Hussmann's operations to any specific product of Pet, the Board found Hussmann was still a "producer" of Pet's products, reasoning as follows:

> [A]s a result of its relationship with the diversified enterprise, Hussmann applies capital, enterprise, and service to Pet and its other subsidiaries and divisions * * *.
>
> Diversified corporations, by their very nature, are composed of operations which provide support for and contribute to one another. The contributions of each to the others may vary considerably. However, all add to the diversification which enables the enterprise as a whole to weather economic assault on any one of its operations. All contribute profits, either actual or potential, which enhance the value of the enterprise and foster its economic viability. All contribute a measure of goodwill.
>
> *   *   *   *   *
>
> * * * Hussmann provides part of the diversification which contributes to the success of Pet and its other operations. Hussmann's acclaimed high sales and earnings generate income which inures to the benefit of Pet and to Pet's effort to maintain its other subsidiaries. The goodwill earned by Hussmann likewise enhances the reputation of all Pet operations. Consequently, Hussmann variously contributes to the operation of Pet as a whole and to each of its subsidiaries and divisions and thus is a producer of all Pet enterprises products in the sense that "producer" is used in the proviso as interpreted by the Supreme Court in *Servette* and subsequent Board decisions.

We are mindful of the Supreme Court's admonition that if the Board's "construction of a statute is reasonably defensible, it should not be rejected merely because the court might prefer another view of the statute." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979). We think that the present case is one of those rare instances in which the Board's interpretation is unreasonable and must be rejected. First, we think it totally at odds with any normal interpretation of the word "produce" to say that because Hussmann's profits inure to the benefit of Pet, Hussmann produces Pet's products. We find the connection between Pet's products and Hussmann to be highly attenuated. Should Pet sell Hussmann tomorrow, Pet would manufacture, distribute, and promote its products the same way it is doing now.

Secondly, we do not think that the Board's decision flows from *Servette*, *supra*, because the Supreme Court was not there considering a case in which the primary-subsidiary's products and services were unrelated to the secondary-parent's products. We note in particular the Court's comment, quoted earlier, that "[t]he term 'produced' in other labor laws was not unfamiliar to Congress. Under the Fair Labor Standards Act, the term is defined as 'produced, manufactured, mined, handled, or in any other manner worked on * * *,' 29 U.S.C. § 203(j) * * *" 377 U.S. at 55–56, 84 S.Ct. at 1104. Hussmann does not work on any of the products of Pet.

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[3] Another case to the same effect is *Middle South Broadcasting*, 133 NLRB 1698, 49 L.R.R.M. 1042 (1961).

Accordingly, we reverse the decision of the Board that the Union's publicity activities fell within the proviso. Pet has asked us to consider three other issues not ruled upon by the Board. The first two, whether Pet and its subsidiaries are separate "persons" from Hussmann for purposes of Section 8(b)(4), and whether the Union's publicity fell within the prohibition of Section 8(b)(4)(ii), are questions initially committed to the discretion of the Board under Section 10(a), which empowers the Board "to prevent any person from engaging in any unfair labor practice * * *" listed in Section 8. 29 U.S.C. § 160(a) (1976). These questions are not trivial and are not free from difficulty. They could be decided by the Board in such a way that it will become unnecessary for us to reach the third issue which is whether, if the Union's conduct is prohibited by Section 8(b)(4)(ii), the Union's first amendment rights are violated. In the circumstances, we decline to pass upon any of the three issues not ruled upon by the Board.

Reversed and remanded for further proceedings.

McMillian, Circuit Judge, dissenting: I dissent. By interpreting the publicity proviso without considering its place in the overall statutory scheme ad without considering the legislative history, the majority substitutes its judgment not only for that of the Labor Board but also for that of Congress, which clearly intended to exempt this kind of publicity from coverage as a secondary boycott.

The publicity proviso resulted from a concern that the secondary boycott provisions in the 1959 Landrum-Griffin Act, which amended the National Labor Relations Act, were overbroad in the area of the first amendment. As the Supreme Court explained in *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits),* 377 U.S. 58, 69, 84 S.Ct. 1063, 1069, 12 L.Ed.2d 129 (1964), "the first step in the development of the publicity proviso" was an analysis prepared by Senator Kennedy and Congressman Thompson of the proposed revisions of the secondary boycott prohibitions:

> The prohibition [prior to addition of the publicity proviso] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
>
> * * * * *
>
> * * * [O]ne of the apparent purposes * * * is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression.

105 Cong.Rec. 16591 (1959), *reprinted in* II NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959, at 1708 (1959) (hereinafter II Legislative History).

The Senate agreed with this criticism and by resolution instructed its members of a conference committee on the Landrum-Griffin Act to insist on a publicity proviso in the final bill. Sen.Res. 181, 86th Cong., 1st Sess., 105 Cong. Rec. 15905–06 (1959), *reprinted in* II Legislative History, *supra* at 1382–83. An analysis of Sen.Res. 181 by its sponsors specified, "There is to be no prohibition on truthful appeals to consumers * * * not to buy goods, because the manufacturer is involved in a labor dispute." 105 Cong.Rec. 15906 (1959), *reprinted in* II Legislative History, *supra* at 1383. As Senator Kennedy, who chaired the conference committee, explained,

> [T]he union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 Cong.Rec. 16414 (1959), *reprinted in* II Legislative History, *supra* at 1432. *See also* 105 Cong.Rec. 14339 (1959) (remarks of Rep. Griffin), *reprinted in* II Legislative History, *supra* at 1615; 105 Cong.Rec. 16637 (1959) (remarks of Rep. Udall), *reprinted in* II Legislative History, *supra* at 1722.

The Congressional purpose could hardly be clearer: whatever secondary objectives were prohibited by § 8(b)(4)(ii)(B), activity would not be prohibited if it consisted only

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of the kind of pure publicity in this case. (An exception exists if the speech had certain effects specified in the publicity proviso itself; no such effects are alleged in this case). As the Supreme Court has explained, "There is nothing in the legislative history which suggests that the protection of the provisio was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress." *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 55, 84 S.Ct. 1098, 1104, 12 L.Ed.2d 121 (1964) (hereinafter *Servette*). The Board, therefore, was entirely correct in its approach to this case. Assuming the union's conduct was within the general coverage of § 8(b)(4)(ii)(B), the conduct was still not prohibited because it involved nothing other than publicity and therefore comes under the publicity proviso.

The majority rests it conclusion to the contrary upon a reading of the words of the publicity proviso apart from the legislative history or statutory purpose. *See* at 547–550. This kind of lateral reading is not appropriate in interpreting the National Labor Relations Act. *N.L.R.B. v. Allis Chalmers Manufacturing Co.*, 388 U.S. 175, 179, 87 S.Ct. 2001, 2005, 18 L.Ed.2d 1123 (1967). The "'familiar rule, that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers'" has "particular application in the construction of labor legislation * * *" *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 619, 87 S.Ct. 1250, 1255, 18 L.Ed.2d 357 (1967), *citing Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892). For example, under a literal reading, the secondary boycott provisions, § 8(b)(4), would apply not only to secondary activity; the language read literally would also reach primary strikes by employees against their own employer. *Local 761, IUE v. NLRB*, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed.2d 592 (1961). The statute is not read literally because the Congressional intent expressed through the legislative history and statutory scheme was not to prohibit primary strikes. *Id.* In this case the majority rests its interpretation of the publicity proviso entirely on the statutory words, contrary to the teaching of *Muniz v. Hoffman*, 422 U.S. 454, 469–70, 95 S.Ct. 2178, 2186, 45 L.Ed.2d 319 (1975), *NLRB v. Allis Chalmers Manufacturing Co., supra*, 388 U.S. at 179, 87 S.Ct. at 2005, and *National Woodwork Manufacturers Ass'n v. NLRB, supra*, 386 U.S. at 619, 87 S.Ct. at 1254. In doing so, the majority arrives at an interpretation of the act at odds with the Congressional purpose that the publicity proviso would remove pure speech from coverage under the secondary boycott prohibitions.

The majority rests its conclusion on a reading of the word "produced" in the publicity proviso. The publicity proviso, the majority contends would apply only to publicity about goods "produced" by Hussmann, and in the majority's view it is unreasonable to find that Hussmann is a producer of Pet's other subsidiaries' goods. At 549. First, the majority asserts that the relationship between Hussmann and the other subsidiaries involves only contribution of profit to Pet. *Id.* at 549. Although the majority recognizes that this profit might be employed in productive activities of other subsidiaries, the relation is too attenuated in the majority's view to involve production of other subsidiaries' goods by Hussmann. Secondly, the majority appears to take the view that the Supreme Court in *Servette* confined the meaning of the word "produced" in the publicity proviso to its definition under other labor acts, i. e., ultimately "produced" means "worked on" in some fashion. At 549, *citing Servette, supra*, 377 U.S. at 55–56, 84 S.Ct. at 1104.

The majority's reading of the statute is not compelled by *Servette*. In that case the Supreme Court explained that Congress meant something broader by "produced" than the word means in ordinary usage. The Court suggested that Congress had in the Fair Labor Standards Act likewise used the word "produced" to mean something broader than in ordinary usage. But the Supreme Court in *Servette* did not incorpo-

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rate the Fair Labor Standards Act definition to limit or restrict the meaning of the word "produced" under the publicity proviso. Instead, the Court approved a broad interpretation of the publicity proviso to cover any publicity which absent the proviso would be covered by § 8(b)(4)(ii)(B). The Court said it found "no basis" for "incongruous" interpretation of the publicity proviso's language to be "any narrower" than the prohibition on secondary activity of § 8(b)(4)(ii)(B). *Id.* at 56, 84 S.Ct. at 1104.

The Board's broad interpretation of the word "produced" results in coverage of the publicity proviso in harmony with the Congressional purpose. The Board's interpretation also does not involve an unjustifiable reading of the word "produced." The majority, at 549, mischaracterizes the Board's position; the Board did not say that Hussmann's only connection with the other divisions is to contribute profits to Pet. The Board said Hussmann contributed not only profits, but also "goodwill" and "diversification." *See id.* at 549, *citing* the Board's opinion in this case, *United Steelworkers of America,* 244 N.L.R.B. No. 6 (1979). The majority does not say why the Board erred in finding a contribution of goodwill and diversification, or why the Board erred in finding that the goodwill and diversification were at least tangentially a part of the production process of Pet's other divisions. Instead, the opinion asserts—pointing to absolutely no support in the record—that "Should Pet sell Hussmann tomorrow, Pet would manufacture, distribute, and promote its products the same way it is doing now." *Id.* at 549. This assertion simply contradicts the Board's belief that Pet's other divisions would have greater difficulty operating in the absence of the goodwill and diversification and profits contributed by Hussman. In the end, this is an arguable question, and without demonstrating any particular error in the Board's approach, the majority merely substitutes the opinion of the court for that of the Board.

The majority's approach also infringes upon the Board's responsibilities in a less obvious but more serious way. The Board assumed (without deciding) that § 8(b)(4)(ii)(B) was applicable to the union conduct in this case and reached only the publicity proviso issue. This approach left open the important question whether picketing (or other activity besides pure publicity) directed against Pet subsidiaries other than Hussmann would be secondary activity under § 8(b)(4)(ii)(B). Under the Board's view (and mine), this important question involves the "secondary" nature of activity other than publicity, because it was not Congress' intent to prohibit pure publicity. By ruling the publicity proviso inapplicable to the pure publicity in this case, the majority forces the Board to interpret the coverage of § 8(b)(4)(ii)(B) in a case that does not involve picketing or other activity other than mere speech. In my view, the Board was correct in finding this case an inappropriate one for resolving this important question of labor relations.

The Board avoided deciding whether a union on strike against one division of a "conglomerate" corporation could picket the whole corporation or must confine strike activities to the division. This difficult problem raises fundamental labor relations issues. An employee organization in one division may, as an economic fact, be up against the entire conglomerate. On the other hand, in some circumstances the conglomerate organizational structure may in fact be loose enough that picketing or other action involving the whole conglomerate could be considered in part secondary activity. It is unfortunate that the majority requires resolution of this important question in a case where the dispute remains in the realm of speech; I would leave the Board free in this sensitive area to await a more suitable case involving picketing or other coercive activity with non-speech components.

Ironically enough, the majority may have decided *sub silentio* the issue it remands to the Board. As noted above, the Supreme Court in *Servette* and the legislative history of the publicity proviso compel the conclusion that the publicity proviso applies to *all* pure publicity that would otherwise come under the coverage of § 8(b)(4)(ii)(B). In other words, mere publicity apart from picketing is covered by the publicity proviso, unless (1) it is not pure publicity in that it involves a threat or the like, or (2) the publicity is not within § 8(b)(4)(ii)(B) because it is not covered secondary activity. No other conclusion is consistent with the *Servette* understanding that the publicity proviso is just as broad as the prohibition on secondary activity. In this case no one claims that the publicity falls outside the realm of pure publicity. Therefore, the publicity falls outside the publicity proviso only if it is not secondary activity covered by the statute. Although the majority derives its conclusion from a reading of the publicity proviso in isolation and remands for a decision on the applicability of the secondary boycott prohibition, in my view the majority has decided that question, because the publicity proviso and the prohibition on secondary activity have the same breadth of coverage. Furthermore, the majority's decision may well also determine that the publicity in this case would not be prohibited if carried out by picketing. That is, if the publicity is not the kind of secondary activity prohibited by § 8(b)(4)(ii)(B), it would not be covered whether carried out by leaflet or picketing.

I do not necessarily disagree with the conclusion that there was no secondary activity in this case. But Congress in the publicity proviso sought to put pure publicity on a different footing than other activity, and this case which involves pure publicity is not appropriate for determining the substantive sweep of § 8(b)(4)(ii)(B). I would deny the petition for review.

NLRB v. Leonard Creations of California, Inc.

638 F.2d 111 (9th Cir.), February 2, 1981; certiorari denied 452 U.S. 955—243 NLRB 832

On petition to enforce Board Order

Before FERGUSON and NORRIS, Circuit Judges, and PANNER,* District Judge

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FERGUSON, Circuit Judge: At a union representation election among employees of Leonard Creations of California, Inc., 62 employees voted in favor of representation, 61 voted against, and one ballot is contested. The contested ballot exhibits a full "X" in the box indicating a vote against union representation and a slash in the box in favor of it.[1] The National Labor Relations Board found the ballot invalid, and thus determined the election outcome in favor of unionization. Consequently, the Board certified the union as representative of the employees.

The company refused to bargain with the union, in order to obtain review in this court of the Board's certification of the union. The Board petitioned to enforce its order to bargain, after finding that the company violated §§ 8(a)(5) and (1)[2] of the National Labor Relations Act by its refusal to bargain and by its unilateral grant of a wage increase. We reverse the Board.

While the NLRB has often held that marks in two alternative squares on a ballot render it invalid, *see, e. g., Caribe Industrial and Electrical Supply, Inc.*, 216 N.L.R.B. 168 (1975); *Bon Tool & Die Co.*, 115 N.L.R.B. 103 (1956), the underlying principle favors inclusion of a ballot in an election tally "where the voter's intent has been clearly manifested," *NLRB v. Sauk Valley Manufacturing Co.*, 486 F.2d 1127, 1133 (9th Cir. 1973). This policy has often resulted in inclusion of ballots with marks in both squares. *See, e. g., Abtex Beverage Corp.*,

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237 N.L.R.B. 1271 (1978) (ballot counted where voter attempted to obliterate one mark); *Belmont Smelting Works*, 115 N.L.R.B. 1481 (1956) (complete "X" in one box validates ballot despite diagonal line in other box).

On review, an NLRB order will not be upheld unless supported by substantial evidence. *NLRB v. Masonic Homes of California*, 624 F.2d 88, 89 (9th Cir. 1980). In the present case, the entire record consists of the contested ballot. Examining the ballot in light of our prior decisions and those of the NLRB, we find little support for the Board's conclusion that the voter's intent was unclear. Although the "Yes" box contains a line, only the "No" box received a completed mark. It follows

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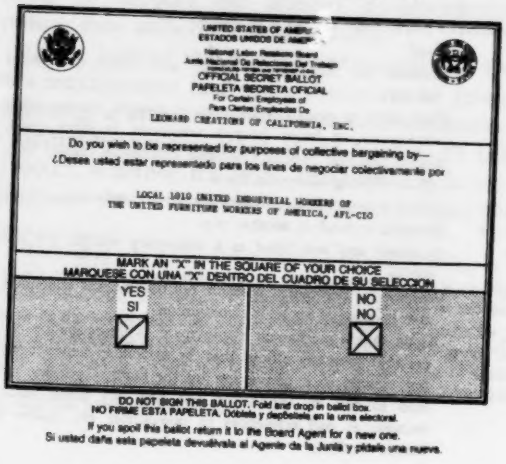
*The Honorable Owen M. Panner, United States District Judge for the District of Oregon, sitting by designation.

[1] The disputed ballot was marked in the following way:



UNITED STATES OF AMERICA
ESTADOS UNIDOS DE AMERICA
National Labor Relations Board
Junta Nacional De Relaciones Del Trabajo
OFFICIAL SECRET BALLOT
PAPELETA SECRETA OFICIAL
For Certain Employees of
Para Ciertos Empleados De
LEONARD CREATIONS OF CALIFORNIA, INC.

Do you wish to be represented for purposes of collective bargaining by—
¿Desea usted estar representado para los fines de negociar colectivamente por

LOCAL 1010 UNITED INDUSTRIAL WORKERS OF
THE UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE
MARQUESE CON UNA "X" DENTRO DEL CUADRO DE SU SELECCION

YES
SI
⧄

NO
NO
☒

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
NO FIRME ESTA PAPELETA. Dóblela y depósitela en la urna electoral.

If you spoil this ballot return it to the Board Agent for a new one.
Si usted daña esta papeleta devuélvala al Agente de la Junta y pídale una nueva.

[2] 29 U.S.C. §§ 158(a)(5) and 158(a)(1).

that the voter intended to register a "No" vote rather than a meaningless gesture of indecision.

The order of the Board is Reversed.

NLRB v. Jacob E. Decker & Sons

636 F.2d 129 (5th Cir.), February 2, 1981—244 NLRB 875

On petition to enforce Board Order

Before Gee, Rubin and Randall, Circuit Judges

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Alvin B. Rubin, Circuit Judge: Again we review a National Labor Relations Board order to remedy the effects of an unfair labor practice. The Board ordered discharged employees Dominguez and Orosco reinstated with back pay. Another panel of this court concluded that the company had committed an unfair labor practice in discharging the employees, but remanded the case to the Board to consider the effect of their post-discharge felony convictions and to determine what form of remedy would best serve the policies of the National Labor Relations Act, taking into account the employees' suitability for reinstatement and their entitlement to back pay. *NLRB v. Jacob E. Decker & Sons,* 569 F.2d 357 (5th Cir. 1978).

On remand, the parties submitted statements of position and the Board ordered a supplemental hearing before an administrative law judge. The ALJ concluded that Dominguez, who was a probationary employee at the time of his discharge, should not be reinstated, but should be awarded back pay from the date of his discharge until the date of his conviction, and that Orosco should be reinstated with back pay notwithstanding his felony conviction for possession of "more than four ounces" of marijuana. The Board affirmed this decision and seeks enforcement of its order.

The company argues that Orosco would automatically have been discharged as a result of his felony conviction and, therefore, reinstatement is not a proper remedy. The Board concluded that the company's management exercised discretion in terminating convicted felons and that the Company's alleged "firm policy" was a pretextual defense. This raises two questions: First, whether the Board's conclusion that the employer did not have a firm policy of automatically discharging all convicted felons is supported by substantial evidence in the record considered as a whole. If we accept the Board's conclusion, we must then determine whether it is correct in deciding that the reinstatement of Orosco effectuates the purposes of the Act.

If the Board's conclusion that company management did not automatically fire all convicted felons is supported by substantial evidence in the record, that decision is not reviewable. *See Universal Camera Corp. v. NLRB,* 340 U.S. 478, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *NLRB v. Laredo Coca Cola Bottling Co.,* 613 F.2d 1338 (5th Cir. 1980). We turn, therefore, to the record.

The local plant manager testified about the Company's policy with respect to convicted felons. His statements suggest that decisions regarding convicted felons had to be "cleared" through Phoenix, the Company's headquarters. The Board attaches great significance to the words the plant manager used. The Company argues that the word "cleared" refers merely to the Company's customary industrial practice: the discharge was automatic but, as a matter of protocol, it was processed through headquarters. We attach little significance to nuances drawn from the manager's words and find them alone insufficient fulcrum on which to lever the opinion.

On the other hand, there was also testimony that the manager told an employee facing a possible criminal prosecution that the manager would "do everything" possible to help the employee retain his job if he was convicted. In addition, there was evidence concerning the actions the Company took with regard to "lead boner Santiago Gonzalez."[1]

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[1] Gonzalez's employment history is as follows:

1970	Hired.
12/73	Arrested and indicted for assault with intent to commit murder.
8/74	Pled guilty to assault with intent to commit murder without malice (a lesser felony); sentenced to three years.
8/74	Branch manager McCarty secured Gonzalez's release from jail by signing his appeal bond.
10/16/75	Sentence suspended; Gonzalez placed on probation.
10/19/75	*Resigned* to work in another city.
12/76	Returned and was hired as a temporary worker for two weeks.
2/77	Applied for permanent position; but told he was unemployable because of his felony conviction.
12/77	Again sought permanent employment. After probation officer told company official that the suspended sentence was not viewed as a conviction by the state, Gonzalez was told to file an application but was not hired (either because of bad references or conviction; the testimony was in conflict).

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Despite the asserted company policy of automatically terminating any convicted felon, Decker permitted Gonzalez to continue working as a permanent employee for more than one year after he was convicted of a felony. He then resigned, apparently to work in another city. After his resignation, Gonzalez returned to San Antonio and was hired as a temporary worker. The company argues that Gonzalez was permitted to retain his permanent employment for one year following his conviction only because the conviction was not yet final and that his subsequent employment, being temporary, is irrelevant to our inquiry. When the Board assessed this in the light of the facts that one of the employees allegedly discharged pursuant to Decker's policy was fired immediately after her conviction and three weeks prior to sentencing and that, after his conviction became "final," Gonzalez resigned rather than being terminated, the Board might well find the company's explanation unconvincing.

This evidence, not by any means conclusive, supports the interpretation that at least one employee who was ostensibly affected by the alleged company policy was not considered unemployable because of his felony conviction. The Board might also take into account the fact that only one, or perhaps two, permanent employees were identified by Decker as having been discharged between 1970 and 1978 pursuant to this alleged corporate policy.

These items, the plant manager's testimony, the isolated prior instance of automatic termination and the Gonzalez episode, are not overwhelming. However, when weighed against the little that was offered to support the alleged no-second-chance policy, they suffice for substantiality.[2]

In the light of the Board's conclusion that Decker's management had some discretion to retain or discharge a convicted felon, we must determine, as required by Section 10(c) of the NLRA, 29 U.S.C. §160(c), whether its order to reinstate Orosco effectuates the purposes of the National Labor Relations Act. In determining whether Orosco's reinstatement effectuates the policies of the NLRA, we consider as one factor the Board's conclusion that all convicted felons were not inexorably discharged. Our primary inquiry, however, is whether reinstatement would create an unacceptable employment relationship and, therefore, frustrate the purposes of the NLRA.

A remedy ordered by the Board is subject only to limited review by this court. *Fiberboard Paper Products v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233, 241 (1964). The Board and the courts have refused to order reinstatement of an unlawfully discharged employee who was quilty of unlawful or offensive conduct of such a nature that reinstatement would create an undesirable employment situation. *See, e.g., NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77, 82–84 (5th Cir. 1966) (employee admitted theft from employer), *NLRB v. R.C. Can Co.*, 340 F. 2d 435 (5th Cir. 1965) (employee threatened company president).

The Board here concluded that reinstatement of Orosco would not create an unacceptable employment relationship and that, in the face of his unlawful discharge, the policies of the NLRA would best be served by ordering him reinstated. This

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conclusion was within the scope of the Board's remedial discretion.

We also conclude that the back-pay awards to both Dominguez and Orosco properly effectuate the purposes of the Act by making the employees whole for losses suffered as a result of their unlawful discharges. Because we enforce the Board's reinstatement of Orosco, he is entitled to back pay from the date of his discharge until he is offered reinstatement. The Board's action with respect to Dominguez, however, requires a different analysis.

Applying the factors that would be consonant with the discretionary policy, the ALJ concluded that in view of his employment history and other factors, Dominguez would have been discharged after he was convicted of felony. He would, however, have been employed by Decker until that time. Therefore, the ALJ concluded that Dominguez should not be reinstated, but that he is nevertheless entitled to be compensated for wages lost as a result of his unlawful discharge. We conclude that the Board's remedy is a pragmatic and reasonable response to the lawful discharge. If back pay were not awarded, Decker would profit as a result of its unlawful conduct and Dominguez would not be made whole for losses suffered as a result of his unlawful discharge. Therefore, Dominguez should be paid wages lost from the date of his discharge until the date of his felony conviction.[3]

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[2] The record also discloses that even the Company's published rules did not contain language that required mandatory discharge if an employee were convicted of a felony. Company Rule 31, in force at the time of Orosco's discharge, read that any conviction would be grounds for "discipline." Under the current corporate rules, a felony conviction "may" result in discharge. While not dispositive, the phraseology of Decker's own rules do not support the assertion that temination inexorably follows an employee's felony conviction.

Accordingly, the Board's order will be ENFORCED, in all respects.

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[3] Similarly, in *NLRB v. Big Three Welding Equipment Company,* 359 F.2d 77 (5th Cir. 1966), we enforced the Board's cease and desist order and its restitution of back pay to unlawfully discharged employees but refused to enforce an order of reinstatement because the employees' admission of pilfering the company's property would have created an unacceptable employment relationship.

Kansas City Power & Light Company v. NLRB

641 F.2d 553 (8th Cir.), February 4, 1981—244 NLRB 620

On petition to review Board Order

Before HENLEY and MCMILLIAN, Circuit Judges, and HARPER,* Senior District Judge

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MCMILLIAN, Circuit Judge: This action is before the court pursuant to § 10(e), (f) of the National Labor Relations Act, 29 U.S.C. § 160(e), (f) (hereinafter the Act), authorizing judicial review of final orders of the National Labor Relations Board (hereinafter the Board). Kansas City Power & Light Co. (hereinafter the employer) petitions for review of the final order of the Board in *Kansas City Power & Light Co.,* 244 N.L.R.B. No. 93 (1979), finding that the employer violated § 8(a)(1) and § 8(a)(3) of the Act. The Board has cross-petitioned for enforcement.

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For the reasons discussed below, we grant the Board's cross-petition and enforce the order.

The employer is a public utility company engaged in the production, transmission, sale and distribution of electrical energy to customers in Missouri and Kansas. The employer and Locals 412, 1464 and 1613 of the International Brotherhood of Electrical Workers (hereinafter collectively referred to as the unions) have had a bargaining reletionship since the early 1940's Together the unions represent approximately 2,100 workers.

The applicable collective bargaining agreements were effective from July 1, 1976 through June 30, 1979. Each collective bargaining agreement contained a wage reopener clause providing that either party could reopen the agreement on June 30, 1978, for the purpose of adjusting wage rates and certain fringe benefits. The wage reopener clause further provided that in the event the parties were unable to reach an agreement, the clause in the collective bargaining agreement prohibiting strikes and lockouts was to be suspended, thereby leaving the unions free to strike in support of their bargaining position. The parties were unable to reach an agreement and the unions began a lawful economic strike on July 1, 1978. The strike continued until November 13, 1978.

When the employees returned to work, the employer required all probationary employees to begin the six-month probationary period anew.[1] In effect, the probationary employees returned to work as "new hires." [2] Thus, the time they had already served before the strike as probationary employees was lost and those benefits [3] that they would have received upon completion of the six-month probationary period were delayed, not for the balance of each employee's probationary period, but for six months.

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*The Honorable Roy W. Harper, United States Senior District Judge for the Eastern District of Missouri, sitting by designation.

[1] The collective bargaining agreements define a "probationary employee" as any individual employed by the company for less than six continuous months. A "regular employee" is an individual who has been employed for six continuous months.

[2] The parties sharply disagree over the appropriate characterization of the employer's treatment of the probationary employees. The administrative law judge (ALJ) and the Board describe the employer as treating the probationary employees "as though they had been terminated." The employer denies the probationary employees were terminated and notes that the paperwork associated with termination was never processed, the probationary employees "as though they had been terminated." The employer denies the probationary employees were terminated and notes that the paperwork associated with termination was never processed, the probationary employees were reinstated immediately following the strike, and the new six-month probationary period merely deferred the accrual of the benefits associated with regular employee status.

This squabbling over semantic accuracy is beside the point. As noted in the text, the probationary employees were required to begin a new six-month probationary period following the strike. In practical effect, these employees began as "new hires."

[3] Upon completion of the six-month probationary period, employees are credited with six months seniority and become eligible for a variety of benefits (sick leave, vacation, health and welfare coverage), including a wage step increase.

The unions file unfair labor practice charges, alleging that the employer's treatment of the probationary employees violated § 8(a)(1) and § 8(a)(3) of the Act. The employer justified its conducted by relying on the collective bargaining agreement provision requiring six months *continuous* service [4] as a probationary employee, its policy and past practice or requiring those probationary employees with interruptions in their probationary periods to begin anew, and the absence of discrimination because *all* probationary employees were required to start all over. The Board affirmed the decision of the administrative law judge (ALJ) that the employer's conduct was "inherently destructive" of employee rights and, even absent a showing of antiunion motivation, a violation of the Act under the standards set forth in *NLRB v. Great Dane Trailers, Inc.*, 338 U.S. 26, 33-34, 87 S.Ct. 1792, 1997-98, 18 L.Ed.2d 1027 (1967), and further that the employer failed to establish "legitimate and substantial business justifications" for its conduct.

The Board ordered the employer to cease and desist from "discharging" or discriminating against employees who joined or participated in a lawful strike and in any like or related manner interfering with, restraining or coercing employees in the exercise of their § 7 rights. The Board further ordered the employer to give credit to all probationary employees "terminated" during the 1978 strike for all service prior to the date of the strike and, upon completion of the total six months employment, treat them as regular employees, giving them retroactive wage step increases and othe benefits lost as a result of the employer's unfair labor practice.

In this petitions to set aside the Board's order, the employer argues that (1) its conduct was not discriminatory and therefore could not constitute a violation of § 8(a)(3); and (2) its conduct was not "inherently destructive" of employee rights and therefore, in the absence of any affirmative showing of antiunion motivation, could not constitute a violation of § 8(a)(3) and § 8(a)(1).

Our review of the Board's decision is quite limited. If the Board's findings are supported by substantial evidence and represent a correct application of the law, the order will be enforced. 29 U.S.C. § 160(e); *e. g., The PaintSmiths, Inc. v. NLRB*, 620 F.2d 1326, 1329 (8th Cir. 1980), *citing Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 840 (8th Cir 1973), *cert. denied*, 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed.2d. 288 (1974).

First, the employer argues that because *all* the probationary employees were treated alike, its conduct was not discriminatory and therefore could not constitute a violation of § 8(a)(3). Discrimination is an essential element of a § 8(a)(3) violation. 29 U.S.C. § 158(a)(3).[5] This argument is clearly without merit. In *NLRB v. Jemco, Inc.*, 465 F.2d 1148 (6th Cir. 1972), *cert. denied*, 409 U.S. 1109, 93 S.Ct. 911, 34 L.Ed.2d. 690 (1973), the employer refused to pay accrued vacation benefits and argued, as the employer does in the present case, that no finding of discrimination, and thus no violation of § 8(a)(3), was possible where all the striking employees had been treated alike. The court rejected the employer's argument.

> Although we are not referred to, nor do we find, any cases involving Section 8(a)(3) discrimination where all employees alike were denied an employment benefit, *we do not believe that unequal treatment of different classes of employees is a pre-requisite to finding a Section 8(a)(3) violation where all employees engaged in a concerted activity.* The interpretation of Section 8(a)(3) which the Company urges us to adopt would lead to the somewhat absurd result tht an emplyer could never be found in violation of that Section so long as he was careful to treat all employees alike, no matter how destructive of employee rights his conduct may be. The Section 8(a)(3) discrimination in the present case lies in the em-

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[4] E.g., Collective Bargaining Agreement between Kansas City Power & Light Co. and Local Union 1613, IBEW, 1976-79, art. V. § 1(a) ("The term 'probationary employee' means any individual engaged by the Company for regular employment without limitations as to time who has not completed *six months of continuous service* with the company.") (emphasis added) (NLRB Ex. J1(c)).

[5] Under section 8(a)(3) of the Act, it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233, 83 S.Ct. 1139, 1148, 10 L.Ed.2d 308 (1963), the Supreme Court held that discouraging membership in a labor organization under section 8(a)(3) includes discouraging participation in concerted activities such as a legitimate strike.

NLRB v. Borden, Inc., 600 F.2d 313, 320 (1st Cir. 1979).

> ployment prior to their engaging in a concerted activity and the
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> benefit which was denied to all employees after they engaged in such activity.

Id. 465 F.2d at 1152 (emphasis added; footnote omitted); *accord, NLRB v. Borden, Inc.*, 600 F.2d 313, 320–21 (1st Cir. 1979); *Allied Industrial Workers Local 289 v. NLRB*, 155 U.S.App.D.C. 112, 121, 476 F.2d 868, 877 (1973) ("A practice applied uniformly to all employees may be discriminatory and violate the Act just as a discriminatory practice may be held to be perfectly innocuous."). In other words, "[t]he fact that an employer stigmatizes striking employees while leaving nonstrikers untouched may be an indication of the employer's hostility toward the Union, but such disparity of treatment is not necessary to find a section 8(a)(3) and (1) violation." *NLRB v. Borden, Inc., supra*, 600 F.2d at 320.

In the present case all the employees went on strike. The employer therefore could not have discriminated against striking employees and in favor of nonstriking employees. However, as discussed above, disparity in treatment *between strikers and nonstrikers* is not necessary to finding a § 8(a)(3) violation. *Id.* Where all the employees engage in a concerted activity, the requisite disparity is between the treatment of all employees *before and after the concerted activity. NLRB v. Jemco, Inc., supra*, 465 F.2d at 1152. Here, the requisite discrimination lies in the disparity of treatment of probationary employees with breaks in service before and after the strike. The General Counsel presented evidence that before the strike three probationary employees were not required to begin their probationary periods anew even though absent from work between two to ten weeks. We conclude that the Board's finding of discriminatory treatment is supported by substantial evidence.

Next, the employer argues that its treatment of the probationary employees was not "inherently destructive" of important employee rights and was justified by "legitimate and substantial" business justifications. Therefore, the employer argues that absent an affirmative showing of antiunion motivation, its conduct could not constitute a violation of § 8(a)(3) and § 8(a)(1). *See NLRB v. Great Dane Trailers, Inc., supra*, 388 U.S. at 33–34, 84 S.Ct. 1197–98; *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228–29, 83 S.Ct. 1139, 1145–46, 10 L.Ed.2d 308 (1963); *see generally* Christensen & Svanoe, *Motive & Intent in the Commission of Unfair Labor Practices: The Supreme Court & the Fictive Formality*, 77 Yale L.J. 1269 (1969).

The employer's argument is based upon the distinction drawn in *Great Dane* between discriminatory conduct which is "inherently destructive" of important employee rights and discriminatory conduct which has a "comparatively slight" adverse effect on employee rights. 388 U.S. at 34, 87 S.Ct. at 1797–98. As outlined in the familiar but somewhat enigmatic passage in *Great Dane:*

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed [6] and the
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> Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.[7]

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[6] Modern labor law cases, that is, post-*Radio Officers Union* cases, emphasize unlawful or antiunion motivation. "The statutory language 'discrimination * * * to * * * discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." *NLRB v. Great Dane Trailers, Inc., supra*, 388 U.S. at 33, 87 S.Ct. at 1797, *citing American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965). *See generally* 3 T. Kheel, Labor Law § 12.02 (1980); Janofsky, *New Concepts in Interference & Discrimination under the NLRA: The Legacy of* American Ship & Great Dane, 70 Colum.L.Rev. 81(1970); Oberer, *The Scienter Factor in Sections 8a1 & 3 of the Labor Act: Of Balancing, Hostile Motive, Dogs & Tails*, 52 Cornell L.Q. 491, 504–06 (1967) (explaining use of words "motive" and "intent" in Supreme Court opinions); Note, *Proving an 8a3 Violation: The Changing Standard*, 114 U.Pa.L.Rev. 866 (1966). *But see* 3 T. Kheel, Labor Law, *supra*, § 12.02 (discussing the "varient view"); Christensen & Svanoe, *Motive & Intent in the Commission of Unfair Labor Practices: The Supreme Court & the Fictive Formality*, 77 Yale L.J. 1269 (1968) (emphasizing discrimination, irrelevance of intent or motive); Note, *Discrimination & the NLRB: The Scope of Board Power under 8a3 & 8b2*, 32 U.Chi.L.Rev. 124 (1964).

[7] The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it

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> Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proven to sustain the charge *if* the employer comes forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U.S. at 34, 87 S.Ct. at 1797–98 (emphasis in original; footnotes added).

"Finding a § 8(a)(3) violation normally requires an affirmative showing that the employer's discriminatory conduct was motivated by an antiunion purpose. But when an employer's conduct is characterized as 'inherently destructive,' 'unlawful motivation is presumed to exist.'" *Loomis Courier Service, Inc. v. NLRB,* 595 F.2d 491, 495 (9th Cir. 1979) (other citations omitted), *citing Western Exterminator Co. NLRB v.,* 565 F.2d 1114, 1118 n.3 (9th Cir. 1977). Thus, the characterization of discriminatory conduct as either "inherently destructive" or having a "comparatively slight" adverse effect is critical because that characterization determines which party has the benefit of a presumption of lawful or unlawful motivation, once a showing of "legitimate and substantial business justification" has been made. "Inherently destructive" discriminatory conduct bears "its own indicia of intent" and thus relieves the General Counsel of the difficult task of proving unlawful motivation. *NLRB v. Erie Resistor Corp., supra,* 373 U.S. at 231, 83 S.Ct. at 1147. Even if the employer establishes a "legitimate and substantial business justification" for "inherently destructive" conduct, the presumption of unlawful motivation remains, leaving the Board the "delicate task" of balancing conflicting legitimate interests in light of the Act and its policy. *E.g., NLRB v. Great Dane Trailers, Inc., supra,* 388 U.S. at 33–34, 87 S.Ct. at 1197–98; *NLRB v. Erie Resistor Corp., supra,* 373 U.S. at 228–29, 83 S.Ct. at 1145–46; *Johns-Manville Products Corp. v. NLRB,* 557 F.2d 1126, 1144 (5th Cir. 1977) (Wisdom, J., dissenting) (express reference to balancing respective interests in order to draw correct inference about real motive of employer), *cert. denied,* 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978); *Kaiser Engineers v. NLRB,* 538 F.2d 1379, 1386 (9th Cir. 1976) (express reference to balancing). Discriminatory conduct which has only a "comparatively slight" adverse effect on employee rights similarly raises a presumption of unlawful motive. However, if rebutted by a showing of "legitimate and substantial business justification," the presumption of unlawful motive disappears, the conduct in question is prima facie lawful, and the General Counsel must affirmatively prove unlawful motive. *E.g., NLRB v. Great Dane Trailers, Inc., supra,* 388 U.S. at 34, 87 S.Ct. at 1797–98; *Johns-Manville Products Corp. v. NLRB, supra,* 557 F.2d at 1144 (Wisdom, J., dissenting).

The Supreme Court has yet to clearly define the phrase "inherently destructive."[8] This Circuit in *Inter-Collegiate Press v. NLRB,* agreeing that the phrase was not easily susceptible of precise definition, acknowledged that "actions creating visible and continuing obstacles to the future exercise of employee rights" are "inherently destructive." 486 F.2d at 845, *citing* Case Note, 85 Harv.L.Rev. 680, 680, 686 (1972); accord, *Loomis Courier Service, Inc. v. NLRB supra,* 595 F.2d at 495, *citing Portland Willamette Co. v. NLRB,* 534 F.2d 1331, 1334 (9th Cir. 1976) (conduct with far-reaching effects which would hinder future bargaining or conduct which discriminates solely upon the basis of participation in strikes or union activity is inherently destruc-

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> unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in the decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

NLRB v. Erie Resistor Corp., supra, 373 U.S. at 228–29, 83 S.Ct. at 1145–46 (emphasis in original; citation and footnotes omitted); *see e. g., Johns-Manville Prods. Corp. v. NLRB,* 557 F.2d 1126, 1144 (5th Cir. 1977) (Wisdom, J., dissenting) (discussing balancing of employee and employer interests), *cert. denied,* 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978); *Kaiser Eng'rs v. NLRB,* 538 F.2d 1379, 1386 (9th Cir. 1976) ("The ultimate problem is the balancing of conflicting legitimate interests.").

[8] In *Great Dane* the Court describes "inherently destructive" conduct as "conduct [which] carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" 388 U.S. at 33, 87 S.Ct. at 1797, *citing NLRB v. Erie Resistor Corp., supra,* 373 U.S. at 228, 231, 83 S.Ct. at 1145–47; *see generally* 3 T. Kheel, Labor Law, *supra* note 6, § 12.02.

tive); *Johns-Manville Products Corp. v. NLRB, supra,* 557 F.2d at 1144 (Wisdom, J., dissenting) ("inherently destructive" describes conduct that thwarts the basic policies of the Act and frustrates the process of collective bargaining or the future of unionization, but not conduct merely influencing workers' ability to maintain their bargaining demands); *Kaiser Engineers v. NLRB, supra,* 538 F.2d at 1386 (discriminatory conduct which is directly related to protected activity is inherently destructive, *citing Signal Oil & Gas Co. v. NLRB,* 390 F.2d 338, 343–44 (9th Cir. 1968)).

While there is much to be said for the Board's characterization of the employer's treatment of the probationary employees as "inherently destructive," it is unnecessary here for us to decide whether the employer's conduct was "inherently destructive" or whether its effect was "comparatively slight" since in either event the result is the same. The employer's conduct was directly related to the probationary employees' participation in a lawful economic strike, a protected activity under the Act. *E. g., NLRB v. Westinghouse Electric Corp.,* 603 F.2d 610, 617 (7th Cir. 1979); *NLRB v. Knuth Bros.,* 584 F.2d 813, 815 (7th Cir. 1978) (§ 8(a)(1) violation); *NLRB v. Moore Business Forms, Inc.,* 574 F.2d 835, 840–42 (5th Cir. 1978); *Kellogg Co. v. NLRB,* 457 F.2d 519, 522 (6th Cir.), *cert. denied,* 409 U.S. 850, 93 S.Ct. 58, 34 L.Ed.2d 92 (1972), citing *NLRB v. Erie Resistor Corp., supra,* 373 U.S. at 233, 83 S.Ct. at 1148; *cf. System Council T-4 v. NLRB,* 466 F.2d 815 n.7 (7th Cir. 1971) (adjustment of net credit service dates, as distinguished from seniority, to account for strike time found to have "comparatively slight" adverse effect on employee rights within context of *Great Dane*) *cert. denied,* 404 U.S. 1059, 92 S.Ct. 740, 30 L.Ed.2d 747 (1972); *Tex-Tan Welhausen Co. v. NLRB,* 419 F.2d 1265 (5th Cir. 1969) (benefit adjustment for strike absence), *vacated on other grounds,* 397 U.S. 819, 90 S.Ct. 1516, 25 L.Ed.2d 805 (1970). Such conduct, when considered from a common sense point of view, is bound to have a discouraging effect on present and future concerted activities, particularly upon the probationary employees' support of the unions. The inevitable consequence of the application of the employer's policy with regard to absences during the probationary period is that probationary employees can strike for one week, or possibly at most for one month,[9] without jeopardizing their accrued probationary service. Such an action creates an obstacle of some dimension to the future exercise of employee rights. *Inter-Collegiate Press v. NLRB, supra,* 486 F.2d at 845.

We recognize that the employer did present evidence tending to show that it was motivated by legitimate objectives in requiring all the probationary employees to start anew that is, the enforcement of its six months continuous service policy. However, there was evidence in the record that the employer's policy was unwritten, flexible, and administered with some discretion by supervisors, and that within the past several years three probationary employees with substantial breaks in service had not been made to begin the probationary period anew.

As the ALJ found, the testimony offered in justification of the six months rule was conclusory and was not supported by any specific evidence—"for instance why the company found it necessary to terminate one who had completed 5 months and 3 weeks."

In the circumstances, we agree with the Board that the employer's assertions fall short of showing substantial and legitimate business considerations and hold that the employer failed to carry its burden of justifying its conduct.

We distinguish *NLRB v. National Seal, Division of Federal-Mogul-Bower Bearings, Inc.* 336 F.2d 781 (9th Cir. 1964), *denying enforcement in* 141 N.L.R.B. 661 (1963). In this pre-*Great Dane* case, the employer applied a probationary rule that the probationary period of 60 days was required to be completed without interruption to striking probationary employees. The rule was of long standing and had been rigidly enforced prior to the strike. In addition, the parties had stipulated that the employer's sole motive in terminating the strike probationary employees was that the employer wanted all probationary periods to be continuous and unbroken. The court denied enforcement of the Board order, declining to adopt a per se rule on the application of otherwise lawful probationary rules to economic strikers, *id* at 783, *citing Quality Casting Co.*, 139 N.L.R.B. 928 (1962), *enforcement denied*, 325 F.2d 36 (6th Cir. 1963), and stressing the absence of evidence of unlawful motivation. 336 F.2d at 784–85. In the instant case we note that the employer's probationary policy was more in the nature of a guideline and not "rigidly enforced."

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[9] The employer's then director of employee relations, Mr. Feild, testified that the policy with regard to absences during the probationary period was unwritten and flexible, its general guidelines "generally understood" by the supervisors. Feild further testified that, although not fixed, an absence lasting up to a week was permissible but absences of a month were generally not, leaving absences between a week and a month as a "gray area" to be handled on an individual basis.

Further, we are not persuaded by the employer's argument that its treatment of the probationary employees was compelled by the collective bargaining agreement and was the lawful implementation of a right required through the bargaining process.[10] *See G.C. Murphy Co.*, 207 N.L.R.B. 579 (1973); *Roegelein Provision Co.*, 181 N.L.R.B. 578 (1970). In both of those cases the Board found that the denial of accrued vacation benefits by the employer pursuant to an express provision in the collective bargaining agreement constituted "a lawful implementation of a right understood to have been acquired through the collective bargaining process." *G.C. Murphy Co., supra*, 207 N.L.R.B. at 582; *Roegelein Provision Co., supra*, 181 N.L.R.B. at 580. But see *G.C. Murphy Co., supra*, 207 N.L.R.B. at 579–80 (Member Fanning, dissenting). In each case there was negotiating history that included repeated discussions about the meaning and scope of the provisions. In contrast, the negotiating his-

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tory in the present case is meager: in the 1974 strike settlement agreement the application of the six months continuous service requirement was suspended, while the settlement agreement for the 1978 strike at issue here did not address the problem. With the exception of the 1974 strike (83 days) and the 1978 strike (4.5 months), past strikes against the company apparently were much shorter and the applicability of the six months continuous service requirement to breaks in service did not become an issue. In any case, we would be very reluctant to find a limitation of the right to strike by probationary employees effected by the language of the provisions of the collective bargaining agreement in question here. *See* note 10 *supra*.

In sum, the Board's finding of a unfair labor practice in supported by substantial evidence on the record as a whole. Accordingly, the order of the Board is enforced.

NLRB v. Carroll Contracting and Ready-Mix, Inc.

636 F.2d 111 (5th Cir.), February 5, 1981—247 NLRB 890

On petition to enforce Board Order

Before KRAVITCH and FRANK M. JOHNSON, JR., Circuit Judges, and ALLGOOD,* District Judge

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ALLGOOD, District Judge: The National Labor Relations Board seeks enforcement of its order issued against Carroll Contracting and Ready-Mix, Inc., wherein Carroll was ordered to bargain on request with the certified representative of its employees.

Carroll, a Florida corporation, is engaged in the wholesale and retail sale and distribution of concrete and asphalt products. In July, 1978, the Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 385 petitioned to represent Carroll's production and maintenance employees. A stipulation for certification upon consent election was thereafter entered into scheduling an election and defining the appropriate unit. A secret ballot election was held on August 28, 1978. The union won by a vote of 55 to 44, with 13 challenged ballots and two void ballots. Carroll timely filed 24 objections to conduct allegedly affecting the results of the election. The Regional Director of the Board conducted an ex parte investigation, and Carroll was given an opportunity to present evidence. Subsequently, a report was issued by the Regional Director recommending that three of the challenged ballots be sustained; that Carroll's objections be overruled in their entirety; and that the union be certified. Exceptions were then filed by Carroll requesting that the election be set aside, or in the alternative, that an evidentiary hearing be held. These requests were denied by the Board when it adopted the Regional Director's findings, and the union was certified as the bargaining representative of Carroll's production and maintenance employees. In order to test the validity of the certification, Carroll refused to bargain with the union. Consequently, the union filed unfair labor practice charges against Carroll. A complaint was then issued against Carroll by the Board's General Counsel alleging a violation of Section 8(a)(5) and (1) of the National Labor Relation Act.[1] Carroll answered and the General Counsel moved for summary judgement. A show cause order was issued to which Carroll responded with a motion in opposition to summary judgment. On February 6, 1980, the Board issued its decision and order granting summary judgment and finding Carroll in violation of Section 8(a)(5) and (1) of the Act. Carroll was ordered to cease and desist from the unfair labor practices; to bargain with the union on request; and to post an appropriate notice. The Board now seeks enforcement of its order.

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[10] This position comes close to an argument that the probationary employees' right to strike was waived by the collective bargaining agreement, specifically by the provision defining probationary employees as individuals with less than six months continuous service. However, although the right to strike may be waived by appropriate provisions in a collective bargaining agreement, such a waiver of a protected right must be expressed in clear and unmistakable language. *E. g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280, 76 S.Ct. 349, 357, 100 L.Ed. 309 (1956).

*District Judge of the Northern District of Alabama, sitting by designation.

Among Carroll's 24 objections to conduct affecting the results of the election was alleged improper electioneering, and it is upon that objection that this case turns. The undisputed evidence revealed that before the polls opened, two former Carroll employees wearing "Vote Teamsters" signs on their hats and enlarged reproductions of the ballot with an "X" marked in the "Yes" box pinned on their shirts, positioned themselves in the parking lot where the line of waiting voters formed. This line was approximately 25 feet from the polls. At one time there were as many as 45 employees waiting to vote. As the line of voters passed them by, both men urged the employees to vote for the union and repeatedly gestured to the "Yes" box on the ballot pinned to their shirt. These activities continued throughout the polling hours.

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At the pre-election conference, the electioneering in the parking lot was brought to the attention of the Board agent. She stated, however, that she could only control electioneering within the polling place.

The Board set out its policy regarding electioneering in *Claussen Baking Company,* 134 NLRB 111 (1961). In *Claussen,* the electioneering took place 15 feet from the polling place and only continued for 15 minutes, at which time it was terminated by the Board agent. Setting the election aside, the Board stated:

> It is the province of the Board to safeguard its elections from conduct which inhibits the free choice of the voters, and the Board is especially zealous in preventing intrusions upon the actual conduct of its elections. In furtherance of this responsibility, *the Board prohibits electioneering at or near the polls.*

134 NLRB at 112. (Emphasis added).

The Board further defined its electioneering policy in the oft cited *Milchem, Inc.,* 170 NLRB 362 (1968), where it stated that elections would be overturned where representatives of any party to the election engaged in "prolonged" conversations with voters waiting to cast their ballots, regardless of the content of the conversation. The Board articulated that the potential for distraction, last minute electioneering, and unfair advantage justified a "strict rule" against such conduct, without requiring an examination into the substance or effect of the conversations. *General Shoe Corp.* 77 NLRB 124, 127 (1948).

This court reiterated that standard in *Home Town Foods, Inc. v. NLRB,* 416 F.2d 392 (5th Cir. 1969). The "laboratory conditions" test represents an ideal atmosphere in which a free choice may be made by employees, protected from interference by employer, union, Board agent, or other parties. 416 F.2d at 396. *Cf. NLRB v. Lake Butler Apparel Co.,* 392 F.2d 76, 82 (5th Cir. 1968). The Board contends that the electioneering which occurred was not improper inasmuch as the two former Carroll employees were not agents of the union, and thus their conduct could not be attributed to the union. We disagree. It is well settled that acts not attributable to the union warrant setting aside the election if the acts disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election. *NLRB*

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[1] Section 8

(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Sec. 9(a).

[29 U.S.C. § 158(a)(1) and (5)].

v. Claxton Manufacturing Co., 613 F.2d 1364, 1371 (5th Cir. 1980). In *Home Town Foods, Inc. v. NLRB*, 397 F.2d 241 (5th Cir. 1967), this court stated:

> We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. "The important fact is that such conditions existed and that a free election is hereby rendered impossible." *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953).

379 F.2d at 244

The Board further argues that the electioneering was not improper because it occurred *outside* the polling place. We are not convinced. As stated by the Board in *Milchem*, the last few moments before voting should be the voters own, "as free from interference as possible." 170 NLRB at 362-363. We do not find that this protection from interference is reserved for only those employees who have gained access to the actual polling place to cast their vote. Once the polls opened, the employees waiting outside in line to vote became a part of the polling place, and were entitled to the safeguards against interference espoused by *Milchem*.

We have held that where the Board promulgates a standard governing conduct under the Act, "such policies are controlling until the Board announces a change and its reasons for the change." *Delta Drilling Co. v. NLRB*, 406 F.2d 109, 113 (5th Cir. 1969); *NLRB v. Osborn Transp., Inc.*, 589 F.2d 1275 (5th Cir. 1979). Since in *Claussen* the Board has prohibited electioneering "at or near the polls", we must set aside the election and enforcement of the Board's order is denied.

ENFORCEMENT DENIED.

Seattle-First National Bank v. NLRB

638 F.2d 1221 (9th Cir.), February 5, 1981—241 NLRB 753

On petition to review Board Order

Before SNEED and FLETCHER, Circuit Judges and JAMESON,* District Judge.

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JAMESON, District Judge: Seattle-First National Bank has petitioned for review of an order of the National Labor Relations Board finding that the Bank violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by failing to bargain in good faith with Financial Institution Employees of America, Local No. 1182 (the Union), and by implementing portions of its last offer before a valid impasse had been reached.[1] The Board in a cross-application seeks enforcement of its order. The Union was permitted to intervene. We deny enforcement and remand to the Board for further consideration.

Factual Background

Seattle-First National Bank is a national banking association headquartered in Seattle and engaged in commercial banking operations at approximately 170 branches throughout the State of Washington. On November 30, 1970, the Union was certified by the Board as the collective bargaining representative of all Bank employees, excluding professional employees, confidential employees, management trainees, and supervisors and guards. The bargaining unit consists of approximately 4,800 employees. The Union and the Bank entered into two successive bargaining agreements, effective from about August 1, 1971 to July 31, 1974, and from August 1, 1974 to July 31, 1977. On July 6, 1977, while the second agreement was still in effect, the Union and the Bank began meetings directed toward the negotiation of a third agreement. The first six meetings were devoted to the presentation and discussion of the Union's first offer. The Bank presented its first offer, exclusive of cost items, on July 27. On July 29, the parties extended the second agreement indefinitely pending negotiations, subject to termination on ten days notice.

The Bank presented succeeding offers at the 11th meeting, on August 10, this one containing its first economic proposals; at **1224** the 16th meeting, on August 23; at the 21st meeting, on September 7; at the 27th meeting, on September 27; at the 33rd meeting, on October 13; and on October 20, in the wake of the 36th meeting, held on October 19. The Union presented succeeding offers at the 17th meeting, on August 29; at the 24th meeting, on September 16; and at the 35th meeting, on October 18. Apart from these offers both sides made counterproposals in limited areas from time to time, and accord was reached on some issues, subject to agreement on a total contract. In all, approximately 45 meetings were held without reaching an agreement. A federal mediator participated in the meetings on and after October 13.

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*The Honorable William J. Jameson, Senior United States District Judge for the District of Montanna, sitting by designation.

[1] The order was issued on April 5, 1979 and is reported at 241 N.L.R.B. No. 117.

The Bank's final offer of October 20 was accompanied by a letter summarizing those areas in which the offer improved upon existing proposals. It stated:

> Our employees have waited long enough. We have met 36 times to date and have yet to reach agreement on major issues. We have bargained in good faith and believe the time has come to conclude these negotiations.
>
> As a result, you have until the end of this month to accept the enclosed offer. If you do not accept it by the end of the month, we will assume these negotiations remain at an impasse, and we will implement our offer effective November 1, 1977.

Also on October 20, the Bank sent the Union a ten day notice terminating the 1974 agreement.

On October 25, the Bank again wrote to the Union, urging that any objections it might have to the final offer be discussed before the November 1, 1977, effective date of the notice of termination. The Union responded by letter on October 28, proposing a meeting on November 2 to discuss and negotiate certain named topics and other items on which agreement had not been reached. The Bank replied the same day:

> While we are willing to continue meeting with you to discuss any of the open issues, as long as further negotiations appear fruitful, you have the Bank's final offer and the statements contained in the letters to you dated October 20 and 25, 1977, still stand.
>
> We look forward to seeing you on November 2nd.

The Union did not accept the Bank's offer of October 20, and the Bank implemented the economic portions of its final offer on November 1. The Bank also stopped furnishing monthly employee status reports, as required by the old agreement, and stopped observing the dues check off provision of the old agreement. Despite the Bank's unilateral action and its claim that impasse was reached in late October (incidental to the "final" offer of the 20th) negotiations continued.

Board Proceedings

Charges of unfair labor practices were filed by the Union on September 19 and October 26, 1977. A consolidated complaint was issued by the Board on November 29, 1977, alleging that the Bank had violated § 8(a)(1) and (5) during contract negotiations by acting with an overall lack of good faith.[2] The bad faith of the Bank was allegedly evidenced by: (1) the content of certain of the Bank's contract proposals, (2) the Bank's insistence to impasse on nonmandatory subjects of bargaining, and (3) the Bank's unilateral implementation on November 1 of portions of its last offer.

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The order of the Administrative Law Judge (ALJ) discussed exhaustively each of the contract proposals urged by the Union as evidence of the Bank's bad faith.[3] It also discussed other alleged indicia of bad faith. The ALJ's findings, however, were limited to the contract proposals, which the judge found provided a basis in themselves for concluding the Bank acted with bad faith during the negotiations. The ALJ also found that the Bank's insistence upon nonmandatory subjects of bargaining up to the time of impasse constituted an unfair labor practice, and that since the Bank had failed to negotiate in good faith no genuine impasse had been reached. The unilateral implementation of portions of its "final offer" accordingly was unlawful under the Act. The ALJ concluded that each of these findings constituted a violation of § 8(a)(1) and (5).

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[2] The applicable portions of Section 8 of the NLRA, as amended, 29 U.S.C. § 158, provide:

> 8(a) It shall be an unfair labor practice for an employer—.
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 (Section 7 guarantees the right of employees "to bargain collectively * * *, and to engage in other concerted activities for the purpose of collective bargaining * * *.")
>
> (5) To refuse to bargain collectively with the representatives of his employees. * * *

Section 8(d) defines the duty to bargain collectively as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." This obligation does not, however, "compel either party to agree to a proposal or require the making of a concession * * *." *Id.*

[3] This portion of the ALJ's order sets out in detail each of the objectionable contract provisions as first proposed, the revised version contained in the Bank's October 20 final offer, the changes made after the "final" offer, and the distinctions between the proposals and comparable provisions in the existing contract.

The Board affirmed the order of the Administrative Law Judge insofar as it held that the Bank had failed to bargain in good faith and had implemented portions of its last offer before a valid impasse had been reached. It reversed the ALJ's ruling that the Bank had bargained to impasse on nonmandatory subjects of bargaining, concluding that the objectionable proposals had not been negotiated to impasse, but were simply items raised and left unresolved by the negotiations. The Board issued a cease and desist order and ordered the posting of notices.

Scope of Review

The Board's findings of fact must be affirmed if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951); *K-Mart Corp. v. NLRB,* 626 F.2d 704 (9 Cir. 1980); *NLRB v. Sacramento Clinical Lab.,* 623 F.2d 110, 112 (9 Cir. 1980). "If facts are open to conflicting inferences we are not at liberty to draw an inference different from the one drawn by the Board, even though it may seem more plausible and reasonable to us." *NLRB v. Millmen, Local 550,* 367 F.2d 953, 956 (9 Cir. 1966); *Queen Mary Restaurants Corp. v. NLRB,* 560 F.2d 403, 407 (9 Cir. 1977). It is required, however, "that substantiality be determined in the light of all that the record relevantly presents." *Universal Camera,* 340 U.S. at 488, 71 S.Ct. at 464.

Bad Faith Bargaining

Ascertaining compliance with the duty to bargain in good faith generally requires inquiry into an employer's motive or state of mind during the bargaining process. *NLRB v. Stanislaus Implement and Hardware Co.,* 226 F.2d 377, 380 (9 Cir. 1955). "Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from circumstantial evidence * * *." *Continental Ins. Co. v. NLRB,* 495 F.2d 44, 48 (2 Cir. 1974). Good faith must be determined from an examination of the totality of circumstances. *NLRB v. Tomco Communications, Inc.,* 567 F.2d 871, 883 (9 Cir. 1978); *NLRB v. Pacific Grinding Wheel Co., Inc.,* 572 F.2d 1343, 1347 (9 Cir. 1978). "A state of mind such as good faith is not determined by a consideration of events viewed separately. The picture is created by a consideration of all the facts viewed as an integrated whole." *NLRB v. Tomco Communications, Inc.,* 567 F.2d at 883,[4] quoting *NLRB v. Stanislaus Implement and Hardware Co.,* 226 F. 2d at 381.

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This court has uniformly deferred to the expertise of the Board to make the initial determination whether an employer's conduct demonstrates an unwillingness to bargain in good faith. See, *e. g., NLRB v. Dent,* 534 F.2d 844, 846 (9 Cir. 1976); *Queen Mary Restaurants Corp. v. NLRB,* 560 F.2d 403, 407 (9 Cir. 1977). We have recognized that the "Board has been afforded flexibility to determine * * * whether * * * conduct at the bargaining table evidences a real desire to come into agreement" and that this determination is made by "drawing inferences from the conduct of the parties as a whole." *NLRB v. Holmes Tuttle Broadway Ford, Inc.,* 465 F.2d 717, 719 (9 Cir. 1972), quoting *NLRB v. Insurance Agents Union,* 361 U.S. 477, 498, 80 S.Ct. 419, 432, 42 L.Ed.2d 454 (1960).

On the other hand, Section 8(d) of the National Labor Relations Act expressly provides that the duty to bargain in good faith does not "compel either party to agree to a proposal or require the making of a concession * * *." This provision has been interpreted to mean that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat'l Ins. Co.,* 343 U.S. 395, 404, 72 S.Ct. 824, 829, 96 L.Ed. 1027 (1952). While this court has sanctioned the Board's consideration of the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract, *NLRB v. Holmes Tuttle Broadway Ford, Inc., supra,* 465 F.2d at 719, inferences drawn from those proposals are not alone sufficient to support a finding of a violation of the oblitation to bargain in good faith. "In addition * * * the Board must show 'substantial evidence that the company's attitude was inconsistent with its duty to seek an agreement' * * *" *NLRB v. Pacific Grinding Wheel Co., Inc., supra,* 572 F.2d at 1348–49, citing *NLRB v. MacMillan Ring-Free Oil Co.,* 394 F.2d 26, 29 (9 Cir.), *cert. denied,* 393 U.S. 914, 89 S.Ct. 237, 21 L.Ed.2d 199 (1968).[5]

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[4] In his decision the ALJ quoted from the Board's decision in *Tomco.* This court, however, in denying enforcement of the Board's order in that case did not find "the requisite substantial evidence of bad faith in the record as a whole," noting the court's divergence from the Board is most apparent in the evaluation of bargaining proposals" and rejecting the Board's analysis of the employer's final offer as "terms which no self-respecting union could be expected to accept." *Id.* at 883.

We turn now to a consideration of the Board's findings of bad faith in the light of these principles. The findings apparently were based solely upon the contract proposals.[6] The Board made no findings with respect to other evidence which assertedly demonstrated bad faith.[7] Nor has it made any findings with respect to the evidence presented by the Bank in support of its contention that it was bargaining in good faith and that the parties were unable to agree because of the Union's "unreasonable proposals and hard bargaining." In other words, we cannot conclude from the Board's findings that it considered the "totality of the circumstances" which are indicative of mental state.

This conclusion is entirely consistent with the holding in the leading case of *NLRB v. Reed & Prince Mfg. Co.,* 205 F.2d 131 (1 Cir.) *cert. denied,* 346 U.S. 887, 74 S.Ct. 139, 98 L.Ed 391 (1953). In that case the employer and the union, as here, engaged in a prolonged period of negotiations without making substantial progress toward reaching agreement. The Board, in reaching its conclusion that the employer had violated his duty to bargain in good faith, examined not only the contract proposals, but all of the circumstances indicative of the employer's mental state which attended the negotiating process. *Id.* at 134–40. In sum, the Board there examined "the totality of the employer's conduct * * *." *Id.* at 134.[8]

The determination of whether the Bank was engaged in impermissible "surface bargaining" or permissible "hard bargaining" involves the application of statutory considerations to complex facts susceptible of varying interpretations.[9] This determination can properly be made only upon consideration of the "totality of the circumstances." We remand to the Board for a re-examination of the record to determine whether the record as a whole, including the course of negotiations as well as the contract proposals, supports a finding of bad faith.

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[5] In *Pacific Grinding Wheel,* the court recognized that "Board disapproval of proposed terms," "a company's adamant insistence on strong pro-management terms," and "rejection by the employer of terms which were in a previous contract" are not sufficient in themselves to establish bad faith, but are factors which may be considered by the Board with other evidence, and that the "totality of the circumstances may justify a finding of failure to bargain in good faith." *Id.* at 1348.

[6] The ALJ found, and the Board agreed, that the Bank, among other things, sought to have the Union abdicate its right to strike even over unfair labor practices, to remove most disputes involving employees from any effective grievance and arbitration procedure, to require the exhaustion of contract remedies before employees could exercise any rights they might have under labor or civil rights statutes and simultaneously to set a short statute of limitations during which such complaints might be filed with outside agencies, and to reserve the right in the Bank to change employee-benefit plans without notice to the Union.

[7] While the record contains evidence of other acts of the Bank's representatives before and during negotiations and after impasse from which bad faith could be inferred and both the ALJ and Board were aware of this evidence, the Board's conclusion that the Bank violated its obligation to bargain referred only to the Board's evaluation of the contract proposals made by the Bank. In finding a violation of the obligation to bargain in good faith based exclusively on contract proposals the Board is in effect doing that which it is prohibited from doing—sitting in judgment upon the substantive terms of a proposed collective bargaining agreement.

[8] This court has cited *NLRB v. Reed & Prince* to support its holdings in *NLRB v. Holmes Tuttle Broadway Ford, Inc., supra,* 465 F.2d at 719; *NLRB v. Yutana Barge Lines, Inc.,* 315 F.2d 524, 528 (9 Cir. 1963); *NLRB v. Stanislaus Implement & Hardware Co., supra,* 226 F.2d at 381. In *NLRB v. Tomco Communications, Inc., supra,* 567 F.2d at 883, and *NLRB v. MacMillan Ring-Free Oil Co., supra,* 394 F.2d at 29, the court, although agreeing with the result of *Reed & Prince,* expresses reservations concerning some of its language.

[9] Surface bargaining is defined as "'going through the motions of negotiating,' without any real intent to reach an agreement." *K-Mart Corp. v. NLRB,* 626 F.2d 704, 706 (9 Cir. 1980). It is often difficult to detect, and is generally provable only through inferences drawn from circumstantial evidence. While it is permissible for a party to engage in "hard bargaining", utilizing its economic power to its advantage to retain as many rights as possible, *NLRB v. Tomco Communications, Inc., supra,* 567 F.2d at 884, good faith presupposes a desire to reach ultimate agreement, thus management and labor cannot maintain an attitude of "take it or leave it." *NLRB v. Ins. Agents International Union, supra,* 361 U.S. at 485, 80 S.Ct. at 424. Sophisticated pretense in the form of apparent or surface bargaining is violative of the Act—what is required is that both parties "enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement * * *." *NLRB v. Holmes Tuttle Broadway Ford, Inc., supra,* 465 F.2d at 719. This requirement must be religiously adhered to lest an employer be allowed to utilize his superior economic strength to talk a union to death. See Cox, "The Duty to Bargain in Good Faith", 71 Harv.L.Rev. 1401, 1413 (1958).

Unilateral Implementation of Bank's "Final Offer"

Those engaged in collective bargaining are normally required to bargain to impasse on all mandatory issues. *NLRB v. Tomco Communications, Inc.*, 567 F.2d at 881. An employer's "unilateral change in conditions of employment under negotiation" is a violation of § 8(a)(5) since it is "a circumvention of the duty to negotiate." *NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). If one party fails to bargain in good faith, no valid impasse can be reached. *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d at 1349.

The Board here found that there could be no impasse since the Bank did not bargain in good faith. If, on remand, the Board decides that the Bank did bargain in good faith, it must then address the question of whether an impasse was reached before the unilateral change in wages and working conditions.[10] If not, there would

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be an independent violation of the duty to bargain in good faith. *NLRB v. Pacific Grinding Wheel Co., Inc.*, 572 F.2d at 1349.

Enforcement of the Board's order is denied and the case is remanded to the Board for further consideration consistent with this opinion.

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[10] On appeal the Board has raised the question of whether under the facts of this case impasse was indeed reached. It appears from the record that the bank, after having submitted its "final" offer of October 20, revised that offer in two significant respects on November 10, ten days after implementing its economic proposals: (1) by deleting the language "unfair labor practice strike" from its no strike clause, and (2) by deleting language requiring that the grievance/arbitration procedure be exhausted before employees could exercise rights outside the contract. Then on December 5, the Bank presented a "revised final offer" which also was rejected. A number of bargaining sessions were subsequently held. These factors raise some question as to whether an impasse had in fact been reached.

NLRB v. K & K Gourmet Meats, Inc.

640 F.2d 460 (3d Cir.), February 6, 1981—245 NLRB 1331

On petition to enforce Board Order

Before GIBBONS and ROSENN, Circuit Judges, and HANNUM, District Judge*

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ROSENN, Circuit Judge: This case comes before us on a petition for enforcement of an order of the National Labor Relations Board ("NLRB" or "Board"), filed pursuant to section 10(e) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(e). The Board found that K & K Gourmet Meats, Inc. ("K & K" or "Company") committed certain unfair labor practices during the course of a union organizing campaign and directed the Company to recognize and bargain with the United Food and Commercial Workers International Union, AFL-CIO, Food Employees Union Local 590 ("Union"). The practices complained of occurred at the K & K plant, located in Leetsdale, Pennsylvania.

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I.

K & K is a small, family-owned company engaged in processing specialty meats. The business is run by its president, Arthur Katz, assisted by Barbara Weiler, the most senior employee.[1] The Company was founded by Arthur and his brother Leo, who died shortly before the events giving rise to this proceeding. Besides Katz and Weiler, the Company employed fourteen full-time and three part-time workers at all times relevant to this cause.

In October 1978, employee Cheryl Welsh communicated with George Nestler, a Union representative, concerning the possibility of organizing the K & K workforce. A meeting was arranged for the evening of October 23. Eight employees attended the meeting, all of whom signed Union authorization cards at that time. One additional card was obtained the following morning.[2]

Nestler confronted Katz with the cards on October 24, 1978, demanding that K & K recognize the Union as the authorized representative of its employees. Katz refused and referred Nestler to the Company's attorney who indicated that K & K had a good faith doubt that the Union represented an uncoerced majority of the employees.

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*Honorable John B. Hannum, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] The Board found Weiler to be a "supervisor" within the meaning of 29 U.S.C. § 152(11). The Company does not dispute that finding in this court.

[2] Two more cards were obtained on Saturday, October 28, 1978. The Company does not dispute that the number of cards held by the Union was sufficient to demonstrate majority strength.

After work on October 24, Weiler stopped for coffee at a local restaurant with employee Ann Anderson, a personal friend with whom she rode to work. In the course of their conversation, which ranged over various topics, the two women discussed the recent events surrounding the Union's organizing drive. Weiler expressed her opinion that the timing of the campaign was unfortunate, since Leo Katz had recently died and Arthur's wife was ill and hospitalized. Weiler also commented that a previous attempt to organize had been unsuccessful and that she thought the present one would also fail. Weiler then asked Anderson whether a majority of the employees were supporting the Union and whether she had signed a Union authorization card. Anderson answered "yes" to both inquiries and then asked that the subject be dropped. Weiler immediately honored that request.

On Saturday, October 28, Weiler telephoned Anderson and another employee, Nancy Green, and in the course of her discussion with each, the subject of working conditions came up. Weiler informed both women that Katz would hold a meeting with all the employees and that he would announce a new pay and benefit package. Weiler claimed that the package would include wages comparable to those paid at a larger food processing plant nearby, a hospitalization plan, and a profit-sharing plan.

Katz did, indeed, hold a meeting with all K & K employees on October 30, 1978, at which he discussed hospitalization insurance and profit-sharing. He indicated that he had considered these items as potential employee benefits and that he had taken steps to obtain further information relating to them. Also at this meeting, Katz made several statements to the employees expressing his interest in their concerns and his desire that those concerns be made known to him.

On the evening of October 30, the employees met with George Nestler to discuss Katz' remarks earlier that day. It was decided that Katz was not to be believed and that the employees would strike. Nestler then filed unfair labor practice charges against K & K, alleging various violations of section 8(a)(1) of the Act, as well as a refusal to bargain in violation of section 8(a)(5), 29 U.S.C. § 158(a)(1 & (5).

A hearing was held before an Administrative Law Judge ("ALJ") who, in a decision issued May 29, 1979, found four unfair labor practices on the part of K & K. First, the ALJ found that Ann Anderson was coercively interrogated by Barbara Weiler during their conversation at the coffee shop on October 24. Second, the ALJ found that, during the same conversation, Weiler had threatened Anderson by indicating that her Union activities would be futile. Third, he determined that Weiler, during her telephone conversations with Anderson and Nancy Green on October 28, had unlawfully promised a grant of benefits if the Union were defeated. Finally, the ALJ found that Arthur Katz promised benefits in the form of hospitalization and profit-sharing in exchange for the Union's defeat at his meeting with the employees on October 30. The ALJ specifically recommended dismissal of that portion of the complaint alleging that Katz had solicited employee grievances and expressly or impliedly promised to remedy them. Finally, the ALJ concluded that a bargaining order was not warranted and recommended that K & K be ordered to cease and desist from further violations of the Act and to post appropriate notices.

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The Board, reviewing the parties' exceptions to the ALJ's decision, adopted that decision except as it dealt with issues of solicitation of grievances and the need for a bargaining order. The Board concluded that the evidence established that Katz had, in fact, solicited grievances at his October 30 meeting with the employees and "in so doing impliedly promised to remedy them." 245 N.L.R.B. No. 173, slip op. at 3. The Board also found that the Company's purpose underlying its unlawful acts was "to impress upon the employees the fact that they did not need a union to obtain satisfaction of their demands." *Id.* at 5. The Board therefore ordered the Company to cease and desist from engaging in such unfair labor practices, including the refusal to bargain collectively with the United Food and Commercial Workers International Union, AFL-CIO, Food Employees Union Local 590. Affirmatively, the Board ordered the Company to bargain upon request with such union as the exclusive representative of all its employees in the appropriate unit and to post appropriate notices. It is that order which is presently before us for enforcement.

II.

In viewing the Board's findings of fact, we are limited by statute to a determination whether they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1950). As to the Board's choice of remedy, we are admonished that "[t]he Board's power is a broad discretionary one, subject to limited judicial review." *Fibreboard Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964), *citing NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346, 73 S.Ct. 287, 288, 97 L.Ed. 377 (1953). The Board's choice of remedy "must * * * be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 612 n.32, 89 S.Ct. 1918, 1939 n.32, 23 L.Ed.2d 547 (1969).

These, then, are the parameters of our scrutiny in this case. They do not, however, render us, as judges, "automata." *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 489, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). Courts are still charged with responsibility for seeing that national labor policies are carried out. As the Supreme Court explained in *Universal Camera,* "Congress has imposed on [courts] responsibility for assuring that the Board keeps within reasonable grounds." 340 U.S. at 490, 71 S.Ct. at 465. It is in the exercise of that responsibility that we proceed to examine the decision of the Board on the record before us.

III.

Of the five unfair labor practices found to have been committed by K & K, two occurred while Barbara Weiler and her personal friend and commuting partner, Ann Anderson, were having coffee after work on October 24. The ALJ heard testimony from both women concerning the content of their conversation in the coffee shop. On direct examination, Anderson summarized the conversation thus:

> Well, on the way home that night [October 24], we stopped for coffee, and she said she knew that I had to know what was going on, and I said I did, and she says, well she was sorry to see that happen, because of all Art's troubles, which was true, and I said I did know, and she says, well, it would never go through, because thay had tried it before, and that it had been blocked, and that it would be blocked again, and she asked me how many girls worked there, and did we have a majority, and I said we did, and she asked me if I had signed a card, and I said yes, I had signed a card, and I told her not to ask me no more questions, and not to tell me nothing.

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Except for a later concession that Weiler identified Leo Katz as the one who "blocked" the Union in the past, and that he was dead at the time of this conversation, Anderson gave no other testimony on the content of the conversation in the restaurant. Anderson's version of the conversation was generally corroborated by Weiler, who was found by the ALJ "to be a generally credible witness."

The Board adopted the ALJ's finding that Weiler's statement to the effect that "the Union was blocked before and would be blocked again" constituted a threat that Anderson's organizing activities would be futile. Neither the ALJ nor the Board supplied any reasoning in support of the conclusion that such conduct constitutes an unfair labor practice or that it was anything more than a permissible expression of opinion. In its brief to this court, however, the General Counsel relies on two fifth circuit cases in support of the Board's finding that a violation occurred. *NLRB v. Henriksen, Inc.,* 481 F.2d 1156 (5th Cir. 1973); *NLRB v. Varo, Inc.,* 425 F.2d 293 (5th Cir. 1970). both of these cases, however, dealt with employers who had made threats as to what they would do *if* the Union were successful. In *Henriksen,* for example, the Company president stood before the employees and stated that she would bargain with the union in the same way she bargained with her suppliers—that is, in a very "hardnosed" fashion. 481 F.2d at 1160 n.4. The Board found that the employer had misrepresented, through use of her analogy, her obligation to bargain in good faith with the Union, should it be selected. In *Varo,* a Company foreman told an employee that the Union "would never get a contract." 425 F.2d at 299. The distinction to be drawn, of course, is that in this case, Weiler was speaking about the unlikelihood that the Union would be successful. This could only have been a matter of opinion because the employer in no real way controlled the results of the organizing campaign. In cases such as *Henriksen* and *Varo*, on the other hand, the employer was threatening to be obstructionistic in a matter which does, in fact, require his cooperation and in which a degree of his cooperation is demanded by law. *See also NLRB v. Hedstrom,* 629 F.2d 305, 308 (3d Cir. 1980) (en banc) *(Hedstrom II)* (employer "would never sign a contract with Union"); *NLRB v. Sky Wolf Sales,* 470 F.2d 827, 831 (9th Cir. 1972) (employer "would not sign a contract with the Union"); *NLRB v. Louisiana Manufacturing Co.,* 374 F.2d 696, 701–02 (8th Cir. 1967) (employer "had no intention of signing a contract with a Union"). The most that may be said of Weiler's comments is that she raised the not unexpected likelihood that the employer, exercising its lawful rights, would oppose the Union's drive and that she believed the Company would prevail.

The theory advanced by the Board in this case bears a remarkable similarity to the theory rejected by this court in *NLRB v. Gentithes,* 463 F.2d 557 (3d Cir. 1972). In *Gentithes,* the Board contended that various remarks by an employer to the effect that he opposed unionization "were designed to demonstrate to the employees the futility of any attempt seeking to establish a bargaining representative." 463 F.2d at 560. Chief Judge Seitz, speaking for a unanimous panel, held that "no interpretation of the limited number of such remarks appearing in the record suggests a coercive attempt by the Company to impose upon its employees its own aversion to unionization * * *. Absent a coercive character the statements cannot be considered violative of § 8(a)(1) of the Act." *Id.* In this case, the Board has wholly failed to articulate facts that substantiate the "coercive character" of Weiler's appraisal of the Union's propects. Thus, the remarks fall within the protective cloak of section 8(c), which operates to ensure an effective exchange of information from both union and management in the sphere of labor relations. *NLRB v. Lenkurt Electric co.,* 438 F.2d 1102, 1108 (9th Cir. 1971). *See also Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974). Therefore, we reject the Board's conclusion that Weiler's comments to Anderson that the Union would be blocked constituted a violation of section 8(a)(1) as neither supported by law nor by substantial evidence.

The second violation found to have occurred during the October 24 conversation was Weiler's interrogation of Anderson regarding her personal position on unionization. The record leaves no doubt that Weiler did question Anderson concerning the Union's majority status and whether she had signed a Union authorization card. However, section 8(a)(1) does not proscribe all inquiries into employees' union sympathies, it is only "when doing so suggests to the employees that the employer may retaliate because of those sympathies" that a violation occurs. *Hedstrom II,* 629 F.2d at 314 (footnote omitted). But the fear of retaliation need not actually appear, the test is whether "'under the circumstances existing, [the employer's conduct] may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" *Id., quoting NLRB v. Armcor Industries, Inc.,* 535 F.2d 239, 242 (3d Cir. 1976). Thus, we are not swayed by the General Counsel's argument that Anderson's request that the subject be dropped indicated "that she saw her personal friendship with Weiler as providing no reason for ignoring the inherently coercive nature of the comments and questions being advanced." Nor do we consider in this inquiry Weiler's testimony that Anderson expressed her feeling that the Union drive and the apparent conflict of feelings would not "ruin [their] friendship." The subjective response of the employee is not controlling. *See Local 542, International Union of Operating Engineers v. NLRB,* 328 F.2d 850, 852 (3d Cir. 1964).

The objective nature of the inquiry is, however, limited by the specific circumstances in which the interrogation takes place. The Union had already informed the Company that it represented a majority of the employees. Weiler's question was put to a self-described "good friend" with whom she not only regularly rode to work but also engaged in social and recreational activity. Weiler and Anderson shared the ownership of a boat. It was not uncommon for the two women to stop at the restaurant on their way home, nor was it unusual that they should talk about work. Anderson's testimony also shows that the Weilers and the Andersons were social companions, and it was common for them to have dinner together. It also appears that Anderson was comfortable with her friend's position in the company; so comfortable, in fact, that in Anderson's company Weiler endured some dinnertime "teasing" about not walking the picket line when the employees finally went out on strike. Under these circumstances, we fail to discern the coercive element that would transform Weiler's inquiries into unlawful interrogation.

The Board also adopted the ALJ's findings that both Weiler and Arthur Katz violated section 8(a)(1) by promising grants of benefits to employees in exchange for defeat of the Union. K & K challenges this finding on the ground that both Weiler, in her phone conversations with Anderson and Green on October 28, and Katz, in his meeting with employees on October 30, emphasized that they were legally unable to promise benefits in exchange for Union opposition and that they were not so doing. The General Counsel argues that this recitation of legal inability was a kind of a "nod and a wink" and will not insulate the Company from its clearly illegal attempts to trade benefits for the Union's defeat. *See, e.g., Michigan Products, Inc.,* 236 N.L.R.B. 1143 (1978); *Montgomery Ward & Co.,* 228 N.L.R.B. 750 (1977). *See also NLRB v. Garry Manufacturing Co.,* 630 F.2d 934, 942 (3d Cir. 1980).

We conclude that substantial evidence supports the Board's findings with respect to both of these violations. In Weiler's telephone conversation with both Anderson and Green on October 30, she initiated a discussion of possible improvements that might occur in their employment situation, specifically mentioning a pay increase, hospitalization benefits and a profit-sharing plan. The conversation appears to have been substantially identical with both women, and it could reasonably be concluded by the listener that she was conveying the Company's proposed bargain to settle the existing "problem" in a manner that would benefit everyone concerned. This is clearly illegal. *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964). For his part, Katz not only described what he had been contemplating in the way of employee benefits, he held those benefits out to the employees with the implied promise that they would be instituted if K & K remained a union-free enterprise. We agree with the Board that employer discussions of potential benefits during a union organizing campaign creates an inference that the benefits do not come without strings attached. That inference becomes more perceptible where, as here, the discussion does not come during a regularly convened meeting of management and labor and when the proposed benefits are different not only in degree but in kind from those presently enjoyed by the employees.

The final unfair labor practice found by the Board was Katz' solicitation of employee grievances coupled with an implied promise to remedy them. This finding of the Board is directly contrary to an express finding of the ALJ. Although this circumstance does not enlarge our scope of review, the ALJ's finding is a portion of the record in this case and must be considered when making a determination whether the Board finding is supported by substantial evidence. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 493–94, 71 S.Ct. 456, 467, 95 L.Ed. 456 (1951); *Frattaroli v. NLRB,* 590 F.2d 15 (1st Cir. 1978).

We begin our discussion of this aspect of the case by noting that a solicitation of grievances is not an unusual occurrence during a union organizing drive. "[A]n organizational drive often comes as a rude shock to an employer, and a simple offer to hear any complaints the employees may have, or to set up machinery to that end, is a natural and non-coercive response." *NLRB v. Rollins Telecasting, Inc.,* 494 F.2d 80, 83 (2d Cir.), *cert. denied,* 419 U.S. 964, 95 S.Ct. 224, 42 L.Ed.2d 178 (1974), *quoted with approval in NLRB v. Eagle Material Handling, Inc.,* 558 F.2d 160 (3d Cir. 1977). For this reason, a "solicitation of grievances is not in and of itself an unfair labor practice." *Hedstrom Co. v. NLRB,* 558 F.2d 1137, 1142 n.12 (3d Cir. 1977) (*Hedstrom I*). "To listen to suggestions does not in and of itself imply that the suggestion will be acted on * * * ." *Visador Co.,* 245 N.L.R.B. No. 71, slip op. at 3 (Sept. 27, 1979).

The Board relied on the testimony of three witnesses, as well as several bits of Katz' own testimony, in finding the solicitation and promise in the instant case. Those witnesses testified that Katz had said he "hoped" to settle disputes and that employees should "try" to resolve their differences with him directly. Such expressions, however, are no more than are reasonably inferred from any *solicita-*

tion of grievances. Indeed, Katz' remarks are less promissory than those of the employer in *Visador,* a case decided just on day after the case at bar, in which the Board declined to find an implied promise to remedy grievances. In *Visador,* the employer stood before the employees and announced: "Whatever problems we've got, we don't need a union to solve them. If you work with me I promise to be fair and to listen to suggestions for improving our plant." 245 N.L.R.B No. 71, slip op. at 3.

A solicitation of grievances becomes an unfair labor practice only when it is accompanied by either an implied or express promise that the grievances will be remedied. *Hedstrom II,* 629 F.2d at 314. This type of conduct is coerive because it lulls employees into believing that they can ob-

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tain the benefits being promised by the union without the union's aid. *Tower Enterprises, Inc., d/b/a Tower Records,* 182 N.L.R.B. 382, 387 (1970). However, that policy demands that an actual promise to remedy be found. In the case at bar, we can find only a willingess to listen and to consider. That is not sufficient to constitute a section 8(a)(1) violation.

This record will not support a finding that Katz made specific promises to remedy grievances, for it does not appear that any complaints were actually tendered. We do not believe that a general, implied promise that complanits will be considered is sufficient to support a finding of a section 8(a)(1) violation. In every case to which this court is cited in support of the Board's finding in this case, the solicitation of grievances was effective and the employer was found to have responded with a promise. *See NLRB v. Eagle Material Handing, Inc.,* 558 F.2d 160, 162, (3rd Cir. 1977) (employer responded to worker complaints about pay by promising package that would be "Cadillac of the industry"); *Landis Tool Co., Division of Litton Industries, v. NLRB,* 460 F.2d 23, 24 (3d Cir. 1972) (employees complained to employer who claimed they "could of [*sic*] worked this all out "without a union); *Reliance Electric, Madison Plant Mechanical Drivers Division,* 191 N.L.R.B. 44 (1971), *enforced,* 457 F.2d 503 (6th Cir. 1972) (series of 10–15 meetings of employees with management officials at which "gripes" were aired.). *See also Hedstrom II,* 629 F.2d at 314 (employer "promised that [subject matter of grievance] would 'be handled differently' by the company's new personnel.' "). Thus, we do not find the Board's conclusion on this matter to be supported by substantial evidence. We agree with the ALJ that "[Katz] told [the employees] he hoped they could resolve their problems together. But such does not amount to unlawful solicitation of greivances."

For the reasons stated above, we conclude that only the Board's findings with respect to promised grants of benefits are supported by substantial evidence on the record as a whole. It remains to determine whether these two violations justify the Board's issuance of a bargaining order in theis case and our enforcement of it.

IV.

All modern-day bargaining orders trace their roots to the landmark case of *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in which the Supreme Court laid down the ground rules under which the Board could force employers to bargain with unions that had not won representation election. *Gissel* treated three types of situtations: (1) " 'exceptional' case marked by 'outrageous' and 'pervasive' unfair labor practices"; (2) "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes"; and (3) "minor or less extensive unfair labor practices which [have only a] minimal impact on the election machinery." 395 U.S. at 613–15, 89 S.Ct. at 1939–1940. In the first situation, the Board is authorized to issue a so-called *Gissel I* order, which orders recognition and bargaining with a union although it has never demonstrated majority strength through authorization cards of otherwise. *United Dairy Farmers Cooperative Association v. NLRB,* 633 F.2d 1054 (1980). In the second situation, the Board may issue a *Gissel II* order, requiring the employer to bargain with a union that has demonstrated majority strength prior to the commission of the unfair labor practices the order is meant to remedy. *Rapid Manufacturing Co. v. NLRB,* 612 F.2d 144, 148 (3d Cir. 1979). It is clear that it is a *Gissel II* order that we are asked to enforce in this case.

The subject of *Gissel II* remedies was recently discussed by this court in *Hedstrom Co. v. NLRB,* 629 F.2d 305 (3d Cir. 1980) (en banc).[3] In *Hedstrom* the Board found that the employer had committed in excess of 40 unfair labor practices, that it had "unlawfully interrogated employees, solicited employee grievances, promised and granted benefits to employees, and threatened employees with discharge, plant closure, reduced benefits, and more onerous work rules." *Id.* at 307. The Board's order was enforced because the case had "all of the elements that * * * are common to those cases in which we have enforced orders to bargain." *Id.* at 312. We also noted that the Company had committed additional violations since we had heard an earlier appeal and that the order was especially appropriate in light of the employer's history of union opposition, demonstrating a propensity to commit unlawful acts.

In *NLRB v. Garry Manufacturing Co.*, 630 F.2d 934 (3d Cir. 1980), this court enforced another bargaining order issued by the Board. In *Garry*, the Board had found that the employer had committed serious unfair labor practices in distributing leaflets that tended to imply a loss of job security and plant closings if the union were elected. Also, the employer had: solicited and expressly promised to remedy employee grievances (to the extent that he had installed a bedside "hotline" when he was ill); removed currently utilized machinery from the plant in an effort to convince employees that he could, and would, move his operations elsewhere; promised employees wage increases if the union were defeated; discriminated against union supporters in disciplinary procedures; and obstructed the Board's investigation of the unfair labor practice charges. Finally, the employer scheduled a family outing for employees at an amusement park for the same day as the union's last organizational meeting before the election.

Obviously, the unfair labor practices in the instant case cannot compare with the numerous and grave violations found to have occurred in *Hedstrom* and *Garry*. Even were we to have upheld *all* the Board's findings, this case at its worst would bear only the resemblance to the other two that "slo-pitch" bears to "hardball." To state the lack of comparability between the cases, however, is to demonstrate that precedents are useful only as very rough guides; the determination is essentially one of fact. It is for this reason that we require the Board to specify the reasoning and findings underlying its issuance of a bargaining order. *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 244–45 (3d Cir. 1976). To discover whether the Board was reasonable in its evaluation of the facts of the case is the only task before us.

The ALJ termed the violations he found in this case "minimal." The Board disagreed, calling those acts "serious" and concluding that their occurrence "precludes the holding of a fair election." The Board appears to have grounded its decision that a bargaining order was necessary primarily on its findings that there had been promises of benefits in exchange for the union's defeat, findings which we have upheld. The Board quoted at length from a "promised benefits" case, *Honolulu Sporting Goods Co., Ltd., a subsidiary of Zale Corp.*, 239 N.L.R.B. No. 173 (1979), which taught that "[a]n employer may have the right to persuade the employees that representation is not in their best interest, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against

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[3] The dissent suggests that at least a significant minority of the members of this court believe that the Supreme Court in *Gissel* erred in interpreting the National Labor Relations Act to permit bargaining orders as a remedy for unfair labor practices committed during an organizing campaign. (Dissenting op., typescript, p. 21.) The author of this opinion respectfully disagrees with such a suggestion. He believes that the minority neither doubts the primacy of the Superme Court in interpreting in *Gissel* that the Act permits bargaining orders in appropriate cases. Rather, opposition to the enforcement of a bargaining order stems from the Board's disregard of the delineations of *Gissel* and from the Board's imposition of bargaining orders when unfair labor practices, regardless of their insignificance, occur during an organizing campaign. Contrary to the dissent's suggestion, members of the minority have not consistently voted against enforcement of bargaining orders regardless of the circumstances. In fact, the opinion of the court in *NLRB v. Eagles Material Handling, Inc.*, 558 F.2d 160 (3d Cir. 1977), which enforced the Board's imposition of a bargaining order, was written by the author of this opinion. Further, he did not object to the decisions of this court in *NLRB v. Daybreak Lodge Nursing & Convalescent Home, Inc.*, 585 F.2d 79 (3d Cir. 1978), and *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d 55 (3d Cir. 1978), enforcing bargaining orders. Each of these cases, however, contained substantial evidence of serious violations supporting the Board's determination that "the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by traditional remedies" was slight. In this case, and too often in others the Board has looked upon a bargaining order as a convenient remedy for minor violations when traditional remedies could be equally as effective and still preserve for employees their statutory right to select their exclusive bargaining agent by a democratic process in an open election. When this has occurred, there has been an unwillingness by some members of the court to enforce the bargaining order award.

choosing a representative. When, as here, an employer does so, free choice in a subsequent election becomes a matter of speculation.* * * ." Here, the Board also found that K & K's actions were "designed to impress upon the employees the fact that they did not need a union to obtain satisfaction of their demands." The employer's conduct, the Board found, was such as "to undermine the Union's majority status" and "a bargaining order [was] necessary and appropriate to protect the majority sentiment expressed through authorization cards." With these talismanic words, *Gissel II* was invoked and, in the Board's mind, satisfied.

The selection of an exclusive collective bargaining agent is not a game of chance but a matter of the highest importance to employees and employers alike. Legislation and experience indicate that an employee's statutory right to select an exclusive bargaining agent should be determined by democratic process in a free and open election. The Board's responsibility for holding such elections was not meant to be supplanted by the authority found to exist in *Gissel.* Only in exceptional circumstances, where it is obvious that the extensive machinery and power of the NLRB is inadequate to ensure a free election, should employees be denied their right to cast a secret ballot for or against an exclusive bargaining agent.[4] In this case, the Board indulges in the grossest kind of speculation to invoke *Gissel II.* The Supreme Court plainly stated that, before a *Gissel II* order should issue, the Board must make a determination that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614–15, 89 S.Ct. at 1940. This is a determination of actual fact on the evidence received in each case. No room is left for automatic formulae under which, for example, one threat, two coerced interrogations and a promise of a wage increase will result in an order while another combination will not. The bargaining order is an extraordinary remedy and, because it operates to disenfranchise the workers in the choice of their representative, it is appropriate only when the harmful effects of that disenfranchisement are outweighed by the positive advancement of the policies underlying federal labor law. We agree with the ALJ and do not believe the Board has struck the appropriate balance in this case.

The record demonstrates that K & K's employees were not much impressed by Arthur Katz' speech on October 30. At a meeting that night, they collectively decided that his representations were not to be believed. They struck. Such are not the actions of cowering and coerced workers. Since the only unfair labor practices which we find to have occurred were promises by Weiler and Katz that certain benefits would be granted in exchange for the Union's defeat, and the employees did not believe those promises, we fail to perceive why the effects of those practices cannot be "erased * * * by the use of traditional remedies." Indeed, it appears to us that the effects of the unfair labor practices were easily and speedily erased by the evening of October 30, without any remedial action by the Board. We conclude that there was no basis in fact for the Board's determination that the extreme remedy of a bargaining order was necessary under these circumstances.

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[4] The dissent submits that against the concern for employers and employees subject to bargaining orders must be weighed "the strong federal policy in favor of the formation of collective bargaining relationships." (Dissenting op., p. 474.) On the contrary, we believe that the federal policy with respect to the formation of collective bargaining relationships is neutral. We view the trust of federal policy as the protection "of the right of employees to organize and bargain collectively" when they are so inclined. See 29 U.S.C § 151 (1976). *See also* 29 U.S.C. § 157 (1976). Therefore, Congress in its declaration of national policy encouraging collective bargaining has also stated its policy in "protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. Freedom of association and free selection of a bargaining agent, however, may be substantially diminished by dependence on authorization cards.

Cards have inherent uncertainties and risks attached to them. Even when the language is clear and unambiguous, the union solicitor may inform the signer that the card will be used only to obtain an election or merely to show interest in an election and that the language above the signature should be disregarded. *NLRB v. Boyer Bros., Inc.,* 448 F.2d 555 (3d Cir. 1971). It may be accompanied by representations that it is not a final designation until there is an election. *See Amalgamated Clothing Workers v. NLRB,* 365 F.2d 898, 906–08 (D.C. Cir.1966). There may also be misrepresentations, e.g., that a majority of the employees have signed authorization cards when in fact they have not. *See NLRB v. Savair Mfg. Co.,* 414 U.S. 270, 277, 94 S.Ct. 495, 498, 38 L.Ed.2d 495 (1973). The solicitations may also be attended by coercion or threats of reprisals and the employee's signature may not be the free and informed decision made in the privacy of a voting booth. *See Texaco, Inc. v. NLRB,* 436 F.2d 520, 524 (7th Cir. 1971). The Court in *Gissel* recognized that cards are "admittedly inferior to the election process," although they may perhaps be the only way of assuring employee choice when the employer engages in conduct disruptive of the election process. 395 U.S. at 602–03, 89 S.Ct. at 1934. As we note in the text, there is nothing in the record here to indicate that the Board could not conduct a fair election at the K & K plant.

The Board's application for enforcement of its order requiring (a) K & K to cease and desist from promising employees benefits to discourage them from engaging in activities on behalf of the Union or any other labor organization; (b) that the Company refrain from in any like or related manner interfering with or restraining employees in the exercise of the rights guaranteed them by section 7 of the Act; and (c) that the Company post appropriate notices, will be enforced. In all other respects, emforcement of the order will be denied.

Each side to bear its own costs.

Gibbons, Circuit Judge, dissenting: It is no secret that at least a significant minority of the members of this court believe that the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), erred in interpreting the National Labor Relations Act to permit the National Labor Relations Board to enter a bargaining order as a remedy for unfair labor practices committed in the course of an organization campaign. Nor is it any secret that those judges who are uncomfortable with the *Gissel* construction of the statute have been signalling the Board vigorously that bargaining orders are unwelcome in this circuit. *See, e.g., NLRB v. Armcor Industries, Inc.*, 535 F.2d 239 (3d Cir. 1976); *Hedstrom Co. v. NLRB, (Hedstrom I);* 558 F.2d 1137, 1148 (3d Cir. 1977) (*Hedstrom I); NLRB v. Craw*, 565 F.2d 1267 (3d Cir. 1977); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 946 (3d Cir. 1980) (Weis, J., dissenting); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 319 (3d Cir. 1980) (en banc) (Rosenn, J., dissenting); *NLRB v. Permanent Label Corp.*, No. 80-1617 (3d Cir., filed Jan. 8, 1981). At the same time the Board is receiving from a different group of judges on this court a quite different signal. *See, e.g., NLRB v. Armcor Industries, Inc.*, 535 F.2d at 246 (Gibbons, J., dissenting); *Kenworth Trucks of Philadelphia v. NLRB*, 580 F.2d 55 (3d Cir. 1978); *NLRB v. Daybreak Lodge Nursing and Convalescent Home*, 585 F.2d 79 (3d Cir. 1978); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (opinion of the court); *Hedstrom Co. v. NLRB*, 629 F.2d 305 (opinion of the court); *NLRB v. Permanent Label Corp.*, No. 80-1617, slip op. at 28 (Seitz, C.J., dissenting). Those different signals are that we acknowledge the primacy of the Supreme Court in interpreting the Act, at least until Congress speaks, that we acknowledge the primacy of the Board's role as a fact finder, and that if the Board decides to enter a *Gissel* order we will be satisfied with a statement of reasons reasonably identifying for us the basis, among several permissible bases, for choosing that remedy.

Until this case the guerilla warfare against *Gissel* orders has been carried out by insisting that the Board's opinion writing is so opaque that we cannot understand it, and remanding. *See NLRB v. Permanent Label Corp.*, No. 80-1617, slip op. at 28 (Seitz, C.J., dissenting). With the present majority a new weapon is resorted to. The majority simply substitutes its fact finding for that of the Board. Perhaps the new tactic reflects a conclusion that finally the Board has devised a formula for stating its reasons satisfactorily. I hope so. The Board's statement follows:

> Respondent's unfair labor practices are serious in nature, and began on the day the Union demanded recognition. Its entire course of conduct, which included a promise of a wage increase, promises of better benefits, and solicitation of and a promise to remedy grievances, was designed to impress upon the employees the fact that they did not need a union to obtain satisfaction of their demands.[5]
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> Under the principles set forth in *N.L.R.B. v. Gissel Packing Company, Inc.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), a bargaining order is appropriate where a union's majority is established by cards and the nature and extent of the employer's unfair labor practices render unlikely a free choice by the employees in our election. As previously set forth, Respondent's unfair labor practices were clearly designed to undermine the Union's majority status. Here, the promises of a wage increase, increased benefits, and new approaches to resolve employee grievances, coupled with the threat that the organizational campaign would be futile, result in giving the employees much if not all of what they were seeking through union representation.

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[5] *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974).

> In *Honolulu Sporting Goods Co., Ltd. a subsidiary of Zale Corporation,* 239 NLRB No. 173 (1979), the Board quoted with approval the following statement from *Tower Enterprises, Inc., d/b/a Tower Records,* 182 NLRB 382, 387 (1970), which is directly applicable:
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>> It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed. An employer may have the right to persuade the employees that representation is not in their best interests, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against choosing a representative. When, as here, an employer does so, free choice in a subsequent election becomes a matter of speculation, so long as the effects of the interference remain unremedied.
>
> Accordingly, we find that a bargaining order is necessary and appropriate to protect the majority sentiment expressed through authorization cards and otherwise to remedy the violations committed.[6]
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> [6] *Honolulu Sporting Goods Co., Ltd., supra.* See also *Crago Gear & Machine Works,* 236 NLRB No. 65 (1978); *National Care & Convalescent Industries, Inc. d/b/a Elmwood Nursing Home,* 238 NLRB No. 40 (1978).

For me this statement of reasons is adequate.

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Turning to the factual bases for the Board's findings of unfair labor practices, I can do no better than to quote them:

> We agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of Act by interrogating an employee concerning employee interest in and activity on behalf of the Union, promising employees a wage increase and health insurance and profit-sharing benefits to discourage their interest in or activity on behalf of the Union, and threatening an employee that the employees' activity on behalf of the Union would be futile.[3]
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> [3] The Administrative Law Judge further found that Respondent did not violate Sec. 8(a)(1) of the Act by changing its method of calculating gross pay for income and social security tax purposes or by assignments of allegedly more arduous work. No exceptions were taken to these findings.
>
> The Administrative Law Judge recommended dismissal of the complaint allegation that Respondent violated Section 8(a)(1) of the Act when President Katz, in a meeting with the employees the week following the Union's demand for recognition, solicited and impliedly promised to remedy employee grievances. We find merit to the General Counsel's exception to this recommendation.
>
> In concluding that there was no solicitation of grievances, the Administrative Law Judge apparently ignored the uncontroverted testimony of three employees, Ann Anderson, Nancy Green, and Evelyn Wirhgt [sic], that Katz stated at the meeting that he wanted the employees to bring their problems to him. Thus, Anderson testified that "Katz said he hoped to settle our disputes among ourselves" and "to try to resolve our problems with him to come to him and get this settled that way." Similarly, Green testified that "Katz said he didn't realize all our problems we had, or were having, and he felt we could handle this problem between us," and Wright testified that "Katz said he hoped he could work with us better in the future, and he told us that he hoped he could settle things, without an outside organization." Indeed, Katz testified himself, on direct examination, that he said that he wanted the employees to deal directly with him and "I also told them that in the past, I probably haven't heard them out * * *. I mean just haven't been around enough to hear what's happened, or what should be happening." On cross-examination, he admitted that he told the employees that they could work out their problems better without a third party and that they should bring their problems to him so that they could try to do so.
>
> The Administrative Law Judge did not make any factual findings based on the testimony of these witnesses as to this issue, but the testimony of all four is consistent and mutually corroborative. In addition, Katz' concession that he told the employees to bring their problems to him is clearly an admission against interest. Based on this testimony,[4] we find that Katz solicited employee grievances and in so doing impliedly promised to remedy them. *Reliance Electric Company, Madison Plant Mechanical Drives Division,* 191 NLRB 44, 46 (1971).
>
> [4] It is well settled that the Board has the power to make findings of fact based on the uncontradicted testimony of witnesses whose testimony has been neither credited nor discredited by an administrative

law judge. See *Retail Clerks International Association, AFL–CIO, Local 219 (National Food Stores, Inc.)*, 134 NLRB 1680, 1683 (1961).

In making this finding, and in adopting the Administrative Law Judge's findings that Katz and Supervisor Barbara Weiler unlawfully promised employees improved benefits to dissuade them from their union activity, we find no merit to Respondent's contention that Weiler and Katz rebutted any inference of promises by stating in their conversations with employees that they could not make such promises. The Administrative Law Judge made no finding regarding Weiler's testimony that she stated in her telephone calls to two employees, in which **473** she was found to have made promises of increased wages and improved benefits, that Katz could make no promises. Nor did the Administrative Law Judge make any finding either on Katz' testimony on direct examination that during his October 30 speech to the employees he had told the employees he could make no promises, or on Katz' concession on cross-examination that he did not explain to the employees his instructions from his attorney not to make promises. We find it irrelevant in the circumstances of this case whether Weiler or Katz denied the ability to make promises, for as stated in *Michigan Products, Inc*, 236 NLRB No. 147, ALJD, sl. op., p. 6 (1978): "It is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." See also *Montgomery Ward & Co., Incorporated*, 228 NLRB 750, 757 (1977).

Thus, we have found that Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning union activities; threatening employees that the Union's organizational campaign would be futile; promising to increase wages and benefits; and soliciting employee grievances. However, contrary to the Administrative Law Judge, we find that Respondent's unlawful conduct precludes the holding of a fair election, and warrants the issuance of a bargaining order.

The Union demanded recognition on October 24, 1978. That afternoon, Respondent interrogated a union proponent, and threatened that the organizational campaign would be blocked. True to its word, Respondent announced several days later that it would grant the employees a substantial wage increase. Then, on October 30, Respondent announced that it had been considering a medical insurance plan and a profit-sharing plan. Furthermore, during the October 30 meeting, Respondent's president told the employees that he hoped to settle the problems "without an outside organization." As previously set forth, we find that, by this latter conduct, Respondent violated Section 8(a)(1) by soliciting and impliedly promising to remedy employee grievances.

A comparison of the well written majority opinion with that of the Board discloses that the majority, looking at the same record evidence, has chosen to draw inferences from that evidence different from those the Board drew. Our scope of review under the National Labor Relations Act does not permit such action. *See* 29 U.S.C. § 160(e) (1976); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *Tri-State Truck Service, Inc. v. NLRB*, 616 F.2d 65, 72 (3d Cir. 1980) (Gibbons, J., dissenting).

Conscientious Board members reading our opinions from *Armcor Industries* in 1976 to *Permanent Label* in 1981 must be puzzled about what they should attempt to do in a *Gissel* bargaining order case to satisfy us. The answer to their puzzlement, I fear, is that for the judges uncomfortable with the *Gissel* interpretation of the statute nothing the Board does will be likely to appear satisfactory. I do not mean to suggest that discomfort over *Gissel* orders is an unreasonable judicial posture. We are all well aware that in recent years labor unions have been winning far fewer contested elections than heretofore. A *Gissel* order insulates a union from the hazards of an election, and arguably tilts the scale too far in the union's favor. But the Supreme Court interpreted the Act in the *Gissel* cases to give the Board that authority, and Congress has not chosen to react. If I were a congressman requested to vote on overruling *Gissel*, I am not sure how I would vote. The opponents of *Gissel* orders point out that they tend to undermine secret balloting in the choice of bargaining representatives. On the other hand, the keystone in the arch of federal labor policy is collective bargaining, which cannot take place until a bargaining representative has been recog-

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nized A card majority is a legitimate means for such recognition. *NLRB v. Atlas Lumber Company,* 611 F.2d 26 (3d Cir. 1979); *Eisenberg v. Hartz Mountain Corp.,* 519 F.2d 138, 143 (3d Cir. 1975); *Suburban Transit Corp. v. NLRB,* 499 F.2d 78, 82–83, 85–86 (3d Cir.), *cert. denied,* 419 U.S. 1089, 95 S.Ct. 681, 42 L.Ed.2d 682 (1974); *NLRB v. Air Master Corp.,* 339 F.2d 553, 556–57 (3d Cir. 1964). If on the basis of a card majority a collective bargaining agreement resulted, we would not be overly concerned about the undermining of secret balloting in the choice of bargaining representatives. Thus one has to take at somewhat less than face value the oft-repeated concern that *Gissel* orders are inimical to the interests of employees. The real concern is for employers, but against that concern must be weighed the strong federal policy in favor of the formation of collective bargaining relationships. *See* 29 U.S.C. § 151 (1976).[1] From that perspective *Gissel* orders do not look quite so threatening. In any event, it is not the role of an intermediate appellate court to substitute its balancing of the competing policies for that of the legislature, in the guise of requiring statements of reasons or of substituting its factual inferences for those made by the Board.

I would enforce the Board's order.

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[1] As stated by Congress in 1935:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

29 U.S.C. § 151 (1976)

Amcar Division, ACF Industries Incorporated v. NLRB

641 F.2d 561 (8th Cir.), February 9, 1981—247 NLRB 1056

On petition to review Board Order

Before STEPHENSON and HENLEY, Circuit Judges, and HUNTER,* District Judge

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STEPHENSON, Circuit Judge: Amcar Division ACF Industries, Inc. (Amcar) petitions for review of a final decision and order of the National Labor Relations Board.[1] The Board, in reversing the decision of the administrative law judge, found Amcar to have committed unfair labor practices under section 8(a)(1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(1) and (3). The NLRB has filed a cross-application for enforcement of its order. The Board found that Amcar committed the unfair practice when it (1) warned employees that they would be charged with unexcused absences if they engaged in a "sympathy strike" by not crossing another union's picket line at the Amcar plant, and (2) subsequently used absences occurring during the period the picket line was maintained in disciplining employees. Because we conclude the Union[2] had waived its employees' right to engage in such a sympathy strike, we deny enforcement of the Board's order.

I. FACTS[3]

Amcar is engaged in the manufacture and sale of railroad freight cars and related products at its facility in St. Louis, Missouri. Two collective bargaining units exist at the Amcar plant, a large "production and maintenance" (P & M) unit consisting of approximately fourteen hundred (1400) employees, and a small maintenance electrician unit consisting of approximately thirty-five employees. The latter were represented by the International Brotherhood of Electrical Workers, Local 1, AFL-CIO (Local 1), while the P & M unit is represented by five jointly certified unions (Union).[4]

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*The Honorable Elmo B. Hunter, sitting by designation on this panel, is now Chief Judge of the United States District Court for the Western District of Missouri.

[1] *Amcar Division, ACF Industries, Inc.,* 247 N.L.R.B. No. 138 (1980) (2–1 decision) (Truesdale, Member, dissenting). Member Truesdale dissented on grounds that there was a waiver of right to engage in a sympathy strike under section 7 for the reasons stated by the administrative law judge.

[2] *See* note 4 *infra.*

[3] Our recitation of the facts is primarily based on the joint stipulation of the parties before the Board and the largely undisputed summary of the facts made by the ALJ.

[4] Brotherhood of Railway Carmen of the United States and Canada, Lodge No. 365, AFL–CIO–CLC; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No.

Continued

A. *The 1978 Labor Dispute*

On October 20, 1978, the maintenance-electrician employees represented by Local 1 established a picket line at the Amcar plant in support of its demands for a new collective bargaining agreement, the former agreement expiring at midnight on October 19, 1978. The picket line was maintained from October 20, 1978 through November 14, 1978.

On October 19, 1978, in anticipation of the strike and picket line by Local 1, Robert Allen, Amcar Director of Labor Relations, proposed to James Johnson, the business agent for the Carmen and the Union's chief negotiator for the 1978 contract negotiations, that Amcar and the Union give the following as a joint notice to the plant P & M unit employees:

> NOTICE
>
> TO: ALL ST. LOUIS PLANT EMPLOYEES
>
> The collective bargaining unit agreement between the Company and the I.B.E.W. covering the maintenance electricians terminates tonight at twelve midnight. At this time a new agreement has not yet been reached. The parties are still meeting. However, if an agreement is not reached the I.B.E.W. may post pickets at the plant after twelve midnight tonight.
>
> Nevertheless all employees other than those maintenance electricians affected are expected to report to their jobs as scheduled. All other employees have an agreement in effect which contains a no-strike clause. Any employee who refuses to report to his job may be considered to be in violation of the no-strike clause and will be counted as absent.

What followed is largely undisputed and well-summarized in the findings of the administrative law judge:

> Johnson said that he agreed that the production and maintenance employees should cross the picket line, but that he would not sign the notice unless he heard from the Union's counsel, although he (Johnson) thought the notice was accurate. Allen then took it upon himself to contact the Union's counsel who stated that he also thought that the production and maintenance employees should cross the picket line, but that he would not advise the Union either way on whether they should sign the notice. Allen next tried to contact Johnson again, but was unable to do so before the end of the first shift at the plant, i.e., the latest time by which notice could be given to the first shift employees prior to the strike. The Company then proceeded to unilaterally distribute the above notice to all of the plant employees, over the signature of plant manager W.D. Harrison. The next day, i.e. the first day of the strike, Allen sent a telegram to the Union in which he protested that the maintenance electrician employees were engaging in mass picketing which prevented some other employees from reporting to work. Allen restated the Company's position that the no-strike clause of their contract precluded the production and maintenance unit employees from honoring the picket line, and he demanded that the Union "take any and all steps reasonable and necessary to insure that the employees of the Company represented by said jointly certified unions report for and perform work at the Company's premises, and that said Article VIII not be violated." That same day (October 20) business agent Johnson told Allen that as far as he was concerned, the employees should cross the picket line.

None of the employees informed Amcar that they would be absent during the period because of the picketing, nor did they offer this as an excuse upon returning. Amcar stipulated that had such an excuse been offered it would have been rejected. It was stipulated that four employees have been discharged and twenty employees have been suspended for absenteeism, with one or more of the absences occurring during the period from October 20, 1978 to November 14, 1978. There were also others absent during that time who could be disciplined for absenteeism based in part on the absences during this period.

27, AFL-CIO; International Association of Machinists and Aerospace Workers, District No. 9, AFL-CIO; International Brotherhood of Firemen, Oilers and Maintenance Men, Local No. 6, AFL-CIO; and International Brotherhood of Electrical Workers, Local No. 1, AFL-CIO.

B. *The Collective Bargaining History*

Amcar and the Union have been parties to a series of collective bargaining contracts effective from 1969 to 1972, 1972 to 1975, 1975 to 1978, and the current contract executed in 1978, which was in effect at the time of the strike by Local 1. Since 1969, every collective bargaining agreement between Amcar and the Union has contained the following "no-strike" clause: "During the term of this Agreement there shall be no lock-out, strike, stoppage of work or slow down." Each contract has also contained a grievance procedure and binding arbitration for grievances. The 1978 contract, in effect at the time of the strike by Local 1, defined "grievance" as "any dispute or difference between the employees and the Company involving the meaning or application of the terms of this Agreement."

The collective bargaining history is explained by the detailed joint stipulation filed by the parties before the Board. We set out its discussion of this history in full:

"14. Following the negotiation of the 1969–1972 contract, picket lines were set up by IBEW Local 1 representing and on behalf of employees other than maintenance electrician employees and by Firemen and Oilers Local 6. These picket lines were set up by IBEW Local 1 and Firemen Local 6 in support of the contract demands of those unions. Employees of Respondent represented by the Brotherhood of Railway Carmen, Boilermakers Local 1012 and District No. 9, International Association of Machinists refused to cross the picket lines of IBEW Local 1 and Firemen Local 6 and report to work. By agreement dated June 18, 1969, with all of the unions * * * except Firemen Local 6, those unions agreed to direct the employees represented by them to cross the picket line of any union picketing the plant premises on or about June 19, 1969, and so directed those employees during the period June 19 to June 24, 1969, while there remained at the plant of Respondent the picket line established and maintained by Firemen and Oilers Local 6. On June 24, 1969, the picket line established and maintained by Firemen and Oilers Local 6 was taken down.

"The picket line set up by IBEW Local 1 and that set up by Firemen and Oilers Local 6 in 1969 were set up notwithstanding Respondent's position that a collective bargaining agreement had been entered into by the certified joint bargaining representative consisting of the five unions * * *. The picket lines of both unions were taken down with the agreement and understanding that as a matter of law and contract the said 5 unions comprise a single bargaining unit of production and maintenance employees (excluding maintenance electrician employees) for purposes of collective bargaining.

"15. In the contract negotiations for the 1972 agreement, the collective bargaining representative * * * presented two composite proposals on behalf of all 5 unions. The first such proposal, dated March 14, 1972, requested that the no-strike provision (Article VIII) be changed to provide that there would be no-strike 'until a grievance has been processed through the third written step' and, further, that the no-strike clause would not apply in the event of certain safety disputes. The second composite proposal, submitted to Respondent on March 27, 1972, repeated the foregoing sought for changes in the no-strike clause and further requested the addition of the following new article, to be numbered Article XXXIII:

> In the event that any Union having an Agreement with the Company shall establish a picket line with the authorization of the International of the Union legally representing the picketing employees, the employees of any other Union having an Agreement with the Company may refuse to cross said picket line without violating this Agreement.

"During the 1972 negotiations the Respondent asked the position of the joint representative with respect to the meaning and effect of the proposed new Article XXXIII. It was the position of the joint representative and each of the 5 unions making it up that should any of the 5 unions or any other union set up a picket line at Respondent's plant then employees represented by the 5 unions would be free to respect those picket lines and not come to work, notwithstanding the existence of a contract. It was the Respondent's position that this question of respecting a picket line notwithstanding the existence of a contract had been settled in the way described in paragraph 14 in 1969. The joint representative and respresentatives of the 5 unions composing it stated that the 1969 agreement was only good for 1969 and it was their position that their members had the

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right to respect the picket line of any union, regardless of a contract between the Respondent and the joint representative. On April 28, 1972, Respondent discontinued negotiations with the joint representative and refused to bargain further with the joint representative for the stated reason provided to the joint representative that the positions taken with respect to the picket line issue were contrary to the 1969 agreement. Unfair labor practice charges were filed by Respondent against the joint representative with regard to this asserted refusal to honor the 1969 agreement and unfair labor practice charges were filed by the joint representative against Respondent for breaking off negotiations. In an agreement between Counsel for Respondent and the joint representative, both unfair labor practice charges were withdrawn and the negotiations resumed, resulting in the 1972–1975 contract previously described, without change in the no-strike clause or the addition of Article XXXIII.

"16. In the contract negotiations in 1975, the joint representative proposed union demands under date of March 4, 1975. Including, at page 81, the addition of a new Article XXXIV stating as follows: 'It shall not be a violation of the Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to go through or work behind a picket line at the Plant.' In the discussions concerning the above-quoted proposal, Respondent inquired about the meaning and effect of the proposal and was informed that it was specifically directed to the picket lines of other unions than those comprising the joint representative, whether representing employees of Respondent or other employees. The aforesaid proposed addition to the contract (Article XXXIV) was not included in the 1975–1978 agreement.

"17. The 1975–1978 agreement went into effect on September 22, 1975. On that same date, IBEW Local 1 established a picket line at Respondent's plant on behalf of maintenance electrican employees and directed to supporting IBEW Local 1's contract demands for an agreement covering maintenance electricians. Some employees of Respondent represented by the joint representative did not report for work as scheduled and, although urged to report for work by the joint representative, continued to remain away from work, until the issuance of a temporary restraining order and order to show cause at 5 p.m. on September 22, 1975 in Cause No. 75-842C(1)."

The above Order was premised in part upon a finding that, "[t]he strike activity and attendant work stoppage sought to be enjoined by the instant proceeding derives from grievances which all parties are contractually obligated to resolve in accordance with the grievance and arbitration procedure set out in the collective bargaining agreement between Plaintiff and Defendant Local Unions." *ACF Industries, Inc. v. Brotherhood of Railway Carmen,* Civ.No. 75-842C, slip op. at 2 (E.D.Mo. September 22, 1975). The parties were ordered to submit the matter to arbitration and the employees represented by the union thereupon returned to work. The parties reached a settlement that the complaint would be dismissed and the temporary restraining order dissolved and that there would be no concerted walk out by P&M employees with respect to the 1975 dispute between Amcar and Local 1. The Union waived its right to arbitrate the issue of honoring the Local 1 picket line, but the agreement provided, "[t]his waiver shall not apply to any future Labor dispute between Plaintiff and Defendants."[5]

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The 1975 contract also included a new absentee and tardiness control program negotiated by Amcar and the Union in response to what both parties agreed was a serious attendance problem at the Amcar plant. Amcar was particularly concerned about high absenteeism on Fridays and Mondays. The Union favored a "mechanical" program which did not give Amcar discretion in excusing absences. This view prevailed. The agreement limited excused absences to funeral leave, jury service, service as a witness, or personal leave of absence with prior company approval. All other absences, without regard to reason, were classified as unexcused. Sinçe the implementation of the program, Amcar has not kept track of the reason for any absence.

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[5] The settlement stated in pertinent part:

3. The parties hereto agree that there shall be no concerted walk out or any other concerted activities by the employees in the Plaintiff's production and maintenance bargaining unit pertaining to the current labor dispute between Plaintiff and the employees in the Local 1, International Brotherhood of Electrical Workers electricians maintenance unit.

4. The Defendants herein waive their right to arbitrate the issue of their asserted right to honor the Local 1, International Brotherhood of Electrical Workers picket line. This waiver shall not apply to any future labor dispute between Plaintiff and Defendant.

The 1975 agreement provided for a graduated series of discipline for those who violated the no absentee provision of the contract. Those employees incurring five or more unexcused absences would receive "counseling" (oral warnings). The next three unexcused absences could also result in warnings, with the fourth resulting in suspension or discharge. Because the Union felt the employees were not "getting the message," the 1978 negotiations resulted in the imposition of a temporary one-week suspension prior to discharge being added to the program.

In 1976, the Absence Control Program with Amcar was subject to a contractual arbitration proceeding when the Union grieved the discharge of an employee who had been discharged for alleged excessive absenteeism. The Union contended absences for legitimate illness or injury are "excused" under the contract, and therefore discharge was not warranted under the circumstances. The arbitrator found no absences were excused under the program except those enumerated and to rule otherwise would be to add terms to the contract, which he as the arbitrator was prohibited from doing. The arbitrator ruled the discharge was for a just and proper cause, and no appeal was taken. The arbitrator's decision thus became the law of the contract. Although there was considerable discussion in the 1975 negotiations concerning what an excused absence might be, there was no discussion with regard to absenteeism due to sympathy strikes.

II. ANALYSIS

At the threshold it should be noted that neither party challenges the ALJ's decision that deferral to arbitration and grievance procedures was inappropriate in the instant case.

Section 7 of the Act generally protects employees who engage in sympathy strikes in support of a lawful, primary strike by another union. *See, e. g., W-I Canteen Service, Inc. v. NLRB,* 606 F.2d 738, 743 (7th Cir. 1979), and cases cited therein. Section 8(a)(1) provides that it is an unfair labor practice for an employer to interfere with section 7 rights. However, in the collective bargaining agreement, employees may waive their right to engage in sympathy strikes. *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 80–81, 73 S.Ct. 519, 524–25, 97 L.Ed. 832 (1953); *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326,* 624 F.2d 1182, 1185 (3d Cir. 1980) Where there is not an express waiver of this right, the evidence of the wavier must be "clear and unmistakable." *W-I Canteen Service, Inc. v. NLRB, supra,* 606 F.2d at 743. *See NLRB v. Gould, Inc.,* 638 F.2d 159 (10th Cir. 1980).[6]

In determining whether there has been a waiver of the right to engage in sympathy strikes, the collective bargaining agreement must be interpreted as a whole and in light of the law relating to it when made. *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 279, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956); *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, supra,* 624 F.2d at 1184; *W-I Canteen Service Inc. v. NLRB, supra,* 606 F.2d at 745. The collective bargaining agreement in the instant case contains an express no-strike provision. There are a number of relevant facts to examine in determining whether the Union intended to waive its right to engage in sympathy strikes. We look to the language of the contract, the structure of the contract, the bargaining history, and any other relevant conduct of the parties that shows their understanding of the contract. *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326, supra,* 624 F.2d at 1185; *Iowa Beef Processors, Inc. v. Amalgamated Meat Cutters,* 597 F.2d 1138, 1144 (8th Cir. 1979), *cert denied,* 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1980). *See W-I Canteen Service, Inc. v. NLRB, supra,* 606 F.2d at 745; *NLRB v. Keller-Crescent Co.,* 538 F.2d 1291, 1296 (7th Cir. 1976), *enf'g.* 217 N.L.R.B. 685 (1975); *Montana-Dakota Utilities Co. v. NLRB,* 455 F.2d 1088, 1091–92 (8th Cir. 1972).

The contract's no-strike clause provides, "[d]uring the term of this Agreement there shall be no lock out, strike, stoppage of work or slow down." In our view, this is insufficient, in and of itself, to constitute a waiver of the right to engage in sympathy strikes. *See Mastro Plastics Corp. v. NLRB, supra,* 350 U.S. at 283–84, 76 S.Ct. at 358. However, a number of cases have interpreted general no-strike clauses to preclude sympathy strikes. *See W–I Canteen Service, Inc. v. NLRB, supra,* 606 F.2d at 745, and cases cited therein. The broad language of this no-strike clause, when examined in light of the bargaining history, the existence of the Absence Control Program, and the facts surrounding the parties' actions at issue here, indicate a clear waiver of the union's right to engage in a sympathy strike.

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[6] The Board has followed this analysis in all its recent cases and it is our view that it is the proper approach. *See, e. g., American Cyanamid Co.,* 246 N.L.R.B. No. 17, 102 LLRM 1443 (1979); *Daniel Construction Co.,* 239 N.L.R.B. 1335 (1979); *Local 18, Operating Engineers (Davis-McKee, Inc.),* 238 N.L.R.B. No. 58, 99 LRRM 1307 (1978); *Keller-Crescent Co.,* 217 N.L.R.B. 685 (1975), *enf. denied,* 538 F.2d 1291 (7th Cir. 1976); *Gary-Hobart Water Corp.,* 210 N.L.R.B. 742 (1974), *enf'd.* 511 F.2d 284 (7th Cir. 1975), *cert denied,* 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed.2d 252 (1976).

A. *Bargaining History of the No-Strike Clauses*

The no-strike clause has remained unchanged since its adoption in 1969, despite attempts by the Union to amend it. The signing of that contract in 1969, was followed by picketing on behalf of two of the five amalgamated unions. The dispute was caused by the view of the striking unions that they were not part of the single bargaining unit. The dispute was settled by an agreement recognizing the five jointly certified unions as a single unit of production and maintenance employees and the Union directed its members to cross the picket line of any union picketing the Amcar plant on or about June 19, 1969.

During the 1972 negotiations, the Union indicated that its agreement in 1969 to cross picket lines was effective only from 1969 through 1972. In 1972, the Union then sought to include a provision in the agreement giving it the right to refuse to cross lawful picket lines, which would have included the right to take part in sympathy strikes. Negotiations were broken off by Amcar who filed unfair labor practice charges, and the Union then filed similar charges for breaking off negotiations. A settlement was reached omitting the disputed provision from the agreement and retaining the same no-strike provision. While sympathy strikes were not the focal point of the 1972 negotiations, the right to engage in such activity was included in the proposal submitted by the Union. Prior Supreme Court and Board decisions have stated that an attempt by the Union to add such a provision is significant in inferring that the Union was waiving its right to engage in sympathy strikes. *NLRB v. Rockaway News Supply Co., Inc., supra,* 345 U.S. at 79–80, 73 S.Ct. at 524; *The Hearst Corp.,* 161 N.L.R.B. 1405, 1416 (1966), *enf'd sub. nom., News Union of Baltimore v. NLRB,* 393 F.2d 673 (D.C. Cir. 1968). *See Gary-Hobart Water Corp.,* 210 N.L.R.B. 742 (1974), *enf'd,* 511 F.2d 284 (7th Cir. 1975). *cert denied,* 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed.2d 252 (1976) (Board applied same analysis when it was employer who had unsuccessfully sought to insert provisions regarding sympathy strikes into agreement).

The Board contends that the action by the Union in 1972 should not have the same effect as it did in *Rockaway News* and *Hearst* because the attempt to amend was not contemporaneous with the origin of the no-strike provision. It argues another possible inference is that the Union was attempting to get in express writing that which it felt the contract already provided. Additionally the Board relies on *Local 18, Operating Engineers (Davis-McKee Inc.),* 238 N.L.R.B. 652 (1978), and *Keller-Crescent Co.,* 217 N.L.R.B. 685 (1975), for the proposition that the parties must discuss the issue of sympathy strikes before waiver can be found. In the instant case the parties were aware that the discussed proposal included sympathy strikes, although this was not the focus of the proposal.

The Board's interpretation becomes less tenable when considered in light of the negotiations for the 1975 contract. The Board's conclusion that "this was really the first direct proposal between the parties in the matter" is not correct. As previously stated, in 1972 the parties discussed the point that the deleted provision would have allowed the union to engage in strikes against any union, although sympathy strikes were not the central point to the negotiations. The Union's action in 1975—again making an express written proposal which would allow for sympathy strikes—together with the facts that the 1975 proposal was discussed by the parties, opposed by Amcar, and not included in the agreement, takes on added significance. It is much less likely the Union was still attempting to "clarify" the contract.

B. *The 1975 Sympathy Strike*

Other extrinsic evidence supports a conclusion that the Union waived its right to engage in sympathy strikes at the Amcar plant in the 1975 agreement. The P & M unit and Amcar reached agreement and their contract went into effect in September 1975. On the same date the agreement went into effect, Local 1 went on strike. These activities parallel the 1978 controversy. In 1975, some of the P & M unit employees respected the picket line, although *urged* to report by the Union's joint representative.

Amcar obtained a temporary restraining order, entered by the United States District Court for the Eastern District of Missouri. The Order directed the P & M unit to return to work and required the matter to be set for arbitration. The parties reached an agreement and did not arbitrate the dispute. The agreement provided, in relevant part, that P & M unit employees waived "the right to arbitrate the issue of their asserted right to honor the Local 1 * * * picket line." It was expressly provided this waiver did not apply to any future labor disputes between Amcar and the Union.[7]

Amcar argues that this episode clearly demonstrates the Union's belief that it had waived the right to engage in sympathy strikes, otherwise the joint representative would never have *urged* the P & M unit employees to cross the Local 1 picket line. The Board stated that there might be "other reasonable explanations" for this action by the Union, that the Union "may have believed that the maintenance electricians were capable of obtaining their contract demands through ecomonic pressure without the need for additional assistance from other union employees." There is no support in the record for such speculation, and it is unlikely that thirty-five Local 1 employees would not need the support of the large P & M unit. *See Acme Products, Inc. v. NLRB,* 389 F.2d 104, 106 (8th Cir. 1968).[8]

C. *The Absence Control Program*

A clear indication that the Union had waived its right to engage in sympathy strikes is further evidenced by the presence of the Absence Control Program in the 1975 collective bargaining agreement. This is a mechanical program excusing absences in only four enumerated situations,[9] and making no reference to sympathy strikes or picket lines. The parties arbitrated the meaning of the program in 1976, and the arbitrator ruled that these four reasons were the only excuses provided for and any other excuses could be achieved only by amendment. The Union did not grieve the arbitrator's decision. In the 1978 negotiations, the Union did not attempt to include sympathy strikes as an exception to the "Absence Control Program," nor did they attempt to amend the no-strike clause in these negotiations to allow for sympathy strikes.

The Board argues the no-strike clause and the Absence Control Program were separately negotiated and the parties were not thinking of the issue of sympathy strikes when they negotiated the Absence Control Program and vice versa. In interpreting a collective bargaining agreement, however, we must construe the contract as a whole. *Mastro Plastics Corp. v. NLRB, supra,* 350 U.S. at 279, 76 S.Ct at 356. While it is possible that the Union made no connection between the two issues, the joint representatives are experienced negotiators and the more reasonable inference is that made by the ALJ, who stated that "the absentee program, as incorporated into the contract is inconsistent with an interpretation that the production and maintenance employees were free to cross the Union's picket lines at the plant without being counted absent."

D. *Action Surrounding the 1978 Strike*

Finally, a clear and convincing waiver is evidenced by the parties' actions in response to the picket line set up by Local 1 in 1978. The chief negotiator for the joint representative, James Johnson, told the company the notice given by Amcar "was accurate." Counsel for the joint representative, Charles Werner, said that the P & M unit employees should cross the picket line. The notice stated, *inter alia*, "[a]ny employee who refuses to report to his job may be considered to be in violation of the no-strike clause and will be considered as absent."

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[7] *See* note 5 and accompanying text *supra.* The Union's reservation of its right to arbitrate the agreement does not indicate that it believed it possessed the right to engage in sympathy strikes. The Union did not arbitrate at this time nor has it sought arbitration since. As noted by the ALJ, "if the Union adhered to the view that unit emmployees could honor maintenance electrician picket lines, then it is difficult to see why the Union would avoid the arbitration directed by the Court and choose instead to go through the same problem again at a future date."

[8] "The Board is entitled to draw reasonable infrences from the evidence but some substantial evidentiary basis must exist to support the inferences drawn. Inferences cannot be based purely on speculation." *Acme Products, Inc. v. NLRB,* 389 F.2d 104, 106 (8th Cir. 1968).

That court also made the following observation related to our standard of review. "[I]n resolving the crucial issue of whether the Board's determination is based upon substantial evidence on the record considered as a whole, the Trial examiner's findings which turn on credibility determinations with respect to witnesses whom he alone saw and heard, are entitled to considerable weight." *Id. See also Cartwright Hardware Co., Inc. V. NLRB,* 600 F.2d 268, 270 (10th Cir. 1979) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496, 71 S.Ct. 456, 468, 95 L.Ed. 456 (1951)).

[9] *See* page 11 *supra.*

We disagree with the Board's conclusion that this action was not significant. The Board argues that there was no evidence that Johnson and Werner had negotiated the original no-strike clause and therefore their opinions could not be attributed to the Union as a whole. Whether speaking as individuals or in their official capacities, however, the views of the people who have just negotiated the collective bargaining agreement then in effect is more important than what the original drafters of the 1969 no-strike clause may have intended. There is a strong inference of waiver considering that it is unlikely Union negotiators would lightly presume they had waived the right to engage in sympathy strikes. *See News Union of Baltimore v. NLRB*, *supra*, 393 F.2d at 678. As stated by the ALJ:

> If the Union believed that notwithstanding the no-strike clause, unit employees could honor the 1978 IBEW picket line without being charged with an unexcused
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> absence, then it may reasonably be inferred that the Union would have advised employees who wished to honor the picket line to notify the Company of the reason for their absence, in order to preserve the rights of the employees in an arbitration or litigation. However, the Union did not do this. * * * [T]he Union took no action in contradiction of [the notice]. The Union did not file any grievances in the matter, nor did it file or join in the present unfair labor practice charge. Instead, the Union's representative sat in silence at the rear of the hearing room, while Company official Allen testified concerning the Union's stated position.

E. *Amcar's Other Contentions*

Amcar also alleges that the Board's petition for enforcement should be denied for the reason that Amcar had no knowledge that any of its employees were engaged in sympathy strike activities. Our finding of waiver obviates the necessity of reaching this or other points alleged as error by Amcar.[10]

III. CONCLUSION

On the basis of the foregoing discussion, we conclude that the substantial evidence did not support the Board's conclusion in the instant case that the Union maintained its right to engage in sympathy strikes. While none of the evidence alone—the broad no-strike clause, the Absence Control Program, the evidence of the bargaining history, or the other evidence extrinsic to the contract—may clearly show a waiver, taken together we agree with the dissenting Board member and the ALJ that the evidence demonstrates an unmistakable waiver of the employees' right to engage in sympathy strikes. Amcar was therefore entitled to take disciplinary action in accordance with the Absence Control Program in the collective bargaining agreement.

The petition for enforcement of the Board's order is denied in its entirety.

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[10] We note that the dissenting member of the Board relied on the opinion of the ALJ only with regard to the waiver question.

NLRB v. H.M. Patterson & Son, Inc.

636 F.2d 1014 (5th Cir.), February 9, 1981—245 NLRB 1412

On petition to enforce Board Order

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges

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VANCE, Circuit Judge: This is a petition for the enforcement of an order of the National Labor Relations Board arising out of a finding by the Board that the respondent company had violated section 8(a)(5) and (1) of the National Labor Relations Act,[1] 29 U.S.C. § 158(a)(1) and (5), by refusing to bargain with the union certified by the Board. The company, H.M. Patterson & Son, Inc., a funeral home business with four mortuary facilities in Atlanta, Georgia, refused to bargain, arguing that the

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[1] 29 U.S.C. §§ 151 *et seq.* (hereinafter referred to as the Act).

Board's determination of the appropriate bargaining unit arbitrarily departs from established Board precedent that an all-employee unit is the only appropriate unit in the funeral home industry. Additionally, the company contends that the Board's decision that the four sons of a twenty percent shareholder were not eligible voters was erroneous.

H.M. Patterson & Son, Inc., founded in Atlanta in the last century, is a closed corporation, entirely owned by relatives of the late Fred W. Patterson, Jr. The business is managed exclusively by Brannon Lesesne, president and thirty percent shareholder, and Dan Allen, vice president, secretary and twenty percent shareholder.

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On June 6, 1978 General Teamsters Local Union No. 528 filed a representation petiton for an election in a unit consisting of licensed funeral directors, licensed embalmers and apprentice embalmers. The company opposed the union's petition on the ground that the unit sought by the union was inappropriate and that the appropriate unit should consist of all employees, including attendant-receptionists, office clericals, maids, porters, yard staff, drivers, maintenance men and organists. Following a hearing held on June 20 and 21, the regional director included attendants-receptionists in the unit,[2] concluding that all of these employees work together in the preparation of the body for final burial. The director rejected the company's contention that all the employees of the firm should be included in the bargaining unit. Although recognizing that there was some occasional, minor overlap of duties between the included and excluded employees, the director concluded that the unit sought by the union, as modified, shared a community of interest and was therefore an appropriate bargaining unit.

In a representation election held on August 3, 1978, there were eighteen ballots in favor of the union, fourteen against, and five were challenged; a number sufficient to affect the results of the election. The challenged ballots included those of the four sons of Dan Allen and the grandson of Brannon Lesesne. A hearing on the challenges was held on September 11. The evidence at the hearing, in addition to showing the family ownership of the firm, also disclosed that the four Allen sons had all been in college until June 19, 1978, with a major part of their expenses paid by their father. They lived at home with their parents until mid-July when they moved to a cabin owned by their father, for which they pay one hundred dollars monthly rent, including utilities. Based on this evidence, on September 27 the hearing officer issued his report, recommending that the four challenges to the Allen children be sustained, that the Lesense challenge be overruled, and that the union be certified. Thereafter, respondent filed exceptions and a supporting brief. The Board adopted the hearing officer's recommendations, without reaching the challenge to Lesesne, because the remaining challenge was no longer determinative of the election.

In reviewing the Board's determination of the appropriate bargaining unit, we note that "the Board is not by statute required to choose *the most* appropriate bargaining unit, only to select a unit appropriate under the circumstances," *NLRB v. Southern Metal Service, Inc.*, 606 F.2d 512, 514 (5th Cir. 1979) (citing *NLRB v. Bogart Sportswear Manufacturing Co.*, 485 F.2d 1203, 1206 (5th Cir. 1973)) (emphasis in original). Our standard for reviewing a Board determination of the collective bargaining unit is "exceedingly narrow." *NLRB v. Fidelity Maintenance & Construction Co.*, 425 F.2d 707, 709 (5th Cir. 1970). "Board unit determinations involve of necessity a large measure of informed discretion and should not be set aside unless the reviewing court finds that the Board has exercised its discretion in an arbitrary or capricious manner." *Spartan Industries v. NLRB*, 406 F.2d 1002, 1005 (5th Cir. 1969).

Applying this standard of review, the Board's determination of the bargaining unit does not justify denial of enforcement of the bargaining order. The employees found by the Board to share a "substantial community of interest" are all directly involved in working with the body of the deceased. The funeral directors and embalmers, along with the assistant funeral directors and registered apprentices, embalm and cosmetize the remains, dress them, and place them in a casket. The attendants-receptionists style the hair of fe-

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[2] The regional director determined that the appropriate unit for collective-bargaining purposes within the meaning of section 9(b) of the Act was "All full time and regular part time funeral directors, assistant funeral directors, embalmers, apprentices, and attendant receptionists employed by the Employer at its four Atlanta, Georgia mortuary facilities, but excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act."

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male remains and manicure their nails. Accordingly, they work together on a common task with which the other employees have little or no involvement. In this case the Board has selected a unit "appropriate under the circumstances." *NLRB v. Southern Metal Services,* 606 F.2d at 514.

The company argues that we are faced with an exception to the general rule of deference to the Board's decision, because the Board is not following its own precedents, contending that "[W]here the Board makes an unexplained departure from its established criteria for unit determination we should deny enforcement * * *." *NLRB v. WGOK, Inc.,* 384 F.2d 500, 503 (5th Cir. 1967). The company cites four prior Board cases involving funeral homes that it asserts establish that only an all-employee unit is appropriate. *Riverside Memorial Chapel, Inc.,* 226 N.L.R.B. 2 (1976); *W.W. Chambers Co.,* 124 N.L.R.B. 984 (1959); *D.W. Newcomer's Sons,* 117 N.L.R.B. 565 (1957); *Utter-McKinley Mortuaries,* 98 N.L.R.B. 450 (1952). These cases, however, do not establish a uniform rule. In *D.W. Newcomer's Sons* musicians were not included in the unit, and in *Riverside Memorial Chapel, Inc.* office clericals were excluded. In addition, in some of these cases job classifications were included in the unit absent disagreement among the parties.

The Board adopted the hearing officer's recommendation that the challenges to the four Allen sons be sustained. The hearing officer based his finding that the sons were ineligible to vote in the election on two independent grounds. First, he determined that the four sons were "employed by their parent and, as such, under Section 2(3) of the Act, are not employees of the Employer." [3] Alternatively, the hearing officer excluded them under section 9(b) of the Act for being more "closely aligned" with management than with their fellow employees.

In *Linn Gear Co. v. NLRB,* 608 F.2d 791 (9th Cir. 1979) the court reviewed the history of the relationship between sections 2(3) and 9(b) in adopting the standard to be applied by the Board in determining whether to include or exclude a blood related employee from a bargaining unit. The ninth circuit approved the following guidelines enunciated by the seventh circuit in *NLRB v. Caravelle Wood Products, Inc.,* 466 F.2d 675 (7th Cir. 1972):

> There are a number of factors the Board must consider under section 9(b): how high a percentage of stock the parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, whether the relative lives in the same household or is partially dependent on the shareholder.

466 F.2d at 679.[4] Additionally, the court in *Linn* added three other factors for consideration:

> (1) the activity, if any, of the employee in the Union (2) the total number of employees as against the number of blood related employees and (3) the overall ties and social activities of the family involved.

608 F.2d at 796.

Like the ninth circuit, we follow a "community of interest" test in determining the appropriateness of a bargaining unit. *Southern Metal Service, Inc.,* 606 F.2d at 513. We threfore join the seventh and ninth circuits in adopting the *Caravelle* and *Linn* standards, noting that not every factor on the list may be relevant in all cases, and that the list of factors is not exhaustive. Applying the *Caravelle* test, and recognizing the discretion Congress has given the Board, *NLRB v. Smith Alarm System,* 524 F.2d 983, 985 (5th Cir. 1975), we uphold the Board's determination on the voting challenges.

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A number of procedural issues are also raised by the company on appeal. One contention is that the Board improperly sustained a challenge to the Allen sons on a ground not specifically raised by the union at the time of the voting. The union challenged the ballots of the four sons on the basis of section 2(3) not section 9(b). The challenge was worded "son of an owner" or "of an Employer." Nonetheless, in view of the close relation historically between the two sections, and after having read the record of the hearing, we find no abuse of discretion on the part of the Board. We have examined defendant's other complaints, and find them to be without merit.

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[3] The hearing officer cited *Schrementi Brothers, Inc.,* 179 N.L.R.B. 853 (1969); *Foam Rubber City No. 2 of Florida, Inc.,* 167 N.L.R.B. 623 (1967) as analogous support for his finding.

[4] *See also NLRB v. Caravelle Wood Products, Inc.,* 504 F.2d 1181 (7th Cir. 1974) (court approved exclusion of six employees under an "expanded community of interest" test).

ENFORCED.

Truman Medical Center, Incorporated v. NLRB

641 F.2d 570 (8th Cir.), February 11, 1981—247 NLRB 396

On petition to review Board Order

Before LAY, Chief Judge, HENLEY, Circuit Judge, and HANSON, Senior District Judge*

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HANSON, Senior District Judge: This case is before the Court on the petition of Truman Medical Center, Inc. (TMC) for review of an order of the National Labor Relations Board, and on the Board's cross-application for enforcement of the same order. The Board found that TMC violated §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(5), by failing to abide by the union security provision of a collective bargaining agreement formerly in effect between TMC and the Service Employees International Union, Local No. 96 (Union). TMC admits that it violated the security provision; it denies, however, any violation of the Act, claiming that it is a political subdivision of the State of Missouri exempt from coverage under § 2(2) of the Act, 29 U.S.C. § 152(2).[1] The Board first

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rejected TMC's claim of exemption and assumed jurisdiction over it in a representation proceeding brought by the Union in early 1978, concluding that TMC "is neither a political subdivision nor a joint employer with one nor a provider of essential services to one and, since [it] otherwise meets the Board's jurisdictional standards, we find it will effectuate the purposes of the Act to assert jurisdiction herein." 239 NLRB 1067 (1978). This conclusion was reaffirmed in the subsequent unfair labor practices proceeding brought by the Union after TMC violated the security provision in order to gain judicial review of the Board's assumption of jurisdiction. 247 NLRB No. 58 (1980). Finding that it has " 'warrant in the record' and a reasonable basis in law," *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944), we affirm the Board's assumption of jurisdiction and enforce its order.

1. The Board has long considered an entity to be a political subdivision of a state within the meaning of § 2(2) only if it is (1) "created directly by the State, so as to constitute a department or administrative arm of the government," or is (2) "administered by individuals who are responsible to public officials or to the general public." *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604–05, 91 S.Ct. 1746, 1749, 29 L.Ed.2d 206 (1971) (*Hawkins County*); *cf. Mobile Steamship Assn.*, 8 NLRB 1297 (1938); *Natchez Trace Electric Power Assn.*, 193 NLRB 1098 (1971), *enf'd*, 476 F.2d 1042 (5th Cir. 1973). TMC satisfies neither of these tests as they have been applied by the Board and the courts.

A. TMC is a not-for-profit corporation organized under the general not-for-profit law of Missouri. *Compare Camden-Clark Memorial Hospital*, 221 NLRB 945 (1975) (hospital not incorporated or organized separately from the city). No special act of the state legislature or any public official was required to create it. *Compare Hawkins County, supra* (utility district organized under a special public law requiring findings by county judge that organization served the public convenience). It is true that TMC was organized in 1962 at the instance of the City of Kansas City, Missouri, to take over from the Kansas City Department of Health the operation of the Kansas City General Hospital; but this was done for the specific reason that the hospital needed more money than the City could provide, and operation of the hospital as a department of the City precluded the availability of federal funds and private grants. It is also true that TMC has assumed the statutory responsibilities of Kansas City and Jackson County, Missouri, for medical care of indigents; but this has been done pursuant to a series of contracts between City and County and TMC under which TMC operates the City and County hospitals, not pursuant to any statutory duty imposed on TMC itself. Since 1971 TMC has also operated as a teaching hospital under an affiliation agreement with the University of Missouri-Kansas City. TMC's contractual relations with exempt political subdivisions of Missouri do not transform TMC itself into a political subdivision of the State. *E. g., Herbert Harvey, Inc. v. NLRB,* 424 F.2d 770 (D.C.Cir. 1969). TMC's operations are not governed by state or local regulations applicable to government agencies. Its employees are not covered by any governmental merit system. It does not require City, County or State approval to borrow money, issue notes, or pledge its property as security for loans. It has no power to tax, no power to eminent domain, or any other sovereign power. There is no evidence in the record that its books and records are "public documents" under Missouri law, although they are subject to inspection by City and County pursuant to contract. *Compare, generally Hawkins County, supra.* The Board's finding that TMC was not created directly by the State so as to constitute a department or administrative arm of the government is amply supported by the record. It is not significantly undermined by evidence that TMC has been treated as a governmental agency by certain federal agencies for certain purposes.[2]

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] 2(2) provides in pertinent part:

> (2) The term "employer" * * * shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . .

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B. Nor is TMC administered by individuals who are responsible in the required sense to public officials or to the general public. Its governing body is a self-perpetuating board of directors, the majority of whom—31 out of 49—are neither appointed by nor subject to removal by public officials or the general public and have no official connection to Kansas City, Jackson County or the University of Missouri. *Compare Camden-Clark Memorial Hospital, supra* (all members of the hospital board of trustees subject to confirmation by city council); *Hawkins County, supra* (utility district's commissioners appointed by county judge and subject to removal under the general law applicable to removal of public officials). It is true that the remaining 18 directors are appointed by or associated with the City, County or University. But the directors determine policy by majority vote and the votes of the government directors are no more significant than the votes of the other directors. Decisions by the board are not subject to approval by any governmental body and are not communicated to City, County or University officials other than those on the board itself. The responsibility of the board of directors to City, County and University, while undoubtedly heavy, derives from the contractual relations between TMC and these political subdivisions, and is not the sort of direct personal accountability to public officials or to the general public required to support a claim of exemption under § 2(2). *Cf. NLRB v. Highview, Inc.,* 590 F.2d 174, *modified on other grounds,* 595 F.2d 339 (5th Cir. 1979); *NLRB v. Natchez Trace Electric Power Assn.,* 476 F.2d 1042 (5th Cir. 1973). Finally, while TMC's affiliation agreement with the University gives the University a veto power in the appointment of certain of TMC's top officials, this power has never been exercised, and the University does not possess the power to remove any of the officials once they have been appointed and has never sought to do so. *Cf. NLRB v. E. C. Atkins & Co.,* 331 U.S. 398, 67 S.Ct. 1265, 91 L.Ed. 1563 (1947) (military's right to veto hire of guards not sufficient to remove employer from Board's jurisdiction).

2. TMC's claim that it is a "joint employer" with the City, County and University is no better founded than its claim that it is itself an exempt political subdivision. We look here to TMC's relations with the unit of service and maintenance employees represented by the Union in the present dispute; our inquiry is whether TMC has retained sufficient control over its relations with these workers that it "is able to bargain effectively about the terms and conditions of employment with the employees' representative." *NLRB v. St. Louis Comprehensive Neighborhood Health Center, Inc.,* 633 F.2d 1268 at 1270 (8th Cir. 1980); *Board of Trustees of Memorial Hospital v. NLRB,* 624 F.2d 177, 185 (10th Cir. 1980); *NLRB v. Austin Developmental Center, Inc.,* 606 F.2d 785, 789 (7th Cir. 1979). We have no

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[2] For example, the IRS has ruled that TMC is not subject to tax on its income because it is an instrumentality of Kansas City, and has approved its pension plan as a "government" plan. However, as the IRS cautioned in its ruling on the status of the pension plan, "This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes." Moreover, the IRS has also ruled that the interest TMC pays on notes is not exempt from federal tax under the exemption for interest on the obligations of political subdivisions of states. *Cf. NLRB v. Randolph Electric Membership Corp.,* 343 F.2d 60, 64–65 (4th Cir. 1965):

> These rulings * * * point in several directions, and are not helpful to the argument. In any event, these rulings of the Internal Revenue Service are not determinative of the meaning of the section 2(2) exemption for purposes of the National Labor Relations Act.

doubt that TMC has retained sufficient such control. No statutory provision gives City, County or University control over the salaries or other benefits of the employees in question; *compare NLRB v. Chicago Youth Centers*, 616 F.2d 1028 (7th Cir. 1980) and *Lutheran Welfare Services of Ill. v. NLRB*, 607 F.2d 777 (7th Cir. 1979). No provision of the contracts between TMC and the City, County or University gives any of the latter the right to approve or disapprove TMC's decision as to "staffing, wage rates and fringe benefits; the employment of any person listed [in a list of all employees]; and the total wages paid to all employees in any given classification," nor has TMC agreed "not to enter into any written contract of employment * * * or any collective agreement covering terms and conditions of employment * * * without the express written consent" of City, County or University; *compare Board of Trustees of Memorial Hospital v. NLRB, supra*, 624 F.2d at 185–86. On the contrary, under its contracts with City, County and University TMC has retained virtually complete control over its relations with the employees here in question, and it has since 1973 negotiated two collective bargaining agreements with them with minimal and only informal consultations with City, County and University. The fact that TMC's ability to bargain is constrained by budgetary restraints arising from its contract does not preclude it from bargaining effectively with the Union; these limitation merely serve "to define the economic framework with [in] which [TMC] and the Union may conclude their bargaining." *NLRB v. St. Louis Comprehensive Neighborhood Health Center, Inc., supra*, at 1271; *cf. NLRB v. Austin Developmental Center, Inc., supra*, 606 F.2d at 789 n.8. In short, substantial evidence supports the Board's conclusion that TMC is not a "joint employer" of the workers here in question with any political subdivision of Missouri.

3. Prior to 1979 the Board sometimes declined to exercise its jurisdiction over an otherwise nonexempt employer if it found that there was an "intimate connection" between the basic or traditional functions of an exempt political subdivision and the services provided to that subdivision by the nonexempt employer. *See Rural Fire Protection Co.*, 216 NLRB 584 (1975); *Temple University*, 194 NLRB 1160 (1972). TMC argues that the Board should have declined jurisdiction over it on that basis, citing its provision of health care to indigent residents of Kansas City and Jackson County. However, the Board has consistently taken the view that "the operation of a hospital is not necessarily so basic or traditional a government function as to warrant our declining to assert jurisdiction," *Grey Nuns of the Sacred Heart*, 221 NLRB 1215 (1975); and in any case the Board abandoned the "intimate connection" test in *National Transportation Service, Inc.*, 240 NLRB 64 (1979). We find no abuse of discretion in the Board's assertion of jurisdiction here.

The order of the Board is enforced.

Lennox Industries, Inc. v. NLRB

NLRB v. Lennox Industries, Inc.

637 F.2d 340 (5th Cir.), February 17, 1981;
rehearing denied March 19, 1981; certiorari denied
452 U.S. 963—244 NLRB 607

On petition to review and enforce Board Order

Before GOLDBERG, POLITZ and SAM D. JOHNSON,
Circuit Judge

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GOLDBERG, Circuit Judge: Over two centuries ago, James Otis decried a political system which dared to impose taxation without representation. Nearly a decade ago, the Supreme Court played an encore to the blare of Gideon's trumpet[1] and held that there could be no incarceration without representation.[2] About six years ago, the Court applied this concept to the labor relations arena, and ruled that an investigatory confrontation without representation was an unfair labor practice.[3] Today we must determine the parameters of an *investigatory* confrontation in order to decide whether union representation was required at a meeting between an employee and his superior when no discipline was intended by the employer.

Petitioner Lennox Industries, Inc. ("Petitioner" or "Lennox") operates a heater and air conditioner manufacturing plant in Fort Worth, Texas. The United Steelworkers of America, AFL–CIO, Local

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[1] *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 790 (1963).

[2] *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

[3] *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975).

4629, represents petitioner's employees. In early 1978, Paul Nestle, a member of the union, was employed at Lennox's Fort Worth plant as an assembly line worker under the supervision of Leo Ary. Fred Boenker, manager of final assembly, was Ary's superior.

Nestle had experienced some difficulty with his assembly line duties and had been criticized by Ary for his slow work. On February, 16, 1978, Ary approached Nestle on the work floor and stated that he would like to talk to Nestle at his (Ary's) desk. Nestle asked that a union representative be present at the meeting, but Ary responded that one would not be necessary. Nestle repeated his request, but nevertheless proceeded toward Ary's desk. As the two men walked, heated words were exchanged and Ary interpreted one of Nestle's remarks as a threat.[4] Ary then asked Nestle to accompany him to Boenker's office and Nestle agreed.

Ary began the meeting with Boenker by complaining that Nestle had threatened him, but Nestle denied this. Boenker asked if there had been any witnesses to the altercation and was told that there were none. Boenker then changed the subject by turning to the issue of production and stating that he had wanted to talk to Nestle and Ary even before their argument. At this point Boenker's telephone rang and as Boenker spoke on the telephone, Nestle and Ary expressed their contempt for each other. Boenker completed his phone call and told Nestle and Ary that while he was aware of their personal differences, he would like to see them get along. Boenker again changed the subject to productivity and discussed the deficiencies of some employees, including Nestle.[5] Nestle attempted to defend himself and asked for a union committeeman to represent him. Boenker replied that if he thought that Nestle needed a committeeman, one would be provided. Boenker then stated that Nestle would have to continue to work under Ary's supervision, and that he did not want any disharmony between supervisors and assembly line workers. He added that Nestle's production would have to improve, but assured Nestle that no threat was intended. The meeting then ended, and both Ary and Nestle left Boenker's office.

In light of the fact that Nestle had requested a union representative and was refused, the National Labor Relations Board found that Lennox had violated Section 8(a)(1) of the National Labor Relations Act.[6] The Board ordered Lennox to cease and desist from this unfair labor practice and from any practice which would interfere with an employee's exercise of his right of concerted activity, as guaranteed by Section 7 of the Act. Lennox has petitioned this court for review of the Board's decision, and the Board has cross-applied for enforcement of its order.

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On appeal, Petitioner Lennox argues that the Board erred in finding a violation of Nestle's right to a union representative at an investigatory meeting. Petitioner notes that the Administrative Law Judge found that discipline was never intended to result from the meeting, and that no discipline in fact resulted. Petitioner reasons that in light of these findings, the meeting was not investigatory, the employee did not reasonably fear discipline, and no union representative was therefore required.

In the landmark case of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), the Supreme Court held that Section 7 of the National Labor Relations Act "guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres." 95 S.Ct. at 965–67. The Court noted that such a rule provides benefits for both employee and employer: it insures adequate representation for an employee who may be too fearful or inarticulate to adeqately present his case, and it enables the employer to save time and effort by getting to the bottom of an incident more quickly. Moreover, "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality [of employer/employee bargaining power] the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Id.* at 966 (citations omitted).

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[4] Nestle claimed that he said "Hey, isn't there some way we can work this out?" NLRB Transcript at 27. Boenker testified that Ary recalled Nestle's words as "Let's leave the premises and get things straight between us." NLRB Transcript at 190.

[5] Boenker said that he had been observing Nestle and a co-employee, and that he believed that they were instigating a production slow-down.

[6] Section 8 of the Act, 29 U.S.C.A. § 158 (West 1973), provides, in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title * * *

"Section 157 of this title," Section 7 of the Act, protects concerted activity by employees, including one employee's request for the presence of a union representative at an investigatory interview which the employee reasonably believes might result in discipline. *J. Weingarten, Inc., supra,* 95 S.Ct at 965–67; *Anchortank, Inc. v. NLRB,* 618 F.2d 1153, 1157–58 (5th Cir. 1980). The Board's finding in the case at bar was based upon this doctrine.

Under *Weingarten,* an employee is entitled to a union representative only when (1) the interview in question is *investigatory,* i.e., when it is designed to elicit answers to work-related questions which might affect the employee or the bargaining unit, and (2) the employee reasonably fears that discipline might result from the interview. Thus where the purpose of a meeting is *disciplinary* rather than *investigatory,* i.e., where the meeting is designed simply to inform an employee of a previously made decision to impose discipline, no union representative is required since there is no attempt to elicit facts which might result in discipline.[7] *See NLRB v. Certified Grocers of California, Ltd.,* 587 F.2d 449 (9th Cir. 1978); Texaco, Inc., 247 N.L.R.B. No. 56 (Jan. 30, 1980); Roadway Express, Inc., 246 N.L.R.B. No. 180 (Dec. 14, 1979); Baton Rouge Water Works Co., 246 N.L.R.B. No. 161 (Dec. 14, 1979). Similarly, where the purpose of a meeting is *supervisory* rather than *investigatory,* e.g., where the meeting is designed simply to show an employee how to improve his work performance, no right to a union representative inheres. *See AAA Equipment Service Co. v. NLRB,* 598 F.2d 1142 (8th Cir. 1979); *Alfred M. Lewis, Inc. v. NLRB,* 587 F.2d 403 (9th Cir. 1978). In the case at bar we must thus decide whether the interview in question was an investigation which Nestle reasonably feared might result in discipline, thereby requiring the presence of a union representative upon request.

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Employee Nestle was asked questions concerning both his poor work performance and his less than friendly altercation with his supervisor. Such questioning is investigatory in that it is designed to elicit responses which might well result in discipline against the employee. Moreover, even if the employer had previously decided that discipline would definitely not result from the interview in question, information could be elicited at that interview which might enable the employer to build a case against the employee, culminating in discipline at some later date. Hence an interview like the one in the case at bar where the employee is asked questions about poor work or an altercation with a superior is by its very nature "an investigatory interview in which the risk of discipline reasonably inheres." *See J. Weingarten, Inc., supra,* 95 S.Ct. at 966.

Insofar as it is inconsistent with this analysis, we reject the language in Eighth and Ninth Circuit opinions which suggests that it is only when disciplinary action is "probable" or "seriously considered" that the right of representation arises. *See, e.g., AAA Equipment Service Co., supra,* 598 F.2d at 1146; *Alfred M. Lewis, Inc., supra,* 587 F.2d at 410. Such language is plainly inconsistent with the dictates and rationale of the Supreme Court in *Weingarten.* An interview may well be "investigatory" and may well reasonably include the "risk of discipline" even though the employer is not seriously contemplating discipline at the time the interview is conducted. Indeed, a purpose of the interview may be to decide whether discipline against an employee is an option to be serious considered. Furthermore, an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening. The *Weingarten* rule is designed to protect such "fearful" or "inarticulate" employees from the inadvertent results of their answers during work-related interviews. *See, J. Weingarten, Inc., supra,* 95 S.Ct. at 966–67. For the *Weingarten* rationale to be effectively achieved, courts must not narrow the scope of the doctrine as enunciated by the Supreme Court: it is whenever the risk of discipline reasonably inheres in an investigatory interview that a union representative is required, and not merely when disciplinary action is "probable" or "seriously considered." *See id.* 965–67. *But see AAA Equipment Service Co., supra,* 598 F.2d 1146; *Alfred M. Lewis, Inc., supra,* 587 F.2d at 410. We break no new ground, but merely restate the words of *Weingarten* in holding that where an interview is designed to elicit information which might reasonably result in discipline—either immediately or at some time in the future—a union representative is required if the employee so requests. Because the risk of discipline is inherent in interviews focusing upon poor work or upon an employee/supervisor confrontation, we agree with the Board and find that a union representative was required in the case at bar.[8]

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[7] The rationale behind this rule was simply stated by this Court in *Anchortank v. NLRB, supra:*

> Since the disciplinary decision has already been made, the union representative cannot safeguard the interests of the entire bargaining unit be exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. Similarly, because there is no factfinding at such an interview, the union representative cannot aid the employer and employee by furthering the former's investigation of the incident as issue.

Id. at 1168 (citations omitted); *see Mt. Vernon Tanker Co. v. NLRB,* 549 F.2d 571, 575 (9th Cir. 1977) (interview not investigatory, since "[t]he result from the outset is a foregone conclusion").

Petitioner also argues that Nestle did not properly request the presence of a union representative at the meetings in question and that therefore no representative was required. Petitioner points out that the purpose of the original meeting between Nestle and Ary was unknown, and that the subsequent meeting in Boenker's office was a result of the altercation between Nestle and Ary. Because the second meeting involved a different presumably a different company official and presumably a different subject, petitioner argues that the employee's request for a representative at the first meeting was not sufficient to require a representative at the second.

It is clear that "an employee may make a request for union representation while on the plant floor, and need not repeat the request at the office if the official there is aware of such request * * *." *Roadway Express, Inc., supra.* Petitioner is correct in pointing out that Boenker, the official in whose office the second meeting was held, was unaware of Nestle's original request for a union representative. However, supervisor Ary was present at the second meeting as well as the first, and he was well aware of Nestle's request. Thus Nestle need not have repeated his request in Boenker's office. Moreover, the Administrative Law Judge correctly characterized the two meetings as a "single, interrelated episode," enabling a single request for a union representative to suffice for both meetings. The fact that the scope of the second meeting included the Nestle-Ary confrontation as well as Nestle's poor work is unimportant. Nestle presumably believed that the first meeting would focus on his work performance, and the second meeting dealt with this topic as well. Ary knew that Nestle desired and requested a union representative at the first meeting, and he certainly should have known that a representative was desired at the second. Indeed, once the scope of the second meeting was expanded to include the Nestle-Ary confrontation, there was even more reason for Nestle to want a union representative, since the risk of discipline was increased. It was therefore unnecessary for Nestle to repeat his S.O.S. in distress at the meeting in Boenker's office.

The rationale of *Weingarten* does not require an employee to repeat his request for union representation each time the subject changes during a meeting with company officials. Such a rule would be both burdensome for the employee and tedious for the company officials. As long as one or more company officials are aware of the employee's desire and request for the presence of a union representative, a single request will suffice for the multiple subjects of a single meeting, or for multiple meetings which are part of a "single, interrelated episode," as here. The union representative's admission ticket gained by the employee's original request entitles the employee to representation during both ends of the doubleheader.

The facts of this case fit neatly within the parameters of the rule that in the labor arena there must be no investigatory confrontation without representation. The meetings here were clearly investigatory, and substantial evidence supported the Board's finding that the employee reasonably feared the risk of discipline. Moreover, the employee's request for a union representative was sufficient to require a representative's presence at both meetings, since one company official was present at both meetings and was aware of the request, and since the two meetings were part of a "single, interrelated episode." The Board's order is therefore.

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[8] Petitioner's argument that there was not sufficient evidence to support the Board's finding that Nestle reasonably feared discipline as a result of the meetings is without merit. As noted above, it is certainly reasonable for an employee to fear the risk of discipline as a result of a meeting focusing on poor work or on an altercation with his superior. Moreover, assurances that a union representative will be provided if a company official thinks one is necessary are insufficient to allay those reasonable fears. Columbus Foundries, Inc., 229 N.L.R.B. 34 (April 18, 1977), *aff'd,* 84 Lab. Cas. ¶10,645 (5th Cir. January 27, 1978); Van Tran Electric Corp., 218 N.L.R.B. 43 (May 29, 1975). The Board's finding that Nestle reasonably feared discipline is supported by substantial evidence on the record as a whole and must therefore be left undisturbed. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 464–65, 95 L.Ed. 456 (1951).

ENFORCED.

NLRB v. Crystal Springs Shirt Corporation, Bernstein and Sons Shirt Corporation

637 F.2d 399 (5th Cir.), February 19, 1981—245 NLRB 882

On petition to enforce Board Order

Before INGRAHAM, GEE and TATE, Circuit Judges

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INGRAHAM, Circuit Judge: Pursuant to section 10(e) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(e) (1976), the National Labor Relations Board (the Board) seeks enforcement of its order issued against Crystal Springs Shirt Corporation and Bernstein & Sons Shirt Corporation (collectively Crystal or the Company).[1] The Board, adopting the findings and conclusions of an Administrative Law Judge (ALJ), rules that Crystal had engaged in unfair labor practices in violation of sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1), (5) (1976), by unilaterally changing piece rates and production quotas, without notifying or bargaining with the certified collective bargaining representative, commencing in May 1977 at its garment factory in Crystal Springs, Mississippi.[2] The Board further found that a strike by Crystal's employees in April 1978 was called in response to Crystal's unfair labor practices and therefore constituted an unfair labor practice strike. Accordingly, the Board entered a broad cease and desist order on September 28, 1979.[3] We enforce that order.

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The History of the Case

In June 1974 the Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC (the Union) was certified as the bargaining representative for a unit of Crystal's production and maintenance empolyees. The parties begun negotiations in September 1974. From then until December 1975 the parties met twenty times without agreeing on a contract. At the last meeting, Crystal submitted its final proposal on a take-it-or-leave-it basis. The Company offered wage increases in return for the Union's acceptance of certain other Company demands and abandonment of certain Union demands. The Union asked for further meetings on the proposal, but Crystal declared that the parties were at impasse. Twenty-five minutes after the December 1975 meeting ended, Crystal unilaterally announced to the plant employees its proposed wage increases and thereafter implemented them. In response, the Union filed unfair labor practice charges. In April 1977 the Board found that Crystal had engaged in surface bargaining with no intention of entering into any final binding collective bargaining agreement and had made unilateral changes in wages in violation of sections 8(a)(1) and (5) of the Act.[4]

In May 1977 the Union formally requested that Crystal resume negotiations. It also asked the Company to provide information on total earnings during a representative period for all employees in the bargaining unit. From this wage and piece rate data, the Union negotiator made certain wage analyses. After the hiatus of over eighteen months, Crystal and the Union sat down again in July 1977. At the next meeting, in September 1977, Crystal gave the Union negotiator additional data showing total earnings summaries and piece rates then in effect at the plant. The Union negotiator complained that the data showed that the Company had converted from production mostly of woven goods entirely to knit goods and also had made changes in the piece rates and production quotas. In October 1977 the Union once again filed unfair labor practice charges against Crystal, alleging violations of sections 8(a)(1) and (5) of the Act.

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[1] The Board's decision and order are reported at 245 NLRB No. 112 (Sept. 28, 1979).

[2] The Board also ruled that Bernstein & Sons and its wholly owned subsidiary, Crystal Springs, constitute a single employer for purposes of the act. This ruling, manifestly supported by substantial evidence on the record as a whole, is not challenged by Crystal in this appeal.

[3] The Board's order requires the Company to cease and desist from engaging in the unfair labor practices found and from in any other manner interfering with the employees' Section 7 rights. Affirmatively, the order requires the Company to comply with the following terms: (1) upon request, to bargain with the Union as the exclusive bargaining agent and, if an understanding is reached, to embody it in a signed agreement; (2) upon request, to furnish the Union with all records necessary and relevant to the Union's decision whether to restore the piece work rates and production quotas in effect prior to May 1977; (3) if the Union so desires, to revoke the unilateral changes in piece work rates and production quotas instituted in May 1977, and to restore the rates of pay and quotas in effect prior thereto, making employees whole for any loss they may have suffered by reason of the unlawful changes; (4) to preserve and, upon request, to make available to the Board and its agents for examination and copying, all records relevant and necessary to a determination of the amounts due employees; (5) upon application, to offer all employees who struck on April 3, 1978, or thereafter, full and immediate reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employee hired after April 3, 1978; (6) to make strikers whole with interest for wages lost commencing five days after unconditional offers to return to work are made until reinstatement is offered, less net interim earnings; and (7) to post customary notices.

[4] *Crystal Springs Shirt Corp.*, 229 NLRB 4 (1977). Crystal consented to the entry of a court judgment; this court entered a judgment enforcing the Board's order on September 11, 1978. (No. 78–2148) Unlike the changes in piece rates and production quotas at issue in the present appeal, the wage increases in that case involved changes in the base rates.

In February 1978 the Union called a meeting of Crystal employees. Union personnel discussed with the employees the history of negotiations with the Company over the past three and one-half years, including the fact that the Company had engaged in surface bargaining and, most recently, had implemented unilateral changes in piece rates and production quotas when it changed from woven production to knit. The Union personnel also explained the difference between an economic strike and an unfair labor practice strike. Thereafter, the employees voted unanimously to authorize the Union to call a strike against Crystal. After one month of preparations, the employees struck in April 1978.

In this application for enforcement, our standard of review is to determine whether there is substantial evidence on the record as a whole to support the Board's findings. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1965). It is not our function to overturn the Board's choice between two equally plausible inferences from the facts, if the choice is reasonable, even though we might reach a contrary result if deciding the case *de novo. NLRB v. United Insurance Co.,* 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968). Acknowledging these principles, Crystal argues that the challenged changes did not violate sections 8(a)(1) and (5) of the Act and that, even if they did, the strike was not called in response to those changes and therefore was not an unfair labor practice strike.[5] We turn now to an examination of each of these arguments.

The Section 8(a)(1) and (5) Violations

It is undisputed that during the last three quarters of 1977, Crystal unilaterally changed certain existing piece rates and production quotas. Conceding this, Crystal attempts to justify its conduct on two grounds. First, Crystal argues that the Union knew or should have known of the changes long before the September 1977 meeting because of certain data previously furnished to the Union. From this notice premise, Crystal argues that the Union waived its right to negotiate over the changes. Second, Crystal argues that even if the Union did not receive notice of the changes, the changes were permissible since they were automatic responses to changes in the underlying job requirements and served only to maintain the status quo.

In support of its notice contention, Crystal points to two occasions on which it provided the Union with certain information relating to piece rates. The first of these was in January 1977 following a negotiating session between counsel for Crystal and the Union negotiator concerning a different plant not involved in these proceedings. Although the data do indicate that there was a piece rate for knit fabric in existence at Crystal during December 1976, there is no indication whatsoever that significant production—or indeed any production—of any knit garments was actually taking place.[6] The second occasion in June 1977, was in response to the Union's request for bargaining data, including a complete set of current piece rates, to be used at the July 1977 resumption of negotiations. This material also failed to give any indication whatsoever of the degree to which Crystal was converting to knit production and implementing corresponding piece rate and production quota changes.[7] Because of the differençe in graphic presentation, moreover, it is impossible to correlate the two sets of data in any manner that would give notice of changes in particular rates. These disclosures, charitably so characterized, do not constitute "circumstances which afford a reasonable opportunity for counter arguments or proposals." *See NLRB v. Citizens Hotel Co.,* 326 F.2d 501, 505 (5th Cir. 1964). "Notice, to be effective, must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining * * *. Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." *International Ladies' Garment Workers Union v. NLRB,* 463 F.2d 907, 919 (D.C. Cir. 1972). Thus, the information presented to the Union at the September 1977 meeting, which was in a format allowing direct comparison with the rates shown in the June material and which showed rates for operations exclusively on knit fabric, gave the Union its first real notice that Crystal had unilaterally implemented changes in existing piece rates and production quotas. Accordingly, Crystal's waiver argument is without merit.

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[5] Crystal also objects to the terms of the Board's remedy. The Company asserts in a conclusory manner that the make-whole remedy gives to the Union a veto over a substantive condition of employment, namely the setting of price rates and production quotas. Since before the Board Crystal did not except with any specificity whatsoever to the ALJ's proposed remedy, we decline to entertain this objection now. *See* 29 U.S.C. § 160(e) (1976); *NLRB v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 322, 82 S.Ct. 344, 347, 7 Ed.2d 312 (1961); *NLRB v. Seven-Up Bottling Co. of Miami,* 344 U.S. 344, 350, 73 S.Ct. 287 290, 97 L.Ed. 377 (1953); *Marshall Field & Co. v. NLRB,* 318 U.S. 253, 255–56, 63 S.Ct. 585, 586, 87 L.Ed. 744 (1943).

[6] It is undisputed that prior to the period at issue here the bulk of Crystal's production consisted of woven garments, for example, Crystal introduced records before the ALJ that seem to indicate that knit production first began during the last week of October 1976.

We next must determine whether these changes were permissible as merely responsive to changes in the underlying job requirements serving only to maintain the status quo. We are mindful that Crystal "carries a heavy burden of proving that such adjustments of wages * * * are purely automatic and pursuant to definite guidelines." *NLRB v. Allis-Chalmers Corp.,* 601 F.2d 870, 875 (5th Cir. 1979). The origin of this defense is the Supreme Court's decision in *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). In *Katz,* the Court implied that unilateral wage changes that "in effect, were a mere continuation of the status quo" would not constitute a violation of section 8(a)(5). *See id.* 746, 82 S.Ct. at 1113. The protection of this defense, however, runs to wage changes that are "in fact simply automatic increases to which the employer has already committed himself." *See id.* The Supreme Court rejected the status quo defense in *Katz* because the wages challenged there "were in no sense automatic, but were informed by a large measure of discretion." *Id.* We think the same must be said of the changes in piece rates and production quotas challenged here.

Crystal asks us to distinguish this case from one involving the unilateral introduction of new base rates of modification of existing base rates, which Crystal concedes would be a discretionary change.[8] The Company argues that its use of time and motion studies to determine the new piece rates and production quotas for knit fabrics insulates those changes from a finding of section 8(a)(5) violation—in other words, that application of the scientific method somehow removes the element of discretion. We disagree.

The piece rate is the price Crystal pays an employee for performing a dozen repetitions of a certain operation. The production quota is the number of dozens of such operations that a so-called "100% worker" can perform in one day. The piece rate is mathematically computed in such a manner that the 100% worker will earn, for all pieces produced in a day, an amount equivalent to the base rate, expressed as a per hour wage, multiplied by the eight hours of the standard work day. Thus, the establishment of a production quota directly affects the amount that the 100% worker can earn each day. But the establishement of that production quota is itself a discretionary choice. It involves breaking down the entire production process into discrete operations, each composed of certain elements of physical motion. It involves selecting the number of repetitions to be timed in order to arrive at an average time per operation. It involves applying a performance rating to the timed average based on the timer's estimation of the operator's output efficiency. It involves making some allowance for the clerical and bundling time necessarily spent by any operator. All of these estimations and calculations must be performed in order to establish the average time that the 100% worker should spend on a given operation.

Next, the available work time in the day is divided by the average time spent on each operation in order to determine how many operations the 100% worker will accomplish—that is, the production quota for that operation. But this determination is also influenced by discretion. The 480 minute day is first reduced by an amount that represents time spent on breaks. The remaining time is further reduced by an amount that compensates for physical fatigue and machine delay. Thus, Crystal computes its production quotas on the basis **404** of a 391 minute day. In the light of the divers judgmental elements outlined above, we find that the piece rate and production quota changes instituted by Crystal through the use of time and motion studies "were in no sense automatic, but were informed by a large measure of discretion." *NLRB v. Katz,* 369 U.S. at 746, 82 S.Ct. at 1113.

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[7] In fact, a simple tally indicates that approximately 70% of all discreet rates listed were for operations performed on woven fabric. At the hearing before the ALJ, however, Crystal introduced records indicating that as early as the first week of April 1977 approximately two-thirds of the operators were performing knit work as opposed to woven.

[8] *See* case cited note 4 *supra.*

Finally, we note that these unilateral changes in piece rates and production quotas manifestly did not serve to maintain the status quo. In fact, workers generally experienced significant increases in earnings. By Crystal's own admission, from the third quarter of 1976 to the fourth quarter of 1977, 77% of the piece work operators experienced increases in earnings, 18% of them experienced decreases in earnings, and 5% experienced no change. These results can hardly be characterized as maintenance of the status quo. In his opening remarks to the ALJ, counsel for Crystal seemed to argue that these general wage increases somehow exonerated the Company's conduct. On the contrary, we conclude that Crystal unilaterally instituted changes in piece rates and production quotas in derogation of the Union's right to negotiate over wages. *See also Waycross Sportswear, Inc. v. NLRB,* 403 F.2d 832, 835-36 (5th Cir. 1968); *McGraw-Edison Co v. NLRB,* 419 F.2d 67, 77 (8th Cir. 1968).

The Unfair Labor Practice Strike

Crystal argues that even if we find substantial evidence to support the Board's finding that the unilateral changes violated sections 8(a)(1) and (5), we nevertheless should conclude that the walkout in April 1978 was not an unfair labor practice strike. "A strike is characterized in this way so as to give employees the right to be reinstated in an unfair labor practice had anything to do with causing it." *NLRB v. Safway Steel Scaffolds Co. of Georgia,* 383 F.2d 273, 280 (5th Cir. 1967), *cert. denied,* 390 U.S. 955, 88 S.Ct. 1052, 19 L.Ed.2d 1150 (1968) (citing *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956)). The result is the same even if the alleged unfair labor practice was only one of multiple causes of the strike. Multiple motivation does not deprive the employees of their status as unfair labor practice strikers so long as the employer's unfair labor practice was a contributing cause. *NLRB v. Pope Maintenance Corp.,* 573 F.2d 898, 907 (5th Cir. 1978).

The issue is this portion of the case is one solely of credibility. There is testimony in the record that, immediately prior to the strike vote, Union personnel recounted the long history of labor strife with the Company, the surface bargaining engaged in by the Company, the labor strife at other plants owned by the Company's corporate parent, and the recent unilateral changes in piece rates and production quotas after the changeover from woven production to knit. The ALJ expressly found that testimony credible. The Company attacks the veracity of the testifiant and asks us to reject the ALJ's credibility determination. When the issue is simply one of the believability, the credibility resolutions of the ALJ are entitled to affirmance unless they are inherently unreasonable or self-contradictory. *NLRB v. National Fixtures, Inc.,* 574 F.2d 1305, 1306 (5th Cir. 1978). We find substantial evidence on the record as a whole to support the ALJ's and the Board's finding that Crystal's unilateral changes in piece rates and production quotas were contributing causes of the April 1977 strike.

For the foregoing reasons, the application for enforcement of the order of the National Labor Relations Board should be granted.

ENFORCED.

Sullair P.T.O., Inc. v. NLRB

641 F.2d 500 (7th Cir.), February 19, 1981—250 NLRB 614

On petition to review Board Order

Before CUMMINGS and CUDAHY, Circuit Judges, and BONSAL, Senior Distric Judge*

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*The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

CUMMINGS, Circuit Judge. This matter is before us on a petition of Sullair P.T.O., Inc. pursuant to 29 U.S.C. § 160(f) to review and set aside a final order of the National Labor Relations Board issued against Sullair on July 15, 1980, and reported at 250 NLRB No. 104. The Board has cross-applied for enforcement of its order. We hold that the Board's findings do not support its legal conclusion and therefore deny enforcement.

I

Sullair, the wholly owned subsidiary of a larger corporate enterprise, is engaged in the manufacture, sale and distribution of air compressors installed as power-take-off units. Sullair's home office is in Michigan City, Indiana, and it does business in Indiana and elsewhere. The events giving rise to this dispute occurred at its plant in New Buffalo, Michigan, which employs approximately 12 production and maintenance workers. These employees are not represented by a union.

Among the fringe benefits Sullair provided its New Buffalo employees from 1975 to 1979 was the opportunity to buy unlimited quantities of gasoline at 35¢ per gallon. On May 31, 1979, Sullair posted on the New Buffalo plant bulletin board a notice that because of increasing cost and a shortage with its suppliers, starting June 1 employees would be able to buy only 10 or 15 gallons of gasoline per week, depending on whether they lived in New Buffalo or out of town, at a cost of 50¢ per gallon "until the shortage lessens with our suppliers."

Later that day,[1] General Manager William A. Jones was stopped on the shop floor near some employees who had questions and complaints about the changed gasoline policy. One of these employees was Terry Lee Boyle, who had been employed by Sullair as a mechanic at the plant since November 1977. Boyle told Jones that Sullair was "f.....g" the employees by the new policy and asked how he, Boyle, was going to be able to afford the price increase "on his f.....g salary." Jones suggested that Boyle could get another job if he thought he could do better. Jones then told the employees he would try to find out whether the change was temporary or permanent and that Sullair's Controller and Human Relations Committee would investigate the matter.

The next day, June 1, 1979, at the request of another employee, Plant Controller Douglas Sommers, who was subordinate to Jones, met in the shop lunchroom with seven or eight of the 12 employees to discuss the gasoline policy. During this meeting, Boyle became the primary employee speaking out against the change. When he asked Sommers "what the f..k" could be done about the change, Sommers replied that it was a policy change by the parent corporation. Thereupon Boyle said Sullair was attempting "to f..k the employees" and then asked if those "rotten m....r f.....g c.........s" at the main plant would ration gas there if there had been a gas shortage at the New Buffalo plant. Sommers told Boyle that he would be glad to stand there to talk about the gas program but not with Boyle's using such profanity. Sommers added that if Boyle were unhappy he could get a job somewhere else. Boyle said that if that was Sommers' answer, he was a "f.....g poor manager."

Sommers immediately went to Jones' office and told him what had occurred. Ten to 20 minutes after the meeting had ended, Jones fired Boyle for "insubordination," reminding him of a previous incident in December 1978 when Boyle had been orally reprimanded for insubordination after complaining that he was being "f....d again" by the company and calling Jones a liar. On that occasion Jones warned Boyle that he would be terminated if such insubordination happened again and that he must not direct vulgar shop language toward management.[2]

Three days after Boyle's discharge, Jones and Sommers prepared two memoranda for Boyle's personnel file reciting complaints about Boyle and his work. These memoranda indicate that Boyle was warned orally on January 11, 1979, to refrain from his continual complaining because it was having a detrimental effect on working conditions[3] and that on February 13 and May 9 other employees complained to management that it was difficult to work with Boyle because of his negative attitude.

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[1] It is immaterial whether this incident occurred on May 31 as the parties' briefs state, or on June 1st as the Administrative Law Judge found (App. 14, 15). The record is unclear on the matter.

[2] It makes no difference whether warnings are oral or written. *Coors Container Co. v. National Labor Relations Board*, 628 F.2d 1283, 1287 (10th Cir. 1980).

[3] At this meeting in Jones' office, Boyle was at least cautioned, if not formally warned, about his future behavior.

On June 26, Boyle filed with the Board an unfair labor practice charge against Sullair asserting that he was wrongly fired for insubordination to Sommers. After a hearing, the Administrative Law Judge concluded that Boyle was engaged in activity protected under Section 7 of the National Labor Relations Act (29 U.S.C. § 157) when he voiced his June 1st complaint about the changed gasoline policy, that his obscene language in the course of the protest was not so serious as to deny him the Act's protection, and that Sullair had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Boyle for engaging in protected activity.

The Board affirmed these findings and ordered Sullair to offer to reinstate Boyle, to expunge from its records any reference to the discharge, to make Boyle whole for any loss of pay and benefits suffered, and to post an appropriate notice. The order also required Sullair to cease and desist from the unfair labor practice found and from interfering in any like or related manner with employee rights under Section 7. This petition for review followed.

II

It is undisputed that Boyle was engaged in a concerted activity protected under Section 7 when he used the obscene language. In *Dreis & Krump Manufacturing Co., Inc.* v. *National Labor Relations Board,* 544 F.2d 320, 329 (7th Cir. 1976), this Court stated that "communications occurring during the course of otherwise protected activity remain likewise protected unless * * * 'so violent or of such serious character as to render the employee unfit for further service.'" While it is for the Board to make an initial determination whether allegedly offensive conduct or language exceeds the protection of the Act, its determination will be disturbed on review when "illogical or arbitrary." *National Labor Relations Board* v. *Thor Power Tool Co.,* 351 F.2d 584, 587 (7th Cir. 1965). Here we conclude that Boyle's insubordination clearly justified his discharge and that the Board's contrary determination was illogical and arbitrary.

The Administrative Law Judge found that the June 1st obscenities interspersed with Boyle's complaints about the gasoline policy were not so serious as to exceed the Act's protection because they were (1) not beyond the pattern of vulgar "shop talk" prevalent in the plant and (2) not directed at Sommers personally (App. 21-22) The record shows that employees at the plant were in fact given great latitude in lodging complaints and that the usage of vulgar or obscene words of sexual connotation was relatively common and tolerated. However, the record also shows that Boyle was an easily excitable person who used vulgar "shop talk" more than other employees and that in spite of warnings he did direct his obscenities at management. Finally, the record shows that the vulgar expressions used by Boyle at the June 1 meeting were directed at management and that he called Sommers a "f.....g poor manager."

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We cannot condone Boyle's use of such vulgarities directed at management and Sommers in front of other employees, causing three of them to leave the meeting. It is clear that Boyle was fired shortly afterwards for insubordination in accordance with his December 7th warning and not because he protested the new gasoline policy. The record is devoid of anything to the contrary. Other employees who questioned the gas policy on May 31 and June 1 were not disciplined, and Sommers was willing to continue the dialogue with them until Boyle's disruptive behavior ended the June 1 meeting. Indeed, Boyle admitted in his charge lodged with the Labor Board that he was fired for his insubordination to Controller Sommers. More important, the Administrative Law Judge (whose decision was adopted with an immaterial exception by the Labor Board) twice found that Boyle's June 1st conduct was the overriding reason for his discharge (App. 21). We conclude therefore that the record as a whole fails to support the Board's determination that the overriding reason for Sullair's discharge of Boyle following the June 1st meeting was his vigorous protest of the changed gasoline policy rather than his outrageous behavior punctuated by shouted obscenities.

III

Our holding here is consistent with our recent decision in *National Labor Relations Board v. Truck*

Drivers, Oil Drivers, Etc., 630 F.2d 505 (1980) (hereafter *"Teamsters Local 705"*). There the executive officer of the employer issued two employees a warning in December 1976 that they would be dismissed unless their work records improved. In April 1977, instead of following established procedures for seeking pay increases, the employees distributed a letter repeating their wage demands to the employer's executive board during a political luncheon for Chicago's then mayor, "to the potential embarrassment" of their employer (at p. 508). That afternoon they were fired for insubordination. Although the Labor Board held that the employees were engaged in activity protected by Section 7 of the Act and therefore ordered their reinstatement with back pay, we denied enforcement of the order. Our rationale was that in these circumstances "the employer's right to performance of assigned duties in a loyal manner" overbalanced the employee's right to petition (at p. 509). The panel added (*ibid.*):

> "The National Labor Relations Act is directed toward recognition of the legitimate rights of both employer and employees, 29 U.S.C. § 141(a). There must be room in the law for a right of an employer somewhere, some time, at some stage, to free itself of continuing, unproductive, internal, and improper harassment."

Teamsters Local 705 was based on sound precendent. As the Fifth Circuit stated in *Florida Steel Corporation v. National Labor Relations Board*, 529 F.2d 1225, 1234 (1976):

> "Section 7 rights are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969). Neither threats of violence nor insubordination constitute protected activities."

Thus in *Chemvet Laboratories, Inc. v. National Labor Relations Board*, 497 F.2d 445 (8th Cir. 1974), the court reversed the Labor Board's order requiring Chemvet Laboratories to offer employee Connie Ellis reinstatement to her job with make-whole pay. Before the regular quitting time she ceased production and was told by one of the two principal shareholders of the company that it was not yet time to quit and to return to work. However, Ellis refused to do so and referred to the shareholder as a "son-of-a-bitch." When she continued to refuse to work, she was discharged. Although the Administrative Law Judge found, as here, that vulgar language was not uncommon in the plant, those using it, apart from Ellis, did not refer to their supervisor in profane terms in their presence. Because of her aggravated conduct toward a superior, the court held that Section 7 did not operate to suspend the company's right to discharge Ellis for cause (497 F.2d at 452).

Similarly, in *National Labor Relations Board v. Prescott Industrial Products Company*, 500 F.2d 6 (8th Cir. 1974), the court refused to enforce the Labor Board's order to reinstate with back pay three employees who had been discharged for insubordination where the employees had been disruptive and used abusive language directed at management during a plant manager's lawful speech to a group of employees.

Finally, in *Boaz Spinning Company v. National Labor Relations Board*, 395 F.2d 512 (5th Cir. 1968), the company had discharged R. C. Alexander for insubordination. During a meeting called by the plant manager, the employees were told they could not make speeches but that after the plant manager's speech he would try to answer any employee questions. When Alexander attempted to make a talk after the close of the plant manager's speech, the plant manager told him to sit down until the plant manager finished answering questions. However, after sitting down momentarily, Alexander jumped up and pointed his finger at the plant manager and said that he was "no different than Castro." Alexander was thereupon fired for insubordination. The court of appeals agreed with the trial examiner that Alexander's Castro remark was made in a deliberate and defiant manner and was a form of flagrant disloyalty warranting his immediate discharge. The Labor Board had disagreed with the trial examiner and ordered his reinstatement. There, as here, the employee was violating the employer's rules and using intemperate language in front of other employees. Consequently, the company was upheld in ordering his discharge and the Board's petition to enforce its order was denied.

In our view, the above-cited authorities control the disposition of this case, where Boyle's complaint about Sullair's new gas policy was not even "a motivating factor" in his discharge. See *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (August 27, 1980). Since Boyle's offensive conduct on June 1st was found by the Labor Board to be "the overriding reason" for his discharge,[4] Sullair did not violate Section 8(a)(1) of the Act. Accordingly, enforcement will be denied.

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[4] Our own decisions hold a discharge to be illegal if a "bad" motive contributes in a significant way to the discharge. *E. g., National Labor Relations Board v. Pfizer, Inc.*, 629 F.2d 1272, 1275, 1277 (7th Cir. 1980) (*per curiam*). Here there was no substantial evidence to support a finding of a bad motive.

TRW–United Greenfield Division v. NLRB

637 F.2d 410 (5th Cir.), February 20, 1981; rehearing granted in part September 24, 1981—245 NLRB 1158

On petition to review Board Order

Before HENDERSON, POLITZ and WILLIAMS, Circuit Judges

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JERRE S. WILLIAMS, Circuit Judge: TRW-United Greenfield Division ("the Company") petitions for review, and the National Labor Relations Board cross-petitions for enforcement, of an order of the Board, 245 N.L.R.B. No. 147, adopting the

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findings and conclusions of the Administrative Law Judge that TRW-United violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1976), during unionization efforts among TRW-United's employees at its Evans, Georgia plant. The Board found that the Company committed unfair labor practices by coercively interrogating certain employees concerning the own and other employees' union activities, soliciting an employee to report on the union activities of other employees, and threatening employees with loss of jobs, loss of promotions, plant closure, and a regressive bargaining posture if they unionized. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") has intervened to seek denial of the Company's petition and enforcement of the Board's order.

The question presented for review is whether the Board's finding that the Company violated § 8(a)(1) of the Act through coercive interrogation, solicitation, and the making of certain threats is supported by substantial evidence on the record considered as a whole.

I.

The Facts

The Company is an Ohio corporation engaged in diversified manufacturing, with plants located throughout the country. This case involves its plants at Evans, Georgia, which is engaged in the manufacturing of high speed cutting tools. The Evans plant commenced operations in 1974, and at times material herein employed in excess of 600 employees.

In January, 1977, the Union began organizational activities among the Company's employees by conducting a meeting and obtaining signatures on a number of authorization cards. After a temporary suspension of overt activity, the Union resumed its organization drive in May of 1977, and, on October 18, 1977, petitioned the Board for a representation election. The election was held on December 16, 1977, and the employees voted 354 to 198 against union representation.

During the three months prior to the election, both the Company and the Union bombarded the employees with campaign propaganda. The Company engaged in a number of instances of conduct which the Administrative Law Judge and the Board found constituted unfair labor practices and which are the subject of the petition and cross-petition before this Court.

In describing these activities chronologically, we are eliminating some instances of interrogation which the Board found coercive but which may not meet the substantial evidence test. There are two instances, however, which clearly meet the test in our view, and we shall describe them and other events related to them in our chronological report.

Around the first of October, Supervisor Archie Burke approached employee Milton Andrews at

Andrews' work station and asked him what he thought about the Union and what his reasons were for supporting it. Andrews replied by alluding to job security, access to management regarding employee problems, and better fringe benefits.[1]

On October 7, the Company sent a letter to all of its employees which stated in part:

> As all of you know, out plant in Plymouth, Michigan was closed and shut down permanently for economic reasons. The UAW Union was in that plant and took money from the paychecks of the employees in due, fees and other charges.
>
> * * * * *
>
> The Union is attempting to get authorization cards signed which could commit you to obligations and liabilities that could interfere with your job, your pay, and your home life and your future. We, therefore, ask you *not to sign* a Union
>
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>
> card or anything else until and unless you know exactly what your obligations and liabilities will be if you do.

Around the first part of November, employee Milton Andrews was in the office of Safety and Training Director Sam Wyse in the personnel section on a personal matter. With no one else present, Wyse asked Andrews what the employees in the plant thought about him (Wyse). Andrews replied that he "could not tell" Wyse. Wyse then asked Andrews what Andrews thought about the Union. Andrews again responded that there was "nothing [he] could tell" Wyse. Finally, Wyse asked Andrews if he would sit in on union meetings and report back to him what "was going on." Andrews replied that he could not do anything like that.

At some time before Thanksgiving, Director Wyse instructed employee Willie Sutton, a known Union organizer, to clock in and tell his foreman that he would be in Wyse's office for a while. When Sutton came to Wyse's office, Wyse told him that he wanted to talk about the Union. Wyse then asked, "What do you know about the Union, what's happening, * * * [T]ell me something." Sutton replied, "[I]t's not for me to tell you what's going on." When Wyse assured Sutton that any reply would be confidential and personal, Sutton asked what he wanted to know. Wyse again asked, "What's happening?" Sutton replied that all he knew was that the employees wanted a union, and that they felt they were not being treated properly. He also alluded to a need for more pay and better sick leave. Wyse responded by saying that the Company was losing money and could not pay more at that time, but that "things are going to get better." Wyse then commented that "there's quite a few people been to the union meetings," to which Sutton replied, "I do not count heads."

On about December 1, Supervisor Louis Eldridge approached employee Andrews at his job when no one else was present and asked him if he had signed a union card. When Andrews replied that he was considering such an act, Eldridge told him that the Union could be of "no significant value" to the employees.

During the two weeks immediately preceding the December 16 election, Operations Manager Roland Springstroh, who was chief operations officer of the Evans plant as well as of two other Company plants, conducted a series of approximately twenty meetings with the employees in which he attempted to dissuade them from unionization. At these meetings, Springstroh made comments from a prepared text and then entertained questions from the employees. At each of these meetings some employee would ask what would be the starting point of contract negotiations in the event of unionization. At this point Springstroch would hold up a blank sheet of paper, which always would be conveniently available, and tell the employees:

> [W]e start with a blank sheet of paper, * * * we have the union over here and us over here and we start from that * * * we'd start from [a blank sheet of paper] * * * it would be like we'd be starting from scratch just like this blank sheet of paper.

When an employee asked Springstroh if "you're going to take my benefits away from me" if the Union came in, Springstroh replied, "No, I did not say that;" "[w]hen we sit down at the bargaining table we start from scratch, nothing." At another meeting, Springstroh said, "I'm not saying you will lose any benefits, I'm just saying when we, me and the negotiators, sit down at the negotiating table, we will start off with a blank sheet of paper." Springstroh also told the employees at these meetings that bargaining could go on for months or indefinitely, and gave no assurance that the Company would bargain in good faith.

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[1] Pursuant to instructions from Employee Relations Manager Jim Bailey, each Company supervisor maintained throughout the fall campaign a weekly roster of the employees under his supervision which indicated each employees's position in the campaign for that week. A plus indicated support for the Company, and a minus indicated support for the Union.

During the week of the election, Employee Relations Manager Jim Bailey engaged employee Willie Sutton in a lengthy conversation about the Union. In the course of that discussion, Bailey spoke at length about the closings of two other Company plants, one in Detroit, Michigan, which had been represented by the Union, and one in Chicago, which had been unrepresented.

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Bailey told Sutton that the Detroit plant had been closed for economic reasons in that "they couldn't afford it, they (the Union) was driving 'em out of the business through higher wages, you know, it was outrageous, they was asking for outrageous things." Referring to the Evans, Georgia plant, Bailey then stated, "[W]ell, if they sold us out and didn't want to pay those wages, they could just close down and write it off as a tax loss."

On December 14, Supervisor Tony Leitner engaged in an informal discussion about the Union with a group of employees. When one employee asked Leitner what would happen to their present benefits if the Union came in, Leitner replied, "[W]e would start with a blank sheet of paper." After a commnet from the employee, Leitner continued by saying that "they would sit down at the table with a blank piece of paper and would negotiate a contract. These are the benefits you get, maybe the union would want to give up some of these and here are some more of these or whatever."

Finally, about two days before the election, Director Wyse approached employee Sutton at Sutton's machine and told him that he would like to have him on the Company's side. Wyse then said, "[Y]ou can go places with the Company, you've got the ability to go places, you know, we are in the process of making things better and you've got the ability to go places."

After losing the December 16 election, the Union filed unfair labor practice charges and elections objections.[2] Agreeing with the Administrative Law Judge, with a few minor exceptions not relevant here, the Board found that the Company violated § 8(a)(1) of the Act by (1) engaging in coercive interrogation in the above described encounter between Company personnel and employees Andrews, Sutton, and others; (2) soliciting employee Andrews to attend Union meetings and report the activities of the Union to management; (3) threatening employee Sutton with plant closure if the employees unionized and also with loss of promotion for supporting the Union; (4) threatening the employees as a whole with plant closure and loss of jobs in its October 7 letter; and (5) threatening, at the Springstroh and the Leitner meetings, to take a regressive bargaining stance which would jeopardize existing benefits if the employees unionized.

The Board's order directs the Company to cease and desist from coercively interrogating employees; threatening loss of existing benefits, closing of the plant, loss of jobs, loss of promotion, or other reprisals; and soliciting employees to report on the union activities of other employees. The order also includes the usual proscription in general terms forbidding the Company from interfering with, restraining, or coercing its employees in any like or related manner in the exercise of their rights guaranteed by § 7 of the Act, 29 U.S.C. § 157 (1976). Affirmatively, the Board's order directs the Company to post appropriate notices.

II.

The Unfair Labor Practice

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right of, *inter alia,* self-organization under § 7 of the Act, 29 U.S.C. § 157 (1976). The test for determining whether an employer has violated § 8(a)(1) is whether the employer's questions, threats, or statements tend to be coercive, not whether the employees are in fact coerced. *Sturgis Newport Bus.*

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[2] The Union's election objections were consolidated with the unfair labor practice charges for purpose of hearing and determination. The Board's election objection rulings did not result in a final order and thus are not before this court. *See Hendrix Manufacturing Co., Inc. v. N.L.R.B.,* 321 F.2d 100, 106 (5th Cir. 1963).

Forms, Inc. v. N.L.R.B., 563 F.2d 1252, 1256 (5th Cir. 1977); *N.L.R.B. v. Huntsville Manufacturing Co.*, 514 F.2d 723, 724 (5th Cir. 1975). The presence of coercive tendencies in a particular instance of an employer's conduct is to be determined in light of the totality

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of the circumstances in which that particular instance of conduct occurred. *N.L.R.B. v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 (5th Cir. 1980), *cert. denied*, —— *U.S.* ——, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980); *N.L.R.B. v. Varo, Inc.*, 425 F.2d 293, 298 (5th Cir. 1970). "Remarks that may not appear coercive when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances." *N.L.R.B. v. Laredo Coca Cola Bottling Co.*, 613 F.2d at 1341 (quoting *N.L.R.B. v. Kaiser Agricultural Chemicals, Div. of Kaiser A. & C. Corp.*, 473 F.2d 374, 381 (5th Cir. 1973)).

We review the validity of the Board's order under the substantial evidence rule. 29 U.S.C. § 160(e) & (f) (1976); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 71 S.Ct. 456, 95 L.Ed. 456 (1951); *Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977). We separately analyze the Board's findings of coercive interrogation, solicitation, threats of plant closure, job loss and promotion loss, and threats of the assumption of a regressive bargaining posture.

A. Coercive Interrogation

Employer interrogation into union activities is not *per se* illegal. *N.L.R.B. v. Laredo Coca Cola Bottling Co.*, 613 F.2d at 1342; *Ridgewood Management Co. v. N.L.R.B.*, 410 F.2d 738, 740 (5th Cir. 1969), *cert denied*, 396 U.S. 832, S.Ct. 87, 24 L.Ed.2d 83 (1969). However, any interrogation of employees by an employer "presents an ever present danger of coercing employees in violation of their § 7 rights." *N.L.R.B. v. Laredo Coca Cola Bottling Co.*, 613 F.2d at 1342; *Texas Industries, Inc. v. N.L.R.B.* 336 F.2d 128, 133 (5th Cir. 1964). In determining whether certain interrogation tends to be coercive in the totality of the circumstances, the following factors are to be considered: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought; (3) the rank of the official of the employer in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employees' reply; (6) whether the employer has a valid purpose in obtaining information concerning the union; (7) whether this valid purpose, if existent, is communicated to the employees; and (8) whether the employer assures the employees that no reprisals will be taken if the support they union. *Sturgis Newport Bus. Forms, Inc. v. N.L.R.B.*, 563 F.2d at 1256; *Florida Steel Corp. v. N.L.R.B.*, 529 F.2d 1225, 1229 (5th Cir. 1976); *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965), *cert. denied*, 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1965). This list is not exhaustive, however, and coercion may occur even if all of these factors operate in favor of the employer. *Sturgis Newport Bus. Forms, Inc. v. N.L.R.B.*, 563 F.2d at 1256; *N.L.R.B. v. Camco, Inc.*, 340 F.2d at 804.

In this case, the Board found that the Company engaged in eight instances of coercive interrogation of its employees. Applying the substantial evidence standard, it is questionable whether the Board's finding of coercive interrogation as to all of them is supported by substantial evidence on the record considered as a whole.

It is unnecessary, however, to search for substantial evidence in all the instances, since substantial evidence on the record as a whole supports the Board's finding of coercive interrogation in the encounters between Wyse and Andrews around the first part of November, and between Wyse and Sutton at some time before Thanksgiving. These instances are related in the facts, *supra*.

The conversation between Safety and Training Director Wyse and employee Andrews in the former's office around the first part of November constituted coercive interrogation on the Company's part, applying the above criteria for determining whether certain interrogation tends to be coercive. First, although there is no history of unfair practices at the Company's Evans, Georgia plant, the Company engaged in a systematic effort to ascertain the union sympathies of its employees

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throughout the campaign. This effort was accomplished by having each Company supervisor talk to and observe the employees under his supervision and maintain, pursuant to instructions from Employee Relations Manager Jim Bailey, a weekly roster of his particular employees that indicated which employees supported the Company and which supported the Union for that week. Additionally, by this time the Company had implicitly indicated its opposition to the Union in the October 7 letter which it sent to all of its employees. Repeated efforts by an employer to determine who supports the union, coupled with employer opposition to the union, may be considered as background when determining whether a conversation tends to be coercive, *Sturgis Newport Bus. Forms, Inc. v. N.L.R.B.*, 563 F.2d at 1257.

Second, the information sought by Wyse was of a coercive nature. Wyse asked Andrews what the employees thought of him and also what Andrews thought of the Union. Although this information sought by Wyse was more innocuous than would have been information concerning the identities of the union leaders, it was more potentially harmful to the employees in terms of possible Company retaliation than would have been casual information regarding how the Union was doing. *See N.L.R.B. v. Camco, Inc.*, 340 F.2d at 807.

Third, as a Director, Wyse held a relatively high rank in the Company. Fourth, the conversation took place in Wyse's office, a place of authority or "unnatural formality," *N.L.R.B. v. Camco, Inc.*, 340 F.2d at 804, rather than at Andrews' work station or at some "neutral" location. Additionally, Wyse conducted his interrogation at a time when Andrews was seeking assistance from Wyse on a personal matter and was therefore potentially more susceptible to responding to such questioning.

Fifth, Andrews gave evasive answers to Wyse's questions, indicating he feared possible retaliation against himself or other employees by Wyse or other Company officials if he were to give honest and direct answers. "If an employee refuses to give a truthful answer even to an innocuous question, the inference of coercion is as strong as if he refused to answer a pointed question." *Id.* 807.

Sixth, there is no indication in the evidence that Wyse or the Company had a valid purpose for inquiring into the employee's feelings about Wyse or Andrews' attitude toward the Union. Seventh, even if such a purpose existed, Wyse did not communicate it to Andrews. Finally, Wyse gave Andrews no assurance that there would be no reprisals against either Andrews or the other employees. "Questioning is much more likely to have a coercive effect if the purpose of the interrogation is not explained and if there are no assurances against retaliation." *N.L.R.B. v. Camco, Inc.*, 340 F.2d at 807 (citing *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F.2d 417 (5th Cir. 1964)).

The conversation between Wyse and employee Sutton at some time before Thanksgiving similarly sustained a finding of coercive interrogation. Again, the encounter occurred in the context of the Company's opposition to the Union and its systematic effort throughout the campaign to ascertain the union sympathies of its employees. The questions, although general on their face, sought specific responses, including possibly the identities of the employees who had attended Union meetings. The questioner, Director Wyse, was again a high ranking Company official; and the questioning took place in the authoritative setting of the official's office, a fact attributable to the official's explicit request that the employee come to his office.

Moreover, Sutton refused to answer Wyse's probing questions about the Union's activities until receiving assurances of confidentiality; and, although he then began to discuss the Union with Wyse, he still gave an evasive response to Wyse's leading comment regarding employee attendance at the Union meetings. Thus, even Wyse's implicit assurance that no reprisals would be taken did not dispel Sutton's apparent concern over discussing the Union too extensively with a Company official. Finally,

there is no indication that either Wyse or the Company had a valid purpose for questioning Sutton, or that, if such a purpose existed, it was communicated to Sutton.

That Sutton publically exhibited his support of and leadership in the Union does not alter the suggestion of coercion. Although an employee has openly declared his support for the union, the employer is not thereby free to probe directly or indirectly into his reason for supporting the union. *ITT Automotive Electrical Products Division*, 231 N.L.R.B. 878 (1977). "[S]uch probing tends to have a coercive effect upon employees, whether or not the employees have openly declared their support for a union." *Id.; see also Paceco, A Division of Freuhauf Corp.*, 273 N.L.R.B. 399, 400 (1978), *vacated on other grounds*, 601 F.2d 180 (5th Cir. 1979). Sutton was knowledgeable and may well not have been coerced in this confrontation, which maintained a facade of friendliness. However, if an interrogation is coercive in nature it makes no difference that actual coercion was not achieved in the particular instance. *See Sturgis Newport Bus. Forms, Inc. v. N.L.R.B.*, 563 F.2d at 1256.

The Company relies on *Federal-Mogul Corp. v. N.L.R.B.*, 566 F.2d 1245 (5th Cir. 1978), and *Delco-Remy Division v. N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979), in support of its contention that the Board's finding of instances of coercive interrogation was erroneous. These cases are inapposite, however. In *Federal-Mogul*, the Court found that there was no systematic campaign of monitoring union sentiments; that the employer's official and the employees were longstanding friends; that the questions were asked by low-echelon supervisors; that the employees were interrogated informally and casually at their work stations or during their break periods; and that the employees' replies were truthful and without fear. 566 F.2d at 1250–51. Similarly, in *Delco-Remy*, the questioning was not systematic; most of the interrogators were low-level supervisors; the conversations took place at the employees' work stations; and the employees questioned gave candid and bold answers. 596 F.2d at 1310.

Accordingly, we find that there is sufficient evidence to uphold a Board finding of at least two instances of coercive interrogation.

B. Solicitation to Report on Union Activities

During their conversation in Wyse's office around the first part of November, Director Wyse solicited employee Andrews to attend Union meetings and report to management the activities of the Union. Although unsuccessful, this request constituted an impermissible interference with the employees in the exercise of their Section 7 rights. *See, e.g., N.L.R.B. v. Citizens Hotel Co.*, 313 F.2d 708, 709 (5th Cir. 1963) (instructing employee to engage in surveillance of union meeting); *N.L.R.B. v. Duval Engineering & Contracting Co.*, 311 F.2d 291, 292 (5th Cir. 1962) (requesting employees to act as informers with respect to union activities); *Independent, Inc. v. N.L.R.B.*, 406 F.2d 203, 205 (5th Cir. 1969) (manager's request of two employees that they "let him know if they heard any union talk").

Therefore, we hold that the Board properly based its order in part on a finding of solicitation of an employee to report on union activities.

C. Threats of Plant Closure, Job Loss, and Loss of Promotion

It is well settled that employer threats of plant closure, job loss, and loss of promotion in the event of unionization or support for a union are violative of § 8(a)(1) of the Act. *See e.g., N.L.R.B. v. Pope Maintenance Corp.*, 573 F.2d 898, 905 (5th Cir. 1978); *N.L.R.B. v. Kaiser Agricultural Chemicals, Div. of Kaiser A. & C. Corp.*, 473 F.2d 374, 380–81 (5th Cir. 1973). Section 8(a)(1) is violated if, under the totality of the circumstances, "the employees could reasonably conclude that the employer is threatening economic reprisals if they support the Union." *Hendrix Manufacturing Co. v. N.L.R.B.*, 321 F.2d 100, 105 (5th Cir. 1963); *see also N.L.R.B. v. Kaiser Agricultural Chemicals*, 473 F.2d at 381.

An employer may express to his employees his general view about unionism or any of his specific views about a particular union, as long as such expression does not contain a "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1976); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547, 580 (1969). An employer may even make a prediction as to the economic consequences he believes unionization will have on his business. *Gissel Packing*, 395 U.S. at 618, 89 S.Ct. at 1942, 23 L.Ed.2d at 580.

> In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. * * * (citation omitted). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coersion * * *.

Id. at 618, 89 S.Ct. at 1942, 23 L.Ed.2d at 580–81. An employer's conveyance of his belief, however sincere, that the plant would or might close as a result of unionization is not a statement of fact unless the possibility of closing is capable of proof, a situation which is highly unlikely. *Id.* at 618–19, 89 S.Ct. at 1942, 23 L.Ed.2d at 581.

Substantial evidence supports the Board's findings that the Company violated § 8(a)(1) by twice theatening plant closure and loss of jobs in the event of unionization. The first instance was in the letter of October 7 to all employees. The second was in the conversation between Director Wyse and employee Sutton about two days before the election. In this conversation, Sutton also was threatened with loss of promotion for supporting the Union.

The Company's October 7 letter, sent to all of its employees, stated that the Company's Plymouth, Michigan plant, where the Union "took money from the paychecks of the employees," had been closed permanently "for economic reasons." It then admonished the employees "not to sign" a Union card until they knew exactly what their obligations and liabilities to the Union would be. The reference in the letter to the closing of the Company plant in Plymouth, Michigan, where collective bargaining was established, could be found reasonably to imply that the Company might take similar action at the Evans plant as a retaliatory measure in the event of unionization there. This result holds despite the letter's statement that the closing of the Plymouth plant had been "for economic reasons."

Contrary to the Company's contentions, the reference to the closing of the Plymouth plant did not serve merely to indicate the effect of high union dues and obligations on union employees, or to illustrate that the Union does not always help its members. While high employee *wages* may bear on the economic condition of a business, high union *dues*, which the letter addressed, have no direct relevance at all.

Further, the letter does not constitute a permissible prediction, under *Gissel Packing*, of the economic consequences of unionization at the Evans plant, since it makes no reference to possible economic consequences at the Evans plant, and since any such reference would not have been susceptible to the requisite proof. The coercive nature of the Company's reference to the Plymouth plant is particularly validated by the testimony of Employee Relations Manager Bailey that the Union at the Plymouth plant had offered to negotiate lower wages to keep that plant open, and that labor costs were not a significant factor underlying the Plymouth plant's poor economic condition. The implication in the letter to the employees does not accord with these facts established at the Board's hearing.

The Company similarly threatened plant closure and job loss in the conversation between Employee Relations Manager Bailey and employee Sutton during the week of the election. During that conversation, Bailey stated that the Company's plant in Detroit had been closed because the Union

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has demanded excessive wages and other benefits. Bailey then said that if similar demands were made at the Evans plant by a union, the Company could simply close down the Evans plant and write it off as a tax loss. Bailey's comments constitued an explicit threat that the Company might close down the Evans plant in the event of excessive wage demands resulting from unionization. Further, this threat was strengthened by Bailey's linking unionization with excessive wage demands in his reference to the Detroit plant. There is some evidence that labor costs were not the decisive factor in the closing of the Detroit plant, but there is no indication that this fact was ever communicated to Sutton.

The Company also threatened employee Sutton with loss of promotion if he supported the Union. During the conversation between Diretor Wyse and employee Sutton two days before the election, Wyse told Sutton that he (Wyse) would like to have Sutton on the Company's side in the campaign. Wyse then told Sutton that Sutton "had the ability to go places" with the Company. The close association of these two statements, combined with the coercive interrogation Sutton had undergone in Wyse's office a few weeks earlier, could very likely lead Sutton reasonably to conclude that his ability to "go places" with the Company in terms of promotions was contingent upon his siding with the Company in the campaign and election. In realistic industrial terms, a possible future opportunity for promotion to supervisor was dangled before Sutton if he would side with the Company.

The Board's findings that the Company threatened its employees with plant closure, job loss, and loss of promotion in the event of unionization are supported by substantial evidence. We uphold them.

D. Threats of a Regressive Bargaining Posture

The Board found coercive and in violation of §(a)(1) the statements made by Operations Manager Springstroh throughout his 20 meetings with the employees, and by Supervisor Leitner during his informal discussion with a few employees two days before the election. These statements were that bargaining would begin "from scratch" or with a "blank sheet of paper" if the Union were to win the election. In our view, these findings are supported by substantial evidence.

" 'Bargaining from scratch' is a dangerous phrase which carries with it the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." *Coach & Equipment Sales Corp.*, 228 N.L.R.B. 440 (1977). Whether such a statement is coercive depends upon the context in which it is uttered. If the "clearly articulated thrust of the bargaining-from-scratch statement is that the mere designation of a union will not automatically secure increases in wages and benefits, and that all such items are subject to bargaining," *id.* at 441, no coercion will be found. If, however, the statement

> can reasonably be read in context as a threat by the employer either to unilaterally discontinue existing benefits prior to negotiations, or to adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employee for choosing collective representation,

id., a violation will be found. "[Bargaining-from-scratch] statements are objectionable when, in context, they effectively threaten employees with a loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the union can induce the Employer to restore." *Plastronics, Inc.*, 233 N.L.R.B. 155, 156 (1977). When a close question exists, "[t]he presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks." *Coach & Equipment Sales Corp.*, 228 N.L.R.B. at 441.

Springstroh's statement did not explicitly threaten that the Company would discontinue existing benefits prior to negotiations. They did however, implicitly threaten that

the Company would adopt a regressive bargaining posture designed to force a reduction of existing benefits as a penalty for a Union victory in the election, Springstroh's remarks likely left the employees with the impression that the benefits they ultimately would receive in the event of unionization would depend largely upon what the Union could induce the Company to restore. This conclusion is especially true in light of the high rank of Springstroh in the Company and against the background of the other unfair labor practices committed by the Company prior to and contemporaneously with these meetings. Even occasional assurances that all benefits would be negotiable and could either go up, down, or remain the same do not alter this result, considering Springstroh's high rank, his constant emphasis of bargaining "from a blank sheet of paper," his statements that bargaining could go on for months, the Company's other unfair labor practices, and Springstroh's continuous graphic use of a blank sheet of paper to illustrate his point. *See Plastronics, Inc.*, 233 N.L.R.B. 155 (1977) (even though company official stated at meetings that all benefits were negotiable and "could go up or down," bargain-from-scratch statements were coercive due largely to contemporaneous use of transparenices projected on screen which indicated that bargaining would begin without any existing benefits). These factors gave Springstroh's statements a much more significant character than that attributed to them by the Company, which contends without merit that these statements were merely replies to Union misrepresentations that the employees could not lose anything as a result of bargaining.

Supervisor Leitner's "blank-piece-of-paper" statements, made during his informal discussion with a few employees two days before the election, implied a similar threat of a regressive bargaining posture in the event of unionization. Leitner's statements were made contemporaneously with the statements made by Springstroh, and were merely reiterations of the threats implied in Springstroh's statements.

Accordingly, we uphold the Board's findings that the Company, in violation of § 8(a)(1), threatened its employees with the assumption of a regressive bargaining posture in the event of a Union victory in the election.

III.

Conclusion

We conclude that substantial evidence supports the Board's findings that the Company violated § 8(a)(1) by engaging in coercive interrogation and solicitation, and by threatening plant closure, job loss, promotion loss, and a regressive bargaining posture. We therefore uphold the order of the Board and order its enforcement.

ENFORCED.

POLITZ, Circuit Judge, dissenting: Respectfully, I dissent from the majority's conclusion that the acts of the petitioner-employer (TRW) justify the heavy hand laid upon it by the Board. Although recognizing that ours is a limited scope of review with only substantial evidence necessary to support the Board's findings, my review of this record results in findings and conclusions which differ markedly from that of the majority. I find the credible evidence fails to justify the setting aside of the election results and the other relief ordered by the Board. For purposes of clarity, the headings in the majority opinion are used in the notation of my principal objections.

A. Coercive Interrogation

The ALJ, Board and majority found coercive interrogation. The ALJ and Board found eight instances; the majority found two, noting that it was questionable whether the others were supported by substantial evidence. I do not share the majority's hesitance or uncertainty; the instances glossed over are *not* supported by substantial evidence. For example, a new supervisor, Gisela Wilson, called an employee, George Thomas, into her office to inquire how he felt about the union. According to Thomas, he told her that he had not made up his mind. Wilson responded that it was

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his decision to make and she apologized for asking. Incredibly, the ALJ concluded: "I find that her interrogation of Thomas was coercive."

Other equally "compelling" examples of coercive interrogation found by the Board include two instances of a supervisor asking an employee what he thought about the union, one instance of a supervisor asking an employee what he thought about the company, a supervisor asking an employee if he was going to a union meeting, and a supervisor telling an employee who had been wearing a union badge: "I see you don't have your badge on today."

The majority opinion focuses on conversations between Safety and Training Director Sam Wyse and employees Milton Andrews and Willie Sutton. None of these three were employed by TRW at the time of the hearing before the ALJ. Wyse did not testify, and the testimony of Andrews and Sutton is singularly unimpressive. I conclude that they in fact were not coerced by their conversations with Wyse, nor were these conversations reasonably likely to coerce or intimidate these men. Wyse tried to pump Sutton about union activities; he got nowhere. If anyone were intimidated in that discussion, it obviously was not Sutton.

The conversation with Andrews is equally insipid with one minor exception, a mote which became a beam in the eye of the ALJ and Board. Wyse inquired of Andrews of the attitude of the employees. Wyse wanted to know what the employees thought of *him*. I admit to a total failure of comprehension how this could possibly constitute coercive interrogation. Wyse was not circumspect, he asked Andrews to go to union meetings and brief him on what "was going on." Andrews refused and that was the end of that episode. Wyse should not have asked, but he got an unqualified answer which concluded the matter. This does not rise to the level of misconduct sufficient to set aside an election.

The conversation detailed in the ALJ findings, more particularly the whole of the conversations as contained in the transcript, are representative of the hyperbole and rhetoric neither foreign nor uncommon to an election contest. There were things which should not have been said on both sides, but these instances of excesses did not so permeate the election atmosphere as likely to lead to an impermissibly distorted result.

B. Solicitation to Report on Union Activities

This incident has already been alluded to. Wyse asked Andrews to attend union meetings and, in the language of the majority, "report to management the activities of the Union." Wyse should not have done this. As noted, Wyse did not testify. It is impossible to know with certainty his purpose, motivation or intent from this record. Regardless, this impropriety does not justify today's ruling.

C. Threats of Plant Closure, Job Loss and Loss of Promotion

Much is made about these allegations, but as I view the evidence, it merely points to the rhetoric and semantic excesses of a moderately heated election campaign. I conclude that the record does not support the finding that anything said or written by TRW representatives could reasonably be interpreted as (1) a threat to close the plant, (2) a threat of job loss, or (3) a threat to loss of promotion if the employees voted union. Spectres were raised by both sides. As the ALJ correctly concluded regarding a number of other allegations, this was all part of the election campaign and the employees could sort it out, just as is done in other election matters. Much is also made of the October 7, 1977 letter which TRW sent to its employees in response to a letter dated September 30, 1977 which the Union had sent to the employees. That letter ended with the exhortation: "We, therefore, ask you not to sign a Union Card or anything else until and unless you know exactly what your obligations and liabilities will be if you do." It strains credulity that this statement is found to be evidence of an unfair labor practice. I find it to be sound advice to be offered in any situation: know what you are signing, and its effects, before you sign.

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D. Threats of a Regressive Bargaining Posture

Finally, TRW is faulted because its manager, Roland Springstroh, and a supervisor made statements in which they purportedly threatened to take a regressive or intransigent bargaining position if the Union were successful in the election. I am in total disagreement with this finding. It is correct that these men informed the employees that bargaining sessions would begin "from scratch" and that the negotiators would start with a "blank sheet of paper," the latter statement being graphically demonstrated by holding up a blank sheet of paper. This plain vanilla bit of dramatics somehow becomes unclean and then illegal. I believe it to be neither.

Critical evidence in this aspect of the dispute was noted by the ALJ, who referred to the testimony of Springstroh telling the employees that "during negotiations, wages and benefits could go up, remain the same, or go down." An editorial in the company newspaper contained the same statement and testimony of employees corroborated Springstroh.

I differ with my colleagues in the majority when they conclude that the "blank paper" and "bargain from scratch" scenario constitutes an unfair labor practice which warrants the Board's order.

Conclusion

The ALJ's findings of coercive interrogation are purely conclusory. He failed to follow the test first enunciated in *Bourne v. N.L.R.B.,* 332 F.2d 47 (2d Cir. 1964), and subsequently adopted by this circuit and underscored on several occasions. *See Federal-Mogul Corp. v. N.L.R.B.,* 566 F.2d 1245, 1250 (5th Cir. 1978), and cases there cited. The majority opinion attempts to fill this void in a careful and scholarly manner. I remain unconvinced.

Today's holding is inconsistent with our prior decisions, particularly the holdings in *Paceco v. N.L.R.B.,* 601 F.2d 180 (5th Cir. 1979), *Delco-Remy Div., General Motors Corp. V. N.L.R.B.,* 596 F.2d 1295 (5th Cir. 1979), and *Federal-Mogul, supra.* In *Federal-Mogul* we refused to enforce an order of the Board which was based, *inter alia,* on alleged coercive interrogation and statements. The *Federal-Mogul* court noted the ALJ's failure (actually refusal) to apply the *Bourne* test. In *Delco-Remy* we denied enforcement of an order ostensibly based on coercive interrogation, soliciting aid against the union, and threatening discharge. The *Delco-Remy* court did not find these charges supported by substantial evidence. In *Paceco* we vacated an order of the Board and remanded for failure of the Board to set forth the legal standards by which it determined that the interrogation was coercive. The *Paceco* court again underscored the viability of the *Bourne* standards which the Board had failed to apply, just as the ALJ and Board failed in the case at bar.

Based on my appreciation of the credible evidence in this record and my understanding of the teachings of our prior jurisprudence, particularly the trilogy cited in the foregoing paragraph which I find controlling and dispositive, I would deny enforcement of the Board's order. Accordingly, I respectfully dissent.

NLRB v. Flite Chief, Inc.; Richard Miller and Karen Miller; M & M Truckadero Coffee Shop, Inc.; James Miller and Paul Minder

640 F.2d 989 (9th Cir.), February 23, 1981—246 NLRB 407

On petition to enforce Board order

Before CHAMBERS and GOODWIN, Circuit Judges, and MURPHY,[*] District Judge

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MURPHY, District Judge: Prior to this backpay proceeding, the Board had found that Flite Chief violated the Act by discharging all of its coffee shop employees because of their union activities. This Court ordered enforcement of the Board's order. *N.L.R.B. v. Flite Chief*, 566 F.2d 1182 (9th Cir., 1974).

The parties being unable to agree upon the amount of backpay due the discriminatees, the Regional Director instituted the instant proceeding by the issuance of a backpay specification. Flite Chief denied any liability as to discriminatee Johnson, and claimed that it owed Templeton only a fraction of what was claimed in the specification. Although other discriminatees were involved, this appeal does not concern them.

After a 3-day hearing, the Administrative Law Judge (ALJ) issued detailed findings recommending $1,080 for Johnson and $5,856 for Templeton. A panel of the Board affirmed the award to Johnson, and increased Templeton's to $23,803. This appeal followed.

Johnson

The only issue in Johnson was whether he was an employee at the time of the discharge, July 22, 1974. The General Counsel and Flite Chief agreed that a payroll journal did not reflect that Johnson was an employee during the week ending July 22, but Johnson offered a check stub indicating payment to him for the pay period ending July 22. In addition, there was in evidence a letter that Flite Chief had sent Johnson, as it did to all discharged employees, offering reinstatement.

We agree with the ALJ and the panel that Johnson was so employed and entitled to the backpay award of $1,080.

Templeton

The principal issues in Templeton are (1) whether the panel was legally justified in increasing Templeton's award by 400%, and (2) whether the Regional Director's denial of Flite Chief's application for leave to take depositions of the discriminatees and their interim employers was a denial of due process.

Templeton was employed in Flite Chief's coffee shop as a cook at $4.00 an hour. He was unlawfully discharged for union activities with the other employees of the coffee shop on July 22, 1974.

On October 18, 1978, the Regional Director issued the backpay specification and notice of hearing in the present proceeding. It alleged in part that Flite Chief's net backpay liability from July 22, 1974 to September 30, 1978 in Templeton's case totaled over $32,000.[*] This specification was amended and reduced by counsel for the General Counsel on the morning of January 16, 1979, the first day of the scheduled backpay hearing after Templeton advised counsel that morning of additional interim earnings from four separate employers of some $8,000.

Since Flite Chief had the burden of proof, it called Templeton and examined him at length on his seven different jobs after July 1974, including the last four at Vikings Table, Ontario Gold Club, Mountain View Country Club, and Your Host Restaurant which he had not reported to the Board's compliance officer until that morning, January 16, 1979.

The ALJ, who alone saw and heard Templeton testify (100 pages of stenographic transcript), found:

"His testimony in response to these questions [why he failed to report these four interim earnings] was inconsistent and implausible and his demeanor was unfavorable. Based upon his failure to credi-

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[*] Honorable Thomas F. Murphy, United States District Judge, Southern District of New York, sitting by designation.

[*] Templeton, on October 18, 1978, the date of the backpay specification, had been working for Your Host as general manager since August 14, 1978 and continued until November 26, 1978.

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bly and convinctly explain why he failed to inform a representative of the Board about his interim earnings with the four employers above, I find that Templeton's intent was to willfully conceal these earnings in order to obtain more backpay than he was entitled to receive.

It is my opinion that, where a backpay claimant willfully conceals interim employment from the Board's compliance officer with an intent to fraudulently increase issuance of a backpay specification, the claimant should be penalized by disallowing all backpay from the date the claimant was first employed by an interim employer who earnings have been concealed until the claimant discloses these earnings to a representative of the Board. Accordingly, I shall recommend that Templeton's backpay be disallowed in its entirety from June 4, 1975, the approximate date when he began working for Vikings Table, until January 16, 1979, the date he disclosed his concealed interim earnings to a representative of the Board."

To fully understand this characterization of a witness in a judicial proceeding, it is important to recall that three of these four jobs were the last three jobs Templeton had before testifying on January 16, 1979, and covered the period of the first two quarters of 1975, the second, third and fourth quarters of 1977, and the third quarter of 1978.

The panel's rejection of such findings is phrased in the most polite language. It stated that it "has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge and to adopt his recommended order as modified herein."

Adopting the arguments and exceptions of the General Counsel that since Templeton *voluntarily submitted* the *additional information* in issue [the concealed earnings of some $8,000, from four interim employers], the panel concludes, "the fact remains that Templeton came forth *voluntarily* and supplied the General Counsel, albeit at the 11th hour, with the *information* necessary to present a *more accurate picture* of his interim employment status." (Emphasis ours)

Although the panel did not condone Templeton's method of *furnishing* the Board with requisite interim employer data or his decision to forego the Board's quarterly reports procedure, it concluded "we do not equate his conduct with an attempt to 'pervert a remedial order of the Board * * * into an instrument of * * * personal gain.' The fact that Templeton *voluntarily* submitted the *missing* information convinces us that he was not seeking to obtain more than his due." (Emphasis ours)

The phrases "voluntarily submitted" and "additional information," "missing information," "more accurate picture," "his decision to forego," etc. are truly words of art, particularly in the face of the finding by the ALJ that Templeton had *willfully understated* interim earnings to a representative of the Board for the purpose of receiving an amount of backpay in excess of the claimed actual loss, and that Templeton's testimony in explanation of his concealment of his interim employment from the Board's compliance officer until the morning of the hearing "was inconsistent and implausible and his demeanor was unfavorable."

What the panel didn't appreciate or explore, in our opinion, was the cause of Templeton's newly found religion or why, like Saul on his way to Damascus, he changed his way of life.

Like others before him, it was a simple thing. In this case it was a *subpoena duces tecum* served on Templeton shortly before the hearing date. In *Hamlet,* it was "the play's the thing wherein I'll catch the conscience of the King."

At p. 201 of the transcript, in Templeton's direct examination immediately after he had given his name and his address, these questions and answers are recorded:

> "Q Were you served with a subpoena by my office to bring certain documents and records here today to this hearing?
>
> A Yes, sir.
>
> Q Did you bring those documents and records pursuant to that subpoena?

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> A Those that I have.
>
> Q And what did you have, and would you describe what is available for my inspection, sir; just briefly.
>
> A Paycheck stubs, W-2 forms.
>
> Q Are some of those paycheck stubs, W-2 forms, and what have you, the materials that have been reproduced by Mr. Wheeler and Mr. Prough that are now in evidence?
>
> A Yes, sir." [Mr. Wheeler and Mr. Prough were attorneys with the General Counsel and present at the hearing.]

In addition, Flite Chief's counsel had present in the hearing room witnesses from some of these employers, whom Templeton admitted that he knew.

It seems prefectly clear to us, as it did to the ALJ, that Templeton realized that the jig was up and the subpoena so jolted him that he was forced to reveal the true nature of his interim employment, sacrificing the windfall he had planned and possibly avoiding jail.

It is interesting to note, also, that the ALJ accepted the testimony of the various employers who testified, and rejected Templeton's as being unworthy of belief even on such simple matters as to whether he was fired or quit.

The panel also relied on the rankest hearsay from the mouth of Templeton to state, in its opinion: "We disagree with the Administrative Law Judge's assessment of Templeton's conduct in these circumstances." [Failing to file quarterly reports with the Board's regional Office], and supports that statement by a fn.3: "Templeton claimed that he was being harassed by Respondents, who he believed had learned of his whereabouts through the quarterly employment reports submitted to the Regional Office. The Administrative Law Judge discredited Templeton's testimony in this regard."

A reading of the hearing transcript for January 16, 1979 (pp. 236, 1. 24 to 240, 1. 4) would indicate to the least sophisticated person that Templeton was lying.

We reject, too, the panel's adoption of the General Counsel's argument that an affirmation of the ALJ's determination would be at odds with the overriding public policy implicit in the Act, that unlawful conduct, as committed by respondent, must be fully remedied. The major and minor premises of this syllogism are that no matter how egregious respondent's misconduct was, it may only be compelled to undo its wrong and not be penalized, because the Act is remedial and not punitive. The conclusion, however, that the ALJ has in effect imposed a penalty on Templeton which contravenes the intent of the statute is a *non sequitur.*

We find nothing in the Act which prohibits such recommendation of the ALJ, nor does it imply that the ALJ was in error in denying backpay for the period of Templeton's fraud, even though he called such denial a penalty. Calling it a penalty, or a remedy, or a diminution, or a set-off, or an abatement is not the test. The test is, does it effectuate the policies of the Act. The Supreme Court explained the breadth of that provision in *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198, 61 S.Ct. 845, 854, 85 L.Ed. 1271 (1941), when it said:

> "[W]e must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

We agree, and adopt the ALJ's explanation and reasoning for his action disallowing any back pay for the period June 4, 1979 to January 16, 1979. Namely, that it was a salutary step in the administration of Board compliance proceedings.

Under § 10(c) of the Act, after a finding of an unfair labor practice the Board is empowered "to take such affirmative action, including reinstatement of employees *with or without backpay,* as will effectuate the policies of the Act." (Emphasis ours)

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The key words in the power entrusted to the Board are "as will effectuate the policies of the Act." Compare, the Supreme Court's analysis of backpay awards under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, which was modeled on the N.L.R.A. backpay provision, in *Albemarle Paper Co., et al. v. Moody, et al.*, 422 U.S. 405, 421–25, 95 S.Ct. 2362, 2373–75, 45 L.Ed.2d 280 (1975), together with Mr. Justice Rehnquist's analysis at 443–47, 95 S.Ct. at 2385–87.

We are statisfied that the panel's quadrupling of the award to Templeton from $5,856. to $23,803. is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act. It rewards a discriminatee for his perfidy as opposed to discouraging such claimants from perverting an order issued in their and the public interest into a scheme for unjustifiable personal gain.

Due Process

It is not contested that Flite Chief appplied to the Regional Director for leave to take depositions of the discriminatees and the interim employers. The parties seem to agree that the Act does not specifically authorize or require the Board to adopt discovery proceedings. Whether the same applies to a backpay proceeding, we leave to another day, *cf., Deering Milliken, Inc. v. Nash,* Lab. Cas. 1976, ¶11,182-20,047 (D.C. S.C.1975).

We are satisfied that Flite Chief suffered no prejudice by the denial, since the backpay hearing was adjourned for three weeks to permit Flite Chief to interview all of the previously undisclosed interim employers and call them as witnesses.

The order of the Board will be enforced as rendered, except Templeton's award will be for only $5,856.

NLRB v. Goodsell & Vocke, Inc.

645 F.2d 680 (9th Cir.), February 23, 1981

On action to hold in civil contempt

Before TRASK and FARRIS,* Circuit Judges, and BURNS,** District Judge

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TRASK, Circuit Judge: Pursuant to a motion by the National Labor Relations Board (the Board), we hereby determine Goodsell & Vocke, Inc., Charles R. Vocke, and Glenara Vocke (the Respondents) to be in civil contempt of this court because of their failure to comply with our judgment and order of August 25, 1977, published at 559 F.2d 1141. The Respondents, therefore, are ordered to discharge themselves of this contempt by taking the following measures:

1. Signing the 1974–77 collective bargaining contract between the Painting and Decorating Contractors Association of Central Coast Counties, Inc. (the Association) and the District Counsel of Painters No. 33, Brotherhood of Painters and Allied Trades, AFL–CIO (the Union), and, within 15 days of the entry of this order, delivering an executed copy of the contract to the Union and a conforming copy to the Board.

2. Preserving all records relevant to determination of the amount of backpay and fringe benefits due to employees as a result of this court's 1977 judgment and order. Such records shall include: payroll records, timecards, and other records showing hours worked by, and wages and benefits paid to, each employee; records detailing employee job classifications and social security payments; personnel records and reports; and tax returns. Such records shall be made available to the Board for inspection and copying within fifteen days of any request.

3. Where existing records are incomplete, reconstructing to the extent possible records of employee wages, hours, and job classifications for the relevant period. Such reconstructed records and the information on which they are based shall be made available to the Board for inspection and copying within fifteen days of any request.

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4. Immediately signing and posting at their place of business in Mountain View, California, copies of the Board's remedial "Notice to Employees" (the Notice). In the event that the Defendants have lost their copy of the Notice, one shall be provided them by the Board.

5. Reproducing and posting in conspicuous places at their place of business, including places where employee notices are customarily posted, copies of this order and an accompanying statement signed by the Respondents that they have undertaken to comply therewith. These copies shall remain posted for a period of 60 days. The Respondents shall ensure that the copies are legible throughout the posting period, and that they are not altered or covered during that period.

6. Mailing to each of the Respondents' current employees and to each of their former employees employed between July 1, 1974 and June 30, 1977, copies of the Notice. A list of all employees to whom the Notice was sent shall be provided to the Board.

7. Filing a sworn statement with the Clerk of this court within 60 days of the entry of this order showing what steps have been taken to comply with the provisions of this order. A copy of this statement shall be sent to the Board.

To assure compliance with the foregoing provisions, it is further ordered that the Respondents pay a fine of $250 for each violation of this order, and an additional fine of $250 for each day that each such violation continues. This court reserves jurisdiction to issue, pursuant to application by the Board, a writ of body attachment against Charles R. Vocke, Glenara Vocke, and any officer or agent of Goodsell & Vocke, Inc. responsible for default in complying with this order.

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*The Honorable James M. Carter, Senior United States Circuit Judge, died on November 18, 1979. The name of the Honorable Jerome Farris was subsequently drawn to replace Judge Carter on this panel.

**The Honorable James Burns, United States District Judge for the District of Oregon, sitting by designation.

American Diversified Foods, Inc., d/b/a Arby's v. NLRB

640 F.2d 893 (7th Cir.), February 24, 1981—245 NLRB 33

On petition to review Board Order

Before PELL and CUDAHY, Circuit Judges, and DUMBAULD, Senior District Judge*

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PELL, Circuit Judge. American Diversified (American or Company) has petitioned this court to review, and the Board has cross-petitioned this court to enforce, a Board order finding that American violated § 8(a)(1), and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), by discharging two "shift managers" employed at one of the company's "ARBY" restaurants in Bloomington, Indiana. The two shift managers, John Fry and Carl Steffes, were admittedly fired for engaging in union organizational activity. The company claims, however, that it did not violate the Act by discharging Fry and Steffes because shift managers are "supervisors" as defined in § 2(11) of the Act, and thus excluded from the Act's definition of "employee" contained in § 2(3). 29 U.S.C. § 152(11), (3). After a hearing, Administrative Law Judge (ALJ) Karl H. Bushman disagreed and held that Fry and Steffes were not supervisory employees. This finding was adopted by the Board when it held that the company violated § 8(a)(1) and (3) in the discharges, 247 N.L.R.B. No. 9 (1980), which holding is the subject of the petition to this court.

Section 2(11) defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). As in most cases involving definitional sections, the exact boundaries of the definition are not precise with the gaps to be filled by subsequent case law. In filling these gaps, the Board is given a substantial amount of discretion and it is well established that the Board shall be affirmed in its determinations if they are supported by substantial evidence. *NLRB v. Adam & Eve Cosmetics, Inc.*, 567 F.2d 723 (7th Cir. 1977).

> In applying the "substantial evidence" test, however, we are not empowered to rubber-stamp the Board's decision simply because the supporting evidence may be "substantial" when considered by itself and in isolation from the evidence that fairly detracts from the Board's conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–91, 71 S.Ct. 456, [463–
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> 466], 95 L.Ed. 456 (1951). Rather, we must take into account the entire record, including the evidence opposed to the Board's view from which conflicting inferences reasonably could be drawn. *Id.* at 487–88, 71 S.Ct. 456 [at 463–64]. If, when so viewed in its entirety, the record contains "such evidence as a reasonable mind might accept as adequate to support a conclusion," we must accept the Board's findings. *Id.* at 477, 71 S.Ct. 456, [at 459]. On the other hand, if the record as a whole "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of the witnesses or its informed judgment on matters within its special competence," we must set aside the Board's findings. *Id.* at 490, 71 S.Ct. at 466.

Id. at 727.

The facts in this case reveal that the shift managers, usually three or four in each restaurant, are third in the ARBY hierarchy behind the store manager and one or two assistant managers, but ahead of approximately 25 counter employees. The unit manager is a salaried managerial employee hired by corporate management and is primarily responsible for the restaurant unit and overseees all aspects of the unit's operation. The assistant manager is also a salaried employee hired by the corporation who aids the manager in carrying out his responsibilities. The shift managers, on the other hand, are hourly-paid employees who are usually promoted by the unit management from the rank of counter employee.

A typical ARBY's restaurant is open seven days a week for two eight-hours shifts each day. Each shift is headed by a "duty manager." Of these 14 shifts, the store manager is the duty manager for four shifts, the assistant manager is the duty manager for four shifts, and the shift managers act as duty managers for the remaining six shifts, usually in the evenings or on weekends. The shift managers spend 40 to 60 percent of their working time as duty managers with the remainder spent as regular counter employees. When the shift managers are serving as duty managers, they are, with the exception of a one-hour overlap period between shifts, the highest ranking employee in the restaurant.

The duty managers' responsibilities include maintaining the inventory and cash receipt records, controlling the cash resources, and the opening or closing of the restaurant at the beginning or end of the business day, depending upon the shift they manage. The duty managers use the restaurant manager's desk for their paperwork which includes the maintaining of a daily log of activities and occurrences at the restaurant and personnel information. They are responsible for assigning counter employees to specific jobs, replacing absent employees, and sending employees home when they are sick or when work is slow. They are also responsible for enforcing the company's dress and behavior rules and allocating work breaks. On at least one occasion, the duty manager, in this case a shift manager, orally reprimanded a counter employee for misbehavior. In short, during those times that the shift managers serve as duty managers, they are in charge of the restaurant's operation.

Shift managers are paid on an hourly basis at a rate of thirty-five cents an hour greater than counter employees when the shift managers served as duty managers, and twenty cents an hour greater at other times. Other benefits the shift managers receive beyond those given counter employees include paid work breaks and one week's paid vacation after one year's employment. They are also eligible for monthly performance bonuses.

In his opinion holding that shift managers were not "supervisors," the ALJ relied upon the fact that shift managers were without independent authority to hire, fire, transfer, or discipline counter employees. Although the ALJ acknowledged that shift managers did occasionally effectively recommend that certain employees should be fired or other persons hired, he noted that counter employees also did so, or could have done so. The Judge further held that the instance of the shift manager issuing an oral reprimand was an isolated example,

and that the duties regarding work assignments and opening and closing responsibilities were routine and did not require the exercise of independent judgment.[1] The ALJ finally held that neither the company nor the shift managers themselves considered the shift managers to be supervisors, and that the evidence of the counter employees' perceptions was "ambiguous."

When viewed as a whole, we do not believe that substantial evidence supports the Board's conclusions. It is well established that only one of the criteria mentioned in § 2(11) need be present to justify a finding that the questioned occupation is supervisory. *NLRB v. Brown Specialty Co.*, 436 F.2d 372, 375 (7th Cir. 1971). Furthermore, although the ALJ was correct in holding that supervisory jobs require the exercise of some degree of independent judgment, *NLRB v. Sayers Printing Co.*, 453 F.2d 810, 814 (8th Cir. 1971), the fact that the exercise is infrequent does not lessen the supervisory status. In *Oil, Chemical and Atomic Workers, Int'l Union v. NLRB*, 445 F.2d 237, 244 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1039, 92 S.Ct. 713, 30 L.Ed.2d 730 (1972), for example, the court stated, "once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence." Similarly, in *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), *cert. denied*, 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553, the court stated that § 2(11) "* * * does not require the exercise of the power described for all or any definite part of the employee's time." The Board has also agreed with these statements in the past. *See Graves Trucking, Inc.*, 246 N.L.R.B. No. 52 (1979). In this case, shift managers, at least for a substantial portion of the time they are acting as duty managers, exercise independent judgment.

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[1] The ALJ found, for example, that the assignment to the meat slicer station was restricted by a minimum age requirement of the state law, and noted that the length of the employee's shift "appeared to have been the determining factor in an employee's work position."

Initially, we are impressed with the fact that for the great majority of the time shift managers are acting as duty managers, they are the highest ranking employees present in the restaurant. At these times, they have sole responsibility for the compliance with all company rules by the counter employees, for cash receipts and resulting records, and for the following of proper closing and opening procedures. The company employee manual states, in fact:

> All shift managers (non-salaried duty managers) are directly responsible to unit management and Company, American Diversified Foods, for following and enforcing all unit and Company rules and procedural policies on the shifts which they manage.

The fact that the questioned employees are the ranking employees present at the worksite has led the Board to a finding of supervisory status. *E.g., Graves Trucking, supra; Mid-Continent Refrigerated Service Co.,* 228 N.L.R.B. 917, 920 (1977), and *see Colorflow Decorator Products, Inc.,* 228 N.L.R.B. 408, 410 (1977).

The record also establishes that shift managers are responsible for assigning work to the counter employees during their shifts. Although the ALJ was correct in findings that this responsibility operated only within certain legal boundaries and common sense limitations, the discretion is not restricted by any written company policy or directive. The record shows that the shift managers exercise sufficient independent judgment when making these decisions. Although external considerations clearly affect the shift manager's discretion when making these assignments, nothing prevents the shift manager from basing his decision, at least in part, on the requirements of the specific job and his opinion of the counter employee's individual capabilities. This is a sufficient exercise of his independent judgment. *NLRB v. Pilot Freight Carriers, Inc.,* 558 F.2d 205, 209 (4th Cir. 1977), *cert. denied,* 434 U.S. 1011, 98

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S.Ct. 723, 54 L.Ed.2d 754 (1978); *Dynamic Machine Co. v. NLRB, 552* F.2d 1195, 1201 (7th Cir. 1977), *cert, denied,* 434 U.S. 827, 98 S.Ct. 103, 54 L.Ed.2d 85; *and see NLRB v. Big Ben Dept. Stores, Inc., 396* F.2d 78, 82 (2d Cir.1968). The fact that the work the shift manager supervises is not complex and does not require close attention does not weaken a finding of supervisory status. *Sourdough Sales, Inc.,* 246 N.L.R.B. No. 20 (1979); *Colorflow Decorator Products, Inc., supra* at 411. In *Adam and Eve Cosmetics, supra,* this court specifically held, for example, that the supervision of menial work in that case "did not call for the exercise of sophisticated judgment." 567 F.2d at 728. However, the court went on to find that this fact did not mean that the employee "was not called upon the use his own judgment in the course of his job." *Id.* As in that case, we are satisfied that the shift managers here exercised sufficient independent judgment in assigning particular tasks to particular employees.

Additionally, the shift managers meet twice a month with the unit management to discuss personnel problems and store procedures. At these meetings, and by the entries and comments made in the daily logs kept by the duty managers, the shift managers can effectively recommend promotions, hirings, and firings. Importantly, the counter employees know of these meetings and the logs and, perhaps unnecessarily therefore, the company manual states:

> All personnel are to give shift managers the same respect that they give the assistant manager and the store manager.

It is also interesting to note that one counter employee testified that although she did not think shift managers were supervisors in what she believes was the "legal sense," "in the dictionary sense, a supervisor would be one who supervises and I would have to say that [the shift managers] did supervise."

These factors, when viewed with the facts that shift managers have the responsibility to replace absent employees, decide which employees are to leave early, and allocate work breaks, indicate to us that they are supervisors as that term is defined in § 2(11). They possess "independent judgment" because they exercise discretion in assigning work, work breaks and early leave privileges. Furthermore, there is a substantial possibility that fraternal feelings arising from the unionization of these shift managers might interfere with the proper exercise of the duty manager's responsibility in carrying out the employer's policies. *NLRB v. Pilot Freight Carriers, Inc., supra* at 207. There is also the possibility

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that the counter employees might be pressured into union membership, or that the shift managers might be able wrongly to maintain a senior union position, due to the potential misuse of the shift manager's supervisory powers. *C&W Supermarkets, Inc. v. NLRB*, 581 F.2d 618,620-21 (7th Cir. 1978); *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1178 (2d Cir. 1968).

In short, shift managers exercise the type of powers described in § 2(11) and finding them to be "supervisors" within the meaning of the Act complies with the policies behind the exclusion of supervisors from the Act's prescriptions. Cases based upon similar factual circumstances are in accord. *See Ohio Power Co., supra; Pilot Freight Carriers, Inc., supra; Dynamic Machine Co., supra; Fredericks Foodland, Inc.*, 247 N.L.R.B. No. 38 (1980); and *Colorflow Decorator Products, Inc., supra.* The Board's order, therefore, is denied enforcement.

ENFORCEMENT DENIED.

United Steelworkers of America v. NLRB

Florida Steel Corporation v. NLRB

646 F.2d 616 (D.C. Cir.), February 25, 1981—244 NLRB 395

On petitions to review Board Order

Before Senior Circuit Judge BAZELON and Circuit Judges WALD and EDWARDS

Opinion for the court filed by Circuit Judge HARRY T. EDWARDS

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HARRY T. EDWARDS, Circuit Judge: This case raises significant questions concerning the remedial authority of the National Labor Relations Board (the "Board" or "NLRB"). In this action the Board found, and it is not here disputed, that Florida Steel Corporation violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (the "Act"), by unilaterally changing the pay rate of two employees recalled from layoff. Given the company's "proclivity to disregard the statutory rights of its employees and their chosen bargaining representatives," the Board ordered extraordinary affirmative relief beyond the traditional "cease and desist" and "make whole" orders imposed for violations of this type. Most significantly, the Board's remedial order includes provisions requiring Florida Steel to grant the United Steelworkers of America certain forms of access to all company plants, including unorganized plants that have not been the site of any union activity.

Both the employer and the union have filed petitions for review of this order of the Board. The union here contends that, in light of numerous prior instances in which Florida Steel has been found to have violated the Act, certain additional remedies requested by the union should have been ordered by the Board. The employer, on the other hand, argues that the extraordinary remedies imposed by the Board are not warranted by the facts of this case. The Board has filed a cross-application for enforcement of its order.

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To resolve the questions raised in these petitions, we are forced to consider several fundamental, yet potentially conflicting, principles of labor law. In particular, this case presents troublesome questions concerning the authority of the Board to take affirmative action to remedy violations of the Act, as opposed to the right of an employer to deny a union access to company property during an organizational compaign. For reasons set forth below, we hold that, in appropriate circumstances, the Board has broad authority to grant a union access to company property as part of a remedial order. However, in part due to principles set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct, 679, 100 L.Ed. 975 (1956), we hold that the Board must make clear that such access is necessary to offset the adverse effects of unlawful employer conduct. Since the Board in this case has not made certain findings that are necessary to justify a corporatewide grant of access in a remedial order, we remand this case to the Board for further consideration and clarification.

I. BACKGROUND

We begin with a brief presentation of the facts of this case. In light of the arguments advanced by the parties, we also review the history of past violations of the National Labor Relations Act by Florida Steel.

A. *The Unfair Labor Practice In This Case*

The facts underlying this action are not in dispute. The incidents involved here occurred at the Indiantown, Florida plant of Florida Steel. As a result of a representation election conducted in May 1974, the United Steelworkers of America was certified by the Board to represent the production and maintenance workers at the Indiantown plant. In January 1975, Florida Steel effected a cutback in operations that resulted in a layoff of approximately 55 employees at the Indiantown plant. Three months later, Florida Steel recalled 24 of those employees. The finding of an unfair labor practice in the case resulted from the fact that the company recalled two employees to perform work similar to that done before the layoff but at a rate of pay lower than that held prior to layoff; the company effected this change in the employees' rate without first bargaining with the union.[1]

Before their layoff, employees McCammon and McDonald performed the duties of "yard helper," a job classification that normally paid $3.50 per hour. Due to problems in recruiting individuals to perform the work of that job classification, McCammon and McDonald were classified before layoff as "billet yard helpers" and paid $3.80 per hour. After their layoff, McCammon and McDonald were recalled and paid as yard helpers, not as billet yard helpers. This post-layoff change in the employees' classification and pay, which resulted from the implementation of a new policy by the company, was made without any negotiation with the union.

Upon the filing of charges by the union and the issuance of a complaint by the Regional Director of the Board, an Administrative Law Judge concluded that Florida Steel had an obligation to consult with the union concerning its classification decision with respect to yard helper work.[2] The ALJ concluded, however, that the unfair labor practice charge had not been timely filed by the union, and accordingly recommended that the complaint be dismissed.[3]

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The Board reversed this decision of the Administrative Law Judge,[4] ruling that the unfair labor practice charge had been timely filed, and that the unilateral change in the pay rate of McCammon and McDonald violated Sections 8(a)(1) and 8(a)(5) of the Act.[5] Pursuant to this ruling, the Board remanded the case to the Administrative Law Judge for consideration of the appropriate remedy.

On remand, both the union and the General Counsel requested that "the broadest remedy possible" be imposed against the company. These requests were made in light of the numerous instances in which Florida Steel had been found previously to have violated the Act. The ALJ denied the requests for extraordinary relief.[6] The Administrative Law Judge stated:

> The violation found by the Board was an isolated one and hardly egregious in the context of the total layoffs and recalls, and, as stated in the original Decision herein, was not accompanied by even an allegation of animus.

244 N.L.R.B. No. 61, decision of Administrative Law Judge at 3. The ALJ recommended only the conventional "cease and desist" and "make whole" orders.

Exceptions were again filed from the recommended decision of the Administrative Law Judge. In rejecting the limited remedial order proposed by the ALJ,[7] the Board stated that:

> While the 8(a)(5) violation involved here would not, under ordinary circumstances, appear to justify extraordinary remedies, we have decided to grant certain additional remedies here for the reasons fully explicated in our decision in *Florida Steel Corporation*, 242 NLRB No. 195 (1979). We indicated there that Respondent's "pattern of unlawful conduct in recent years" had evidenced a "rejection of the principles of collective bargain-

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[1] Eight other employees were named in the complaint. For various reasons not contested here, the complaint was dismissed as to those employees. *See Florida Steel Corp.*, 235 N.L.R.B. 1010 (1978), *supplemented*, 244 N.L.R.B. No. 61 (Aug. 20, 1979).

[2] The original decision of the ALJ is appended to 235 N.L.R.B. 1010 (1978).

[3] 235 N.L.R.B. at 1014.

[4] *Florida Steel Corp.*, 235 N.L.R.B. 1010 (1978).

[5] 235 N.L.R.B. at 1011. Although the union was not certified by the Board as bargaining representative until June 1975, the Board held that Florida Steel had "a precertification obligation to bargain with the Union over its decision to effect a post layoff change in McCammon's and McDonald's pay for performing the same work." Id. at 1010.

[6] The supplemental decision of the ALJ is appended to 244 N.L.R.B. No. 61 (Aug. 20, 1979).

[7] *Florida Steel Corp.*, 244 N.L.R.B. No. 61 (Aug. 20, 1979).

> ing." We view this case as a continuation of that rejection. Moreover, in reaching our conclusion, we note that Respondent's unlawful conduct here does not constitute its initial transgression of employee rights at the Indiantown, Florida, facility involved. In a prior Board decision, 220 NLRB 1201 (1975), enfd. 538 F.2d 324 (4th Cir. 1976), the Board found that Respondent had violated Section 8(a)(3) and (1) of the Act by withholding a wage increase in retaliation for its employees' union activities. Accordingly, we believe that extra remedial relief is necessitated by Respondent's proclivity to disregard the statutory rights of its employees and their chosen bargaining representatives.

244 N.L.R.B. No. 61 at 2 (footnote omitted).

The Board entered an order providing for the following "extra remedial relief": (1) issuance for corporatewide cease and desist order; (2) corporatewide posting of the Board's notice; (3) mailing of the notice to all employees of Florida Steel; (4) reading of the notice to all employees of Florida Steel; and (5) publication of the notice in all appropriate company publications. The Board decision further provided:

> In addition, if, within 2 years of the date of this Decision, a Board-conducted election is scheduled at any of Respondent's plants involving the Charging Party [United Steelworkers of America], we will require Respondent to provide access to at least two union representatives for a 30-minute speech during worktime, the date thereof to be not more than 10 working days, but not less than 48 hours, prior to any such election. If within the same 2-year period, any agent of Respondent convenes and addresses employees at any of Respondent's plants concerning union representation, we will require Respondent to provide the Union with equal time to respond to such speeches.

244 N.L.R.B. No. 61 at 2–3.

The Board refused to grant two additional remedies requested by the union. Believing that the above measures would remedy adequately the unfair labor practice found, the Board denied requests for: (1) union access for one year to plant bulletin boards companywide; and (2) a list of the names and addresses of the employees of Florida Steel on a companywide basis.

B. *Prior Violations of the Act by Florida Steel*

The remedial order of the Board at issue in this case was based upon Florida Steel's "pattern of unlawful conduct in recent years." We review briefly, therefore, the history of prior cases involving Florida Steel that have arisen before the National Labor Relations Board.

Florida Steel Corporation operates 22 divisions in 11 cities throughout the southeastern United States. By its own admission, Florida Steel is "an enterprise waging a tough, prolonged campaign" against the United Steelworkers. Brief for Petitioner Florida Steel, p. 10. Union organizational activity has been conducted at only four different Florida Steel locations.[8] At each of those locations, the company's "tough, prolonged campaign" against the union has included the commission of several unfair labor practices. In 17 separate cases the Board has found violations of the Act by Florida Steel.[9] Moreover, in most of those cases several unfair labor practices were found.

These cases may be placed roughly in several different categories. At each of the four plants where organizational campaigns were conducted, the company violated the Act by withholding wage and fringe benefit improvements from those plants that were granted companywide.[10] The Board found in these cases that, during the course of a union campaign, Florida Steel deliberately withheld customarily granted benefits in order to discriminate against employees at those plants. In addition, the withholding of benefits at one plant (Croft) was widely publicized at another plant (Indiantown) in an attempt to discourage employees at the latter plant from voting for the union.[11] After an unlawful withholding of benefits was found at a fourth plant, the Board ordered the company to cease and desist from the unlawful activity on a corporate wide basis.[12]

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[8] There has been organizational activity at the Charlotte plant in Croft, North Carolina, and at plants in Tampa, Jacksonville, and Indiantown, Florida.

[9] In 10 of the 12 cases that have been reviewed by an appellate court, the court has granted enforcement of the Board orders in full or with minor modification. In two cases enforcement has been denied. *See Florida Steel Corporation:* 214 N.L.R.B. 264 (1974) (Croft), supplemented, 221 N.L.R.B. 1008 (1975), *enforced in part,* 551 F.2d 306, 94 L.R.R.M. 2589 (4th Cir. 1977); 215 N.L.R.B. 97 (1974) (Tampa), *enforced in part,* 529 F.2d 1225 (5th Cir. 1976), *supplemented,* 234 N.L.R.B. 1089, *enforced,* 586 F.2d 840 (5th Cir. 1978) (table); 220 N.L.R.B. 225 (1975) (Tampa), *enforced in part,* 544 F.2d 896 (5th Cir. 1977); 220 N.L.R.B. 260 (1975) (Croft), *enforced,* 543 F.2d 1389 (D.C. Cir. 1976) (table); 220 N.L.R.B. 1201 (1975) (Indiantown), *enforced,* 538 F.2d 324 (4th Cir. 1976) (table); 221 N.L.R.B. 371 (1975) (Tampa), *enforced,* 534 F.2d 1405 (5th Cir. 1976) (table); 221 N.L.R.B. 554 (1975) (Croft), *supplemented,* 226 N.L.R.B. 123 (1976), *enforced,* 562 F.2d 46 (4th Cir. 1977) (table); 222 N.L.R.B. 955 (Jacksonville), *enforced,* 536 F.2d 1385 (5th Cir. 1976) (table); 223 N.L.R.B. 174 (1976) (Jacksonville); 224 N.L.R.B. 45 (1976) (Tampa); 224 N.L.R.B. 587 (1976) (Tampa); *enforced,* 552 F.2d 368 (5th Cir. 1977) (table); 231 N.L.R.B. 651 (1977) (Tampa), *enforcement denied,* 586 F.2d 436 (5th Cir. 1978); 231 N.L.R.B. 923 (1977) (Croft); 233 N.L.R.B. 491 (1977) (Tampa), *enforcement denied,* 587 F.2d 735 (5th Cir. 1979); 235 N.L.R.B. 941 (1978) (Croft), *enforced in part,* 601 F.2d 125 (4th Cir. 1979); 235 N.L.R.B. 1010 (1978) (Indiantown), *supplemented,* 244 N.L.R.B. No. 61 (Aug. 20, 1979) (present case on appeal); 242 N.L.R.B. No. 195 (June 20, 1979) (Croft), *enforced in part,* 620 F.2d 79 (5th Cir. 1980).

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In another series of cases, Florida Steel violated the Act by threatening, discharging, and conducting unlawful surveillance of known union adherents. In *Florida Steel Corp.*, 214 N.L.R.B. 264 (1974) (Croft), *supplemented,* 221 N.L.R.B. 1008 (1975), *enforced in relevant part,* 551 F.2d 306, 94 L.R.R.M., 2589 (4th Cir. 1977), the Board found the following unfair labor practices: the company had made appeals to racial prejudice in an attempt to defeat the union; the company had threatened employees with loss of jobs, plant closure, reduction of overtime, reduction of benefits, and deterioration of working conditions if the union was accepted; the company had unlawfully interrogated employees concerning union sympathies, and spied on union adherents; and the company had unlawfully discharged 11 employees, and suspended one employee, as a result of their support for the union. In *Florida Steel Corp.*, 215 N.L.R.B. 97 (1974) (Tampa), *enforced in relevant part,* 529 F.2d 1225 (5th Cir. 1976), *supplemented,* 234 N.L.R.B. 1089, *enforced,* 586 F.2d 840 (5th Cir. 1978) (table), the Board found that the company had violated the Act by maintaining and enforcing an invalid no-solicitation rule, by interrogating employees with regard to their union memberships and activities, by harassing known union supporters through extensive surveillance, and by discharging two employees because of their union activities. Similar violations were found in four additional cases.[13]

In addition, at all four locations where employees attempted to organize and an election was held, the conduct of Florida Steel caused the first election to be set aside or the ballots to be seized.[14] In two re-run elections conducted by the Board, the union was successful in obtaining the support of a majority of the employees and was certified as bargaining representative (Croft and Indiantown).

The selection of the union by employees of Florida Steel, however, has not stopped the company's "tough, prolonged campaign" against the union. In a more recent series of cases, the company has attempted to undercut the standing of the union as exclusive bargaining agent by refusing to bargain in violation of Section 8(a)(5). In *Florida Steel Corp.*, 231 N.L.R.B. 923 (1977) (Croft), the Board found that the company unilaterally changed wages, hours, and conditions of employment in violation of Sections 8(a)(1) and 8(a)(5) in prohibiting the continued use of company credit cards, reducing reimbursement rates for meal and lodging expenses, and stating that it would deduct one-half hour pay when meal compensation was provided, all without negotiation with the union. The Board further found a violation of Sections 8(a)(1) and 8(a)(3) when those actions were considered against increases in benefits granted to nonunionized employees at other plants. The Board again noted that the company used the plight of its unionized employees as a warning to employees at an unorganized plant not to select the union.[15] As a

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[10] *Florida Steel Corporation:* 220 N.L.R.B. 260 (1975) (Croft), *enforced,* 543 F.2d 1389 (D.C. Cir. 1976) (table); 220 N.L.R.B. 1201 (1975) (Indiantown), *enforced,* 538 F.2d 324 (4th Cir. 1976) (table); 221 N.L.R.B. 371 (1975) (Tampa), *enforced,* 534 F.2d 1405 (5th Cir. 1976) (table); 221 N.L.R.B. 554 (1975) (Croft), *supplemented,* 226 N.L.R.B. 123 (1976), *enforced,* 562 F.2d 46 (4th Cir. 1977) (table); 222 N.L.R.B. 955 (Jacksonville), *enforced,* 536 F.2d 1385 (5th Cir. 1976) (table).

[11] *See* 220 N.L.R.B. 260 at 266.

[12] 222 N.L.R.B. 955 (Jacksonville), *enforced,* 536 F.2d 1385 (5th Cir. 1976) (table). As noted by the Board in an earlier withholding of benefits case, "Respondent's history of unfair labor practices similar to those committed herein, and its recent history of other types of flagrant violations, indicate a course of unlawful conduct taken by Respondent in the service of designs inimical to the collective-bargaining process." 226 N.L.R.B. 123 at 124.

[13] 220 N.L.R.B. 225 (1975) (Tampa), *enforced in relevant part,* 554 F.2d 896 (5th Cir. 1977) (unlawful interrogation and discharge of one employee); 223 N.L.R.B. 174 (1976) (Jacksonville) (improper no-solicitation rule, unlawful threats of punishment for engaging in union activity, interrogation of employees concerning union activity, unlawful discharge of one employee); 224 N.L.R.B. 45 (1976) (Tampa) (unlawful interrogation of one employee, discriminatory application of no-access rule to employees known or suspected to be union adherents); 224 N.L.R.B 587 (1976) (Tampa), *enforced,* 552 F.2d 368 (5th Cir. 1977) (table) (coercive interrogation, threats of punishment for union activity, unlawful discharge of one employee). In two other discharge cases, enforcement was denied on the ground that the discharge was for a lawful purpose. 231 N.L.R.B. 651 (1977) (Tampa), enforcement denied, 586 F.2d 436 (5th Cir. 1978); 233 N.L.R.B. 491 (1977) (Tampa), *enforcement denied,* 587 F.2d 735 (5th Cir. 1979).

[14] *Florida Steel Corporation:* 11-RC-3735 (Croft); 12-RC-4461 (Indiantown); 12-RC-4844 (Tampa); 12-RC-4845 (Jacksonville).

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result of this use of employees in one plant as an example to employees in another plant, the company was ordered to post a remedial notice at all of its plants and locations.[16]

In *Florida Steel Corp.*, 235 N.L.R.B. 941 (1978) (Croft), *enforced in relevant part*, 601 F.2d 125 (4th Cir. 1979), the Board again found that the company violated Sections 8(a)(1) and 8(a)(5) at the Croft plant by making a unilateral change in working conditions, and, in addition, by failing to provide the union with information necessary for collective bargaining. As in the previous case, the company was ordered to cease and desist the unlawful conduct, and to post the remedial order, on a corporatewide basis.

One final case in this series deserves special attention, for the Board order in that case closely parallels the order at issue here. In *Florida Steel Corp.*, 242 N.L.R.B. No. 195 (June 20, 1979) (Croft), *enforced in part*, 620 F.2d 79 (5th Cir. 1980), the Board found that Florida Steel violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to give the union information concerning the reinstatement of several employees previously found to have been unlawfully discharged. To remedy this violation, the Board granted a request for extraordinary remedies, stating that such remedies were necessary "in order to fully remedy Respondent's rejection of the principles of collective bargaining as evidenced by its pattern of unlawful conduct in recent years" 242 N.L.R.B. No. 195 at 2. The Board entered a remedial order virtually identical to that at issue in this case.

Since the Board in the present case relied heavily on the findings of this earlier decision, it is important to state those findings with some care. After reviewing the many instances of misconduct cited above, including the use by Florida Steel of its unlawful conduct at one plant as a warning to employees at other plants, the Board explained the broad remedial order as follows:

> Thus, the pattern is clear. Respondent has used unlawful means to oppose employee organizational activity at its Croft, Tampa, Indiantown, and Jacksonville plants. Having failed in its efforts to stifle employee free choice at the Croft and Indiantown plants, Respondent next made the union's victory a hollow one by refusing to bargain concerning basic decisions affecting the working conditions of unit employees. The instant violation is yet another step in what can only be characterized as a corporate campaign to chill employee organizational activity throughout its facilities through unlawful conduct. We therefore deem it essential to grant the Charging Party's request for extraordinay remedies in order to counteract the effects of this campaign of lawlessness.

242 N.L.R.B. No. 195 at 4. The Board further noted that "although these remedies might be considered punitive if applied to an isolated instance of misconduct, they are essential to neutralize the effects of Respondent's continuing pattern of unlawful conduct in recent years." *Id at 5.*

On petition for review, the Fifth Circuit modified the remedial order of the Board. The court held that the Board acted within permissible limits in ordering Florida Steel to give notice—by letter, by posting, and by reading—that it would not interfere with employee rights protected by Section 7 of the Act. 620 F.2d at 82. In addition, in part because of the company's use of past violations elsewhere in the corporate structure as part of its anti-union campaigns, the court agreed that the notice should be provided to employees at all plants of Florida Steel. *Id.* Given these broad notice provisions, however, the court held that the additional requirement that notice be placed in appropriate company publications could not be sustained as a remedial measure. *Id.* at 83.

The court also struck down certain portions of the order granting the union access to all plants of Florida Steel. The court held that the provisions for access to the two unionized plants, Croft and Indian-

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town, could be justified "as a means for deterring any repetition of the conduct before the Board and for preventing other efforts by the company to impair the effectiveness of the union as a bargaining representative." 620 F.2d at 83. With respect to all other plants, the court stated:

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[15] 231 N.L.R.B. at 923, 926–27.

[16] 231 N.L.R.B. at 927.

> In requiring this access to be provided at plants where the Steelworkers union is not a bargaining representative, however, the Board's order cannot be viewed as remedial with respect to the charge before it, one involving interference with the union's performance of its role as a bargaining representative.

Id. The court thus held that the portion of the order providing access at these other plants, imposed perhaps from the "understandable frustration and impatience" of the Board, could not be sustained. *Id.*

C. *Issues Presented*

From the above, it is clear that we are dealing with a relatively minor violation of the Act, committed, however, by an employer apparently dedicated to defeating the union at all costs. As stated at the outset, only the propriety of the Board's remedial order is at issue in this case.

The union contends that the Board did not go far enough in its grant of extraordinary remedies, and should have (1) granted the union access to plant bulletin boards companywide for one year and (2) ordered the company to furnish the union with a list of the names and addresses of the employees of Florida Steel on a companywide basis. In support of this request, the union notes an earlier finding of the Board that "it will effectuate the purposes of the Act to require Respondent to provide the Union with companywide access for 1 year to bulletin boards, and furnish the Union with a list of the names and addresses of all employees on a companywide basis." *Florida Steel Corp.*, 233 N.L.R.B. 491 at 491 (1977).[17] The union argues that these remedies are necessary "to insure that *all* Florida Steel employees are informed of the protection afforded them in order to expunge the coercive effect of earlier company communications to employees concerning various unfair labor practices." Brief of Petitioner United Steelworkers, p. 20 (emphasis in original).

In contrast, the company argues that the Board went too far; the company contends that the order of the Board is not supported by substantial evidence in the record and should not be enforced by this court. Florida Steel asserts that the remedies imposed by the Board far exceed that which is appropriate based on an objective examination of the company's record, and are punitive in nature and therefore improper.[18] In particular, the company argues that the access requirements, like the employee name and address list, are essentially organizational tools for the union, appropriate only if "consistent with the principles set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956) which require a showing of special need for increased access in order to effectuate the purposes of the Act." Brief of Petitioner Florida Steel, p. 8.

The resolution of these competing claims requires a careful examination of general principles governing the purpose and proper scope of remedial action taken by the National Labor Relations Board. We agree with Florida Steel that certain aspects of the Board order at issue here raise important questions concerning the proper relationship between remedial action that may be taken by the Board and other principles that normally govern the conduct of an organizational campaign. In particular, we must consider whether the principles announced in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), have any effect on a remedial grant of access to a union on a corporatewide basis at unorganized plants.

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We turn then to consider these potentially conflicting areas of the law. First, in part II of the opinion, we examine restrictions placed by the Supreme Court on union access to company property during an organizational campaign. Second, in part III, we set forth principles governing remedies under the National Labor Relations Act, including a survey of recent developments with respect to the use of union access as a remedial measure. In part IV of the opinion, we set forth the appropriate principles to be applied in cases involving "union access" as a remedial measure. Finally, in part V, we apply these principles to the remedial order at issue in this case.

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[17] The order of the Board in 233 N.L.R.B. 491 was denied enforcement, on substantive grounds, by the Fifth Circuit. *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979).

[18] The company contends in this regard that "it was neither alleged nor shown that the Company's actions in this case affected employees outside the Indiantown plant, were ever calculated to do so, or ever practically prevented the Union from adequately representing the Indiantown unit." Brief for Petitioner Florida Steel, p. 11.

II. PERMISSIBLE RESTRICTIONS ON UNION ACCESS TO COMPANY PROPERTY DURING AN ORGANIZATIONAL CAMPAIGN

The principles governing union rights of access to company property are among the most fundamental of labor law. Access can be an extremely valuable organizational tool. One empirical study has found that those employees who switch from a pro-company to a pro-union position during an organizational drive are more likely to be familiar with the content of a union campaign than those employees who do not switch. Getman and Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation,* 28 Stan.L.Rev. 263, 281 (1976). Thus, a union organizational drive may be facilitated by access to a company plant during the course of an election campaign.

At the same time, union access by definition impacts on the private property rights of an employer. In *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), the Supreme Court recognized these competing forces and established rules governing rights of access of nonemployee union organizers to the private property of an employer.

At issue in *Babcock* was the legality of a rule promulgated by an employer that prohibited the distribution of literature by nonemployee union organizers on company-owned parking lots. The plant in *Babcock* was located in a community of 21,000 people. Approximately 40% of the employees lived within the community, with the remainder located within a 30-mile radius. The only public area in the immediate vicinity of the plant was an area where the driveway to the plant met a public right-of-way; because of traffic conditions, however, union solicitation could not be conducted safely at that spot.

Concerning the right to solicit union support on company property, the Supreme Court noted that a distinction "of substance" existed between rules applicable to employees and those applicable to nonemployees. The Court recognized, as earlier established in *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945), that no restriction could be placed on the right of employees to discuss unionization among themselves on company property, unless the employer could demonstrate that a restriction was necessary to maintain production or discipline in the plant. Unlike employees, however, outside union organizers have no preexisting right to be present on the property of the employer. As a result, the Court held in *Babcock* that an accommodation was required to be made between the organizational interests of employees and the private property interests of an employer. As described by the Supreme Court:

> Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.

351 U.S. at 112, 76 S.Ct. at 684.

The Supreme Court in *Babcock* set forth specifically the manner in which the accommodation between organizational rights and property rights was to be made. The Court held:

> It is our judgment * * * that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

351 U.S. at 112, 76 S.Ct. at 684. Stated alternatively, "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." *Id.* at 113, 76 S.Ct. at 685.

Applying this standard, the Court in *Babcock* denied the union access to company property, finding that other means of communication were readily available by which the union could deliver its message to employees. 351 U.S. at 113–14, 76 S.Ct. at 684–85. Since the issuance of the decision in *Babcock,* unions rarely have been granted access to company property during organizational campaigns.[19] Indeed, the Supreme Court itself has recently recognized that "the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205, 98 S.Ct. 1745, 1761, 56 L.Ed.2d 209 (1978).[20]

The restrictions against union access during organizational drives announced in *Babcock* have held firm in a number of different contexts. One of the most important applications of *Babcock* occurred just two years later in *NLRB v. United Steelworkers (NuTone)*, 357 U.S. 357, 78 S.Ct. 1268, 2 L.Ed.2d 1383 (1958). In *NuTone*, two cases were consolidated. In the first case, the employer enforced a no-solicitation rule against employee solicitation valid under *Republic Aviation* (because necessary to maintain plant production or discipline), but at the same time engaged in noncoercive, anti-union solicitation while committing other unfair labor practices. The facts of the second case were identical, except that the employer anti-union solicitation in that case was itself coercive and thus a violation of the Act. The issue presented in *NuTone* was whether the existence of anti-union solicitation by an employer—particularly if coercive or accompanied by other unfair labor practices—had any effect on employee rights of solicitation or union rights of access as set forth in *Republic Aviation* and *Babcock*.

The Supreme Court ruled in *NuTone* that the existence of anti-union solicitation by an employer or other unfair labor practices did not nulify the *Republic Aviation* and *Babcock* standards. As stated by the Supreme Court:

> No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees. Just as that is a vital consideration in determining the validity of a no-solicitation rule, see *Republic Aviation Corp. v. Labor Board, supra*, at 797–798 [65 S.Ct. at 985]; *Labor Board v. Babcock & Wilcox Co., supra*, at 112 [76 S.Ct. at 684], it is highly relevant in determining whether a valid rule has been fairly applied.

357 U.S. at 363, 78 S.Ct. at 1271. The Court further stated:

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> If, by virtue of the location of the plant and of the facilities and resources available to the union, the opportunities for effectively reaching the employees with a pro-union message, in spite of a no-solicitation rule, are at least as great as the employer's ability to promote the legally authorized expression of his anti-union views, there is no basis for invalidating these "otherwise valid" rules.

Id. at 364, 78 S.Ct. at 1272.[21]

Babcock also served as a basis for the resolution of a controversy concerning union rights to access to respond to a "captive audience" speech of an employer. In *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951), the Board considered a case in which an employer had assembled workers on company premises during working time to deliver an anti-union message one week before an election. The company then refused to grant the union an opportunity to address the employees under similar conditions. The Board held that the employer's refusal to grant the union "equal time" violated Section

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[19] *See Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972), *enforced mem.*, 83 L.R.R.M. 2992 (9th Cir. 1973); *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948). *But see Hutzler Brothers Co. v. NLRB*, 630 F.2d 1012 (4th Cir. 1980); *Sabine Towing & Transportation Co. v. NLRB*, 599 F.2d 633 (5th Cir. 1979); *NLRB v. Tamiment, Inc.*, 451 F.2d 794 (3rd Cir. 1971), *cert. denied*, 409 U.S. 1012, 93 S.Ct. 440, 34 L.Ed.2d 306 (1972); *NLRB v. Kutsher's Hotel and Country Club, Inc.*, 427 F.2d 200 (2d Cir. 1970).

[20] The Court noted that in the absence of discrimination, "the union's asserted right of access for organizational activity has generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees." 436 U.S. at 205 n.41, 98 S.Ct. at 1761 n.41.

[21] While *NuTone* established the general relevance of the *Babcock* and *Republic Aviation* standards in the context of employer solicitation or unfair labor practices, it was not immediately clear whether those standards would be applied as rigorously in all instances of such conduct. The Court in *NuTone* stated that it was inappropriate to establish a *per se* rule that a union had a right of access to respond to an unlawful anti-union campaign, implying that such a *per se* rule was improper because it would apply whether or not "the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication." 357 U.S. at 362, 78 S.Ct. at 1271. The Court thus left open the door for the possibility that some other standard might apply if the employer conduct created such an imbalance. The "organizational imbalance" language of *NuTone* seemingly has proved to have little effect in subsequent cases, however, on union rights of access to company property. As stated by one court, "[t]he determination of whether or not the • • • employer conduct produced an imbalance in opportunities for organizational communications is dependent upon the existence or non-existence of alternative methods of communication open to the Union." *May Department Stores Co. v. NLRB*, 316 F.2d 797, 799 (6th Cir. 1963).

8(a)(1) of the Act. Enforcement was denied by the Second Circuit, however, because the court found that the Board's order was overly broad. *Bonwit Teller, Inc. v. NLRB,* 197 F.2d 640 (2d Cir. 1952), *cert. denied,* 345 U.S. 905, 73 S.Ct. 644, 97 L.Ed. 1342 (1953). Two years later, in *Livingston Shirt Corp.,* 107 N.L.R.B. 400 (1953), the Board appeared to modify its *Bonwit Teller* doctrine, and held that an employer does not commit an unfair labor practice in making a pre-election speech to employees on company property and denying a union request for an opportunity to reply. An exception to the *Livingston Shirt* rule was later announced, however, in *May Department Stores Co.,* 136 N.L.R.B. 797 (1962), where the Board declared unlawful an employer "captive audience" speech made, without affording the union an opportunity to respond, in a department store context, where "broad but privileged" employee no-solicitation rules (prohibiting solicitation in working areas during nonworking time) had been enforced by the employer.

Relying on *Babcock* and *NuTone,* the Sixth Circuit denied enforcement of the Board order in *May Department Stores. May Department Stores Co. v. NLRB,* 316 F.2d 797 (6th Cir. 1963). The court held that the employer had not committed an unfair labor practice in delivering a captive audience speech, while enforcing a "broad but privileged" no-solicitation rule and denying the union equal time, since no showing had been made that employees could not be reached by the union through alternative means of communication. That critical standard from *Babcock* was again held to be determinative. 316 F.2d at 800–01.[22]

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Despite the setbacks of *NuTone* and *May Department Stores,* unions did not abandon their fight to obtain greater access during organizational campaigns. Relying on language in *NuTone* suggesting that a "balance" should exist between the opportunities of unions and employers for organizational communication,[23] unions continued to press the Board for access to company property for solicitation purposes.

In *Excelsior Underwear Inc.,* 156 N.L.R.B. 1236 (1966), the Board once again attempted to resolve this issue. The Board recognized in *Excelsior* that an employee can make an informed and reasoned choice in a representation election only if he has an effective opportunity to hear arguments concerning union representation from both labor and management. The Board also noted that an employer, through possession of employee names and addresses and the ability to communicate with employees on company premises, is virtually assured of a continuing opportunity to inform employees of management views.

Despite these facts, the Board in *Excelsior* was forced to recognize that union organizers have no right of access to company property except as narrowly established in *Babcock.* As a result, to reconcile the need for "full and fair communication" against the restraints imposed by *Babcock,* the Board set forth what has become known as the *Excelsior* rule. The Board held that within seven days after the Regional Director approves a consent-election agreement or directs the holding of an election, an employer must make available to the union a list of the names and addresses of all employees eligible to vote in the election.[24] In this way, unions are able to communicate with employees more easily off company property. In announcing the Excelsior doctrine, the Board decided to defer any reconsideration of union access rights until after the effects of *Excelsior* had become known. *General Electric Co.,* 156 N.L.R.B. 1247, 1251 (1966).

Babcock has continued to be extended and reaffirmed in recent Supreme Court cases. In *Central Hardware Co. v. NLRB,* 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972), the Supreme Court held that the *Babcock* analysis applies to questions of union access rights in an organizational campaign conducted in a large city, in which employees are scattered over a densely populated metropolitan area.[25] The Court in *Central Hardware* stated that *Babcock* set forth "the guiding principle" for adjusting conflicts between employee rights protected by Section 7 of the Act and private property rights. 407 U.S. at 544, 92 S.Ct. at 2241. In *Hudgens v. NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), the Supreme Court utilized this language and held that *Babcock* governs the rights of union members to engage in peaceful primary picketing within the confines of a privately owned shopping center.[26] *See also Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 204, 98 S.Ct. 1745, 1761, 56 L.Ed.2d 209 (1978).[27]

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[22] The Sixth Circuit later declared that, in a very specific situation, a union may be entitled to "equal time" to respond to a captive audience speech by an employer. In *Montgomery Ward & Co. v. NLRB,* 339 F.2d 889 (6th Cir. 1965), the court enforced a decision of the Board that an employer violated the Act in denying a union equal time to address employees following an anti-union employer speech, since the employer in that case had *unlawfully* prohibited employee solicitation in nonworking areas of the store during nonworking time (a "broad" but "unprivileged" rule). *Montgomery Ward* is thus one of the few instances in which a refusal by an employer to grant a union access to company property has been held to violate the Act, absent a showing that alternative means of communication did not exist.

[23] *See* note 21, *supra.*

[24] This requirement was upheld by the Supreme Court in *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

The principles of *Babcock* were most recently reiterated by the Supreme Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978). The Court there stated:

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> While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.

436 U.S. at 205, 98 S.Ct. at 1761.[28]

In summary, *Babcock* and its progeny reflect well-established and strict rules governing union access rights to company property during an organizational campaign. *Babcock* and related cases make clear that an employer may deny a union access to company property, unless the union meets a heavy burden of showing that no other reasonable means of communicating its organizational message to the employes exist.

III. UNION ACCESS AS A REMEDIAL MEASURE

In a separate series of cases, unions have been granted access to company property as a remedial measure for violations of the Act by an employer. We first consider general principles governing remedies under the National Labor Relations Act, and then turn to trace this development of union access as a remedial measure.

A. *General Remedial Principles under the National Labor Relations Act*

The authority of the Board to impose remedies for violations of the Act is granted by Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976). That section provides in relevant part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

The statute gives little guidance concerning the scope of this authority of the Board. Certain general principles, however, have been established by the courts.

First, it is firmly entrenched in the case law that the imposition of remedies is a matter of special administrative competence, subject to very limited judicial review. This principle is more than mere rhetoric or boilerplate; the administrative expertise of the Board in fashioning remedies, derived from its unique understanding of the complex relationship between labor and management in our industrial society and the policies incorporated in the labor laws, is not to be interfered with lightly by reviewing courts lacking that expertise.[29] As stated

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[25] *See also Monogram Models, Inc.*, 192 N.L.R.B. 705 (1971); *Falk Corp.* 192 N.L.R.B. 716 (1971).

[26] The Court in *Hudgens* also ruled that a union has no right of access from constitutional guarantees of free expression. 424 U.S. at 512–21, 96 S.Ct. at 1032–37. *See also Asociacion de Trabajadores Agricolas de Puerto Rico v. Green Giant Co.*, 518 F.2d 130 (3d Cir. 1975).

[27] In *Sears*, the Supreme Court noted that "the Court has indicated that *Babcock* extends to § 7 rights other than organizational activity." 436 U.S. at 204, 98 S.Ct. at 1761.

[28] Enforcement of two Board orders in which a union was granted access to company property during an organizational campaign has been denied recently because the Board placed a burden on the employer of proving that alternative means of communication existed. *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir. 1980); *Sabine Towing & Transportation Co. v. NLRB*, 599 F.2d 663 (5th Cir. 1979).

[29] *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348–49, 73 S.Ct. 287, 289–90, 97 L.Ed. 377 (1953); *Fibreboard Paper Prod-*

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by the Supreme Court in *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943), the selection of remedies made by the Board must stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

Despite this broad and important principle, the authority of the Board has certain recognized bounds. A second and equal fundamental principle governing Board remedies is that the powers of the Board are remedial, not punitive, and the Board may not justify an order solely on the ground that it will deter future violations of the Act. *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 147 n.36 (D.C.Cir.), *cert. denied,* 442 U.S. 942, 99 S.Ct. 2885, 61 L.Ed.2d 312 (1979). As stated by the Supreme Court in *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 11, 61 S.Ct. 77, 79, 85 L.Ed. 6 (1940), "[w]e do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."[30]

These clean bounds of doctrine soon give way, however, to much hazier lines in application. While it is clear that Board remedies may not be punitive, the Supreme Court has also stated that Section 10(c) is a broad "command" that the Board order such affirmative action as is necessary to effectuate the purposes of the Act. *NLRB v. J. H. Rutter-Rex Manufacturing Co.,* 396 U.S. 258, 262, 90 S.Ct. 417, 419, 24 L.Ed.2d 405 (1969). *See International Union of Electrical Workers v. NLRB,* 426 F.2d 1243, 1249 (D.C.Cir.), *cert. denied,* 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256 (1970). Indeed, the Supreme Court stated in *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 73 S.Ct. 287, 97 L.Ed. 377 (1953):

> It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does, as [the order in this case] does, and what order does not, bear appropriate relation to the policies of the Act.

344 U.S. at 348, 73 S.Ct. at 289.

We believe that it is wise to pay heed to this warning of the Supreme Court not to get caught up in a semantic debate between what is "remedial" and what is "punitive." Certainly the Board has no power to "punish" offending parties, as distinguished from "remedying" unfair labor practices. Such labels oversimplify the problem, however. There is a danger that purely "compensatory" remedies may fail in some cases to effectuate fully the purposes of the Act. For instance, it has been recognized that an order granting reinstatement with back pay in an unlawful discharge case may amount to no more than "a license fee for union busting." Staff of Subcommittee on NLRB, House Committee on Education and Labor, 87th Cong., 1st Sess., Administration of the Labor-Management Relations Act by the NLRB 2 (Comm. Print 1961).[31] An unlawful discharge may affect employees who are not themselves the subject of employer action; an atmosphere of fear and anxiety may be created that is very difficult to define or quantify and remedy. If the Act is to be effectuated fully, these effects are perhaps the most important to offset.

This problem is most acute in cases of parties who have demonstrated an unyielding disregard for the Act by repeatedly committing unfair labor practices and ignoring Board orders to cease and desist from unlawful conduct. It long has been evident to the Board and the courts that some "stronger medicine" is necessary to effectuate the policies of the Act in cases of recidivist violators. As a result, it is now firmly established that the Board has the power—and indeed the obligation—to take into account a history of recalcitrance in designing a remedial order. *Textile Workers Union v. NLRB,* 475 F.2d 973, 976 (D.C. Cir. 1973).[32] As

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ucts Corp. v. NLRB. 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964); *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 612 n.32, 89 S.Ct. 1918, 1939 n.32, 23 L.Ed.2d 547 (1969).

[30] *See also Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 235–36, 59 S.Ct. 206, 219–20, 83 L.Ed. 126 (1938); *Decaturville Sportswear Co. v. NLRB,* 406 F.2d 886, 889 (6th Cir. 1969).

[31] *See J. P. Stevens & Co. v. NLRB,* 380 F.2d 292, 303 (2d Cir.), *cert. denied,* 389 U.S. 1005, 88 S.Ct. 564, 19 L.Ed.2d 600 (1967); *J. P. Stevens & Co. v. NLRB,* 417 F.2d 533, 538 n.9 (5th Cir. 1969).

[32] *See also NLRB v. Clinton Packing Co.,* 468 F.2d 953, 954 (8th Cir. 1972); *J. P. Stevens & Co. v. NLRB,* 417 F.2d 533, 537 (5th Cir. 1969); *J. P. Stevens & Co. v. NLRB,* 406 F.2d 1017, 1019, 1022 (4th Cir. 1968); *Truck Drivers & Helpers Local 728 v. NLRB,* 332 F.2d 693, 697 (5th Cir.), *cert. denied,* 379 U.S. 913, 85 S.Ct. 261, 13 L.Ed.2d 185 (1964).

stated in *Containair Systems Corp. v. NLRB*, 521 F.2d 1166 (2d Cir. 1975):

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> Without doubt the Board has a duty in a litigated case to employ broader and more stringent remedies against a recidivist than those usually invoked against a first offender, particularly where normal remedies have proved to be ineffective after earlier proceedings. Otherwise the Board might fail to carry out the mandates of § 10(c) of the Act, 29 U.S.C. § 160(c), which obligates it to order a proven violator "to take such affirmative action * * * as will effectuate the policies of this act."

521 F.2d at 1171.[33]

It could be said that this attitude toward recidivists is irreconcilable with the notion that Board orders may not be punitive or designed to deter. If Section 10(c) commands the Board in every case to impose such affirmative remedial action as is necessary to effectuate the policies of the Act, it is difficult to conceptualize what "more" can be imposed against a recidivist that is not in some way punitive. Courts thus far have rarely addressed this potential inconsistency.

In resolving this conflict, we are tempted simply to note again the statement of the Supreme Court in *NLRB v. Seven-Up Bottling Co., supra*, that rather than focus on what is remedial and what is punitive, "[i]t seems more profitable to stick closely to the direction of the Act by considering what order does, * * * and what order does not, bear appropriate relation to the policies of the Act." 344 U.S. at 348, 73 S.Ct. at 289. We believe that it is possible, however, to reconcile the need to impose more stringent remedies against recidivists with the incantation that Board orders not be punitive.

This reconciliation is based upon the fact, perhaps simply unspoken in earlier cases, that in the case of a recidivist violator "the whole may be greater than the sum of its parts." In other words, a series of violations may have a cumulative effect on employees that is greater than the combined effect of each violation viewed in isolation. Employees may be affected deeply by the mere fact that an employer has demonstrated a staunch willingness to violate the Act in open defiance of past Board orders. More "stringent" remedies are required to offset this additional effect that is not present in the case of a first-time offender. These remedies may appear "punitive" in the context of an individual case, but are clearly "remedial," and therefore proper, in the context of the total conduct of a recidivist violator.[34]

B. *"Union Access" as a Remedial Measure at a Plant Where Unfair Labor Practices Occurred*

Grants of union access to company property have been ordered by the Board to remedy violations of the Act by an employer. Generally, such access has been limited to the site at which unfair labor practices were committed. While the use of access as a remedial measure appears to be increasing, the development of this remedial tool has not been marked by any consistent standard or theory.

1. Union Access to Bulletin Boards

The most common form of access granted to a union as a remedial measure is a grant of access to bulletin boards of the plant. Access to bulletin boards is perhaps the least intrusive form of access to company property, yet provides the union an important means by which to communicate with employees. That communication is often essential to offset effects caused by the unlawful conduct of an employer.

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Access to bulletin boards as a remedial measure has been imposed in a variety of cases. Most often, access to bulletin boards is ordered to remedy "flagrant violations," "outrageous conduct," or "a gross interference with employees' organizational rights."[35] Access to bulletin boards has also been

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[33] The importance of deferring to the expertise of the Board in such a situation has also been emphasized. As stated by the court in *Amalgamated Local 355 v. NLRB*, 481 F.2d 996, 1007 (2d Cir. 1973), "[t]he problem of how drastic to mold the remedy in a particular proceeding concerned with the latest in a series of violations calls for the sensitive exercise of administrative judgment, and we cannot substitute our own opinion for the Board's reasoned explication."

[34] We endorse the suggestion of the Second Circuit in *Amalgamated Local 355, supra* note 33, that the imposition of remedies in the case of a recidivist violator particularly demands the sensitive exercise of administrative judgment and expertise.

[35] *See e.g., Kent Corp.*, 212 N.L.R.B. 595, 613 (1974), *enforced in relevant part, NLRB v. Kent Corp.*, 530 F.2d 610 (5th Cir. 1976); *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 888–89 (6th Cir. 1969); *United*

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granted in cases in which the employer had an extended history of unlawful conduct.[36]

In certain cases, the remedial nature of a grant of access to bulletin boards has been made clear. In *John Singer, Inc.*, 197 N.L.R.B. 88, 90 (1972), the Board found that union access to bulletin boards was necessary because additional forms of communication were needed to allow the union to reclaim allegiance lost as a result of the company's frivolous refusal to bargain. *See also Koval Press, Inc.*, 241 N.L.R.B. No. 189, at 10 (May 4, 1979), *enforced, NLRB v. Koval Press, Inc.*, 622 F.2d 579 (3d Cir. 1980). In *J.P. Stevens & Co. v. NLRB (Stevens II)*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S.Ct. 112, 21 L.Ed.2d 107 (1968), the court upheld a grant of union access to bulletin boards in order to offset the company's use of bulletin boards in a coercive compaign against the union. The court in *Stevens II* noted that access to bulletin boards also was "appropriately designed to dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign." 388 F.2d at 906.

This use of bulletin board access as a remedial measure designed to dissipate an atmosphere of fear was further explained by the Fifth Circuit in *J.P. Stevens & Co. v. NLRB (Stevens V)*, 417 F.2d 533 (5th Cir. 1969). The court in *Stevens V* noted that while reinstatement and back pay may remedy the direct consequences of an unlawful discharge, there is a substantial danger that these traditional remedies will do nothing to dissipate the fear and anxiety that may be caused by widespread unlawful conduct. The court thus upheld a grant of union access to bulletin boards, stating:

> Surely, the Board could conclude that this rather impersonal outlet for Union views was necessary to eliminate the employees' apprehension of incurring the risk of discharge or other retaliation if they engaged in personal solicitation either in or out of the plant.

417 F.2d at 540. The court upheld the grant of access while admitting that "[w]e do this even though there was no specific showing that the Union was unable to disseminate its lawful propaganda." *Id.*

In other cases, however, courts and the Board have take a different approach. Placing greater emphasis on the principles announced in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed 975 (1956), access to bulletin boards has been rejected as a remedial measure where alternative means existed for the union to bring its message to the employees. *See Greenfield Manufacturing Co.*, 199 N.L.R.B. 756, 757 n.7 (1972). In the first *J.P. Stevens* case, *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005, 88 S.Ct. 564, 19 L.Ed.2d 600 (1967), the court refused to enforce a provision granting the union access to plant bulletin boards. Although the court upheld a finding of the Board that 71 employees had been discharged unlawfully for engaging in union activity, the court ruled that access to bulletin boards was not warranted, on the grounds that "[n]o unique problem of access has been shown," and that "the Board made

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virtually no findings concerning the issues relevant to solicitation, and made no adequate showing that the Company's bulletin boards are necessary to the Union in its organization campaign." 380 F.2d at 305.

2. Direct Plant Access for Union Organizers

A similarly inconsistent development has occurred in the use of direct plant access for union organizers as a remedial measure. It is clear that the use of this remedy by the Board is increasing, once again typically limited to the site of the unfair labor practice. As with access to bulletin boards, the general theory behind the use of this remedial tool is that greater communication between the union and employees is needed to dissipate the effects of fear and oppression that have been created by serious or repeated employer unfair labor practices. The effect of *Babcock* in this setting, however, has been felt more clearly.

In a series of cases, direct union access to company property as a remedial measure has been denied because alternative means existed by which the union could communicate with employees. Citing *Babcock*, the Board in *Greenfield Manufacturing Co.*, 199 N.L.R.B. 756 (1972), denied a union

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Dairy Farmers Cooperative Ass'n, 242 N.L.R.B. No. 179, at 10 (June 12, 1979), *Betra Mfg. Co.*, 232 N.L.R.B. 1126, 1127, 1137 (1977), *enforced, NLRB v. Betra Mfg. Co.*, 624 F.2d 192, 89 Lab.Cas. (CCH) ¶ 12264 (9th Cir. 1980).

[36] *See Textile Workers Union v. NLRB*, 475 F.2d 973, 975 n.3 (D.C.Cir. 1973); *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 n.15 (5th Cir. 1969), *Beveri Chevrolet, Inc.*, 221 N.L.R.B. 710 (1975).

request for access to property as a remedial measure, stating:

> In our view, the record does not justify the application of this species of extraordinary relief because viable alternative means for the Union's organizational access to employees appear to be at hand.

199 N.L.R.B. at 757 n.7. Similarly in *Heck's Inc.*, 191 N.L.R.B. 886 (1971), *enforced in relevant part, Food Store Employees Local 347 v. NLRB*, 476 F.2d 546 (D.C. Cir. 1973), *reversed in part on other grounds*, 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974), the Board rejected a request for direct access as a remedial measure, stating that such a remedy is not warranted "unless, as is not established to be the case here, alternative means of access are clearly unavailable or have been tried and found wanting." 191 N.L.R.B. at 887 (citing *Babcock*).[37]

Similarly, in *Winn-Dixie Stores, Inc.*, 224 N.L.R.B. 1418 (1976), *enforced in relevant part, Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343 (5th Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978), the Board adopted a statement of an Administrative Law Judge concerning the relationship of Babcock to direct union access as a remedial measure. In denying a request that access be incorporated in a remedial order, the ALJ stated:

> I would find that an imbalance has been created by Respondent's unfair labor practices, which would tend to critically impair the Union's opportunities for effective communication among all but the most militant employee supporters of the Union at the Jacksonville warehouse. Yet as illogical as the law may appear in this regard, under the precedent no weight is accorded to a lack of access attributed to unfair labor practices; instead, only imbalances attributable to physical factors are regarded as relevant to the inquiry.

224 N.L.R.B. at 1459 n.17.

An opposite approach was taken by the court in *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886 (6th Cir. 1969). In that case, the Sixth Circuit enforced a remedial provision that granted union organizers access to plant approaches and parking lots during nonworking time for a period of six months. The court completely rejected the applicability of *Babcock* in the remedial setting. As stated by the court:

> *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed 975 (1956), on which the company relies, is not inconsistent with
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> our decision on this point. There, the question was whether denial of access to company property in order to distribute union literature consitituted an unfair labor practice and the Supreme Court held it did not. Here, the question is whether reasonable access to company property for a limited time is an appropriate remedial measure after a finding of unfair labor practices. The two questions involve different considerations. We conclude therefore that this is a valid exercise of the Board's authority.

406 F.2d at 889. *See also Teamsters Local* 115 v. *NLRB*, 641 F.2d 984 at 992 (D.C.Cir. 1981).

Finally, a number of cases have approached the question of plant access as a remedial measure without any discussion of *Babcock* at all. In *International Union of Electrical Workers v. NLRB*, 383 F.2d 230, 232 n.4 (D.C.Cir. 1967), *cert. denied*, 390 U.S. 904, 88 S.Ct. 818, 19 L.Ed.2d 871 (1968); this court enforced, due to "aggravated circumstances" present in the case, that portion of a Board order granting the union access for one hour, on company time and at company expense, to give a presentation of the union position.[38] In a recent series of cases, due to the presence of unfair labor practices so "outrageous" and "pervasive" that "conventional remedies will not suffice to dissipate them and are inadequate to give Respondent's employees sufficiently explicit reassurances and understanding of their rights under the Act," the Board has granted union (1) access to nonwork areas of the plant during nonworking time, (2) access to respond to any anti-union speech by the employer, and (3) access to the plant to make a 30-minute speech prior to any election in which the union is participant. *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, at 10, 12 (June 12, 1979); *Haddon House Food Products, Inc.*, 242 N.L.R.B. No. 180 (June 12, 1979), *enforced in relevant part, Teamsters Local 115 v. NLRB*, 641 F.2d 984 (D.C. Cir. 1981); *Sambo's Restaurant, Inc.*, 247 N.L.R.B. No. 122, at 4 (Feb. 4, 1980); *F.W. I.L. Lundy Brothers Restaurant, Inc.*, 248 N.L.R.B. 415, 436 (1980).

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[37] *See also NLRB v. H. W. Elson Bottling Co.*, 379 F.2d 223 (6th Cir. 1967). The court in *Elson* refused to enforce that part of a remedial order that granted the union the right to hold two in-plant meetings on company time, in part because "this record shows no problem of union access to or communication with employees of this company." 379 F.2d at 227 (citing *Babcock*). The court modified the order, however, to grant the union equal time to respond to any speech made by the employer on the question of union representation.

[38] *NLRB v. Crown Laundry & Dry Cleaners*, 437 F.2d 290, 294 (5th Cir. 1971) (civil contempt); *NLRB v. Johnson Mfg. Co.*, 511 F.2d 153, 157 (5th Cir.) (civil contempt), *cert. denied*, 423 U.S. 867, 96 S.Ct. 130, 46 L.Ed.2d 97 (1975); *Scottex Corp.*, 200 N.L.R.B. 446, 445 (1972).

In other cases, access has been denied without reference to *Babcock*. In *C.W.F. Corp.*, 188 N.L.R.B. 554, 560 (1971), *enforced, Retail Store Employees Local 400 v. NLRB*, 458 F.2d 792 (D.C.Cir. 1972), access was denied simply because lesser remedies were deemed adequate.[39] In *Malrite of Wisconsin, Inc.*, 213 N.L.R.B. 830 (1974), the Board denied a request for access as a remedial measure on entirely different grounds. The Board stated that to grant access in that case "would put the Board in the position of appearing to lend support to the unionization of Respondent's engineers by one particular union regardless of whatever interest another union might have. In such matters the Board must be and appear to be scrupulously neutral." 213 N.L.R.B. at 831. Similar concerns were expressed by a dissenting member in another Board case granting broad union access as a remedial measure. *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, at 12 n.15 (June 12, 1979), *See also Haddon House Food Products, Inc.*, 242 N.L.R.B. No. 180, at n.11 (June 12, 1979), *enforced in relevant part, Teamsters Local 115 v. NLRB*, 641 F.2d 985 (D.C.Cir. 1981).

C. *Union Access as a Remedial Measure Beyond the Plant Where the Unfair Labor Practice Occurred*

As set forth above, an extensive campaign of unfair labor practices can produce effects on employees in a plant that cannot be offset by reinstating discharged employees or setting aside a challenged election. Widespread unlawful practices may create an atmosphere of fear chilling the exercise of employee rights guaranteed by the Act. While such effects are often produced by a prolonged campaign in which an employer demonstrates a deliberate disregard of protected legal rights by repeatedly violating the Act and ignoring Board orders, an atmosphere of tension and apprehension may be created even without an extensive history of past violations. As Judge Mikva aptly recognized in *Teamsters Local 115 v. NLRB*, at 992 (D.C.Cir. 1981), "an employer who strikes the first blow hard enough may not need to strike another."

To offset the effects caused by such unfair labor practices, courts and the Board have recognized that more extensive remedies are at times needed. Employees must be assured that certain rights do exist and will be protected. In order to bring that critical message home to employees, it has been found necessary in some cases to grant the union access to company bulletin boards or even to the plant itself. Without utilizing these additional means of communication, there may be no way to dissipate lingering effects caused by an unlawful antiunion campaign and to allow employees to make a free, uncoerced choice concerning union representation.

In some cases, however, even this increased access at the site where unfair labor practices have been committed may not be enough to remedy the effects of a strong, unlawful employer campaign. As recognized by the Supreme Court in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965), employer practices at one plant may have a "chilling effect" on the employees at another plant. In *Darlington*, a company closed one of its 18 plants following a successful union campaign at that plant, an action the Board found to be an unfair labor practice.[40] In reviewing this finding, the Supreme Court noted that an employer has an absolute right to terminate its entire business at any time for any reason. The Court recognized, however, that a partial closing of only one plant could produce effects elsewhere in the company, and held that such action may violate the Act "if motivated by a purpose to chill unionism in any of the remaining plants." 380 U.S. at 275, 85 S.Ct. at 1002. Thus, an otherwise lawful act was held to become unlawful if accompanied by an intent to chill the exercise of protected employee rights at other company locations.

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[39] *See also Dee Knitting Mills, Inc.*, 214 N.L.R.B. 1041, 1051 (1974), *enforced, NLRB v. Dee Knitting Mills, Inc.*, 538 F.2d 312 (2d Cir. 1975); *Fuqua Homes Missouri, Inc.*, 201 N.L.R.B. 130, 135 (1973).

[40] While the immediate employer involved had only one plant, that employer was owned and controlled by a company with 17 other plants.

In the present context, the employer actions are themselves unlawful. The critical point recognized in *Darlington,* however, is that employer actions at one plant may produce a chilling effect on employees elsewhere in the company. It is inevitable that such chilling effects can and do occur. Employees do not live in a vacuum. Actions of their employer at another company location may reach them directly through intra-company communications, or through the outside media. Necessary business transactions may bring employees in one plant in contact with those in another. As this case illustrates, the company itself may publicize an unlawful response to unionism at one plant as a warning to employees at other company locations. In short, a well-coordinated unlawful campaign at one plant may produce chilling effects throughout a corporate structure.

To offset companywide effects caused by extensive unlawful conduct, courts and the Board have expanded remedial measures beyond the actual locations at which unfair labor practices were found.[41] In certain

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cases, remedies designed to facilitate union communication and dissipate harmful effects have been applied companywide. In rare instances, such remedies have included corporatewide grants of union access to company property.

The most extensive corporatewide access remedies have been imposed in cases involving J.P. Stevens Company. It will serve no good purpose here to describe J.P. Stevens' prolonged and unlawful campaign against the United Textile Workers and the relentless efforts of the Board to dissipate the effects caused by that campaign. From the very first *Stevens* case, the Board found that the company's practices were so extensive and so well-publicized as to have a coercive impact at plants other than those at which unfair labor practices were found. *See J.P. Stevens & Co. v. NLRB,* 380 F.2d 292, 304 (2d Cir.), *cert. denied,* 389 U.S. 1005, 88 S.Ct. 564, 19 L.Ed.2d 600 (1967).

Two recent *Stevens* cases are of special relevance here. In both *J.P. Stevens & Co. v. NLRB,* 612 F.2d 881 (4th Cir.), *cert. denied,* ———U.S. ———, 101 S.Ct. 315, 66 L.Ed.2d 145 (1980), and *J.P. Stevens & Co. v. NLRB,* 623 F.2d 322 (4th Cir. 1980), *cert. denied,* ——— U.S. ———, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981), Board orders were enforced that granted the union broad access to all of the company's plants.[42] The union was given the right, on a corporatewide basis, to respond to any employer speech concerning union representation, to address the employees before any election scheduled by the Board, and, most importantly, to have access to all nonwork areas of the plants to communicate with employees.

The company objected to the broad access provisions in each case. In the first case, reported at 612 F.2d 881, the company objected to the extraordinary corporatewide relief on the ground that the unfair labor practice found occurred only at its Tifton, Georgia plant. The Board had found that the corporatewide access remedy was needed "[i]n view of Respondent's history of serious and similar violations of the Act and its disregard of past Board Orders." 240 N.L.R.B. 33 at 33 (1979). The court enforced the Board's remedial order with little discussion. 612 F.2d at 882.

In the second case, reported at 623 F.2d 322, the company presented a more specific objection. Since the unfair labor practice found in that case was a refusal to bargain at an organized plant, the company argued that the imposition of remedies that would affect the union's organizational efforts at other unorganized plants was punitive and improper. The Fourth Circuit disagreed. As stated by the court:

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[41] *See J. P. Stevens & Co. v. NLRB,* 380 F.2d 292, 304 (2d Cir.), *cert. denied,* 389 U.S. 1005, 88 S.Ct. 564, 19 L.Ed.2d 600 (1967); 406 F.2d 1017, 1021–22 (4th Cir. 1968); 612 F.2d 881, 882 (4th Cir.), cert. *denied,* — *U.S.* ——, 101 S.Ct. 315, 66 L.Ed.2d 145 (1980); 623 F.2d 322, 327 (4th Cir. 1980), *cert. denied,* —— U.S. ——, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981); *Gerry's Cash Markets, Inc. v. NLRB,* 602 F.2d 1021, 1025 (1st Cir. 1979); *NLRB v. Jack LaLanne Management Corp.,* 539 F.2d 292, 295 (2d Cir. 1976); *Texas Gulf Sulpher Co. v. NLRB,* 463 F.2d 778, 779 (5th Cir. 1972); *Winn-Dixie Stores, Inc.,* 236 N.L.R.B. 1547, 1551 (1978); *Alberts, Inc.,* 213 N.L.R.B. 686, 698 (1974), *enforced, NLRB v. Albert's, Inc.,* 543 F.2d 417 (D.C.Cir. 1976), *But see Wesselman's Enterprises, Inc.,* 248 N.L.R.B. 1017, 1017 n.2 (1980); *Wolverine World Wide, Inc.,* 243 N.L.R.B. No. 72 at 2 (July 12, 1979); *Pacific Gas & Electric Co.,* 234 N.L.R.B. 739, 739 n.2 (1978).

[42] *See also J.P. Stevens & Co. v. NLRB,* 638 F.2d 676 (4th Cir. 1980).

> This provision of the Board's order is predicated on its finding that the company employed its unlawful bargaining strategy to chill the union's organization of other plants. The notice and access order is designed to counteract the use the company has made at other plants of its unfair labor practices in bargaining at Roanoke Rapids.

623 F.2d at 327. The broad access provisions were again upheld.

In addition to these two *Stevens* cases, we again note the recent decision of the Fifth Circuit in another Florida Steel case. *Florida Steel Corp. v. NLRB,* 620 F.2d 79 (5th Cir. 1980). In that case, as here, the Board ordered that the union be provided access to all plants of Florida Steel. As described at the outset, the Fifth Circuit enforced those provisions of the order granting union access to the two organized Florida Steel plants. However, the court did not enforce the grant of access to other unorganized plants; the court instead adopted the position urged by J.P. Stevens in the latter case described above. As stated by the court, "[i]n requiring this access to be provided at plants where the Steelworkers union is not a bargaining representative, however, the Board's order can-

not be viewed as remedial with respect to the charge before it, one involving interference with the union's performance of its role as a bargaining representative." 620 F.2d at 83.

In none of these corporatewide access cases have the courts discussed the possible relevance of the principles of *NLRB v Babcock & Wilcox Co.* As demonstrated above, the effect of *Babcock* on the use of access as a remedial measure has varied tremendously. Even in cases ignoring *Babcock,* courts have differed with respect to the extent to which access may be used as a remedial measure. Having explored this background in some detail, we turn now to attempt to set forth some guiding principles concerning the proper use of union access to company property as a remedial tool.

IV. THE APPROPRIATE STANDARDS TO BE APPLIED IN CASES INVOLVING "UNION ACCESS" AS A REMEDIAL MEASURE

Remedial orders granting a union access to company plants necessarily affect private property rights, and often have an impact on organizational campaigns. Since the Supreme Court in *NLRB v. Babcock & Wilcox Co.* set forth principles governing conflicts between private property rights and organizational access rights, that case often has had an effect on the propriety of union access as a remedial measure.

As stated above, the impact of *Babcock* has varied tremedously. At one extreme, an Administrative Law Judge has suggested that "no weight is accorded to a lack of access attributed to unfair labor practices; instead, only imbalances attributable to physical factors are regarded as relevant to the inquiry." *Winn-Dixie Stores, Inc.,* 224 N.L.R.B. 1418, 1459 n.17 (1976). Other decisions have applied *Babcock* literally to remedial situations and have granted access only when the union can show, perhaps as a result of the unfair labor practices involved, that no alternative means of communication exist. Yet another group of cases has considered the appropriateness of access as a remedial measure without any discussion of the relevance or impact of *Babcock* principles.

As more fully developed below, we believe that the principles announced in *Babcock* do not govern the priopriety of union access granted as a remedial measure. We agree with the position taken by the Sixth Circuit in *Decaturville Sportswear Co. v. NLRB,* 406 F.2d 886 (6th Cir. 1969), that the propriety of access as an organizational tool and the propriety of access as a remedial measure are two separate questions, and that "[t]he two questions involve different considerations." 406 F.2d at 889. This approach has been endorsed very recently in this Circuit. In *Teamsters Local 115 v. NLRB,* 641 F.2d 984 (D.C.Cir. 1981), this court considered a broad grant of union access ordered by the Board as a remedial measure, and stated:

> The Employer next cites *N.L.R.B. v. Babcock & Wilcox Co.,* 351 U.S. 105 [76 S.Ct. 679, 100 L.Ed 975] (1956), and its progeny, as authority for the proposition that the Employer's property rights preclude union access to the property unless there are no other reasonable means of reaching the employees. But none of these cases deal with the *remedial* powers of the Board; they only seek to determine when an employer's denial of access to his property can itself be deemed an unfair labor practice, *see Decaturville Sportswear*

> *Co. v. N.L.R.B.*, 406 F.2d 886, 889 (6th Cir. 1969).

Id., at 993 (emphasis in original; footnote omitted). The court in *Teamsters* enforced an order of the Board granting the union access to bulletin boards, reasonable access to nonwork areas of the plant during nonwork time, equal time to respond to employer speeches, and the right to address employees on working time prior to any election in which the union was a participant.[43]

We agree that there is a critical difference between access as an organizational tool and access as a remedial measure. Absent unfair labor practices, private property rights entitle an employer to restrict the ability of union organizers to enter company property and solicit for the union. As long as important employee rights may be exercised through other means, equally important private property rights need not be sacrificed. When an employer directly interferes with those employee rights, however, different considerations come into play. The Act contains a broad command that the Board take such affirmative action as is necessary to safeguard employee rights and thus effectuate the policies of the Act. As illustrated above, certain employer conduct may be of such a nature that some form of union access is needed to dissipate an atmosphere of fear and helplessness that has been created and to assure employees that fundamental rights exist and will be protected. In such a case, an employer cannot avoid the direct consequences of its own actions by invoking the talisman of private property rights. As employee rights have been violated, so too may private property rights be compromised. Private property rights are easily safeguarded, as decreed by *Babcock* and its progeny, by simple adherence to the strictures of the Act.

We hold, therefore, that access may be imposed as a remedial measure without a finding that the union will be unable to reach the employees through other available channels of communication. Instead, the critical inquiry is whether the employer conduct is of such a nature that access is needed to offset harmful effects that have been produced by that conduct. If union access is needed to dissipate those effects, access may be granted even though the union has alternative means of communicating with employees.

We also acknowledge, as developed above, that certain employer conduct may produce effects beyond the plant in which the unfair labor practices were committed. This is particularly true in cases in which an employer publicizes its unlawful conduct in an attempt to warn employees at other plants. In such situations, if access is needed to dissipate effects produced beyond the site where the unfair labor practices were committed, access may be awarded as a remedial measure beyond that location. If an extensive anti-union campaign has produced coercive effects corporatewide, access as a remedial measure may be imposed corporatewide as well.

Furthermore, we hold that access as a remedial measure at unorganized plants may be predicated on a finding by the Board that a company's unlawful bargaining strategy at an organized plant has chilled employee rights at the unorganized plants. In *Florida Steel Corp. v. NLRB*, 620 F.2d 79 (5th Cir. 1980), the Fifth Circuit held that access in such a case could not be, by definition, "remedial." We disagree. As stated above, the critical inquiry in these cases is whether the unlawful conduct of the employer has produced coercive effects chilling the free exercise of employee rights. Those effects can be produced as easily by a repeated refusal to bargain with a certified union as by improper interrogation or unlawful discharges during an organizational campaign. As was found by the Fourth Circuit in *J.P. Stevens & Co. v. NLRB*, 623 F.2d 322 (4th Cir. 1980), *cert denied*, ——— U.S.———, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981), "the Board's order is predicated on its finding that the company employed its unlawful bargaining strategy to chill the union's organization of other plants." 623 F.2d at 327. We agree that access at unorganized plants may be necessary in an appropriate case to remedy a refusal to bargain at an organized plant, and that such access therefore would not be improper.

The hallmark principle in each of these applications of access as a remedial measure is the necessity to offset coercive effects caused by an employer's unlawful campaign. As those effects spread and become entrenched, so too may an access remedy. In this way, grants of access are designed fully to effectuate the policies of the Act; access is ordered to remedy the effects of unlawful behavior and not to punish or deter an employer. It is clear that the principles of *Babcock* have no direct application in this setting.

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[43] The remedial order in *Teamsters* involved only one plant.

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At the same time, we recognize that the presence of *Babcock* cannot be totally ignored. Access may be awarded as a remedial measure if necessary to offset the direct consequences or effects of an employer's unlawful conduct. Having produced such effects, an employer cannot hide behind the protection of *Babcock* or private property rights. If those effects are not present, however, the above analysis fails. Absent the necessity to counter these harmful consequences, access cannot be justified as a remedial measure and instead may directly affront the principles announced in *Babcock*. As a result, before access may be imposed, it is critical that a clear showing be made that access is needed to reassure employees of the existence and vitality of protected legal rights.

In granting access as a remedial measure, therefore, a burden lies upon the Board to substantiate its conclusion that access is necessary to offset the consequences of unlawful employer conduct. In articulating the standard that the Board must meet, we are sensitive to the difficulty the Board faces in establishing that the exercise of employee rights has been chilled. Coercive effects are difficult to prove, yet at the same time the most important to dissipate. Certainly in this setting even more so than in other areas, the Board possesses an unmatched expertise in distilling and identifying the effects of unlawful employer conduct. We believe that the Board may rely on that expertise, and on the cumulative experience of past cases, to presume that certain employer conduct will inevitably produce certain effects on employees.

Given the amount at stake in this setting, however, a conclusory statement by the Board that access is needed to neutralize effects is not sufficient to justify a grant of access. Assumptions must be supported by evidence in the record. The seriousness of the violations at issue must be weighed. Where access is awarded beyond the locations at which unfair labor practices are found, the extent to which employees located in other plants know, or have reason to know, of unlawful conduct must be considered. The distance between the employer's operations may be relevant. The presence or absence of union activity at various company locations is an important factor that should be considered.[44] In the case of a recidivist violator, the effect of the passage of time between violations must be evaluated.[45] In short, we hold that the Board must find that it is reasonably foreseeable that the employees at those plants where access is imposed have suffered coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects.

In summary, the Board has a broad authority to use access as a remedial measure if such a remedy is necessary to offset coercive effects caused by unlawful employer action. We endorse that principle as rigorously as we require the Board to demonstrate that such access is necessary and therefore remedial. We do not impose here an impossible burden on the Board; we simply believe that given the existence of constraints bordering the use of access as a

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remedial measure, the Board must not be conclusory in the use of this remedial tool. In requiring the Board to substantiate its action in this area, the authority of the Board to use access as a remedial measure will not be weakened.

V. THE DISPOSITION OF THIS PROCEEDING

The Board order in this case granted the union broad rights of access at every plant of Florida Steel. Access was ordered at the plant at which the unfair labor practice was found, at an additional organized plant of Florida Steel, at two plants where organizational activity had been conducted, and at all other company locations where no organizational drives had yet begun. In addition to this broad access remedy, the Board ordered that various forms of corporatewide notice be issued by the company. The Board denied, however, union requests for access to bulletin boards and for a list of the names and addresses of all Florida Steel employees.

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[44] It is possible that employees at an organized plant, represented by an established union and protected by a collective bargaining agreement, are less likely to be coerced by employer conduct at another company location than employees at an unorganized plant.

[45] Too often the Board has invoked a history of past violations as justification in itself for extraordinary access remedies. It is not a history of unlawful conduct that justifies access as a remedial measure, but rather it is the effects that such a history may produce. The Board must demonstrate, through evidence and carefully articulated presumptions, that such effects have occurred or are likely to occur. In doing so, the Board must consider, for example, the seriousness of the violations involved, the amount of time between violations and the extent to which employees know or may have reason to know of past incidents of unlawful conduct. We do not suggest that the Board has failed in all cases to consider these factors. For instance, in *Wolverine World Wide, Inc.*, 243 N.L.R.B. No. 72 (July 12, 1979), the Board held that three instances of misconduct committed during a period of time of six to fourteen years were too remote in time from the instant proceeding to support a finding that the employer had a proclivity to violate the Act.

We believe that each of the remedies imposed in this proceeding is within the authority of the Board to impose in an appropriate case. As developed above, each of these remedies may be ordered if necessary to offset the effects of unlawful employer conduct. Furthermore, the Board was clearly entitled, in shaping its remedial order in this case, to consider the extensive record of past unlawful activity of Florida Steel.

We are unable, however, to enforce the order of the Board. The Board has failed to make the findings described above that these corporatewide remedies are necessary to offset coercive or chilling effects caused by the employer conduct at issue, even as that conduct is magnified by the existence of previous violations of the Act. The Board has not yet demonstrated that it is reasonably foreseeable that such effects have been produced on a corporatewide basis.

The Administrative Law Judge in this action found that the violation at issue here could be remedied adequately through the use of traditional cease and desist and affirmative remedial orders. The Board disagreed, and concluded that "extra remedial relief is necessitated by Respondent's proclivity to disregard the statutory rights of its employees and their chosen bargaining representatives." 244 N.L.R.B. No. 61 at 2 (Aug. 20, 1979). The Board supported this conclusion by reference to "reasons fully explicated" in an earlier Florida Steel case, 242 N.L.R.B. No. 195 (June 20, 1979). The Board also noted that the present action was not the initial transgression of employee rights at the Florida Steel plant involved; the Board cited an earlier case in which the Board had found that Florida Steel violated the Act at the Indiantown plant by withholding a wage increase in retaliation for union activities of the employees. The Board made no findings in this case concerning *effects* caused by the unlawful employer conduct, either at the immediate plant involved or at any other facility of Florida Steel.

In the earlier decision relied upon by the Board, 242 N.L.R.B. No. 195, the Board reviewed at length "the repetitive and flagrant nature" of violations of the Act by Florida Steel. 242 N.L.R.B. No. 195 at 2. The Board stated in that case that extraordinary remedies were needed "to fully remedy Respondent's rejection of the principles of collective bargaining as evidenced by its pattern of unlawful conduct in recent years." *Id.* The Board also found that "[t]he instant violation is yet another step in what can only be characterized as a corporate campaign to chill employee organizational activity throughout its facilities through unlawful conduct." *Id.* at 4. The only statement made by the Board concerning the effects produced by this unlawful campaign, however, was a conclusory assertion in a footnote that extraordinary remedies were "essential to neutralize the effects of Respondent's continuing pattern of unlawful conduct in recent years." *Id.* at 5 n.10.

These statements are insufficient to substantiate the conclusion that *corpo-*

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ratewide access is needed to offset coercive or chilling effects produced corporatewide by the unlawful conduct of Florida Steel. We are no less disturbed than the Board by the extensive history of unlawful conduct of the employer. However, that history alone cannot justify the relief ordered in this case. We have already noted the factors that the Board must weigh before granting union access as a remedial measure. We repeat, for emphasis, that with respect to locations other than the plant where the unfair labor practice has occurred, the Board must find that it is reasonably foreseeable that the employees at these other locations have suffered coercive effects from the employer's unlawful conduct and that an access remedy is necessary to cure those effects. Absent these findings, the Board order at issue here cannot be justified as remedial action, and can only be explained as containing punitive measures designed to deter future violations of the Act.

There is evidence in two earlier Florida Steel proceedings that the company used statutory violations committed at one plant as a "warning" to employees at another plant.[46] On our examination of the record, however, no such evidence has been uncovered since 1977. Moreover, there appears to be no evidence that the company has ever publicized its unlawful conduct corporatewide, or indeed at any of the plants at which there has not yet been union activity. We simply cannot assume from the evidence in this record that the conduct of Florida Steel has had a corporatewide chilling effect upon employees. Given the critical need for coercive effects to be present before access is awarded at the unorganized plants of Florida Steel, we are unable at this time to enforce the order of the Board.

We recognize that chilling effects are sometimes difficult to prove. Moreover it has not been clear previously what the Board must find to justify a broad grant of access imposed as a remedial measure. We have decided, therefore, to remand this case to the Board for further consideration. This decision is consistent with previous cases in this Circuit that have remanded cases to the Board for a more complete explanation of a remedial order. *See Textile Workers Union v. NLRB*, 475 F.2d 973, 976 (D.C.Cir. 1973); *UAW v. NLRB*, 455 F.2d 1357, 1369–70 (D.C.Cir. 1971).

It is possible that as a result of the guidelines set forth in this opinion, the Board may decide on remand that some remedies included in this order are not appropriate. Such a decision may lead the Board to impose other remedies, not here ordered, to offset the effects of the unlawful employer conduct. As a result, we do not here address the propriety or impropriety of each remedial measure granted or requested in this case. An entire restructuring of the remedial order may be necessary; we express no opinion on the course such restructuring, if at all necessary, should take. We emphasize again that all of the remedies included in this order fall within the scope of authority of the Board; certain remedies may be imposed, however, only in an appropriate case after necessary findings are made.

There is one additional aspect of the order at issue in this case that we call attention to the Board to consider more fully on remand. Certain provisions of the Board order grant advantages to the Steelworkers Union that competing unions, if any exist, do not similarly receive. We have some reservations concerning the propriety of such an order, particularly at plants in which the Steelworkers have not yet engaged in organizational activity. We reserve judgment on this issue, however, pending further consideration and explanation by the Board on remand.

We recognize that this is a difficult case. Although we have expressed some concerns about certain aspects of the Board's order, we do not in any way suggest that the Board should act less aggressively in en-

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forcing the Act. We simply require that the Board act more deliberatively. We therefore remand this case for further proceedings consistent with this opinion.

So ordered.

Fugazy Continental Corp. of Connecticut v. NLRB

NLRB v. Shortway Lines, Inc.

Fugazy Continental Corp. of Connecticut v. NLRB

514 F. Supp. 718 (E.D. N.Y.), February 26, 1981

On motion to require compliance with Bd.
supoenas

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COSTANTINO, District Judge: The above captioned actions arise out of proceedings presently before the National Labor Relations Board ("NLRB"). Multiple claims have been raised by both the NLRB and Fugazy Continental Corporation of Connecticut ("Fugazy"). Specifically, the NLRB has requested that an order by this Court be issued which requires Shortway Lines, Inc. ("Shortway"), Holland Industries, Inc. ("Holland"), Dell Bus Co., Inc. ("Dell"), and Michael Margolies, an individual ("Margolies"), to comply with certain NLRB subpoenas; Fugazy, Shortway and Holland have opposed this motion, and in addition, Fugazy has moved for the following additional relief: (1) that the NLRB hearings be permanently stayed to the extent they affect or will affect Fugazy's alleged liability under the federal labor act; (2) that Fugazy's motion to intervene as a respondent in the NLRB application for subpoena enforcement be granted; and (3) that the NLRB's request for subpoena enforcement be stayed so that Fugazy may have an opportunity to argue and receive rulings on the sufficiency of service and the relevancy of materials sought in said subpoenas. For the reasons stated herein, the Court grants the NLRB's request for subpoena enforcement and must deny all of Fugazy's requests.

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[46] *See Florida Steel Corp.*, 220 N.L.R.B. 260, 266 (1975); *Florida Steel Corp.*, 231 N.L.R.B. 923, 926 (1977).

Two related unfair labor practice cases are presently before the NLRB. The purpose of one such proceeding is to determine

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the liability of various enterprises under an unfair labor practice order issued by the NLRB and enforced by the Second Circuit Court of Appeals.[1] These enterprise are alleged to be the successors and *alter egos* of the predecessor corporation, Airport Bus Services, Inc. ("Airport"). In that capacity, the enterprises are alleged to be jointly and severally liable for the prior unfair labor claims.

The second proceeding is to determine the merits of certain additional and continuing unfair labor practice allegations made by the NLRB against Airport and its alleged successors and *alter egos.*[2] A hearing in this latter case is presently in progress. The two proceedings represent a forum in which to resolve, *inter alia,* the allegations of successorship and *alter ego* status, continuing unfair labor practices, and joint and several liability for unfair labor practices of the predecessor corporation.

In the first action filed before this Court, Fugazy seeks to stay the presently pending NLRB hearings in Case Nos. 29-CA-5134, 5148, 6185, 6251, 7154. To this end, Fugazy interposes two defenses, to wit, (1) that the untimely submission of a proof of claim by the Board, as a matter of federal bankruptcy law, bars a claim against Airport Bus, and thus, Fugazy, and (2) the Bankruptcy Court's Order regarding the sale of assets by Holland to Fugazy effectively absolved Fugazy of liability with regard to any backpay claims of the NLRB.

It is well established that interlocutory rulings of the NLRB in the course of proceedings involving unfair labor practices may not be considered by federal District Courts. *Myers v. Bethlehem,* 303 U.S. 41 58 S.Ct. 459, 82 L.Ed. 638 (1938); *United Aircraft Corp. v. McCulloch,* 365 F.2d 960 (D.C. Cir. 1966). Here, Fugazy's attempt to enjoin the NLRB proceedings regarding unfair labor claims and to obtain federal District Court review is foreclosed under the National Labor Relations Act. 29 U.S.C. § 151 *et seq. See Board of Trustees of Memorial Hospital of Fremont County v. NLRB,* 523 F.2d 845 (10th Cir. 1975); *NLRB v. Scenic Sportswear,* 475 F.2d 1226 (6th Cir. 1973); *Bokat v. Tidewater Equipment Co.,* 363 F.2d 667 (5th Cir. 1966). Fugazy's claims do not establish jurisdiction in the federal District Court. The instant case does not fall within the exceptions to the general principle of non-reviewability of NLRB proceedings by district courts. *See Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958).

In the second action before this court, the NLRB seeks a court order requiring Shortway, Holland, Dell, and Margolies, an individual, to comply with certain subpoenas pursuant to 29 U.S.C. § 161(1). This court finds that the subpoenaed material is neither painly incompetent nor irrelevant to the NLRB hearings. *See NLRB v. Cowan and Co., Inc.,* 522 F.2d 26 (2d Cir. 1975).

Fugazy, however, has moved this court for leave to intervene as a respondent in the subpoena enforcement proceeding. In addition, it has filed a separate action, CV-80-2968, in which it requests that the order for subpoena enforcement be stayed until Fugazy has had the opportunity to argue and receive rulings by the ALJ on the sufficiency of service, and the relevancy of materials sought in the subpoenas.

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Fugazy argues that as the alleged *alter ego* of the Respondents named in the NLRB subpoenas, it should enjoy the same standing and right to argue subpoena revocation before the ALJ. Moreover, Fugazy maintains that it was entitled to be served with all subpoenas issued to the *alter ego* and/or *successor* co-Respondents, and finally, that it had an absolute right to argue the question of relevancy relative to any subpoena served upon such co-Respondents.

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[1] This case is a supplemental proceeding to determine whether certain named respondents are jointly and severally liable to remedy the unfair labor practices of the predecessor corporation. See NLRB Consolidated Case Nos. 29-CA-5134 and 29-CA-5148: Airport Bus Service, Inc., and its Successors and *Alter Egos* Shortway Lines, Inc., Cross County Coach Corp., Dell Transportation Service, Manpower and Maintenance, Inc., Holland Industries, Inc., Fugazy Continental Corporation of Connecticut, and Albert Altesman, Trustee in Bankruptcy. An Administrative Law Judge found that certain unfair labor practices had been committed; the findings were sustained and reduced to an Order by the NLRB; a Judgment Enforcing the Order was issued by the Second Circuit Court of Appeals on September 15, 1978.

[2] This case is entitled Airport Bus Service, Inc. and its Successors and *Alter Ego* Shortway Lines, Inc., Cross County Corp., Dell Transportation Service, Manpower and Maintenance, Inc., Holland Industries, Inc., and Fugazy Continental Corp. of Connecticut, Case Nos: 29-CA-6185, 6251, and 7174.

A district court must be reticent to examine alleged procedural irregularities in the underlying administrative proceedings insofar as piecemeal appeals will disrupt the resolution of labor disputes. *NLRB v. Dutch Boy, Inc., Glow Lite Div.*, 606 F. 2d 929, 933 (10th Cir. 1979); *NLRB v. Cowan and Co., Inc.*, 522 F.2d 26, 28 (2d Cir. 1975); *NLRB v. Williams*, 396 F.2d 247, 249 (7th Cir. 1968); *NLRB v. C.C.C. Associates, Inc.*, 306 F.2d 534, 538 (2d Cir. 1962); *Storkline v. NLRB*, 298 F.2d 276, 277 (5th Cir. 1962).

Here, Fugazy has not been named or served with the subpoenas in question. Indeed, during oral argument in court, Fugazy stated that it neither owned nor possessed the subpoenaed materials. Yet Fugazy argues that insofar as an *alter ego* employer is the same employer under a new name, it enjoys, or should enjoy, the same standing as its co-Respondents. Fugazy further asserts that its rights will be unalterably prejudiced if the opportunity to argue the relevancy of the co-Respondent's subpoenas is foreclosed.

This court finds, that at this stage of the proceeding, judicial intervention is unwarranted. Fugazy will have the opportunity to demonstrate prejudicial error in the administrative proceedings upon appeal from the final order of the Board. *See NLRB v. Dutch Boy, Inc., Glow Lite Div., supra* at 933; *NLRB v. C.C.C. Associates, Inc., supra* at 538. Further, Fugazy will have the right to argue the relevancy of any subpoenaed materials which are introduced as evidence during the course of the labor hearings. This court finds that, under the standards of District Court inquiry in subpoena enforcement, the requirements of the National Labor Relations Act have been satisfied, 29 U.S.C. § 161(1), and accordingly, the subpoenas must be enforced.

The Court is also cognizant that there is no provision in the National Labor Relations Act for parties not under subpoena to petition to revoke subpoenas served on others. Indeed, it is well settled that a person has no Fourth Amendment basis for challenging subpoenas directed at the business records of a third party. *See, e. g., United States v. Miller* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971); *First National Bank v. United States*, 267 U.S. 576, 45 S.Ct. 231, 69 L.Ed. 796 (1925); *Reporters Committee For Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979); *United States v. Schutterle*, 586 F.2d 1201 (8th Cir. 1978); *United States v. House*, 524 F.2d 1035 (3d Cir. 1975); *United States v. Continental Bank & Trust Co.*, 503 F.2d 45 (10th Cir. 1974); *Application of Cole v. Franklin National Bank*, 342 F.2d 5 (2d Cir.), *cert. denied*, 381 U.S. 950, 85 S.Ct. 1803, 14 L.Ed.2d 723 (1965). *Cf. California Bankers Ass'n v. Schultz*, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771 (1911).

In point of fact, the courts have not taken an expansive view of standing; instead, they have located its boundaries within a personal and introspective setting. *See generally United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (June 23, 1980); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct., 961, 22 L.Ed.2d 176 (1969). Thus, it is submitted that it is now for the legislature, and not for the courts, to broaden the scope of standing in the context of the National Labor Relations Act. *See, e. g.*, 26 U.S.C. § 7609.

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Finally, the Court is unconvinced that Fugazy has established the grounds for intervention as of right or for permissive intervention. Fed.R.Civ.P. 24(a), (b). As admitted in court, Fugazy has neither ownership nor possession of the subpoenaed materials. The subpoenas direct specific entities to produce documents in their possession which are allegedly relevant to the issues involved in a pending unfair labor practice proceeding.

Fugazy has established neither a claim of privilege nor a proprietary interest in the subpoenaed records. Instead, it asserts a right to intervene in the subpoena enforcement proceeding, merely by virtue of its status as a co-Respondent and alleged *alter ego* in the administrative proceeding. With this proposition, the Court cannot agree. *See generally United States Postal Service v. Brennan,* 579 F.2d 188 (2d Cir. 1978); *Commonwealth Edison Co. v. Train,* 71 F.R.D. 391 (N.D.Ill.1976). A putative intervenor must demonstrate an interest relating to the property which is the subject of the action; the mere assertion that the examination of third party records may unearth incriminating evidence is not sufficient to invoke Rule 24. *See Donaldson v. United States,* 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580) 1971).

The Court also is not convinced that the enforcement of the sub-poenas will impair Fugazy's ability to protect its interest or that Fugazy, in this matter, will be inadequately represented by the supoenaed parties. *See generally United States Postal Service v. Brennan, supra; Commonwealth Edison Co. v. Train, supra.* Fugazy will have ample opportunity to inspect and oppose the admission of any document into evidence during the course of the pending administrative hearing.

Accordingly, the Court must deny Fugazy's motion to intervene pursuant to either Rule 24(a) or (b). Fed.R.Civ.P.24. Finally, this Court will enforce the subpoenas in light of the fact that (1) they are seeking information neither irrelevant nor plainly incompetent and (2) the information relates to matters under investigation.

In addition, this Court will not remand the subpoena enforcement proceeding to the administrative forum and will not stay the administrative hearings on the unfair labor claims.

So Ordered.

NLRB v. Anchorage Times Publishing Co.

637 F.2d 1359 (9th Cir.), February 27, 1981;
certiorari denied October 5, 1981—237 NLRB 544

On petition to enforce Board Order

Before ANDERSON & SKOPIL, Circuit Judges, and BYRNE,* District Judge

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WM. MATTHEW BYRNE, Jr., District Judge: The National Labor Relations Board ("the Board") petitions for enforcement of its order against the Anchorage Times Publishing Co. ("the Company" or "the Times"), reported at 237 N.L.R.B. No. 78 (1978). We hold that substantial evidence supports all of the Board's unfair labor practice findings and, accordingly, enforce the Board's chosen remedies, including a bargaining order.

I. *BACKGROUND*

The Times is Alaska's largest newspaper publishing company, with its primary offices located in a single building in downtown Anchorage. During the relevant period, the Times employed approximately 280 employees in five departments.

During the late summer of 1976, several employees in the editorial department (the newsroom) initiated meetings between high level management officials and newsroom employees to discuss wages and working conditions.[1] Dissatisfied with the results of these meetings, a group of employees sought to find a union willing to represent the Times employees in the accounting, advertising, circulation, and editorial departments. To this end they met with William Coleman, a representative of the International Brotherhood of Electrical Workers, Local 1547 AFL-CIO ("the Union"), who agreed to help organize a campaign among Times employees in the four departments.

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Coleman conducted four meetings with the employees between October 24 and November 5, 1976. At these meetings he solicited employees to sign cards authorizing the Union to represent them for the purpose of collective bargaining with Times management.[2] Coleman explained to the employees that if thirty percent of the employees in the bargaining unit signed such cards, a petition could be filed for a Board-conducted election. He further explained that if fifty-one percent of the employees in the bargaining unit signed authorization cards, the Union could request the Company to recognize the Union voluntarily as the employees' exclusive bargaining representative, although he cautioned that it was unlikely that the Company would extend such recognition. The employees were advised by Coleman that by signing the cards they were authorizing the Union to represent them in collective bargaining. Some of the cards were signed by employees at the meeting; others were signed at other locations and returned to the Union.

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*The Honorable Wm. Matthew Byrne, Jr., United States District Judge for the Central District of California, sitting by designation.

[1] The first meeting was held in early August 1976, the second on September 22, and the third in early October. At these meetings topics included the phasing out of pressroom jobs because of the installation of new electronic equipment, inadequacies of salaries, and the existence of newly-established wage scales and promotion guidelines.

"AUTHORIZATION FOR REPRESENTATION

I authorize the International Brotherhood of Electrical Workers to represent me in collective bargaining with my employer."

The other card, which was mailed to employees, read:

"I REQUEST A GOVERNMENT ELECTION I, the undersigned of my own free will, hereby authorize and designate the National Brotherhood of Electrical Workers of the AFL-CIO and CLC to represent me in collective bargaining with my employer in all matters pertaining to rates of pay, hours of employment, and other conditions of employment. This card is also for the purpose of requesting the N.L.R.B. for an election."

[2] The Union distributed two different cards to employees. The card handed out at meetings read:

On November 15, 1976, the Union filed with the Board a petition requesting a representation election. After a hearing, the Regional Director determined that the appropriate bargaining unit contained 181 employees and that 97 valid authorization cards had been signed on or before November 13, 1976.[3] He ordered the election to be held in early January, 1977.

The election was held on January 20, 1977, and the employees voted seventy-seven to seventy-three against the Union, with sixteen ballots challenged.[4] The Union filed separate unfair labor practice charges against the Company on January 17, 1977, and on January 24, 1977. The Union contended that, during the course of the campaign, both before and after the Union filed the petition requesting an election, the Company engaged in a course of conduct that included interrogating employees about union sympathies; conducting surveillance of Union-related employee activities; threatening job losses in the event of a vote in favor of the Union; terminating an employee for discriminatory reasons; and granting wage increases immediately prior to the election in order to influence the employees' votes. These charges were consolidated for hearing before the Board's Administrative Law Judge ("ALJ"). After extensive hearings, he determined that the Company had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 158(a)(1) & 158(a)(3) (1976). The ALJ found that the Union represented a majority of the employees and that the unfair labor practices prevented the holding of a fair "rerun" election. He therefore recommended that the Board set aside the results of the January 20 election and order the Company to bargain with the Union. The ALJ also recommended that one employee, who had been dismissed in violation of the Act, be reinstated and made whole, and that the customary notices be posted. The Board adopted the ALJ's recommendations with minor variations, not here relevant.[5] Now

the Board petitions for enforcement of its order.

II. *THE UNFAIR LABOR PRACTICES*

The Board found that the Company had engaged in a pervasive scheme of unfair labor practices, both before and after the filing of the election petition. In reviewing these findings, the Court cannot overturn decisions that are supported by substantial evidence in the record considered as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487–88, 71 S.Ct. 456, 464–65, 95 L.Ed. 456 (1951); *L'Eggs Products, Inc. v. NLRB,* 619 F.2d 1337, 1341 (9th Cir. 1980); *NLRB v. Tischler,* 615 F.2d 509, 511 (9th Cir. 1980); *NLRB v. Bighorn Beverage,* 614 F.2d 1238, 1240 (9th Cir. 1980). That is, if there are conflicting interpretations of the facts, and the one adopted by the Board is supported by substantial evidence, the Court may not substitute a different interpretation. *See NLRB v. Adams Delivery Service, Inc.,* 623 F.2d 96, 99 (9th Cir. 1980).

A. *INTERROGATIONS*

The largest number of unfair labor practice incidents found by the Board consisted of unlawful interrogations of employees about their union sympathies. These interrogations were conducted over a period of several months by various high-ranking Company officials including General Manager William Tobin (who oversaw all five departments),

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[3] Three additional valid authorization cards were signed by employees on November 14, 1976, making a total of one hundred.

[4] The Regional Director of the National Labor Relations Board issued a supplemental decision on the challenged ballots, overruling twelve challenges, sustaining one and leaving three undetermined. The revised tally showed a vote of eighty-eight to seventy-four against the Union.

[5] The Board corrected certain computational errors made by the ALJ in determining total valid authorization cards and determined that the obligation to bargain arose on November 13, 1976. (Chairman Fanning disagreed on the issue as to when the duty to bargain arose.)

Managing Editor Clint Andrews (who supervised the editorial department), City Editor Michael Todd, and Director of Circulation Jules Molenda.[6]

The Company raises three objections to the Board's findings that these interrogations constituted unfair labor practices: first, that substantial evidence does not support the factual findings of the Board; second, that the Board erred in finding the interrogations unlawful because there was no evidence that the questioning actually **1364** intimidated any employees in the exercise of their guaranteed rights; and third, that under the Board's "critical period" doctrine the interrogations conducted before the filing of the election petition should not be considered unfair labor practices or, at least, should not be relied upon in justifying a bargaining order.

1. *Substantial Evidence*

After a careful review of the extensive testimony at the hearings before the ALJ, the Court concludes that the Board's determination of facts in each incident is supported by substantial, although not uncontradicted, evidence. The Company points to testimony in the record that would tend to undermine the particular factual findings. In each instance, however, the conflict in testimony resolves to a question of evaluating the credibility of the witnesses. The ALJ is in the best position to evaluate which witness is recalling the facts most accurately, and the Court cannot conduct a *de novo* review of the testimony to make different credibility determinations. *NLRB v. Adams Delivery Service, Inc.,* 623 F.2d at 99.

2. *Intimidation*

The Company argues that the Board's findings should be overturned because there was no evidence that the interrogations actually had a coercive effect on the employees. Indeed, in two instances the interrogators indicated that the employees did not have to answer the questions.[7] Thus, it argues, the interrogations did not affect the outcome of the election and should not be considered unfair labor practices.

The short answer to this argument is that interrogation violates the Act if it has a tendency to intimidate employees in the exercise of their protected rights, even if there is no evidence of actual intimidation. *See Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1080 (9th Cir. 1977); *NLRB v. Bell Manufacturing Division, DiGiorgio Leisure Products, Inc.,* 483 F.2d 150, 151–53 (9th Cir. 1973). As this Court explained in *Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 364 v. NLRB,* 435 F.2d 668, 669 (9th Cir. 1970),

> [i]n order for an employer's interogation of employees to constitute unfair labor practices under section 8(a)(1) it must be associated with express or implied threats or promises, or form part of an overall pattern tending to restrain or coerce employees with regard to their protected activi-

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[6] In early October 1976, reporter Mary Kay Brown approached General Manager Tobin regarding management's failure to reveal wage scales assigned to employee job levels. Tobin asked Brown what kind of conspiracy the newsroom employees were plotting. He advised her that the Times did not expect employees to stay with the newspaper forever and that if she was unsatisfied she could go elsewhere. He also said that if the employees had a union movement going on, it would not be proper for him to talk to her. The ALJ credited Brown's testimony, finding Tobin's remarks to be a "veiled threat that if the employee persisted in her activities, her job status would be in jeopardy."

The Board found that Managing Editor Andrews had interrogated employees in violation of the Act in three instances. In mid-October he called reporter Mary Day Brown into his office and stated he knew she was involved with the Union. She told him he did not have the right to question her and he answered that he could question her but she did not have to answer. Thereafter the Union organizing committee drafted a note to Andrews warning him not to interrogate employees about Union activities. Andrews also called reporter Frank Gerjevic into his office to inform him of a raise and to state that he appreciated Gerjevic's work because he was quiet and did not want to vote. Finally Andrews asked another reporter, John Matthews, if he had made up his mind about the Union, noting that it might not be legal for him to ask. Matthews gave an evasive answer.

The Board also found that the City Editor, Michael Todd, had unlawfully interrogated three Times employees, reporter Carl Sampson, reporter William Wilson and his wife Sarah Wilson. These instances were found to violate the Act partially because the Company's animus against the unionization was well known and because no legitimate purpose was served by the questioning.

In late December, Director of Circulation Jules Molenda divided the duties of the departing office manager in the circulation department among three "group leaders," Elaine Craft, Elaine Moore, and Betty Broste. According to testimony credited by the ALJ, he told them their jobs were probationary. At the same time he inquired if the three employees were pro-Union, cautioning them that they did not have to answer that question. The Board determined that the question contained an implied threat that the permanence of the promotion depended upon their refusal to support the Union.

The last incident of interrogation occurred when an employee, Lynn Symonds, inquired of the Personnel Manager, Martha Lloyd, if there was a job opening at the Times for her brother. Lloyd asked her if her brother was pro-Union. The Board found that this question carried the implication that the Times considered the Union sympathies of an applicant for employment, despite its official policy to the contrary.

[7] *See* note 6 *supra.*

> ties * * *. When the inquires are not undertaken in a threatening manner but are only isolated instances free of coercion and without any systematic intimidation in the background, they are not unlawful.

The burden rests on the General Counsel to prove that the interrogations violated the Act. *See Hughes & Hatcher, Inc. v. NLRB,* 393 F.2d 557, 563 (9th Cir. 1968).

In this case, the Board found that each interrogation incident was associated with an implied threat. Moreover, it found that the interrogrations were part of an overall systematic pattern of intimidation of employees. These findings are supported by substantial evidence and, therefore, justify the conclusion that the interrogations were unfair labor practices even though there was no evidence that employees were actually intimidated by the interrogations.

3. *The "Critical Period" Doctrine*

Finally, the company argues that under the Board's "critical period" doctrine, interrogations occurring before the filing of the election petition should not be considered unfair labor practices and should not be considered in determining if the results of the election should be set aside and the Company ordered to bargain. It relies upon *Ideal Electric and Manufacturing Co.,* 134 N.L.R.B. 1275, 1278 (1961), wherein the Board

> concludes, in all the circumstances, that the date of filing of the petition * * * should be the cutoff time in considering alleged objectionable conduct in contested cases. From that time, when the Board's processes have been invoked and a prompt election may be anticipated pursuant to present procedures, we believe that conduct thereafter which tends to prevent a free election should appropriately be considered as a postelection objection.

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To the extent that the Company is arguing that the "critical period" doctrine is a variety of statute of limitations imposed by the Board on unfair labor practices, it is clearly wrong. The only statute of limitations upon unfair labor practice charges is that found in Section 10(b) of the Act, 29 U.S.C. § 160(b), which provides that the Board cannot issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *." *See Local Lodge No. 1424 v. NLRB,* 362 U.S. 411, 80 S.Ct. 822 4 L.Ed.2d 832 (1960). As long as this requirement is satisfied, the Board is free to find that unfair labor practices have been committed regardless of the date of the filing of an election petition. Indeed, an employer can commit an unfair labor practice in some instances even if there is never an election petition filed.

To the extent that the Company is arguing that the "critical period" doctrine prevents these "prefiling" interrogations from being considered in issuing a bargaining order, it is also incorrect. It is not clear whether the Board considers the "critical period" doctrine expressed in *Ideal Electric* to be a rule of evidence or a rule of substantive law. *See Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB,* 589 F.2d 1166, 1170–74 (2d Cir. 1978). This Court, however, has considered the *Ideal Electric* "critical period" doctrine and found that it

> is simply an evidentiary device calculated to render irrelevant upon a post election contest, conduct "too remote" to have interfered with the employees' exercise of the free choice guaranteed by Sec. 7 of the Act.

NLRB v. R. Dakin & Co., 477 F.2d 492, 494 (9th Cir. 1973). The Court concluded that we were

> not prepared to give our approval to a rule which flatly bars the consideration of all pre-petition misconduct, particularly where, as here, the Regional Director concluded, and the Board affirmed, that such alleged misconduct "raised a substantial and material issue of fact" regarding the validity of the election.

Id. Accord, NLRB v. Lawrence Typographical Union No. 570, 376 F.2d 643, 652 (10th Cir. 1967).[8] Here, the Board considered that the events that occurred before the petition was filed were relevant to the fairness of the election. All of the incidents found to be unfair labor practices by the Board were within a month and a half of the filing of the petition, and all arose out of the Company's concern about the organization drive that led to the petition and, ultimately, to the election. This Court cannot say, as a matter of law, that these events were too remote to have had an effect on the election outcome. Nor will the Court require the Board to enforce an inflexible *per se* rule to disregard incidents before the filing of the election petition. Therefore, the Company's objections based upon the "critical period" doctrine are rejected.

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[8] The Board itself has not invariably followed the *Ideal Electric* rule when it felt circumstances warranted considering pre-petition conduct. *See, e.g., Baker Machine & Gear, Inc.,* 220 N.L.R.B. 194, 207 (1975); *Servomoton of Columbus, Inc.,* 219 N.L.R.B. 504, 505 (1975); *Willis Shaw Frozen Express,* 209 N.L.R.B. 267 (1974); *Weather Seals Inc.,* 161 N.L.R.B. 1226 (1966).

The Court has considered the other objections raised to the Board's finding that these interrogations constituted unfair labor practices and finds them without merit.

B. *SURVEILLANCE AND THREATS*

Director of Circulation Jules Molenda urged Yvette Hamilton, then office manager of the circulation department, to have some employees attend a Union meeting and report back. She persuaded two employees to attend the meeting and Molenda, on his own, persuaded two others to attend as well. The Board's conclusion that this activity constituted an unfair labor practice is supported by substantial evidence. *Cf.*

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NLRB v. Randall P. Kane, Inc., 581 F.2d 215, 218 (9th Cir. 1978).

City Editor Michael Todd told Sarah and William Wilson, both Times employees, that management was watching who attended NLRB hearings on the representation petition. He told them he did not think Sarah Wilson should attend, although it would be all right for William Wilson to attend, because his job was covering labor news. Creating the impression of surveillance of union activities can be as coercive as actual surveillance and, therefore, constitute an unfair labor practice. *See NLRB v. Miller Redwood Co.,* 407 F.2d 1366, 1368 (9th Cir. 1969). Substantial evidence supports the Board's conclusion that Todd committed an unfair labor practice.

The Board also found that Director of Circulation Molenda, at a group meeting of the circulation department, threatened employees that if the Union won the election it would be cheaper to replace the composing room employees with a computer. Larry King, a lower-level mailroom supervisor, threatened two mailroom drivers that, if the Union won the election, at least one of them would be laid off because the company could not afford both. The Board has the primary responsibility to distinguish between a threat, which is an unfair labor practice, and a prediction of the probable consequence of unionization, which is not. *See NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969); *NLRB v. General Telephone Directory Co.,* 602 F.2d 912, 915 (9th Cir. 1979). Prior anti-union policies or sentiments by the Company can be considered in determining if the particular statement is a prediction or a threat. *See e.g., NLRB v. Lenkurt Electric Co.,* 438 F.2d 1102, 1107 (9th Cir. 1971). In both of these instances, ample evidence supports the Board's conclusion that unfair labor practices were committed.

C. *THE TERMINATION OF ANN GABLER*

Ann Gabler was an education reporter with the Times. During the Union election campaign she decided to return to school to become a paramedic. On several occasions in December 1976, she asked Times managers if she could continue as a part-time worker after beginning school in mid-January. On December 6, 1976, Managing Editor Andrews told her that he thought something could be worked out. On the next day, City Editor Todd indicated that he could use her on Saturdays. According to testimony credited by the ALJ, on the same day, General Manager Tobin told her that her plan to work part-time would be "fine." Gabler again discussed the question with Andrews in early January and received an indication that it could be worked out.

Sunday Editor Michael Doogan testified that shortly before Gabler was due to stop working full-time he asked Andrews if she could work for him on Saturday nights. Andrews replied, "We don't know where she is on this union business. She tells [Tobin] one thing and other people something else." He instructed Doogan to find out what her Union sentiments were. Thereafter Andrews told Gabler that she could not work part-time, although he indicated that there might be a position after the election. She replied that if she were still working she would vote for the Union and, according to Gabler's testimony, Andrews replied that "elections are won or lost by a single vote." Finally, the Personnel Manager testified that the Times management had placed Gabler's name on the "undecided" list regarding her Union sentiments.

The pendency of a union representation election does not prevent management from carrying on its business in the normal fashion. A company may continue to make business decisions for good reasons, for bad reasons, or for no reasons at all, so long as the decisions are not motivated by anti-union discrimination or a desire to punish activities protected by the Act. *L'Eggs Products, Inc.*, 619 F.2d at 1341. An employer is free to terminate [9] an employee

unless anti-union animus is the moving or "but for" cause. *See NLRB v. Adams Delivery Service, Inc.*, 623 F.2d at 99; *Stephenson* v. *NLRB*, 614 F.2d (1210, 1213 (9th Cir. 1980); *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977). The General Counsel bears the burden of proving that the discharge was in violation of the Act. *See NLRB v. Adams Delivery Service, Inc.*, 623 F.2d at 99. The Board must base the finding on more than a mere circumstantial inference drawn from a general history of anti-union activities by the company. *NLRB v. Best Products Co., Inc.*, 618 F.2d 70, 74 (9th Cir. 1980).

In this case the ALJ credited the testimony of Gabler and Doogan and found that "the employee's position regarding the Union was a critical factor in management's decision not to honor her request for part-time employment." He found that she would have been offered the part-time job if management had been certain that she took an anti-Union stance. Thus, the ALJ concluded and the Board agreed, that the Company impermissibly based the employment decision upon Gabler's failure to express an anti-union preference, in violation of § 8(a)(3) of the Act. This finding is supported by substantial evidence and will not be overturned.

D. *GRANTING BENEFITS PRIOR TO THE ELECTION*

On July 26, 1976, well before the unionization drive began, the Company formulated a new program of wage reviews, which was to take effect in September of that year. The program called for regular reviews of all employees at various intervals, depending upon the length of employment and job description. The Board did not find that this program violated the Act. However, the Board found that the Company deviated from the plan in such a way as to grant an inordinate number of wage increases and promotions in the two days immediately preceding the election. Twenty-eight employees, or fifteen percent of the bargaining unit, received wage increases on January 18 or 19, 1977. Eleven of the wage increases were granted three or more weeks later than the time prescribed in the wage review plan timetable. Six of the increases were granted two or more weeks earlier than called for in the timetable. The Board found that these wage increases were "saved" to have the maximum impact on the election results and that, therefore, they constituted unfair labor practices.

Granting a regularly scheduled wage increase does not become an unfair labor practice merely because a union representation election is pending. *Oshman's Sporting Goods, Inc. v. NLRB*, 586 F.2d 699, 705 (9th Cir. 1978); *Allen v. NLRB*, 561 F.2d 976, 981 (D.C. Cir. 1977); *NLRB v. Styletek, Division of Pandel-Bradford, Inc.*, 520 F.2d 275, 280 (1st Cir. 1975); *NLRB v. Gruber's Super Market, Inc.*, 501 F.2d 697, 701 (7th Cir. 1974). However, § 8(a)(1) prohibits "conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 460, 11 L.Ed.2d 435 (1964). *Accord, NLRB* v. *Olympic Medical Corp.*, 608 F.2d 762, 764 (9th Cir. 1979). The motive of the employer is critical in determining whether the granting of a wage increase prior to an election is an unfair labor practice. An important indicator of that motive is whether there has been a change from the status quo. *See Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1129 (9th Cir. 1978). Moreover, the law is well established that there is a presumption of illegal motive adhering to wage increases granted prior to an election.

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[9] Both parties discuss this issue as a termination question, even though Gabler voluntarily left her full-time employment with the Company. The Board's remedy for the unfair labor practice requires that the Company reinstate her in a job on a part-time basis, or the equivalent.

Id.; NLRB v. Newman-Green, Inc., 401 F.2d 1, 3 (7th Cir. 1968). As one court has observed:

> The Board has long required employers to justify the timing of benefits conferred while an election is actually pending. Justifying the timing is different from merely justifying the benefits generally.
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>
> Wage increases and associated benefits may be well warranted for business reasons; still the Board is under no duty to permit them to be husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice.

NLRB v. Styletek, Division of Pandel-Bradford, Inc., 520 F.2d at 280.

In this case the large percentage of the bargaining unit that received wage increases, coupled with the several weeks variation from the Company's own schedule for those increases, coupled with the extremely close proximity to the election provides ample evidence to support the Board's conclusion that the Company intended the wage increases to influence voting in the election. The Company's explanation that the fact the wage increases occurred in the two days prior to the election was merely coincidental is incredible. Therefore, the Court affirms the determination of the Board that these wage increases constituted unfair labor practices.

III. *THE BARGAINING ORDER*

Relying on *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the Board set aside the election and ordered the Company to bargain with the Union. Such an extreme remedy is authorized where an employer's conduct during an election campaign is so disruptive as to taint any "re-run" election. In *Gissel* the Court identified two categories of cases in which such an order is warranted. In the first category the employer's unfair labor practices are so "outrageous" and "pervasive" that a bargaining order is almost always warranted. *Id.* at 613–14, 89 S.Ct. at 1939–40. In the second category the employer's conduct is less flagrant but still bad enough to tend to undermine the free election process. In this latter category the Board can issue a bargaining order if the Union demonstrates that it represented a majority of the unit employees who signed valid union authorization cards. The Court also identified a third category in which the employer's practices will not merit a bargaining order because of their minimal effect on the election process. *Id. at 614–15, 89 S.Ct. at 1940. See NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d 266, 268 (9th Cir. 1979) (delineating the three *Gissel* categories); *NLRB v. Pacific Southwest Airlines,* 550 F.2d 1148, 1151 (9th Cir. 1977) (same).

The Company's activities in this case were not outrageous enough to fit into the first *Gissel* category. Therefore, the bargaining order will be enforced only if there is sufficient evidence in the record to support the conclusion that the Union enjoyed majority status at some time prior to the election and that the employer's unfair labor practices were sufficiently pervasive and outrageous to undermine the opportunity for a fair "re-run" election.

A. *THE UNION'S MAJORITY STATUS*

The Board found that by November 15, 1976, the Union had obtained 97 valid authorization cards in a unit of 181 employees As a majority would consist of 91 employees, at least seven of the authorization cards would have to be invalidated to destroy the Union's majority. The Company's primary argument is that some fourteen of the authorization cards were invalid because the employees who signed them believed that the cards only requested an election and did not authorize the Union to represent them in collective bargaining with the Company.

The Union used two different authorization card forms, one of which was "single purpose" and the other of which was "double purpose."[10] Both cards clearly and unambiguously indicate the signer's intent to be represented by the Union in collective bargaining. In *Gissel* the Supreme Court noted:

> employees should be bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to direct the signer to disre-

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[10] *See* note 2 *supra.*

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> gard and forget the language above his signature.

395 U.S. at 606, 89 S.Ct. at 1936. The Company argues that Union organizer William Coleman created a false impression about the purpose of the cards at group meetings, that individual Union adherents told particular employees that the only purpose for the card was to secure an election and that several employees believed that the only purpose of the card was to gain an election, although they could not remember exactly what was told to them.

As to William Coleman, a review of the record reveals ample evidence to support the Board's finding that he fully and fairly explained the representation function of the authorization cards. The fact that several employees who attended group meetings could not recall such explanation is not sufficient to require this Court to overturn the Board's factual determination.

As to the individual solicitations, the rule is that where an employee is told that his card will be used only to obtain an election the card is not valid, but where he is not actually told that, but his only intent is to obtain an election, the card is valid. *See NLRB v. Randall P. Kane, Inc.,* 581 F.2d 215, 219–20 (9th Cir. 1978); *NLRB v. South Bay Daily Preeze,* 415 F.2d 360, 365–67 (9th Cir. 1966), *cert. denied,* 397 U.S. 915, 90 S.Ct. 919, 25 L.Ed.2d 96 (1970). A careful reading of the record reveals that only four employees (Kathleen Digel, Patricia Kieferly, Beverly Gearhart and Joseph Maguire) testified that they were actually told that the only purpose was to obtain an election. If the ALJ and Board had credited the testimony of these four employees, their authorization cards would be invalid. However, the ALJ and Board did not credit their testimony and their findings are entitled to great weight by this Court. Moreover, even if all four cards had been excluded, the remaining cards would have been sufficient to constitute a Union majority.

Seven other employees (Kathleen Ann Bibler, Lynn Conway, Betty Mead, John Spahr, Beth McCullough, Linda Goodson and Patricia Lindsey) recall being told that the cards would be used to obtain an election but fail to recall if they were told that it was the *only* purpose of the cards. In the absence of direct testimony that the employees were improperly solicited, it would be impossible for this Court to overturn the Board's factual findings and substitute a finding that Union adherents had "deliberately and clearly" cancelled the card's Union authorization purpose. Therefore, the Board's finding that the authorization cards of these seven employees were valid will not be changed.

The remaining objections of the Company, that the Union's majority status is tainted by the efforts of supervisors on the behalf of the Union, that the Board improperly refused to allow the Company to see affidavits and questionnaries given to it by employee-signers who did not testify, and that one of the unit members, Ray Tyson, should have been considered a manager and, therefore, not eligible to participate as an employee in the election, are not well founded. Therefore, we find that the Union did enjoy majority status as of November 13, 1976.

B. *PERVASIVE UNFAIR LABOR PRACTICES*

In *Gissel* the Court emphasized that the determination of when to issue a bargaining order is within the discretion of the Board. 395 U.S. at 612, n.32, 89 S.Ct. at 1939 n.32; *NLRB v. Peninsula Ass'n for Retarded Children and Adults,* 627 F.2d 202, 204 (9th Cir. 1980); *NLRB v. Pacific Southwest Airlines,* 550 F.2d at 1150–51. Although that discretion is not unbounded, the Court should enforce a bargaining order where the unfair labor practices are pervasive and severe enough to fit in either the first or second *Gissel* category.

In this case, the Board explained its decision to issue a bargaining order, based on the range of unfair labor practices that it had found, as follows:

> The numerous and presistent acts of unlawful interrogation by higher level management, the selective hiring policy based upon unlawful questioning of job applicants or employees seeking to arrange

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> employment interviews for job applicants, the use of employees to engage in surveillance, and the creating of an impression among employees that management was engaging in surveillance of their union and protected activities, as well as the threats of loss of employment are collectively sufficient to warrant a determination that a fair rerun election could not be held. Equally perni-

cious * * * is management's manipulative use of the wage review program to grant pay increases to groups of employees in all departments in an effort to undermine their support for the Union and influence the outcome of the election. It is reasonable to conclude that the total cumulative effect of these unfair labor practices, coupled with the additional unlawful refusal to employ Gabler on a part-time basis, will be a lasting one, and the conditions necessary for providing a fair expression of employee sentiment in a rerun election will not be achieved by a traditional cease and desist order.

The total number, severity, and immediacy of the unfair labor practices in this case far exceeds those in *NLRB v. Peninsula Ass'n for Retarded Children and Adults*, 627 F.2d at 204, (where the violations were characterized as "relatively mild"), and in *NLRB v. Chatfield-Anderson Co., Inc.*, 606 F.2d at 269, (where the most severe violations were "mitigated" and others were "almost trivial"), two recent cases in which we refused to enforce Board bargaining orders.

The wage increases, which were granted immediately prior to the election, are the most significant among the many unfair labor practices cited by the Board. It is unlikely that those who received such benefits, or who heard of them, will forget that it is the Company that has the final word on wage increases—and decreases.

In addition, we are not persuaded that the harmful effect of the Company's unfair labor practices has been dissipated by the fact that two of the Company's representatives who committed some of the unfair labor practices (supervisors King and Molenda) have left its employ. Several of the unfair labor practices were committed by high level management personnel who did not, as did the management personnel in *Chatfield-Anderson Co., Inc.*, choose to disavow their coercive conduct before the election. Moreover, the unlawful wage increases were granted by management, not by the departed supervisors. *Cf. NLRB v. Peninsula Ass'n for Retarded Children and Adults*, 627 F.2d at 205 (solicitation manager "directly responsible" for violations no longer with employer). Therefore, it appears unlikely that the effect on the employees of the unfair labor practices of management has been softened by the departure of two supervisors.

The Board's findings that a fair rerun election would not be possible is, therefore, supported by substantial evidence.

The Board's entire order, including the bargaining order, is enforced.

Caterpillar Tractor Co. v. NLRB

638 F.2d 140 (9th Cir.), March 2, 1981; rehearing denied October 7, 1981—250 NLRB 527

On petition to review Board Order

Before Duniway, Tang and Canby, Circuit Judges

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Tang, Circuit Judge: The question presented is whether substantial evidence supports the finding that Caterpillar Tractor Company violated the National Labor Relations Act on two occasions when it disciplined union steward Everett Cleveland. We find that there is substantial evidence, and therefore, deny Caterpillar's petition for review, and grant the Board's cross-application for enforcement of its order.

I.

The Board found that Caterpillar violated §§ 8(a)(1) and 8(a)(3) of the Act when Caterpillar issued a warning to Cleveland for his communication with employees in a department other than his own, because Caterpillar's action was a discriminatory application of a plant rule that was motivated by Cleveland's status as chief steward. We agree that § 8(a)(1) was violated. We therefore need not consider whether § 8(a)(3) was also violated.

Caterpillar's discriminatory enforcement of plant rules against Cleveland because he was a union steward interfered with the exercise of Cleveland's Section 7 rights. Caterpillar defends its disparate treatment of Cleveland on the ground that the presence of a union steward is "inherently disruptive." This reason, however, does not constitute a legitimate business justification under the facts of this case. The record shows that the brief visits and communications by Cleveland which precipitated his discipline were either just before or near the end of the work day and did not disrupt the plant's work activity. "In such a situation there is no need to inquire into motive and no need to balance competing rights." *National Cash Register Co. v. NLRB,* 466 F.2d 945, 936 (6th Cir. 1972), *cert. denied* 410 U.S. 966, 93 S.Ct 1442, 35 L.Ed.2d 700 (1973); *see also Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263, 268-69, 85 S.Ct. 994, 998, 13 L.Ed.2d 827 (1965).

II.

The Board also found that Caterpillar violated § 8(a)(1) of the Act when it suspended Cleveland for 60 days because he assisted an employee with the filing of her grievance.

Cleveland, as the chief union steward, was authorized under the bargaining contract to write up employee grievances. He was engaged in protected activity when he went to assist employee McPherson in department 94cc. *See Keokuk Gas Service So. v. NLRB,* 580 F.2d 328, 333 (8th Cir. 1978); *Inter-Polymer Industries, Inc. v. NLRB,* 480 F.2d 631, 633 (9th Cir. 1973). Supervisor Simi's order that Cleveland write the grievance outside on a dirty table where a truck was unloading was a restraint on that activity. With little contradiction, the record shows that the indoor lunch room, not the picnic table, was the area where grievances were usually written up. Simi's arbitrary decision to restrict access to the lunch room, in addition to other evidence showing that Simi was trying to discourage resort to the grievance procedure, provided a substantial basis for the Board's conclusion that Caterpillar had violated § 8(a)(1). In view of the fact that even a past supervisor had designated the lunch room as a proper place to write up grievances Caterpillar's purported business justification for Simi's improvised rule—to prevent disruption—appears to be a pretext.

In light of the above, the fact that Cleveland reacted to Simi's action with an outburst of profanity does not provide good cause for his suspension. Although such

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conduct cannot be condoned, the Board reasonably found here that it was a response to Simi's interference with protected activity. *See NLRB v. Max Factor & Co.,* ——— F.2d ———, No. 79-7118 (9th Cir. 1980); *Trustees of Boston University v. NLRB,* 548 F.2d 391 (1st Cir. 1977); *NLRB v. Mueller Brass Co.,* 501 F.2d 680 (5th Cir. 1974).

Caterpillar's petition for review is denied and the Board's cross-application for enforcement is granted.

NLRB v. Consolidated Freightways Corporation of Delaware

651 F.2d 436 (6th Cir.), March 2, 1981—242 NLRB 770

On petition to enforce Board Order

Before MERRITT and KENNEDY, Circuit Judges, ANNA DIGGS TAYLOR, District Judge*

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The National Labor Relations Board petitions for enforcement of an order issued by the Board on June 4, 1979, finding that the defendant violated Sections 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158, by discriminatorily refusing to hire John Mitchell because he had engaged in protected union activity, and by informing O.D. Lofton, a job applicant later hired, that it would not hire John Mitchell because of Mitchell's protected union activities. The Board's decision is reported at 242 NLRB No. 119. After a full hearing on these matters, the administrative law judge filed an opinion containing his findings of fact and conclusions of law. The Board adopted his findings and conclusions.

The ALJ found that while acting as president of the local, Mr. Mitchell engaged in a heated conversation with Bob Kirksey, manager of defendant's Memphis terminal, during which he threatened to break both of Kirksey's arms and legs. The ALJ further found that although Mitchell's threat was made in the context of a labor relations discussion it was not protected under the Act, that these threats were, in fact, a matter of genuine concern to Kirksey and that Kirksey's reliance on Mitchell's threats were well-founded and legitimate reasons for not hiring him. In his opinion, the ALJ commented that "Mitchell's conduct and statements [were] so flagrant, opprobrious and egregious at [sic] to have exceeded the bounds of the protection afforded by the Act. Indeed, a punch in the nose pales in comparision to Mitchell's admitted statements to Kirksey." Finally, the ALJ found that neither the company in general, nor Kirksey in particular, entertained a general union animus, and had hired former union officials. Despite these findings which were supported by substantial evidence on the record, the ALJ concluded that there was at least a mixed motive for not hiring Mitchell based upon his view of certain statements attributed to Kirksey concerning Mitchell's past handling of a particular labor dispute.

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*Honorable Anna Diggs Taylor, District Judge, United States District Court, Eastern District of Michigan, sitting by designation.

The proper test in determining whether the discharge or failure to hire an employee is an unfair labor practice is whether the anti-union animus was a dominant motive. Thus when both a "good and bad" reason for discharge or failing to hire exist, the burden is upon the General Counsel to establish that in the absence of protected activities, the discharge would not have taken place. *Coletti's Furniture, Inc. v. N.L.R.B.*, 550 F.2d 1292, 1294 (1st Cir. 1977). *In Wright Line*, 251 NLRB No. 150, 105 LRRM 1169 (1980), the Board, using an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), set forth a test of causation for cases alleging violations of Section 8(a)(3) of the Act. Initially, the General Counsel must make a prima facie showing that an illegal purpose was a "motivating factor" in the employer's decision. Once the General Counsel has established a prima facie case, the employer then has the burden of demonstrating that the same action would have taken place even in the absence of the illegal reason.

In the instant case the ALJ found that Kirksey's reliance on Mitchell's threats were well-founded and legitimate reasons for not hiring him. There was no evidence that Mitchell's threats were merely a pretext used as an excuse for not hiring him because of his union activity. *N.L.R.B. v. Howell Automatic Machine Company*, 454

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F.2d 1077 (6th Cir. 1972). The ALJ's conclusion that defendant violated 8(a)(3) and (1) of the Act cannot withstand scrutiny under *Coletti* and *Wright Line.*

Furthermore, there was no evidence that Kirksey's explanation to O. D. Lofton, a former union officer hired by defendant as a driver, as to why he would not hire Mitchell tended to interfere with Lofton's free exercise of his employee rights under the Act.

For the reasons outlined above, enforcement of the order of the National Labor Relations Board in this case is denied.

American Safety Equipment Corporation v. NLRB

643 F.2d 693 (10th Cir.), March 3, 1981—241 NLRB 115

On petition to review and cross petition to enforce Board Order

Before DOYLE, MCKAY and SEYMOUR, Circuit Judges

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SEYMOUR, Circuit Judge: American Safety Equipment Corporation (Company) engages in the manufacture, nonretail sale and distribution of automotive restraint systems. The International Association of Machinists and Aerospace Workers, AFL-CIO, sought to organize production and maintenance employees at the Company's Palmyra, Missouri facility. A National Labor Relations Board representation election was held October 29, 1976. The Union lost, and it filed several objections to the Company's conduct during the preelection period. After an investigation, the Regional Director overruled all the Union objections, but nonetheless set aside the election.

The Regional Director based his decision upon two rules in the Company's employee handbook. One rule prohibited "distribution of unauthorized leaflets, papers, or other materials during working hours on Company property." Rec., vol. II, at 301. The other stated that "only the recognized solicitations for charitable organizations and similar activities specifically approved by the Company will be permitted during working hours."[1] *Id.* The Regional Director held that the no-solicitation, no-distribution rules constituted an interference with the employees' organization rights.

The Company's request for NLRB review of the Regional Director's decision was telegraphically denied, and a second election was held January 14, 1977. The Union won. The Company objected, claiming section 9(c)(3 of the Act, 29 U.S.C. § 159(c)(3), barred a second election because a valid election had been held in the preceding twelve-month period. The Regional Director overruled the company's objection

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[1] The Company promulgated the rules in 1968 to regulate solicitations concerning highly controversial political issues at its already unionized California facility. These rules were adopted without modification when the Company began operation of the Palmyra plant in 1976.

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and certified the Union as the employees' bargaining agent. The Board denied the Company's request for review of this decision in a written opinion [2] on January 26, 1978, approximately one year after the Union was certified.

No negotiations took place between the Union and the Company during the Union's certification year. Shortly after review was denied by the Board, the Union sent a letter to the Company requesting negotiations. A second Union letter again sought a bargaining meeting and requested pertinent information about Company employees. The Company did not respond to either communication. Subsequently, the Union filed the unfair labor practice charge that is the basis of this appeal, alleging the Company had refused to bargain and to supply requested information. The Board found violations of sections 8(a)(5) and (1)[3] of the Act and directed the Company to bargain with the Union. The Company petitioned this court for review of the Board's order. The Board cross-applied for enforcement.

The Company raises three issues on appeal. It argues 1) that the Board erred in setting aside the first election; 2) that even assuming the Company had an obligation to bargain after the second election, the Company did not illegally refuse to do so during the certification year; and 3) that after the year had expired, its refusal to bargain was based on a reasonable, good faith doubt as to the Union's majority status. We find the first issue dispositive and, therefore, need not reach the other two questions.

The Company is charged with an unfair labor practice for refusing to bargain with the Union. The Company claims that it had no duty to bargain because the Union was defeated in what it contends was a valid first election. Thus, in determining whether the Company committed an unfair labor practice, we must decide if the Regional Director was justified in setting aside the first election.

Congress has given the Board wide discretion in supervising representation elections. *NLRB v. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946). This includes the right to set aside an election in which a party's preelection conduct "reasonably tends to interfere with the voter's free choice," *Independent, Inc. v. NLRB*, 406 F.2d 203, 206 (5th Cir. 1969) (quoting *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 864 (5th Cir. 1966)), or unduly influences the election result. *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 12, 180 (6th Cir. 1967). Our review of such a Board decision is limited to determining whether it is supported by substantial evidence on the record considered as a whole. *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 125 (6th Cir. 1974); *Tennessee Packers*, 406 F.2d at 180. Substantial evidence is "more than a mere scintilla and connotes such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Ann Lee Sportswear, Inc. v. NLRB*, 543 F.2d 739, 742 (10th Cir. 1976).

In this case, the Regional Director conducted a full investigation of the objections made by the Union to the first election. Both the Union and the company were given ample opportunity to present evidence, including sworn statements from witnesses, on the conduct of the election. The only basis found by the Regional Director for setting aside the first election was the no-solicitation, no-distribution rules in the Company handbook, which was given to every new employee.

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379 F.2d at 180 (quoting *NLRB v. Blades Manufacturing Corp.*, 344 F.2d 998, 1003 (8th Cir. 1965)). In deciding whether such conditions have been disturbed, rules prohibiting solicitation or distribution during working *hours*, as opposed to working *time*, are presumed to interfere with employees' organizational rights. *See Essex International, Inc.*, 211

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[2] The decision is reported at 234 N.L.R.B. 501, 97 L.R.R.M. 1305 (1978).

[3] These sections provide:

"(a) It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

"* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

N.L.R.B. 749, 86 L.R.R.M. 1411, 1412 (1974). However, an "employer [may] show by extrinsic evidence that, in the context of the particular case, the 'working hours' rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." *Id.*

In setting aside the election on the basis of the two rules in the handbook, we conclude that the Regional Director erroneously applied the analysis in *Essex* to the facts before him. He recognized that under *Essex* an employer may rebut a prima facie presumption of invalidity by a showing that either the "working hours" rules were *communicated or applied* properly. But he failed to consider the evidence showing proper application in this case. To meet its burden the Company submitted four employee affidavits covering the solicitation issue. The industrial relations manager stated that employees were told their lunchtime and breaktime were their own to do with as they pleased and that employees were well aware the rules on solicitation and distribution applied only to actual working time. He also stated that employees openly engaged in Union activities, including the distribution of Union material during their nonwork time, and were not disciplined or prohibited from doing so. Two other employees stated that material for and against the Union was openly distributed at the plant during nonworking time and that no one was disciplined as a result. Although as noted by the dissent the Regional Director found only four instances in which employees were specifically informed that the rules only covered actual work time, the evidence clearly establishes that the rules were consistently *applied* properly by the Company. There is absolutely no evidence to the contrary. Furthermore, in overruling Union objections 2, 3 and 5, the Regional Director himself found that "in enforcing its no-solicitation, no-distribution rules, [the Company] did not engage in conduct which would provide a basis upon which the election may be set aside, inasmuch as the investigation failed to disclose that during the lengthy organizational campaign, the Employer enforced such rules disparately and took action only against employees who supported the [Union]." Rec., vol. II, at 298.

We agree with the dissent that we cannot choose between conflicting facts or inferences from facts. But here the evidence is uncontroverted that the rules were applied by the Company to permit proper Union solicitation. Consequently, the Company met the burden, imposed by *Essex*, of overcoming the prima facie invalidity of the rules.[4] The Regional Director refused to consider the affidavit evidence presented by the Company. His decision can stand only if the rules are to be considered a per se interference with a representation election. As *Essex* indicates, such rules do not create an irrebuttable presumption. *See also House of Mosaics, Inc.*, 215 N.L.R.B. 704, 88 L.R.R.M. 1428, 1430 (1974). Nor has this court ever held, in reviewing solicitation and distribution rules in a non-election setting, that the mere promulgation of such rules is a per se violation of the Act. *See Groendyke Transport, Inc. v. NLRB*, 530 F.2d 137, 141 (10th Cir. 1976); *NLRB, v. Shawnee Industries, Inc.*, 333 F.2d 221, 225 (10th Cir. 1964).[5]

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The Regional Director's conclusion that the record evidence did not overcome the presumptively "coercive effect" of the rules stands absolutely unsupported. The substantial and uncontradicted evidence showed that the Company applied the rules lawfully, and that the employees understood them to permit dissemination of Union information during nonwork time. Therefore, we find the Board's decision affirming the Regional Director to be inexplicable and contrary to its own articulated policy. To the detriment of both parties, this error was aggravated by the Board's one-year delay in announcing its decision.

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[4] Contrary to the assertion of the dissent, we are not placing the burden of proof on the employees or the Union. Rather, we are holding that the *Company* met its burden of producing sufficient evidence to rebut the prima facie invalidity.

[5] The Board has applied the *Essex* analysis in determining whether no-solicitation and no-distribution rules constitute a section 8(a)(1) violation. *See House of Mosaics, Inc.*, 215 N.L.R.B. 704, 88 L.R.R.M. 1428 (1974). Therefore, our holding in *Groendyke* and *Shawnee* is relevant to the facts of this case.

The situation here is very close to the one in *Shawnee*, where we pointed out that:

> "The record contains no evidence that the rules were ever used to interfere with any union or any organizational activities; . . . or that the rules were adopted for a discriminatory purpose. We see nothing in the record to sustain an inference that these rules ever have been, or ever will be, used in a forbidden manner. It is presumed that a person obeys the law and discharges the obligations imposed on him by law. Imagined possibilities are not enough. A charge of an unfair labor practice must be based on something more than suspicion. Here the only showing is the existence of the rules. In our opinion the mere promulgation of the rules is not per se a violation of the Act."

333 F.2d at 225. In *Groendyke* the record showed that the rule was actively enforced in an unlawful manner to prevent any distribution or solicitation "on Company premises at any time." 530 F.2d at 142. We therefore held the rule a violation of the National Labor Relations Act.

Accordingly, we hold that the Board's decision to set aside the first election is arbitrary, unsupported by substantial evidence, and an abuse of discretion. The petition for review is granted, and the decision and order of the Board is set aside. The cross-petition for enforcement is denied.

WILLIAM E. DOYLE, Circuit Judge, dissenting: I respectfully dissent:

The controversy here revolves around a handbook prepared by the Company and distributed to new employees. It was a twenty-one page pamphlet. Under the heading Personal Conduct the handbook set forth rules of employee conduct on Company property. It stated that violation of such rules could subject offenders to termination. One such rule prohibited "distribution of unauthorized leaflets, papers or other materials during working hours on Company property." Under the heading Solicitations another rule stated "solicitations, collections and circulation of petitions of any nature frequently result in misunderstanding. To avoid this possibility only the recognized solicitations for charitable organizations and similar activities specifically approved by the Company will be permitted during working hours." Still another rule prohibited "distribution of unauthorized leaflets, papers or other materials during working hours on Company property."

These rules made it clear that solicitations were not favored by the Company, and the term "working hours" tends to mean all of the period from eight to five, for example. This leaves no room for construction.

THE DECISION

The Regional Director concluded that in the circumstances described that the extrinsic evidence presented by management did not overcome the force or effect of such written rules. Notwithstanding the fact that the employer presented evidence that approximately four of the employers were advised that solicitation and distribution in violation of the written rules were permitted, such rules remained in the handbook and there was no notice given to *all* employees that such rules had in any way been modified or rescinded. Thus, the Regional Director concluded that such rules permitting only authorized approved solicitations and distributions during working hours constituted the basis upon which the election should be set aside. The solicitations authorized were those which pertain to charitable drives, etc.

The Board adopted the Regional Director's conclusion on the basis that it was

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supported on the record as a whole. The question is whether there is substantial evidence in the record considered as a whole to support the Board's finding.

We cannot, of course, consider issues of fact on a de novo basis and choose between conflicting inferences even though we might arrive at a different conclusion. Such a choice is not ours to exercise. *Ann Lee Sportswear, Inc. v. NLRB* 543 F.2d 739 (10th Cir. 1976); *NLRB v. Tennessee Packers, Inc., Frosty Morn Division,* 379 F.2d 172, 180 (6th Cir. 1967).

The Board in this case determined that since both the no-distribution, no-solicitation rules of American Safety Equipment Corp. prohibited those activities during working hours, rather than working time, that the employees of the corporation had been denied the laboratory conditions essential to a fair representation election. *American Safety Equipment Corp.,* 234 NLRB 501, 1978 CCH NLRB p. 31, 427–8. See also *Tennessee Packers,* supra, 379 F.2d at 180. The majority opinion would have this court hold that the Board's ruling constitutes an abuse of discretion, in that the Board's decision is not supported by substantial evidence in the record as a whole.

WHAT IS THE EFFECT OF THE RULES ON THE ELECTION?

We must note at the outset that the standards for determining whether an employer has engaged in conduct which interferes with the employees' rights to a noncoercive electoral atmosphere are not as demanding as the standards for determining whether an employer has engaged in an unfair labor practice. As the court stated in *NLRB v. Tennessee Packers, Inc., supra,* "[i]t is not necessary that conduct which interferes with the freedom of choice in an election actually constitute an unfair labor practice." *See* in addition, *Hedstrom Co. v.*

NLRB, 558 F.2d 1137, 1151, n. 36 (3rd Cir. 1977) App. 629 F.2d 305 (3rd Cir. 1980); *Independent, Inc. v. NLRB,* 406 F.2d 203, 207–8 (5th Cir. 1969); *NLRB v. Shirlington Supermarket,* 224 F.2d 649, 652–3 (4th Cir. 1955), *cert. denied,* 350 U.S. 914, 76 S.Ct. 198, 100 L.Ed. 801 (1955).

There are indeed a number of cases which hold that a presumptively invalid no-solicitation rule does not constitute an *unfair labor practice* in the absence of a showing that the rule was applied in an invalid manner. However, we do not have a question of unfair labor practice here. Here we are facing the issue of whether no-solicitation/no-distribution rules constituted a violation which was sufficient to void an election which the Union lost, and as a result of which the employees of American Safety Equipment Corp. were not represented by any Union. In order for the Board to find that the laboratory conditions necessary for a fair representation election were not present, it is not, we repeat, necessary that it be shown that the rules were definitely applied in an invalid manner, and thus that the employer committed an unfair labor practice.

It is the duty of the Board to draw the inferences from the facts presented and determine whether the employees' organizational rights had been interfered with so that laboratory conditions were not present at the time of the representation election. In this case the Board determined that since both rules were couched in the same terms, the logical conclusion which could have been reached by the employees of American Safety Equipment Corp. was that solicitation and distribution were banned at all times. In addition, although the Regional Director recognized that four of the company's employees had been advised that solicitation and distribution in violation of the written rules were permitted, the Director noted further that these rules remained the same, and that no notice was given to all of the employees-at-large that the rules had been modified or rescinded. The company had no general policy of discussing or explaining the rules in pre-hire interviews, and it did not, officially or otherwise, notify its large employee force as a whole that the rules were to be applied in a manner inconsistent with their language.

There was some evidence given by the Company that the new employees were told

that the noon hour, for example, was theirs alone, but the Company didn't tell them that in relationship to whether or not there could be solicitation or as to whether or not the rules pertaining to solicitation applied. Those rules were written so that they were final and, indeed, the rules threatened termination in fact.

The four employees to whom the Company revealed that the no-solicitation rules were not applicable were actually management level employees. There is no evidence that they communicated this to employees interested in joining the Union. Therefore, I cannot see any basis for this court accepting their testimony over the strong inferences which are to be drawn from the circumstances surrounding the existence of these rules having to do with solicitation.

In the case of *Allis Chalmers Corp.,* 224 NLRB 1199 (1976), the Board held that the Company's no-solicitation rule constituted an unfair labor practice. In that case there was evidence that no one had ever been replaced for soliciting, that the rule had never been enforced except against an isolated vendor, and the employees did engage in Union solicitation during their break and meal periods. However, the rule was posted during the Union's organization drive and management did not explain to the employees that the rule was not applicable to break and meal periods. The court held that the rule violated the National Labor Relations Act even though a later rule restricted the solicitation ban to working time, because the change was not explained to the employees. If the rule in *Allis Chalmers* is an unfair labor practice, it is clear that the Board did not abuse its discretion in holding in the case at bar that several rules constitutes sufficient grounds to set aside the election. *See also, Bandag, Inc., v. NLRB,* 583 F.2d 765 (5th Cir. 1978); *L.O.F. Glass, Inc.,* 216 NLRB 845 (1975).

In the Board's decision in *Flat River Glass Co.,* 234 NLRB 200, 1978 CCH NLRB p. 31, 651, its holding was that the mere existence of an invalid no-solicitation rule was not sufficient justification for overturning a representation election, but in that case two unions were competing in an election. The Board refused to set the election aside due to the fact that the employer had an invalid no-solicitation rule because there was a lack of evidence that this unlawful rule was applied in a disparate manner to the two competing unions. Thus *Flat River* is distinguishable from our case which involved only one union, and an effort on its part to get recognition.

In *Essex International, Inc.*, 211 NLRB 749, 1978 CCH NLRB p. 34, 563, the Company had three rules which discussed solicitation and distribution. Two of these prohibited solicitation for any cause or distribution of literature during working time. Only one rule prohibited distribution of literature during working hours. The Board decided the employer had made a sufficient showing to rebut the prima facie presumption from the rules' invalidity, and stated:

> It is arguable that the no distribution rule, standing alone, is invalid because of its prohibition of distribution during "working hours." However, after considering that rule, together with the Employers' no solicitation rule referring to "working time" and the separate section on Solicitations, which sets forth the Employers' rule against distribution during working time, we are unable to conclude that employees would consider the single reference to working hours to mean something other than working time.

Thus in *Essex* there was mitigating material. The Board also stated that the employer should be allowed to rebut the presumption of the rules' invalidity by presenting extrinsic evidence showing that the rule had not been applied in a manner such as to interfere with the employees' organizational rights. However, the important thing was that the Board relied on the fact that two of three rules used the term "working time" in reaching its decision that the election should not be set aside. The instant case is distinguishable in that both rules used the term "working hours." Hence potential members of the Union could not get any consolation from either of the rules.

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The majority opinion appears to rely on the Regional Director's statement in his findings that in enforcing the no-solicitation, no-distribution rules the company had not engaged in conduct which would provide a basis for setting aside the election. That statement is cited in support of the majority's position that there were *no* grounds upon which to set aside the election. However, the Regional Director was referring to specific allegations of misconduct presented by the Union, which the Regional Director held to be unfounded. The Regional Director specifically stated that in the circumstances presented there was no evidence of misconduct. This is not to say, however, that the rules themselves were valid, or that the rules themselves were not grounds for drawing inferences in support of the judgment setting aside the election. The Director found that the rules were invalid and supported the voiding of the election.

The effect of the majority opinion would be to place a burden on the employees, or the Union, to show that the rules were applied to mean "working hours" rather than "working time." The burden of proof is not with the Union, however, but with the employer. The fact remains that the rules prohibited solicitation and distribution during "working hours" and, as such, were presumptively invalid. It was, therefore, the burden of the employer, America Safety Equipment Corporation, to rebut that presumption. *Essex, supra.*

The Regional Director determined in this case that American Safety had not met its burden of overcoming the coercive effect of its written rules. Thus the Director placed the burden where it belonged: on the employer in these conditions.

The Board decided that the evidence that the four employees, three of whom held supervisory positions and one of whom was a personal secretary, believed that the rules were to be applied to mean working time rather than working hours was not sufficient to rebut the prima facie inference of the rules' invalidity. This court should not disturb the Board's ruling and choose its own conclusion.

In the case of *Groendyke Transport, Inc. v. NLRB, supra,* we stated that in order to find that a presumptively invalid no-solicitation or no-distribution rule is valid, the employer must prove unusual circumstances justifying the rule. *See* 530 F.2d at 141. Thus we are not empowered to set aside the Board's finding and conclude on our own that the fact that the four mentioned employees believed the rules were applied to mean working time is sufficient to establish that the rules were harmless. Nor is it possible for us to shift the burden from the employer to rebut the presumption of the rules' invalidity—to the Union to show that the rule was applied in a manner to interfere with the employees' organization rights. Rules of this nature tell a conclusive story. Hence they are presumed to interfere with the employees' organizational rights. It is up to the employer to show otherwise.

In *Ann Lee Sportswear, Inc. v. NLRB, supra,* 543 F.2d at 742, this court said "that it should only interfere with the Board's findings in the rare instance when the standard [regarding substantial evidence] appears to have been misapprehended or grossly misapplied."

The fact that both of the rules used the term "working hours" and a resultant restricted meaning existed is bolstered by the fact that there is still another rule prohibiting the soliciting generally and a warning against it. Inasmuch as both of the rules used the term "working hours" and the employees-at-large were not notified that any different meaning or interpretation was intended, the evidence supporting the Board's decision to set aside the election because laboratory conditions were not present surely meets the substantial evidence test inasmuch as it constitutes more than a mere scintilla and connotes such relevant evidence to support a conclusion.

Accordingly the decision of the National Labor Relations Board to set aside the first representation election should be affirmed. Therefore, this court should consider the merits of appellants' second and third issues of this appeal.

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The majority opinion would place the burden on the employees or the Union to show the rules were applied to mean "working hours" rather than "working time." The burden of proof is not with the Union, however, but with the employer.

For the reasons stated, I would enforce the Board's order.

NLRB v. Dillon Stores, Division of Dillon Companies, Inc.

643 F.2d 687 (10th Cir.), March 3, 1981—241 NLRB 579

On petition to enforce Board Order

Before SETH, Chief Judge, MCKAY, Circuit Judge, and CHRISTENSEN, Senior District Judge*

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CHRISTENSEN, District Judge: The National Labor Relations Board seeks enforcement of its order issued against Dillon Stores, Division of Dillon Companies, Inc. (the Company), pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). The Board adopted the findings and order of the Administrative Law Judge (ALJ) who found that the Company had committed an unfair labor practice as defined in section 8(a)(1) and (3) of the N.L.R.A., 29 U.S.C. § 158(a)(1) and (3),[1] by changing the duties of and then discharging James P. Kuhn because of his union activities.

* * * * *

Kuhn was employed by the Company from July, 1963, until his discharge on January 7, 1978. In April of 1977, he was transferred to the Company's store No. 50 where he worked in the meat department with Melvin Cowger, the department manager. On November 3, 1977, Kuhn's duties were changed from meatcutting to ordering, stocking cases, wrapping and cleaning. On January 7, 1978, without prior warning, Kuhn was discharged by the Company.

Contemporaneous with these events was an attempt to unionize the Company's meat market employees. In February and March a representation hearing was held, where the Board determined that the Company's meat market managers, including Cowger, were not supervisors within the meaning of section 2(11) of the Act and were thus eligible to vote in the Board-conducted elections. Both Cowger and Kuhn voted in the May 13, 1977 election and in a second election held on November 30, 1977.

In the unfair labor practice proceeding based on Kuhn's discharge, the ALJ allowed relitigation of Cowger's supervisory status and concluded that he was a statutory supervisor whose anti-union actions and statements were attributable to the Company. The ALJ further concluded that anti-union animus was the motive for Kuhn's change in duties and ultimate discharge.

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*Of the United States District Court for the District of Utah, sitting by designation.

[1] 29 U.S.C. § 158(a).

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

The Company resists enforcement of the Board's order on the grounds that (1) relitigation of Cowger's supervisory status was error and (2) there is no substantial evidence on the record to support the findings that Cowger was a supervisor or that Kuhn's change in duties and discharge were in violation of section 8(a)(1) and (3)

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The Company contends that the Board's regulation 29 C.F.R. § 102.67(f) renders the earlier determination that Cowger was an employee *res judicata,* precluding relitigation of his status. The relitigation of Cowger's status with the conclusion that he was a supervisor was essential to the Board's determination that there was a discriminatory discharge, since it relied upon Cowger's statements to impute anti-union animus to the Company.[2]

Section 102.67(f) provides in part:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.

This section bars relitigation of an issue determined in a representation hearing only when the subsequent hearing is a "related" proceeding. Most courts addressing the issue have concluded that unfair labor practice proceedings under section 8(a)(1) or (3) are not so related to prior representation hearings that relitigation of common issues is precluded. *E. g., Rock Hill Tel. Co.* v. *NLRB,* 605 F.2d 139 (4th Cir. 1979); *Heights Funeral Home, Inc.* v. NLRB, 385 F.2d 879 (5th Cir. 1967); and *Amalgamated Clothing Workers of America* v. *NLRB,* 365 F.2d 898 (D.C.Cir.1966). While the Board has not always been consistent in applying section 102.67(f), it has recently adopted the rationale of *Amalgamated Clothing Workers. See Serv-U-Stores, Inc.,* 234 *NLRB* No. 191, 1978 CCH NLRB ¶ 19.054 nn. 8 and 10 (1978) (expressly overruling decisions inconsistent with *Amalgamated Clothing Workers).*

We agree with this interpretation. The purpose of determining whether an individual is a supervisor is different in a representation proceeding than it is in an unfair labor practice proceeding involving interference with organizational rights, and different policy considerations underlie each. The rule has an additional advantage of avoiding the unnecessary delay in representation elections that would result if parties were forced to engage in protracted litigation to protect their interests in different contexts. *Amalgamated Clothing Workers,* 365 F.2d at 905.

The Company's remaining contentions challenge the ALJ's findings of fact, which must be judged by the substantial evidence standard enunciated in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). This standard of review is a narrow one, requiring upholding of the Board's findings if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion." 340 U.S. at 477, 71 S.Ct. at 459. If such evidence exists in the record considered as a whole, the Board's findings must be accepted without any necessity of searching for contrary alternative inferences that might also be drawn from the record evidence. *U.S. Soil Conditioning* v. *NLRB,* 606 F.2d 940, 944 (10th Cir. 1979).

There is ample evidence on the record as a whole to sustain the Board's conclusion that Melvin Cowger was a supervisor within the meaning of section 2(11) of the N.L.R.A., 29 U.S.C. § 152(11), which provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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Since this section is framed in the disjunctive, the existence of any one of the powers listed, as long as it involves the use of independent judgment, is sufficient to support a determination of supervisory status. *Furr's, Inc. v. NLRB,* 381 F.2d 562, 565 (10th Cir. 1967), *cert denied,* 389 U.S. 840, 88 S.Ct. 70, 19 L.Ed.2d 105 (1967).

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[2] Although a finding of supervisory status is not always necessary before imputing an individual's actions to an employer, *Betts Baking Co. v. NLRB,* 380 F.2d 199, 202 (10th Cir. 1967), this is the usual basis for such an imputation and was the theory upon which General Counsel relied. We note also that in some circumstances a supervisor's acts cannot be imputed to the employer. *See Sinclair & Valentine Co. v. NLRB,* 549 F.2d 1183 (8th Cir. 1977). *See also Furr's, Inc. v. NLRB,* 381 F.2d 562 (10th Cir. 1967), *cert. denied,* 389 U.S. 840, 88 S.Ct. 70, 19 L.Ed.2d 105 (1967). In this case the circumstances do not justify a departure from the general rule.

The Board found that Cowger was the manager of a meat department staffed by four to five people and that he assigned and scheduled work, oversaw the employees in the performance of their work, granted time off, and assigned overtime and vacations. Cowger's immediate superior, the district supervisor, visited the market approximately once a week for a period of 45 minutes to one hour. At all other times Cowger directed the daily operation of the department. In addition, Cowger made regular written evaluations of the employees' performance, which sometimes took the form of recommendations for promotion. These recommendations were honored in most instances.

These findings and the resulting conclusions that Cowger was a supervisor are supported by substantial evidence in the record. A contrary determination would lead to the conclusion that, except for the one-hour weekly visits by the district supervisor, the meat market employees functioned without any in-house supervision. The unlikelihood in general of such a situation and the contrary indications in the record before us confirm the Board's conclusion. *See, e.g., Vega v. NLRB,* 341 F.2d 576 (1st Cir. 1965), *cert denied,* 382 U.S. 862, 86 S.Ct. 123, 15 L.Ed.2d 100 (1965).

Now as to the Board's findings that Kuhn's duties were changed and he was discharged because of his union activities: The credited evidence reasonably tends to establish and the ALJ found the following facts: Prior to his discharge, Kuhn worked for the company fourteen and a half years with an unblemished work record. During the last ten years of his employment he usually worked as a "second man" in the Company's meat departments. He first learned of the organizational campaign of the Amalgamated Meat Cutters and Butcher Workmen of North America, Local 576 in March of 1977 through conversations with other meat department employees. In one of these conversations he urged another employee to attend a union meeting in order to find out about its program.

In April of 1977, Kuhn was transferred to store No. 50 to work under the direction of Melvin Cowger. At about this same time he signed a union authorization card at his home. During his first several months at store No. 50, Kuhn received numerous compliments from Cowger regarding his performance. On May 3, Kuhn voted in the representation election. A month later he informed Cowger that he had received a subpoena requiring his attendance at a post-election hearing. Cowger laughed and responded, "You got a subpoena. You're in trouble. You better get a lawyer." At lunch that day Cowger made the unsupported statement to other employees that Kuhn had received the subpoena because he was responsible for the pregnancy of a thirteen-year-old girl. Four days later, Cowger offered Kuhn five dollars not to honor the subpoena. He repeated the offer several times and thereafter raised the offer to ten dollars. Kuhn attended the representation hearing but did not testify, apparently because his testimony was unnecessary. Some or all of the other employees appearing at the hearing testified on behalf of the union.

During the ensuring months, Cowger's attitude toward Kuhn changed. He began "cursing and ridiculing" him daily. On November 3, Cowger informed Kuhn that his duties would be changed from meatcutting to ordering, stocking cases, wrapping and cleaning. Because of this change in assignment, Kuhn was required to work until 6:00 p.m. on Saturdays instead of his former 4:30 p.m. quitting time. Later that month Kuhn asked to take his annual "floating holiday" around Thanksgiving. Cowger ar-

bitrarily refused the request. On November 30, Kuhn voted in the second representation hearing.

On December 3, after arranging the temporary transfer of another employee to the store, Cowger told Kuhn, "Your brother is coming over." When Kuhn said he didn't have a brother, Cowger responded, "Bob Puff, your union brother." Later that day Cowger referred to another employee as Kuhn's "union brother." One month later Kuhn was summarily fired without prior warning.

The Company's defense to the charge that it changed Kuhn's duties and discharged him because of union activities was that Kuhn's work performance was inadequate. Even though Kuhn's employee evaluations were high prior to his transfer to store No. 50, Whitie Miller, the district supervisor, testified that at store No. 50 Kuhn could not get along with other employees and his presence had a negative effect on morale and production. The Company did not introduce evidence of any decreased production or other objective evidence of inferior performance by Kuhn. It did present testimony that one employee had asked for a transfer to "get away from the hassle" between Cowger and Kuhn. However, the ALJ pointed to evidence of numerous employee complaints about Cowger in refusing to give weight to the evidence, concluding that the assertion of poor work performance was vague and unsupported by concrete evidence.

Underlying much of the Company's challenge to the Board's findings is an attack on the ALJ's credibility determinations. It argues that the ALJ acted arbitrarily in uniformly crediting the Board's witnesses and discrediting its witnesses. Merely because the ALJ believed the employee's story does not furnish reason to overturn his credibility determinations. *NLRB V. Pepsi-Cola Bottling Co. of Topeka,* 613 F.2d 267, 271 (10th Cir. 1980). The ALJ advanced good reasons for his appraisal of credibility, and it is not for this court to substitute its weighing of creditibility for that of the ALJ absent extraordinary circumstances. *Osteopathic Hospital Founders Ass'n v. NLRB,* 618 F.2d 633 (10th Cir. 1980).

In establishing that an employee's duties were changed and he was discharged in violation of section 8(a)(1) and (3), the Board bears the burden of proving that these actions were unlawfully motivated, and this burden must be met by substantial evidence. *NLRB v. First Nat. Bank of Pueblo,* 623 F.2d 686, 693 (10th Cir. 1980). Proof of an employer's knowledge of his employee's union activity is an essential part of that burden. *Bill's Coal Co., Inc., v. NLRB,* 493 F.2d 243, 246–47 (10th Cir. 1974). There is no direct evidence in the record that Cowger or any other company representative knew that Kuhn signed a union authorization card or that he had urged another employee to attend a union meeting. Of course, an employer's knowledge that an employee voted in representation elections and honored a subpoena to appear at a representation hearing, in and of itself would be insufficient to establish knowledge of union support. However, such knowledge may be established by circumstantial evidence. *Id* at 247. Cowger's singling out Kuhn for derision regarding his subpoena, his extraordinary interest in inducing Kuhn not to honor it, and his multiple references to Kuhn's "union brothers," as well as the small size of the market in which the two worked are circumstances from which a reasonable inference of knowledge of union support may be drawn.

In assessing whether the record reasonably supports the finding of discriminatory change of duties and discharge, we are mindful that an employer may dismiss an employee for any reason or no reason at all, so long as hostility toward the employee's union activities does not enter into the decision. *Betts Baking Co. v. NLRB,* 380 F.2d 199, 203 (10th Cir. 1967). But when the Board produces evidence raising a reasonable inference of unlawful motive, the employer must explain its actions consistent with a legitimate motivation. *NLRB V. Okla-Inn,* 488 F.2d 498, 506 (10th Cir. 1973). Determining the degree of significance to

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be accorded the employer's explanation is, within the bounds of reason, the primary responsibility of the Board. Against a prima facie showing of unlawful motivation, a flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an anti-union motivation. *See Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966). *See also NLRB v. Automotive Controls Corp.,* 406 F.2d 221 (10th Cir. 1969) and *NLRB* v. Okla-Inn, 488 F.2d at 507. The Board's finding of an improper motive for Kuhn's change of duties and discharge is buttressed by the Company's vague and unsupported explanation for its actions.

There are circumstances in the record that could support the Board if it had arrived at a contrary decision.[3] But it did not do so, and we may not

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[3] The Company argues that the circumstances of Kuhn's change in duties and discharge make it unreasonable to infer an anti-union animus for Kuhn's treatment. It emphasizes that a long period of time elapsed between any knowledge it might have had on Kuhn's union activities and his change in duties and discharge and that other employees, who were not harassed or discharged, were as active or more active in support of the union than Kuhn was. In other circumstances the timing of an employee's discharge and the limited nature of his union activities have contributed to the court's conclusion that an inference of unlawful motive could not be drawn. *E. g., NLRB v. First Nat. Bank of Pueblo,* 623 F.2d 686 (10th Cir. 1980). The circumstances of this case, however, do not require such a conclusion. Cowger's anti-union statements and actions were directed specifically at Kuhn and his union activities, suggesting that this particular employee was singled out for abuse in at least significant part because of his union activities. Since this harassment originated during,

Continued

substitute our judgment for that of the Board if its crucial findings have a reasonable basis in the record considered as a whole. In our opinion they have.

The Board's application for enforcement of its order is granted.

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and continued throughout, the unionization period, the lapse in time between the Company's knowledge of his union activities and his change in duties and discharge does not negate the inference of anti-union motivation.

Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. NLRB

645 F.2d 1151 (D.C. Cir.), March 3, 1981—244 NLRB 826

On petition to review Board Order

Before PECK,* Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, MACKINNON and GINSBURG, Circuit Judges

Opinion for the Court filed by Circuit Judge GINSBURG

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GINSBURG, Circuit Judge: The National Labor Relations Board decided that a leaflet Local 174 ("the Union") sought to distribute was primarily a "political tract" and not a measure for the "mutual aid or protection" of employees within the meaning of § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976). It therefore held that Firestone ("the Company") committed no unfair labor practice in refusing to allow union members to distribute the leaflet during nonworking time in nonworking areas of the Company's premises. We agree with the Union that the Board's method of adjudication in this case was intolerably abrupt. Nevertheless, we deny the Union's petition for review because, in our judgment on the undisputed facts, distribution of the leaflet falls outside the boundaries of § 7's mutual aid or protection" clause.

I.

The day before Election Day, 1978, representatives of Local 174 requested permission from the industrial relations manager of Firestone's Riverview, Michigan, plant for employee distribution of a leaflet in nonworking areas of the plant during nonworking time. The two-page leaflet, titled "Protect your hard-won collective bargaining gains—VOTE on Tuesday, November 7," features the Union-endorsed candidates for Governor, United States Senator, and Justices of the Michigan Supreme Court; it describes the endorsed candidates as "committed to working for the best interests of working men and women" or "familiar with workers' needs."[1] Firestone's manager refused the requested permission and threatened disciplinary action if any employees distributed the leaflet at the plant.

The Union abandoned its plans for leafletting on plant premises, but filed an unfair labor practice charge against the Company. The charge asserted that distribution of the leaflet was protected activity under § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976),[2] hence the Company's refusal to allow the distribution violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976).[3] The Board's General Counsel agreed with the Union and filed a § 8(a)(1) complaint against the Company. Since the Company's answer admitted all

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material facts, the Board, on motion of the General Counsel, transferred the proceeding to itself and directed the Company to show cause why summary judgment should not be granted against it.

In response, the Company proposed that the parties first address the propriety of disposition without an evidentiary hearing; if the Board still determined to dispose of the case summarily, the parties could then file briefs on the merits. (J.A. (Joint Appendix) 29-30.) By telegram, the Board agreed to this proposal. (J.A. 31.) The parties thereupon filed briefs addressing the threshold procedural question, but the Board, with no further communication to the parties, issued a Decision and Order on the merits denying the General Counsel's motion for summary judgment, and granting summary judgment to the Company. The three-member panel declared it "clear as a matter of law" that distribution of the leaflet did not constitute concerted activity for the "mutual aid or protection" of employees; therefore the Company's refusal to permit the distribution did not interfere with the employees' exercise of rights safeguarded by § 7.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The leaflet is reproduced in full as an appendix to this opinion.

[2] Section 7 provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." The full text of § 7 is set out in note 4, *infra*.

[3] Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" § 7 of the Act.

Understandably upset that the Board had violated its agreement to limit initial argument and decision to the procedural issue and, thereafter, to establish a schedule for submissions on the merits, the Union moved for en banc reconsideration with oral argument and accompanied the motion with a memorandum of law. (J.A. 46–47.) Recognizing the merits of the Union's procedural point, the same three-member panel granted the Union's request to the limited extent of reconsidering the merits "in light of the Charging Party's Motion and supporting memorandum and Respondent's Opposition thereto" (J.A. 49); upon such reconsideration, the panel reaffirmed its original Decision and Order. The Union petitioned this court for review.

II.

The Board's manner of proceeding in this case was indefensible. After specifically instructing the parties to limit argument to the propriety of disposition by summary judgment, the panel skipped beyond that question and, without benefit of briefs, issued a decision on the merits. In addition to the obvious unfairness to the participants, the rush to judgment that occurred here diminishes respect for the Board; it fosters the impression that administrative agencies do not heed what those subject to their regulations say. The Board's handling of the matter, in short, was at odds with traditions of due process and orderly administrative procedure.

Nevertheless, a remand would serve no useful purpose, nor does the Union invite us to return the case to the Board. All parties now agree that the facts are undisputed, the leaflet "speaks for itself," and a pure question of law is at stake. Briefs and memoranda presented to the Board on the motion for reconsideration aired the parties' views on the merits of the unfair labor practice charge. Of more immediate prominence, the parties' positions have been briefed and argued comprehensively in this court. Consistent with the request for a final decision in all of the presentations before us, we turn to resolution of the substance of the controversy.

III.

Our inquiry is guided by *Eastex, Inc. v. NLRB,* 437 U.S. 556, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978), in which the Supreme Court upheld an NLRB determination that an employer committed an unfair labor practice when it banned employee distribution of a newsletter criticizing a proposal to incorporate a "right-to-work" provision into the state constitution and a recent Presidential veto of a federal minimum wage increase. The Court ruled that characterization of "right-to-work" laws and minimum wage levels as political issues did not remove distribution of the newsletter from shelter under the "mutual aid or protection" clause of § 7. *Id.* at 570 n.20, 98 S.Ct. at 2514 n.20.[4] That clause, the Court said,

encompasses employee endeavors to improve terms and conditions of employment, or the well-being of workers outside the immediate employee-employer relationship. *Id.* at 565–67, 98 S.Ct. at 2512–2513.

But the range of § 7's "mutual aid or protection" clause, the Court assumed in *Eastex,* is not infinite. "[A]t some point," the Court noted, the relationship of a proposed activity to employees' interests as employees "becomes so attentuated that [the] activity cannot fairly be deemed to come within the * * * clause." *Id.* at 567–68, 98 S.Ct. at 2513. The Court, however, did not consider itself the proper forum of first instance "to delineate precisely the boundaries" of the statutory "mutual aid or protection" language. "That task," the Court said, "is for the board to perform * * * as it considers the wide variety of cases that come before it." *Id.* at 568, 98

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[4] Section 7, as amended, as set forth in 29 U.S.C. § 157, states in full:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title [29].

The Court, much earlier, had held that an employer may not prohibit its employees from distributing union organizational literature in nonworking areas during nonworking time absent a showing that the ban is necessary to maintain plant discipline or production. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

S.Ct. at 2513. Stressing that it anticipated "case-by-case" Board consideration, *Id.* at 570 n.20, 98 S.Ct. at 2514 n.20, the Court footnoted with apparent approval an NLRB decision distinguishing the Board's *Eastex* ruling. *Id.* at 568 n.18, 98 S.Ct. at 2513 n.18. That decision, *Ford Motor Co.,* 221 N.L.R.B. 663 (1975), *enf'd,* 546 F.2d 418 (3d Cir. 1976), involved an employer's refusal to permit election eve distribution of a tract urging workers to reject both Democratic and Republican politicans and to support formation of an "independent workers party." The Board held the distribution unprotected by § 7 even though "the election of any political candidate may have an ultimate effect on employment conditions." 221 N.L.R.B. at 666.

The question we must resolve, then, is whether the handout before us bears, as the *Eastex* newsletter did, a sufficiently close relationship to employees' interests as to come within the guarantee of § 7's "mutual aid or protection" clause, or whether the link is so attenuated that § 7 does not shelter the activity.[5] The *Eastex* newsletter singled out and discussed two topics of immediate economic concern to employees, "right-to-work" laws and minimum wage levels. At the conclusion of the discussion, union members were urged to "elect our friends," and were reminded to register to vote. No election was pending. No particular candidates were named. The focus of the material was issues, not candidates.

The leaflet here, in contrast, focuses on the election of four candidates identified by name (printed twice in large bold-face type) and photograph. Preceding the candidate identification, the handout lists an assortment of issues of general concern to workers, but discussion of the listed issues is sparse. The dominant message conveyed by the leaflet is to vote for the endorsed individuals. We cannot disagree with the Board's conclusion that the principal thrust of the leaflet was to induce employees to vote for specific candidates, not to educate them on political issues relevant to their employment conditions.

The Union argues that the board is taking a "we know it when we see it" approach[6] that leaves both employees and employers without standards to guide their future conduct. This position, we believe, ignores the Supreme Court's direction in *Eastex* that the Board proceed "case-by-case." Moreover, the Board has indicated the approach it is taking.

In its brief to this court the Board states that it is attempting to range union "political" communication along a continuum, placing at one end literature dominantly aimed at inducing votes for specific candidates, and at the other, literature designed principally to educate employees on political issues that may impinge on their employment conditions.[7] We find this approach to be consistent with the Supreme Court's statements in *Eastex* that § 7 protection may depend upon the object or context of the activity. 437 U.S. at 568 & n.18, 570 n.20, 98 S.Ct. at 2513 & n.18, 2514 n.20.

The Board acknowledges that it may some day confront literature ranged around the midpoint of the spectrum, cases presenting close questions as to protected status. This, however, is not such a case. The leaflet before us does "speak for itself." We conclude, as did the Board, that it falls securely at the unprotected end of the spectrum. Accordingly, the Union's petition for review is denied.

It is so ordered.

APPENDIX

Protect your
hard-won
collective
bargaining

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[5] *Eastex* involved two distinct questions: (1) whether, apart from the location of the activity, distribution of the newsletter was the kind of concerted activity encompassed by § 7, (2) if § 7 sheltered the activity, did the employer have a countervailing interest in precluding use of its premises for the activity. 437 U.S. at 563, 98 S.Ct. at 2511. In this case, only the first of the two questions is before us.

[6] *Cf. Jacobellis v. Ohio,* 378 U.S. 184, 197, 84 S.Ct 1676, 1683, 12 L.Ed.2d 793 (Stewart, J., concurring).

[7] Brief for the National Labor Relations Board at 9–10.

gains—

VOTE
on Tuesday,
November 7

1156

Don't let your gains at the bargaining table be wiped out in Lansing and Washington.

Collective bargaining agreements are not unbreakable rocks of economic security—they're vulnerable to the changing tides of state and federal government.

For example, take state government. The degree of safe working conditions in shops and plants is dependent on how many safety inspectors are hired by the state Department of Labor, and how vigorously they do their job. The administration of workers' and unemployment compensation benefits is also the responsibility of the Department of Labor.

Even our fringe benefits are affected by what state government does. The level of Blue Cross-Blue Shield premiums, which is regulated by the state insurance commission, affects the cost of our negotiated health care benefits. Similarly, the level of state unemployment compensation benefits determines how much SUB money must be paid out to laidoff auto workers. Therefore, the less money paid out for such things as SUB and health care, the more money that can be freed for other negotiated benefits.

The story is much the same concerning the federal government—its action or inaction affects our collective bargining agreements.

William B.
FITZGERALD
for Governor

Action by the federal government to reduce inflation and taxes would give workers additional purchasing power. A system of national health care could free up for other purposes the money now diverted in our contracts for health care benefits.

Better funding for the Occupational Safety and Health Administration could ensure safer working conditions. A labor law reform bill would end the stalling tactics used by employers to prevent collective bargaining with unions. And plant closing legislation would prevent workers from being left with nothing but a worthless contract when a plant closes or moves away.

So as you can see, what happens in state and federal goverenment does affect what we accomplish at the bargaining table.

To protect our collective bargaining gains, we need to send candidates to Lansing and Washington who will protect and strengthen those gains. That's why Michigan UAW-CAP is backing BILL FITZGERALD for governor and CARL LEVIN for U.S. senator—they're two men committed to working for the best interests of working men and women.

Carl
LEVIN
for U. S. Senator

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Don't forget the Supreme Court

Remember to vote for the Michigan Supreme Court on the blue non-partisan ballot—it's important to you and other workers.

The Supreme Court rules on many issues vital to workers, such as workers' compensation benefits, insurance, unemployment compensation and others. Thus it's important to elect justices to the court who are familiar with workers' needs.

Two such men are Justice G. Mennen Williams and Judge Gary McDonald, both of whom were nominated by the Democratic Party for the Supreme Court.

We need to elect justices to our state's highest court who understand the problems and needs of working people. That's why Michigan UAW-CAP endorses G. MENNEN WILLIAMS and GARY McDONALD for election to the Michigan Supreme Court on November 7.

G. Mennen Gary
WILLIAMS & McDONALD
for
Michigan Supreme Court

Vote for ALL the
CAP-endorsed candidates
on Tuesday, November 7

Paid for by Michigan UAW-CAP
[illegible]

NLRB v. Los Angeles New Hospital

640 F.2d 1017 (9th Cir.), March 6, 1981—244 NLRB 960

On petition to enforce Board Order

Before Wright and Tang, Circuit Judges, and Hanson,* Senior District Judge

1018

Hanson, Senior District Judge: The National Labor Relations Board (Board) found that the Los Angeles New Hospital (Hospital) had interrogated and threatened its employees and created the impression that their protected union-organizing activities were under surveillance, all in violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (Act). The Board applies to this Court for enforcement of its September 11, 1979, order directing the Hospital to cease and desist from the unfair labor practices and to post an appropriate notice. We conclude that the Board's order should be enforced.

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*The Honorable William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

I.

On May 30, 1978, the Hospital announced that it was changing its sick leave policy so that effective June 5, 1978, employees would no longer be paid for their first day of sick leave. Employees Richard Fox and Richard Hopkins began soliciting other employees to sign a petition protesting the policy change. After organizing the petition drive, Fox and Hopkins approached Hospital administrator Jeffery Steadman and asked him to arrange a meeting at which they might present the petition to Stanley Diller, Hospital president and chairman of the board. The meeting was arranged and Fox and Hopkins presented the petition to Diller. At this meeting, the possibility of forming a hospital grievance committee was discussed. The committee—composed entirely of employees—was formed and it met a few days later in a seventh floor classroom of the Hospital, with management's knowledge and permission. At the grievance committee meeting, discussion turned from specific grievances to unionization, and an organizational meeting was arranged.

On June 19, 1978, a number of hospital employees met with representatives of the Hospital and Service Employees Union, Local 399. The Hospital activities challenged in this proceeding took place before and after the June 19 meeting. We discuss these in more detail below under separate headings, in connection with our review of the Board's separate findings and conclusions.

In reviewing the Board's decision and order, we are mindful that "The judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satis-

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fies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978).

II.

A. *Interrogation of Employees Fox and Myles.*

1. At the hearing before the Administrative Law Judge (ALJ), employee Richard Fox, a pathologist assistant, testified that Diller approached him while he was in the hospital cafeteria distributing memos that publicized the June 19 union meeting. Diller asked for one of the memos and after reading it, told Fox that he "felt [Fox] was working too hard in the matter." Fox also testified that, on the day of the union meeting, Diller told him "something to the effect that a union would never survive in that hospital and that we were fools and trouble-makers for trying to bring one in." Diller also asked Fox for the names of persons who were on the committee. Fox divulged the names, and later, committee members Richard Hopkins and Theresa Siminski told Fox that Diller had called them to his office and questioned them. Also on the day of the union-meeting, Fox spoke to administrator Steadman. Steadman said that he "felt sorry for [Fox] because [he] was under a lot of pressure and that [Fox] had to watch every move [he] made because Mr. Diller was watching [him]." Finally, a couple of weeks after the union meeting, Fox encountered Diller. Fox told him that his involvement in union activities was over. Diller replied, "That's good, because [I'm] still watching [you]." The ALJ credited the testimony of Fox because Steadman's testimony was too "vague and uncertain" to credit and because Diller did not testify at the hearing. The ALJ found that the statements by Diller and Steadman were "derogatory and repressive antiunion comments," and thus § 8(a)(1) had been violated. But, according to the ALJ, the statements failed to indicate that the Hospital had engaged in surveillance of its employees or created the impression that the employees were under surveillance, as alleged in the Complaint filed by the Regional Director. The Board agreed that § 8(a)(1) had been violated, but substituted its own finding that the comments amounted to threats of reprisal, and further created the impression that Fox's union and other protected concerted activities were under surveillance.

2. Jacqueline Myles, a secretary in the engineering department, was asked by Diller on the day after the union meeting whether she had attended that meeting. Diller also asked her for the names of those people in her department who attended. In a separate incident in late September of 1978, Myles

was transferred at her request from engineering to the X-ray department. The day after her transfer, Myles's replacement in engineering quit and she was transferred back to her old department. Myles went to Assistant Administrator Sy Zafrani to protest. During their conversation, Zafrani asked her, "How do you feel about the Union?" Myles's testimony was credited because neither Diller nor Zafrani testified at the hearing. The Board upheld the ALJ's finding that the questioning of Myles by Diller and Zafrani was in violation of § 8(a)(1).

3. Interrogation of employees by the employer violates Section 8(a)(1) when that interrogation carries a threat of reprisal against the employee or when it forms a pattern of coercive conduct tending to inhibit the exercise of Section 7 rights. *NLRB v. Silver Spur Casino*, 623 F.2d 571, 584 (9th Cir. 1980), *pet. for cert. docketed*, No. 80-660 (filed Oct. 11, 1980). "[T]he test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their protected rights." *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977).

In this case the record amply supports the Board's conclusion that both Fox and Myles were subjected to coercive interrogation by superiors. We note that neither Fox nor Myles was assured by the interrogators that no reprisals would be taken against them.

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In addition, Diller and Zafrani failed to communicate to the employees whether they had a valid purpose for asking the questions. And finally, Diller, who held the highest position in the hospital management hierarchy, asked both employees specifically for names of individuals who were involved in the organizational activities, reasonably creating an impression that he sought information upon which to base actions against individual employees. All of the aforementioned factors are relevant in weighing the lawfulness of interrogations by management. *See NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970), *citing NLRB v. Varo, Inc.*, 425 F.2d 293, 298 (5th Cir. 1970). Finding substantial evidence on the record as a whole, we uphold the Board's decision as it relates to the interrogation of these two employees.

B. *Solicitation by Employee James Cooke.*

1. Anesthesia techician James Cooke testified that during the first week of July 1978, he was reading union literature to three other employees during his break time in a break room or lounge that was adjacent to the operating room. He was told by his supervisor, Ora Randall, that he was not supposed to have the literature in that area. According to Cooke, Randall stated that the room was not really a break room and that Cooke was not on a scheduled break. When Cooke continued to read the literature, Randall called him into her office and repeated that he was not on a scheduled break, that he was not supposed to have union literature in that particular room, and that he could be replaced for having the literature there. Randall testified that the area where Cooke was soliciting was not a lounge area, but rather part of the operating room. The ALJ, however, credited Cooke's testimony that the room was used by employees as a break room and that Cooke was in this break room at a time when he customarily took his break. The Board adopted the ALJ's conclusion that Randall prohibited Cooke from discussing unionism on his break time and threatened that he could be replaced for having union literature in the lounge area, both in violation of § 8(a)(1).

2. The general Board policy regarding solicitation in hospitals is that "solicitation on nonwork time may be prohibited only where necessary to avoid disruption of patient care or disturbance of patients." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 99 S.Ct. 2598, 2603, 61 L.Ed.2d 251 (1979). Thus, proscriptions against solicitation in "immediate patient-care areas" are not regarded as presumptively invalid. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978). But in areas other than immediate patient-care areas, such proscriptions are presumptively invalid; and if they are to be sustained it is incumbent upon the Hospital to show that "disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas." *Id.*, at 495, 98 S.Ct. at 2470. In addition, we recognize that it is the Board's function to develop presumptions and "its conclusions on such matters are traditionally accorded considerable deference." *Baptist Hospital, supra*, 99 S.Ct. at 2611 (Brennan, J. concurring).

In *Baptist Hospital,* the Court held that substantial evidence supported the Hospital's position that solicitation in corridors and sitting rooms on patients' floors tended to disrupt patient care and disturb patients, justifying a ban on solicitation in those areas: "Small public rooms or sitting areas on the patient-care floors, as well as the corridors themselves, provide places for patients to visit with family and friends, as well as for doctors to confer with patients' families—often during times of crisis." 99 S.Ct. at 2604–05.

In the instant case, the controversy turns on the characterization of the room in which Cooke was soliciting. The Hospital argues that the area in question was a "sitting room" on a patient-care floor and thus it was permissible for Randall to prohibit Cooke from soliciting there and to threaten that he could be replaced for so soliciting.

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The room in question is adjacent to the operating room on the second floor of the Hospital. There are four doors in the room. One door opens onto the second floor's main corridor. Approximately twenty feet away from this main door, at the opposite end of the room, are two doors which lead respectively to the doctors' and nurses' dressing rooms. Also on this end of the room is a narrow hallway, approximately fifteen feet long. At the end of the hallway is the room's fourth door; this door leads to the outer portion of the operating room area where there are patients waiting to go into surgery. The dimensions of the room itself, not including the hallway that leads to the operating rooms, are approximately ten feet by twenty feet. No patients ever enter the area in question; it is never used as a passageway through which to transport patients to and from the operating room, nor is it ever used as a holding area for patients awaiting or recovering from surgery. Patient access to the operating room is through double doors that connect the operating room area directly to the main corridor. The room in question is furnished with a couch and two chairs. There is also a bulletin board on the wall. It was undisputed that employees regularly eat and drink in the room. Cooke testified that he has seen as many as fifteen people at one time in this room and that it is used as a lounge by thirty people from two different departments. But the ALJ rejected Randall's testimony that the room is part of the operating room (and thus an "immediate patient care area"), finding that

> Although Ora Randall's testimony sought to establish the "lounge" area as a part of the operating room—and thus not a permissible place to engage in union conversation—the evidence overwhelmingly refutes her testimony. One doesn't regularly eat lunch, drink cokes and coffee, and engage in social conversation in an operating room. That these things were done in the "lounge" area where James Cooke was "selling" the Union's cause is undenied.

The Board agreed that the room is indeed a lounge; it noted that in fact there was once a sign on the door leading into the room designating it as the "Doctor's Lounge." In addition, the Board indicated that the presence of a bulletin board in the room reinforced the conclusion that the room is a lounge for Hospital employees,[1] and therefore a permissible place to solicit support for the Union. Although the room is not generally accessible to visitors and patients, doctors occasionally confer with patients' relatives in the room. There is, however, a separate waiting room on the second floor for the use of visitors. Substantial evidence on the record supports the Board's conclusion that the area in question is neither part of the operating room, nor a public sitting room; it is a lounge for the use of hospital employees during their nonwork time.

Since the area where Cooke was soliciting is not an immediate patient care area, the burden rests on the Hospital to show that Randall's complete prohibition was necessary to prevent disruption of patient care. *Beth Israel, supra,* 437 U.S. at 495, 98 S.Ct. at 2470. Randall testified that before the incident with Cooke she was attending to a patient who was awaiting surgery in the operating room area—the area that is connected to the lounge by the fifteen-foot long corridor. A nurse asked Randall if she had seen Cooke because some supplies for which he was responsible could not be located. Randall looked for Cooke in the anesthesia room, but he was not there so she located the supplies herself. She then found Cooke, who was on his break, in the lounge reading union literature to three other employees. According to the credited testimony of Cook, Randall told him that

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[1] The presence of a bulletin board in the hospital cafeteria in the *Beth Israel* case served as one indication to the Court that the cafeteria was used for solicitation and distribution of other types of communications unrelated to union activity. As such, the cafeteria was held by the Court to be a permissible venue within the hopsital for solicitation and distribution of union literature. *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 490, 98 S.Ct. 2463, 2468, 57 L.Ed.2d 370 (1977).

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he was not supposed to have union literature in the lounge. Cooke replied that he was on his break. Randall then returned to the operating room area where she had been before. She stated that she was aware of noise coming from the lounge. It was at this point that she returned to the lounge, told Cooke to come to her office, and then directed him to stop soliciting. This isolated incident is insufficient to show that "disruption to patient care would necessarily result" in the absence of a complete ban on solicitation in the lounge. *Beth Israel, supra,* 437 U.S. at 495, 98 S.Ct. at 2470. Randall failed to take the less restrictive approach of requesting that Cooke and other employees talk more quietly. As the ALJ observed, "It may very well be that this particular 'lounge' area is not well suited for a lounge area because of its proximity to the operating room. Nevertheless, it has been so used by the employees for at least the past year." Here, there is substantial evidence to support the Board's conclusion that the Hospital failed to overcome the presumption that solicitation in non-immediate patient care areas of the hospital does not disturb patient care or disturb patients. Cooke was soliciting on nonwork time in a nonwork area. While Randall claimed that she was disturbed by Cooke's solicitation, her response to the alleged disturbance was overbroad under the circumstances. The Board's order predicated on its finding that Supervisor Randall's prohibition violated § 8(a)(1) shall be enforced.

C. *Interrogation of Employee Siminski.*

1. Theresa Siminski, who no longer works at the Hospital, was the secretary to the assistant administrator in charge of fiscal affairs, Sol Goldner. She was questioned by both Goldner and Diller before and after the union meeting. Before the meeting, Diller asked Siminski if she knew anything about the union meeting and asked her to tell him the names of other employees who were planning to attend. Goldner called Siminski into his office twice on the day of the meeting. The first time he asked her not to go to the meeting. Siminski became so upset that Goldner told her to take a break. After she returned from her break, Goldner again called her into his office and again asked her not to go. Later in the day, Goldner changed his mind; he suggested that she go to the meeting and then report back to him about what had happened there. After the union meeting, Diller called Goldner's office. Siminski answered the phone and Diller asked her whether she had gone to the union meeting and whether she had signed a union card. Siminski told him that she attended the meeting but that she did not sign a union card. Diller replied that he thought someone had told him that she had signed a card. After Diller conversed with Goldner on the telephone, Goldner called Siminski into his office. He asked her whether she had signed a union card and again she denied it.

None of these interrogations was found by the ALJ to have been an unfair labor practice because the ALJ concluded that Siminski, as secretary to Sol Goldner, was a "confidential employee" and thus did not come within the Board's definition of employees who are protected under the Act. The Board reversed this conclusion; it found that Siminski was not a confidential employee, and held that the conduct of Goldner and Diller violated § 8(a)(1).

2. It is established Board policy that employees who have a confidential relationship to "persons who formulate, determine, and effectuate management policies in the field of labor relations," are "confidential employees" and may be excluded from rank-and-file bargaining units. *The B. F. Goodrich Co.,* 115 NLRB 722, 724 (1956); *Ford Motor Co.,* 66 NLRB 1317 (1946). The ALJ found first, that Siminski worked in a confidential relationship with Goldner, and second, that Goldner is a person who formulates, determines, and effectuates management policies in the field of labor relations (the so-called "labor nexus" requirement, *see, e. g., Kleinberg, Kaplan, Wolff, Cohen & Burrows,* 253 NLRB No. 54 (1980)). Then the ALJ went on to find that the Board-created exclusion of confidential em-

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ployees from rank-and-file bargaining units extends to exclude those employees from protection under the Act against unfair labor practices.[2] Therefore, according to the ALJ, the interrogations of Siminski by Diller and Goldner were not unfair labor practices because Siminski was a confidential employee, and as such, her concerted activities were not protected by the Act.

The Board reversed the ALJ's finding that Siminski was a confidential employee because the evidence was insufficient to indicate that Siminski worked in a confidential capacity to Goldner. Thus, the Board did not address the issue of whether Goldner, in his capacity as assistant administrator in charge of fiscal affairs, had the requisite labor nexus to warrant a finding that Siminski was a confidential employee. The Board did note that the ALJ made a finding inconsistent with current Board law when he concluded that the concerted activities of confidential employees go completely unprotected under the Act.[3] Likewise, we need not reach the labor nexus question or the question of the extent of coverage of confidential employees under the Act if we conclude that substantial evidence on the record as a whole supports the Board's finding that Siminski did not have the requisite confidential relationship with Goldner.

The Board stated that the ALJ's conclusion as to the confidential status of Siminski was based on a series of memoranda that were typed by Siminski for Goldner and that were introduced as evidence by the Hospital at the hearing. The documents included memoranda to the Hospital's personnel director regarding wage raises and evaluations by department heads of certain employees; a memo to an employee's file regarding his termination; and other internal management memoranda regarding payroll and other matters. The Board emphasized that Siminski could not be said to have a confidential relationship to Goldner solely because she typed these memoranda and because she had access to confidential data. In addition, Siminski's other duties of answering Goldner's telephone, opening his mail, and working with raw, confidential data that Goldner eventually used to implement policy decisions upon fiscal matters were insufficient to conclude that Siminski was a confidential employee.

Prior Board decisions have established that mere access to confidential material or typing of confidential labor relations memoranda does not, without more, establish a confidential relationship. *United States Postal Service,* 232 NLRB 556 (1978); *Ernst & Ernst National Warehouse,* 228 NLRB 590, 591 (1977). This circuit has previously held that mere access to confidential data is insufficient to constitute confidential employee status. *See Union Oil Co. of Cal., Inc. v. NLRB,* 607 F.2d 852, 854 (9th Cir. 1979). The Board refrains from a broad definition of confidential employees—and justifiably so: "Because most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively, the Board has narrowly construed the definition of confidential employee." *Union Oil, supra,* 607 F.2d at 853. We therefore conclude that substantial evidence on the record as a whole supports the Board's finding that Siminski was not a confidential employee and was thus entitled to protection under the Act.

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Having found that Siminski was protected by the Act, we additionally find that substantial evidence supports the Board's finding that the interrogations of Siminski by Diller and Goldner were unlawful and in violation of § 8(a)(1). The questions put to Siminski could reasonably be construed to be threats of reprisal and reasonably created an impression that the employees were under surveillance. Siminski's testimony certainly indicated that she took the interrogations by Goldner to be veiled threats of reprisal for engaging in union activities.[4]

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[2] In so doing, the ALJ relied on a Fourth Circuit case, *NLRB v. Wheeling Electric Co.,* 444 F.2d 783 (4th Cir. 1971), which holds that confidential employees were wholly excluded from protection under the Act because they were "supervisors" within the meaning of that term as used in § 2(3) of the Act; 29 U.S.C. § 152(3) provides in relevant part that, "The term 'employee' * * * shall not include * * * any individual employed as a supervisor."

[3] *See Hendricks County Rural Electric Membership Corp.,* 236 NLRB No. 212 (1978), *reversed,* 603 F.2d 25 (7th Cir. 1979), *pet. for cert. docketed,* No. 80-885 (filed December 1, 1980); *Southern Greyhound Lines,* 169 NLRB 627 (1968), *enforced,* 426 F.2d 1299 (5th Cir. 1970). The Courts of Appeals are in disagreement as to whether confidential employees are protected under the Act for purposes of unfair labor practices. *Compare Hendricks County, supra* and *NLRB v. Wheeling Electric Co.,* 444 F.2d 783 (4th Cir. 1971) *with NLRB v. Southern Greyhound Lines, supra.*

[4] Siminski testified that the second time she was called in to Goldner's office, she asked him, "If I go [to the union meeting], will you fire me?" During the hearing, the ALJ indicated that he gave a great deal of weight to Siminski's testimony: "As I've indicated earlier Theresa Siminski was a very candid, I felt, and almost too nervous a witness to have been anything but credible and honest on this witness stand * * *"

The impression that the employees were under surveillance was imparted by Goldner's request of Siminski to attend the meeting and report back to him afterward. Such requests have been held to be unfair labor practices by the Board. *See Ayer Lar Sanitarium, supra,* 536 F.2d at 47–48.

Accordingly, we find that substantial evidence on the record as a whole supports the findings of the Board in their entirety.

ORDER ENFORCED.

Golden Day Schools, Inc. v. NLRB

644 F.2d 834 (9th Cir.), May 8, 1981—236 NLRB 1292

On petition to review Board Order

Before BROWNING, Chief Judge, CHOY, Circuit Judge, and THOMPSON,* District Judge

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BROWNING, Chief Judge: Employees of Golden Day Schools, Inc., a proprietary child care facility, held meetings at which the benefits of unionization were discussed. At least thirteen participants were interrogated about the meetings, and eight were fired. Employees picketed Golden Day and distributed leaflets. Five additional employees were discharged.

The union filed an unfair labor practice charge. The Board found Golden Day had violated section 8(a)(1) of the National Labor Relations Act by coercively interrogating employees concerning their interest in the union and asking one employee to renounce her membership.[1] The Board also found Golden Day had violated sections 8(a)(1) and (3) of the Act by discharging the 13 employees for union activity, and ordered reinstatement with back pay.

I.

Golden Day argues the Board should have exercised its discretion not to assert jurisdiction over Golden Day because Golden Day operates as an "adjunct" to the California school system, performing services "intimately connected" with the purposes of the school system, within the meaning of prior Board decisions declining to exercise jurisdiction over private employers standing in such a relationship to an exempt state entity.[2]

The cases relied upon by Golden Day are no longer controlling. Under subsequent Board decisions the test is "whether th[e] employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization which represents them." *D.T. Watson Home for Crippled Children,* 242 NLRB, ———, ——— (1979) (No. 187).[3]

Although the State of California reviews Golden Day's budget and sets academic standards, Golden Day, not the State, controls such matters as hiring, firing, employee evaluation, pay raises, grievance procedures, and sick and vacation allowances. Clearly, Golden Day has sufficient control over the terms and conditions of employment of its employees to bargain effectively with a union representing their interests.

Alternatively, Golden Day contends that its gross income was below the $1,000,000 standard established by the Board for exercising jurisdiction over "educational institutions." However, Golden Day met the Board's $250,000 standard for exercising jurisdiction over "day-care centers," and the Board concluded that Golden Day fell in this category.

Golden Day does not challenge the appropriateness of the two standards; it argues only that the Board applied the wrong standard to Golden Day because the Board mischaracterized Golden Day's operations. The issue is the reasonableness of the Board's classification on the facts.

The Board's determination of such a question will not be set aside "in the absence of extraordinary circumstances, such as unjust discrimination." *NLRB v. Car-*

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*Honorable Bruce R. Thompson, Senior Judge, United States District Court for the District of Nevada, sitting by designation.

[1] Golden Day does not challenge this aspect of the Board's findings and conclusions.

[2] *Laurel Haven School for Exceptional Children, Inc.,* 230 NLRB 1197, 1198–99 (1977); *Perkins School for the Blind,* 225 NLRB 1293, 1294 (1976); *Mitchell School, Inc.,* 224 NLRB 1017 (1976); *Rural Fire Protection Company,* 216 NLRB 584 (1975); *Pennsylvania School for the Deaf,* 213 NLRB 513 (1974); *Overbrook School for the Blind,* 213 NLRB 511 (1974). Golden Day relies heavily upon *Pennsylvania Labor Relations Board,* 209 NLRB 152 (1974). This case applied the "adjunct" test disapproved in *D.T. Watson Home for Crippled Children,* cited in the text.

We do not understand Golden Day to claim statutory exemption as a "political subdivision" of the state, *see* 29 U.S.C § 152(2). In any event, it is clear that Golden Day is not a "political subdivision" of the state under the test traditionally applied under Section 152(2). And the most liberal version of the statutory test is the same as the test for "adjunct" status applied in this opinion. *See NLRB v. Austin Development Center, Inc.,* 606 F.2d 785, 789 (7th Cir. 1979).

[3] *See also National Transportation Service, Inc.,* 240 NLRB 565 (1979).

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roll-Naslund Disposal, Inc., 359 F.2d 779, 780 (9th Cir. 1966).[4] There are no such circumstances here. The administrative law judge concluded that Golden Day's operations are "essentially undistinguishable from *Young World* [5] and *Salt & Pepper Nursery School*," [6] in which the Board asserted jurisdiction under the standard for "day-care centers". We agree. Golden Day enrolls children between 2 years and 4 years 9 months in age.[7] Its hours of operation (6:30 a.m. to 6 p.m.) coincide with the parents' work day rather than with a conventional school schedule. Most of its employees are non-teaching aides. Although some of Golden Day's activities are educational, the emphasis, as the administrative law judge stated, is upon "caring for, rather than educating, very young children." Educational elements in its program are informal and occupy a small part of the daily schedule. Most of the day is spent feeding the children, assisting them during bathroom periods, putting them down for naps, and supervising them in coloring, painting, or singing, indoor play with toys, or outside playground activities.

II.

Golden Day argues that the evidence was not sufficient to sustain the Board's finding that the employees were discharged because of their efforts to organize a union.

The employees met on September 30, 1976 and October 7. Golden Day learned of the meetings on Monday, October 11. On the same day, management personnel began to question individual employees regarding the meetings. Witnesses credited by the administrative law judge testified that the interrogation concerned formation of a union. On Wednesday management personnel called a meeting of all employees and told them there would be no union at Golden Day. From Monday through Friday, thirteen employees were interrogated, one for three hours, several more than once. Eight of the thirteen interrogated employees were discharged during the course of the week. On the following Monday, numerous employees picketed and distributed leaflets at Golden Day. Five were discharged. Thirteen of Golden Day's total workforce of 25 to 30 were terminated during the eight-day period.

Golden Day's management testified that seven of the first eight employees terminated were not discharged because they met to consider organizing a union but because they participated in unauthorized meetings with parents to induce these parents to withdraw their children from Golden Day and enroll them in a new school to be formed by staff members; because the employees made false and malicious statements to these parents regarding Golden Day's services and facilities; and because the employees falsely denied attending the meetings or making the derogatory statements to the parents. Golden Day asserts the remaining one of the first eight employees terminated was discharged for unsatisfactory work performance.[8]

Management testified that three of the last five employees terminated were not discharged because they picketed Golden Day, but because they circulated a disparaging leaflet regarding Golden Day while

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picketing, and that the remaining two were not discharged.[9]

"[I]t is particularly within the purview of the Board to determine in cases such as this on conflicting evidence what the motivation for discharge was." *NLRB v. Winkel Motors, Inc.*, 443 F.2d 38,

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[4] *See also NLRB v. Timberland Packing Corp.*, 550 F.2d 500, 501 (9th Cir. 1977).

[5] 216 NLRB 520 (1975).

[6] 222 NLRB 1295 (1976). *See also Austin Development Center, Inc.*, 226 NLRB 134 (1976); *Lutheran Welfare Services of Illinois*, 216 NLRB 518 (1975).

[7] Golden Day also provides "limited day-care and enrichment care for approximately 50 children age 4 years 9 months to age 12." This fact is not relevant to the jurisdictional issue since Golden Day concedes that the primary service is day-care until the children's parents arrive to pick them up.

[8] This employee, Henry, attended the union meetings and was discharged with the others who attended them. She was given neither written nor oral warning that her work was unsatisfactory. There was no evidence that she was late to work or fell asleep on the job, as Golden Day asserted.

[9] Two bus drivers who engaged in the picketing were "relieved of their keys." Golden Day argues this was done only to permit others to drive the vehicles. However, there was evidence that the drivers picketed only when not on duty, that when relieved of their keys they were told to pick up their pay checks, that upon inquiry, one of the two was told he had been fired, that neither was told of Golden Day's limited purpose in taking the keys, and that they were asked to return to work three days later when Golden Day found itself "in need of replacements for those individuals."

40 (9th Cir. 1971). The determination may, and usually must, be based upon circumstantial evidence.[10] Self-serving declarations by Golden Day's management personnel regarding their motivation are not conclusive.[11] Indeed, when the Board determines, as it did here, that such declarations are untrue, the false assertions of lawful purpose support the inference that the declarants' motive was unlawful.[12]

The record amply supports the Board's finding that the discharges were motivated by antiunion bias. The discharges followed immediately upon union organizing activity in which the discharged employees participated. Golden Day evidenced strong antiunion bias by announcing to its assembled workers that there would be no union, and by the timing, nature, and extent of interrogation of individual employees. And as the Administrative Law Judge found, Golden Day "concocted the flimsiest of explanations" for its conduct.

Golden Day questioned the adequacy of the performance of only one of the discharged employees, and as to this employee the charge was not borne out by the record.[13] There was no evidence that meetings between staff and parents were prohibited unless specifically authorized. There was no evidence that the two meetings that were held had any purpose except to consider organization of a union. There were no parents at the first meeting; only two parents attended the second. One was invited because of her knowledge of union matters; the other attended to inquire about conditions at Golden Day. The unfavorable statements regarding Golden Day's services and facilities appear from the testimony to have been moderate responses to direct questions asked of employees by this parent. There is no evidence that any employee sought to solicit these or any other parents to remove their children from Golden Day.

Since the leaflet containing statements disparaging Golden Day was distributed during the picketing, it could not have played a part in the eight discharges that occurred before the picketing. The record also supports the inference that the disparaging statements did not influence the discharge of the five employees who picketed while the leaflet was being distributed.

Golden Day admits that two of these five employees did not participate in distributing the leaflet.[14] The Administrative Law Judge found that Golden Day punished all "five employees on no known basis other than having picketed the school following [the] rash of discharges," indicating that the ALJ discredited testimony of the President of Golden Day that he was aware of the contents of the leaflet when he discharged the other three of the five employees. Rejection of the alternative motive is also reflected in the ALJ's finding that all five employees were discharged "for engaging in the protected activity of protesting an unfair labor practice." From what we have said earlier, it is evident that this finding that anti-union bias alone motivated the discharge of all five employees is amply supported by the record.[15] Assuming distribution of the leaflet would have afforded Golden Day justifiable ground for discharge of three of these employees, therefore, their discharges are nonetheless unlawful, for it is settled that "[d]ischarge of an employee for whom the employer has a justifiable ground for discharge constitutes a violation of § 8(a)(3) if the employer's motivation is in fact discriminatory." *NLRB v. Western Clinical Laboratory, Inc.*, 571 F.2d 457, 459 (9th Cir. 1978).

III.

Golden Day contends that even if the employees were dismissed for union activity, the Board abused its discretion in ordering that they be reinstated with back pay. Golden Day argues that reinstatement was inappropriate because (1) the employees' pre-termination misconduct in meeting with parents without prior authorization "constituted gross disloyalty, justifying a denial of their reinstatement," and (2) the employees' post-termination misconduct in distributing a leaflet impugning Golden Day's services and facilities "renders them unfit for further service."

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[10] *See Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[11] *Id.*

[12] *See id.*; *Foikins v. NLRB*, 500 F.2d 52, 53 (9th Cir. 1974).

[13] *See* note 8.

[14] *See* note 27.

[15] For this reason "mixed motive" cases, applying the "moving cause" test to discharges motivated by both lawful and unlawful purposes, are not relevant. *See, e.g., L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341–42 (9th Cir. 1980) (collecting cases).

Both arguments relate only to the appropriateness of the remedy. We have sustained the Board's finding that the employees were not discharged for their alleged misconduct, but because of their union activity. For the purpose of this portion of their argument, Golden Day assumes the correctness of this decision. Thus, the issue here is not whether the employees might have been discharged for the alleged misconduct, but whether that misconduct bars reinstatement with back pay.[16] For this reason, the portion of Section 10(c) of the Act that bars reinstatement of any individual discharged for cause,[17] and cases such as *NLRB v. Electrical Workers,* 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953), applying this provision, are not strictly relevant. As the court said in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S.203, 217, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1965):

> The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual

> who had been discharged because of misconduct. There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand. (footnote omitted) [18]

Golden Day recognizes that the Board has broad discretion in the choice of remedies,[19] and that reinstatement with back pay is the normal remedy for an unlawful termination.[20] The question the Board must answer in each case is whether in the particular circumstances reinstatement "wll effectuate the policies" of the Act.[21] The Board's exercise of its broad discretion to determine when reinstatement is appropriate is subject to only "limited judicial review." *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964), *quoted in NLRB v. Western Clinical Laboratory, Inc.,* 571 F.2d 457, 461 (9th Cir. 1978). As the Supreme Court said in *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346–47, 73 S.Ct. 287, 288–89, 97 L.Ed.2d 377 (1953) "[w]hen the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' "[22]

Important policies served by the Act include "[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by § 7 of the Act, 29 U.S.C. § 157, and protection for the victimized employee." *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 185, 94 S.Ct. 414, 425, 38 L.Ed.2d 388 (1973). "The primary purpose of the act is to protect the public interest and the policies of the Act by mitigating the effects of the violation and preventing future violations," *Marriott Corp. v. NLRB*, 491 F.2d 367, 371 (9th Cir. 1974).[23]

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[16] *See NLRB v. Yazoo Valley Electric Power Ass'n,* 405 F.2d 479, 480 (5th Cir. 1968); *NLRB v. Apico Inns of California, Inc.,* 512 F.2d 1171, 1175 (9th Cir. 1975); *NLRB v. O'Daniel Oldsmobile, Inc.,* 179 NLRB 398, 404–05 (1969).

The inquiry has also been stated in terms of the coverage of the statute—whether the employees' conduct was "protected" activity under the Act—rather than in terms of selecting the appropriate remedy. Under this analysis "[t]he standard is whether [the employee's] improper conduct was so indefensible as to forefeit the act's protection." *NLRB v. Max Factor & Co.,* 640 F.2d 197, 89 CCH Lab. Cas. ¶ 12,232 (9th Cir. 1980). *See also NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17, 82 S.Ct. 1099, 1104, 8 L.Ed.2d 298 (1962); *Coors Container Co. v. NLRB,* 628 F.2d 1283, 1286 (10th Cir. 1980); *Dreis & Krump Mfg. Co. v. NLRB,* 544 F.2d 320, 328–29 (7th Cir. 1976); *NLRB v. Cement Transport, Inc.,* 490 F.2d 1024, 1029–30 (6th Cir. 1974); *NLRB v. Owners Maintenance Corp.,* 581 F.2d 44, 49–50 (2d Cir. 1978). This analysis may obscure a consideration that is important in some cases: The purpose of the remedy is not merely to vindicate or punish a particular employer or employee, but to protect the public interest. *See Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 192–93, 194, 61 S.Ct. 845, 851, 852, 85 L.Ed. 1271 (1941); *Trinity Valley Iron & Steel Co. v. NLRB,* 410 F.2d 1161, 1168 (5th Cir. 1969). Even though in the circumstances of a particular case, the unlawful conduct of the employees may make the remedy of reinstatement inappropriate, other remedies may be available and should be employed to protect the public interest in deterring unfair labor practices.

[17] Section 10(c), 29 U.S.C § 160(c), provides in part that if the Board finds that any person has engaged in an unfair labor practice, the Board shall issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]." The portion of the section referred to in text then provides, however, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

[18] *See Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 412 (9th Cir. 1978).*

[19] *See Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 181, 94 S.Ct. 414, 423, 38 L.Ed.2d 388 (1973); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 215–18, 85 S.Ct. 398, 405–07, 13 L.Ed.2d 233 (1964); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194–96, 61 S.Ct. 845, 852–53, 85 L.Ed. 1271 (1941).

[20] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 187–89, 61 S.Ct. 845, 849–50, 85 L.Ed. 1271 (1941); *NLRB v. Apico Inns of California, Inc.,* 512 F.2d 1171, 1175 (9th Cir. 1975).

[21] *See* note 17.

[22] *See NLRB v. Western Clinical Laboratory, Inc.,* 541 F.2d 457, 460 (9th Cir. 1978); *United Association of Journeyment, et al. v. NLRB,* 553 F.2d 1202, 1205 (9th Cir 1977).

In determining whether reinstatement will serve these policies, the Board must consider the degree and kind of unlawful conduct committed by the employer and by the employees, the relationship between the conduct of both, and the probable impact, in all the circumstances, of selecting the particular remedy. "[T]he Board, as a part of the process of determining whether reinstatement would effectuate the policies of the Act, will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike." *NLRB v. Thayer Co.*, 213 F.2d 748, 755 (1st Cir. 1954).[24]

The appropriateness of reinstatement as a remedy for the discharge of the eight employees because of their attendance at union organizing meetings requires little discussion.

Protection of the right of self-organization lies at the heart of the Act. Golden Day's reaction was accurately characterized by the administrative law judge as a "harsh and sudden crackdown," beginning with coercive interrogations and ending with discharge. As has been seen, the employees' alleged misconduct—meeting with parents without prior authority and responding to questions regarding conditions at Golden Day—was, at worst, innocuous. As the Board found, Golden Day's "stated reasons for the first eight discharges were transparently pretextual."

In sum, the employer's violations were egregious; and the employees' conduct was not of the quality or extent that might reasonably be thought to threaten future amicable relations between the employer and the employees.[25] In these circumstances reinstatement was clearly necessary to vindicate the purposes of the Act, deter future violations, and preserve industrial peace.[26]

Golden Day contends that three of the remaining five discharged employees should not be reinstated because they distributed a leaflet disparaging Golden Day's services and facilities while picketing Golden Day.[27] The leaflet was written in harsh language and made serious charges, not all of them true. It cannot be condoned. Nonetheless, we cannot hold that the Board abused its discretion in deciding that on balance, the purpose of the Act would best be served by reinstating the three offending employees.

Two other communications—a short written statement and a press release—were distributed with the disparaging leaflet and dealt almost exclusively with matters directly involved in the dispute. Although the leaflet itself consisted largely of criticism of Golden Day's facilities and services, these were not entirely irrelevant to the on-going dispute. Complaints about cleanliness, teachers' duties, and care of the children could be expected to figure prominently in discussions between the school's management and any union representing the employees. The leaflet ended with a plea for the parents' sympathy in the workers' dispute with Golden Day. Moreover, as the administrative law judge noted, the leaflet fell "woefully short of the malicious tone" that would have been necessary to justify discharge under the doctrine of *NLRB v. Electrical Workers*, 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1954). The administrative law judge concluded that, on balance, "no sufficient showing of unfitness for further duty as the school is shown for any person involved in the preparation or dissemination of the flyer."

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[23] *See also NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969); *Social Security Bd. v. Neirotko*, 327 U.S. 358, 363 & n.11, 66 S.Ct. 637, 640 & n.11, 90 L.Ed. 718 (1946); *Phelps Dodge Co. v. NLRB*, 313 U.S. 177, 193–94, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941).

[24] As we have said:

> • • • the misconduct which will justify a court in refusing to enforce a Board order to rehire depends upon the degree and kind of the misconduct and each case must be decided on an ad hoc basis.

NLRB v. Miller Redwood Co., 407 F.2d 1366, 1370 n.2 (9th Cir. 1969).

[25] Reinstatement might be questionable if, for example, the misconduct has been such as to indicate that "the employee was and is unfit for the job." *NLRB v. Apico Inns, Inc.*, 512 F.2d 1171, 1176 (9th Cir. 1975); or that renewal of the employment relationship "bids ill for all concerned," *NLRB v. Yazoo Valley Electric Power Ass'n*, 405 F.2d 479, 480 (5th Cir. 1968); or that there was a "basic antagonism" between the employee and employer "that would preclude future harmonious relations between them." *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280, 286–87 (7th Cir. 1963). *Compare NLRB v. Max Factor and Co.*, 640 F.2d 197, 205, 89 CCH Lab. Cas. ¶ 12,232 (9th Cir. 1980); *NLRB v. Miller Redwood Co.*, 407 F.2d 1366, 1370 n.2 (9th Cir. 1969) (collecting cases); *NLRB v. A. P. W. Prods. Co.*, 316 F.2d 899, 904 (2d Cir. 1963).

[26] See cases cited note 19.

[27] Golden Day has not contended that the other two of the five employees who were discharged after they participated in the picketing had also participated in distributing leaflets. Indeed, Golden Day argued these two employees were not discharged at all and were asked to return to work when the President of Golden Day learned that, although they had engaged in picketing, they had not been seen distributing leaflets.

The leaflet and other documents were prepared and distributed in response to the most severe provocation. They appeared immediately after Golden Day had coercively interrogated and peremptorily discharged eight of its employees—one-third of the work force—for union activity. The picketing during which the leaflets were distributed was primarily in protest against the unlawful and unwarranted firing of fellow employees. As the Board concluded, Golden Day "acted with flagrant

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disregard for its employees' rights under the Act." The purposes of the Act would not be accomplished without a firm and sure sanction for such aggressive anti-union efforts. A mere finding of unlawful discharge without the added remedy of reinstatement would be a weak deterrent indeed. As Judge Sobeloff said in *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965):

> An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment. The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression. To accept the argument addressed to us by the company would be to provide employers a method of immunizing themselves from the only real sanction against violations of section 8(a)(3). Reinstatement in the instant case is not, as the employer puts it, a reward to the employee for insurgency. Rather, as we see it, refusal to reinstate her would put a premium on the employer's misconduct. (citation omitted).[28]

The Board's order will be enforced.

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[28] *See also Local 833, U. A. W., AFL-CIO v. NLRB*, 300 F.2d 699, 702-03 (D.C.Cir. 1962); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 390 (4th Cir. 1967).

Ernestine Bentley, Bonnie Collins, Ben Hall and Vera Hall v. NLRB

653 F.2d 243 (6th Cir.), March 9, 1981—242 NLRB 547

On petition to review Board Order

Before LIVELY and KEITH, Circuit Judges, and BOYLE,[*] District Judge

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Bonnie Collins, Ernestine Bentley, and Vera Hall brought this matter upon a petition for review of a May 24, 1979 order for the NLRB reported at 242 NLRB 95. That decision dismissed a consolidated complaint against South East Coal Co. as being time barred under Section 10(b) of the National Labor Relations Act.

The petitioners are daughters of Ben Hall. Both before and after his retirement from South East Coal Co. in 1954 Ben Hall was an active supporter of the union. In 1962 and 1963 he picketed at the company's premises during a strike which the union had called against it. Daniel Quillen, vice president in charge of operations of the

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company, who has done all its hiring since December 1971 was aware of Ben Hall's membership in and activities on behalf of the union.

In August, 1976, Collins and Bentley filed complaints with the Kentucky Commission on Human Rights, alleging that the company had refused to employ them because of their sex, in violation of the state civil rights law. Their aunt, who had previously filed a similar complaint, was subsequently offered employment by the company under a conciliation agreement. Under that agreement, the company also placed an advertisement in local newspapers, stating that it was an equal opportunity employer, and that it was seeking applications from all qualified persons. The advertisement further stated that all previous applications were considered inactive, and that any past applicants who wished to be considered for employment must reapply.

As a result, Bentley filed an application for employment, dated September 3, 1976, and received by the company on September 16, 1976. Vera Hall filed an application dated September 17, 1976, and received by the company on September 20, 1976. Collins filed an application dated December 8, 1976, and received by the company on December 11, 1976. The application forms stated that all applications would be considered inactive after six months, and that anyone who still wished to be considered for employment after that period would have to reapply.

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[*] Hon. Patricia Boyle, United States District Judge for the Eastern District of Michigan, sitting by designation.

Company vice-president Quillen interviewed Bentley on September 24, 1976, and Vera Hall on September 29. Quillen decided, on the days the interviews were held, that he would not hire these applicants, and did not subsequently reconsider the decision. He did not interview Collins or reconsider his prior rejection of her. None of the sisters subsequently reapplied for employment.

The Kentucky Commission on Human Rights dismissed the sex discrimination complaint filed by Collins and Bentley in September 1977. They filed motions for reconsideration, which the Commission denied, indicating that the company had said that it had not hired, and would not hire, Collins and Bentley because their father, Ben Hall, had a pro-union reputation.

On November 22, 1977, Collins filed a charge with the NRLB alleging that the company had discriminatorily refused to hire her. This charge was served on the company on November 23, 1977. On December 5, 1977, Bentley filed, and served on the company, a charge alleging that the company had discriminatorily refused to hire her. On March 27, 1978, the Regional Director issued a complaint alleging that, [S]ince on or about May 23, 1977, the company had hired other employees while discriminatorily refusing to hire Collins and Bentley. On May 30, 1978, the complaint was amended to allege that Vera Hall, as well as Collins and Bentley, was discriminatorily denied employment "[S]ince on or about May 23, 1977."

On the foregoing facts, the Board found, in agreement with the ALJ, that the company had refused, prior to May 23, 1977, to hire each of the three sisters because of their father's reputation as an active supporter of the union. However, the Board concluded that the general counsel had failed to prove that any discriminatory refusal to hire had occurred on or after May 23, 1977. Accordingly, the Board found that any unfair labor practices occurred more than six months before the filing of the charges herein, and were therefore barred by Section 10(b) of the Act. The Board therefore dismissed the complaint in its entirety.

Our standard for reviewing the Board's finding of fact here is whether there is substantial evidence to support the Board's decision. *See N.L.R.B. v. Challenge-Cook Bro. of Ohio, Inc.*, 374 F.2d 147 (6th Cir. 1967). We believe that the Board's finding that the company refused to hire the petitioners before May 23, 1977, and not after that date, is supported by substantial evidence. Accordingly, the petition for review is denied.

Pay'n Save Corporation v. NLRB

641 F.2d 697 (9th Cir.), March 9, 1981—247 NLRB 1346

On petition to review Board Order

Before PREGERSON, POOLE and NORRIS, Circuit Judges

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PREGERSON, Circuit Judge: Pay'n Save Corporation, engaged in retailing goods to the public, petitions this court to review and set aside an order of the National Labor Relations Board (NLRB); the NLRB cross-applies for enforcement of its order. The contested order was based on the NLRB's finding that Pay'n Save had violated subsections 8(a)(1) and (3) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (3),[1] by maintaining and disparately applying an unwritten rule against wearing "controversial" buttons, including union buttons, and by suspending and later discharging two employees for engaging in protected union activities. The alleged violations took place during a union organizing campaign. The NLRB's order required Pay'n Save to recognize and bargain with the union and to cease and desist from interfering with employees' exercise of protected rights, to offer reinstatement and backpay to the discharged employees, and to post an appropriate notice.

Pay'n Save contends that its prohibition of controversial buttons was a justified business decision taken to avoid antagonizing coustomers, that the two employees were legitimately discharged for insubordination, and that the circumstances of this case do not justify the issuance of a bargaining order. Pay'n Save also challenges two evidentiary rulings made by the administrative law judge (ALJ) in the hearing on the unfair labor practice charges.

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[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. (Section 7 appears, in relevant part, in note 5 *infra*.) Subsection 8(a)(3), in relevant part, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Because we find that the NLRB's findings of fact are supported by substantial evidence on the record as a whole, and that the NLRB correctly applied the law, we deny Pay'n Save's petition and enforce the NLRB's order.

I. FACTS

The instant dispute arose in May 1978, during an organizational campaign by the Retail Clerks Union Local No. 381 (Union) at Pay'n Save's Port Angeles, Washington, store. Dawn Frederick, a Pay'n Save sales clerk, contacted the Union in early May, obtained union authorization cards, and distributed them to other store employees. Ten of the thirteen employees signed cards.

At a May 15, 1978 meeting with Pay'n Save employees, a Union representative distributed yellow and black lapel buttons, 1¼ inch in diameter, some saying "Vote Yes Retail Clerks Union AFL-CIO" and others "Vote Retail Clerks Union AFL-CIO." That day and the next day, Frederick and fellow employee Joyce Berry wore the union buttons on their company-issued jackets while on the store sales floor.[2] On May 17, Assistant Store Manager Gary Jennings directed Frederick and Berry to remove the buttons; they refused, and Jennings suspended them. Later that afternoon, Store Manager Jim Hanrahan telephoned Frederick and Berry and told them they would be discharged by May 19 unless they returned to work without the buttons. Frederick telephoned Hanrahan a few minutes later, asked whether she could wear the button on her own clothing rather than on the store jacket, and was told she could. She and Berry both wore the buttons on their personal clothing when they returned to work.

On May 27, Frederick and Berry each wore a union button on their store jackets. (Berry wore an additional button on her personal clothing.) Hanrahan called them into his office one at a time and discharged them. Although there is conflicting testimony as to exactly what was said, it is clear that Hanrahan withdrew the option of wearing the union button on personal clothing, and made it clear that the buttons were not to be worn on the sales floor at all.

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After a hearing, an ALJ found that Pay'n Save had violated subsections 8(a)(1) and (3) of the Act by suspending and discharging Frederick and Berry, and ordered reinstatement and backpay as a remedy. The NLRB substantially affirmed the ALJ's findings, but reversed the finding that Pay'n Save's ban on controversial buttons had not been disparately applied. The NLRB also issued a bargaining order.

II. DISCUSSION

This court will enforce the NLRB's order if the NLRB correctly applied the law and if its findings of fact are supported by substantial evidence on the record as a whole. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, at 724 (9th Cir. 1980).[3]

A. *The Rule Against Controversial Buttons*

Although Pay'n Save's employee handbook contained no written regulation concerning buttons or insignia, the company alleges it had a long-standing policy prohibiting employees from wearing political, controversial, or offensive insignia on store jackets. It argues that this policy was meant to avoid the appearance of an endorsement of a controversial position that might offend customers.

This circuit has held that, absent "special considerations," an employee has a right, protected by section 7 of the Act,[4] to wear union buttons and insignia at work. *NLRB v. Essex Wire Corp.*, 245 F.2d 589, 593 (9th Cir. 1957). *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945). A later opinion made it clear that this right is not per se guaranteed by the Act; "evidence of a purpose protected by the act" is also required. *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964). In the instant case, the button-wearing was linked to such a protected purpose—

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[2] Each Pay'n Save employee is issued a store jacket. The women's store jacket is a bright orange, hip-length smock.

[3] That the NLRB's findings were in part contrary to the ALJ's does not change this standard of review. *NLRB v. Big Bear Supermarkets No. 3*, ——— F.2d ——— at ——— (9th Cir. Apr. 2, 1980).

[4] Section 7, 29 U.S.C. § 157, guarantees to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

the Union's attempt to organize Pay'n Save's employees. Thus Pay'n Save's ban on wearing union buttons interfered with the exercise of a protected right—a violation of section 8(a)(1) of the Act—unless there were special considerations justifying the ban.

The NLRB has found such special considerations, justifying a prohibition on wearing union insignia, in cases where the insignia could exacerbate employee dissension,[5] jeopardize employee safety,[6] or damage machinery or products.[7] The courts have recognized additional "special considertions"—distraction from work demanding great concentration[8] and a need "to project a certain type of image to the public."[9] Only the last of these special factors is even arguably present in the instant case.

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Pay'n Save argues that its ban on union buttons was justified by its legitimate concern about the image projected to the public by its employees and compares its policy to that upheld in *NLRB v. Harrah's Club, 337* F.2d 177 (9th Cir. 1964). That case, however, is quite different from the present one, since in *Harrah's Club* "the wearing of the union buttons was not part of any concerted campaign to organize the employees" or otherwise to exercise rights protected by the Act, *id.* at 178, and was thus not in itself a protected activity, *id.* at 179. The court's remark, *id.* at 180, that Harrah's concern with "the appearance of its uniformed employees" would in the circumstances of that case have been sufficient justification for prohibiting the buttons even if button-wearing in itself had been a protected right was dictum unnecessary to the decision of the case.[10]

Pay'n Save also cites the Fifth Circuit's decision in *Davison-Paxon Co. v. NLRB,* 462 F.2d 364 (5th Cir. 1972), which held that a fashionable department store was justified in prohibiting its employees from wearing a large, gaudy union button on the selling floor. The Fifth Circuit noted that the store "was concerned primarily with the button's capacity to antogonize its customers"—the same interest Pay'n Save asserts here. *Id.* at 369. And *Davison-Paxon,* unlike *Harrah's Club,* did uphold a ban on a union button while a union organizing campaign was in progress. Nevertheless *Davison-Paxon* is distinguishable from our case because it involved "animosity between union and anti-union factions at the store" that made the ban on the union buttons reasonable. *Id.* Moreover, *Davison-Paxon* involved a fashionable department store that liked its employees to double as customers and models for its merchandise, *id.* at 368.

Finally this case is different from either *Harrah's Club* or *Davison-Paxon* because the NLRB found that Pay'n Save had disparately enforced its controversial-button rule against Frederick and Berry.[11] Substantial evidence in the record indicates that, although Pay'n Save had consistently enforced its rule against political buttons, various non-political but potentially controversial buttons had been tolerated on employees' store jackets while the employees were in contact with the public. Buttons with religious messages, religious holiday insignia, and product promotional insignia had been permitted. Moreover, company officials appeared to disagree as to precisely what Pay'n Save's unwritten rule prohibited.[12]

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[5] *United Aircraft Corp.,* 134 NLRB 1632 (1961) (reasonable to ban wearing union pins to prevent disorder and divisiveness between strikers and nonstrikers).

[6] *Andrews Wire Corp.,* 189 NLRB 108 (1971) (banning union insignia on employees' hard hats was permissible where insignia could impair the hats' visibility and endanger employees).

[7] *Campbell Soup Co.,* 159 NLRB 74, *enforced in part, enforcement denied in part on other grounds,* 380 F.2d 372 (5th Cir. 1967).

[8] *Fabri-Tek, Inc. v. NLRB,* 352 F.2d 577 (8th Cir. 1965) (manufacture of computer memory units demanded extraordinary concentration, justifying ban on distracting union insignia).

[9] *NLRB v. Harrah's Club,* 337 F.2d 177, 180 (9th Cir. 1964) (casino/restaurant could prohibit wearing of union buttons by employees coming into contact with public).

[10] Moreover, *Harrah's Club* would be distinguishable from the instant case even if wearing union buttons were a per se protected right without the need for a link with an otherwise protected purpose. For in *Harrah's,* the court's dictum indicates that the strong employer interest in the image its employees presented to the public would outweigh the weak employee interest in wearing union insignia in the absence of any organizing or collective bargaining activity. In our case the employee interest is much stronger, since an organizing drive was under way, and the employer's interest in employee appearance is much weaker, since Pay'n Save's clerks in their bright orange smocks have little in common with the service personnel of a casino/restaurant "on a par with * * * the finest theater-restaurants in the world." 337 F.2d at 178 n.1.

[11] The court in *Davison-Paxon* explicitly stated that "(t)here is no issue of discriminatory motive here." 462 F.2d at 370 n.14. In *Harrah's Club* the employer's rule had "been strictly enforced in the past against badges, pins, and buttons showing religious, political, or social affiliations." 337 F.2d at 178.

[12] For example, Dale Collette, Pay'n Save's director of training and former personnel director, stated that no buttons were allowed "that would illustrate an endorsement by the company of any type of politics, religion, anything like that"—and that anything worn on the store jackets would constitute an endorsement or promotion by the company. Execu-

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Thus, there is substantial evidence to support the NLRB's finding that Pay'n Save violated section 8(a)(1) of the Act by maintaining and disparately applying a rule against wearing political or controversial

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buttons, including union buttons. Pay'n Save has not met its burden of establishing that its policy was justified by "special considerations."[13]

B. *The Suspensions and Discharges*

Given that, absent special circumstances, the wearing of union buttons at work during a union organizational drive is an activity protected under the Act, the illegality of suspending or discharging an employee for wearing a union button is an obvious corollary. Subsection 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against an employee for engaging in protected union activity.[14]

The employer's motivation is controlling in determining whether subsection 8(a)(3) is violated by a discharge or suspension. *Clear Pine Mouldings Inc. v. NLRB,* 632 F.2d 721 at 726 (9th Cir. 1980). The Company argues that Frederick and Berry were disciplined for insubordination, not for engaging in protected union activity. The determination of motive, however, is particularly within the purview of the NLRB. *NLRB v. Fort Vancouver Plywood Co.,* 604 F.2d 596, 600 (9th Cir. 1979), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). The NLRB's inferences and findings must prevail where they are reasonable and supported by substantial evidence. *Clear Pine Mouldings, Inc. supra,* 632 F. 2d at 726.

The NLRB concluded that the Company engaged in unfair labor practices within the meaning of subsections 8(a)(3) and (1) of the Act by suspending and later discharging Frederick and Berry. This conclusion was based upon the uncontradicted evidence that Frederick and Berry were discharged for wearing union buttons on their store jackets during a union organizatonal drive. There is substantial evidence to support the NLRB's conclusion that the restriction on political campaign buttons was broadened to include all "controversial" buttons in direct response to the Union's activity. Thus, the NLRB's finding that the Company violated section 8(a)(3) and (1) by discharging and suspending Frederick and Berry for wearing union buttons must be upheld.

C. *The Bargaining Order*

> [A] bargaining order can properly be entered where three requirements are satisfied. First, that the union once had a card majority; second, that the employer committed serious unfair labor practices which, though less "outrageous" and "pervasive" than those which by themselves justify a bargaining order, undermine the union's majority and continue to impede the holding of a fair election; and third, that the likelihood of erasing the effects of the unfair practices and obtaining a fair election by the use of traditional remedies is slight and that on balance the employees will best be protected by entry of a bargaining order.

NLRB v. Peninsula Association for Retarded Children and Adults, 627 F.2d 202, at 203 (9th Cir. 1980). *See NLRB v. Gissel Packing Co.,* 395 U.S. 575, 610–16, 89 S.Ct. 1918, 1938–1941, 23 L.Ed.2d 547 (1969). Here, the union clearly had a card majority when ten of the thirteen employees signed union authorization cards. The NLRB found that Pay'n Save's serious misconduct—discharging the leading Union adherents for engaging in protected union activities—tended to dissipate that majority status and made it "practically * * * impossible" that a fair election could be held. The NLRB accordingly issued a bargaining order.

Pay'n Save urges this court not to enforce the bargaining order, arguing that: (1) the union authorization cards were tainted by Frederick's misrepresentations;

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(2) Pay'n Save exhibited good faith and a lack of anti-union animus; and (3) twelve employees, on

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tive Vice-President Calvin Hendricks spoke of "a controversial political button" as the type banned. And Store Manager Jim Hanrahan testified that "there's no list of what buttons are acceptable" and that he would decide on a case-by-case basis what to permit.

[13] Pay'n Save also contends that it did not in fact ban the union buttons, since employees had the option of wearing such buttons on their own clothing, as Frederick and Berry had done for almost two weeks. The facts belie this contention. Store Manager Hanrahan testified that he gave Frederick and Berry a choice between discharge and removing their union buttons and that he withdrew the option of wearing the buttons on their personal clothes.

[14] *See* note 1 *supra.*

their own initiative, petitioned the NLRB for an election and thereby expressed their opposition to a bargaining order. Deciding whether a bargaining order is warranted, however, is a matter peculiarly committed to the discretion of the NLRB, calling for "its expert estimate as to the effects on the election of the unfair labor practice." *NLRB v. Bighorn Beverages*, 614 F.2d 1238, 1243 (9th Cir. 1980). And a determination that a bargaining order is needed will not be upset if supported by substantial evidence. *Id.* Measured against this strict standard, Pay'n Save's arguments are inadequate.

First, Pay'n Save fails to cast serious doubt on the validity of the union authorization cards. "[E]mployees should be bound by the clear language of what they sign unless that language is clearly and deliberately cancelled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606, 89 S.Ct. 1918, 1936, 23 L.Ed.2d 547 (1969). The union cards here were entitled "Authorization for Representation." They stated in simple language that the signer authorized the Union to represent him or her for collective bargaining purposes. Pay'n Save did not convince the ALJ or the NLRB that any of the signatures on the cards were obtained by misrepresentations that cancelled this clear wording. The NLRB could properly find majority support for the Union on the basis of the cards signed and returned by employees.

Second, Pay'n Save contends that the NLRB failed to consider the company's good faith and lack of anti-union animus. The Supreme Court in *Gissel*, however, endorsed the NLRB's approach, under which good faith, "is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election." 395 U.S. at 594, 89 S.Ct. at 1929. Indeed, the Court in *Gissel* viewed its decision as reinforcing the NLRB's policy of avoiding any inquiry into the employer's state of mind at the time of the unfair labor practices. R. Gorman, *Basic Text on Labor Law* 96.

Finally, Pay'n Save points to a July 1, 1978 petition, signed by twelve employees, as a clear indication that a majority of the store's employees wanted a union election rather than a bargaining order. The petition stated that the employees signed the union cards as a step towards an election rather than as evidence of a decision in favor of the union. Courts have noted, however, the understandable tendency of employees, desiring to retain their jobs and maintain good relations with management after indicating support for a union, to make statements damaging to unions or undermining the validity of union authorization cards they signed. *Gissel, supra*, 395 U.S. at 608, 89 S.Ct. at 1937; *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1350 (9th Cir. 1980). NLRB argues persuasively that the petition is strong evidence that the discharge of the two leading Union adherents had a chilling impact upon other Union supporters. We cannot say that the petition should have compelled the NLRB to find a bargaining order unwarranted.

There is substantial evidence to support the NLRB's conclusion that a bargaining order is a proper remedy in this case. "The probable impact of unfair labor practices is increased when a small bargaining unit, such as here, is involved and increases the need for a bargaining order." *NLRB v. Bighorn Beverages*, 614 F.2d 1238, 1243 (9th Cir. 1980) (citations omitted). This case falls within the *Gissel* holding approving the "use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." 395 U.S. at 614, 89 S.Ct. at 1940.

D. *The Evidentiary Rulings*

Pay'n Save attacks two evidentiary rulings that were made during the unfair labor practice hearing before an administrative law judge.

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(1) At the hearing, Pay'n Save sought to elicit testimony from Richard L. King, an official of an employer group that negotiates and administers labor contracts for members like Pay'n Save, about conversations with union and NLRB officials that allegedly supported Pay'n Save's claim that it was entitled to discipline employees for wearing union buttons. The ALJ sustained an objection to the testimony. King's testimony was of doubtful relevance: the issuance was not how an NLRB official, speaking without authorization or full knowledge of the facts, characterized Pay'n Save's actions, but whether those actions were lawful.

(2) The ALJ sustained the relevancy objection to admission of the July 1, 1978 petition discussed earlier. That petition, signed by twelve employees several weeks after the discharge of Frederick and Berry, stated that the employees had signed the union cards only as a step towards an election, not to indicate a decision in favor of the union. Pay'n Save argues that the NLRB should have considered this petition as evidence that a bargaining order was inappropriate. This circuit noted recently that the NLRB may properly disregard attacks on authorization cards made after employer unfair labor practices. *L'Eggs Prods. Inc. v. NLRB*, 619 F.2d 1337, 1350 (9th Cir. 1980).

CONCLUSION

The NLRB's order is supported by substantial evidence in the record as a whole and the NLRB correctly applied the law. Accordingly, the petition to review and set aside the NLRB's order is dismissed and the order is enforced.

NLRB v. Vulcan-Hart Corporation (St. Louis Division)

642 F.2d 255 (8th Cir.) March 9, 1981—248 NLRB 1197

On petition to enforce Board Order

Before Ross, Henley and McMillian, Circuit Judges

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Ross, Circuit Judge: In this case the National Labor Relations Board requests this court to enforce its order of April 17, 1980, in connection with an alleged unfair labor practice held to have been committed by Richard Klohr, general manager of Vulcan-Hart Corporation of Kirkwood, Missouri, on June 22, 1979.

Vulcan-Hart manufactures commercial refrigerators in Kirkwood, Missouri. At the time of the alleged unfair labor practice about 37 of its employees were represented by Stove, Furnace, and Allied Appliance Workers Union of North America, AFL-CIO, Local 110 (the union). In 1973 Klohr offered to permit its workers to use the company lunchroom for union meetings after normal working hours. He charged the union a nominal $5 per month for this use.

From December of 1978 to May of 1979, the union and its president filed three unfair labor practice charges against Vulcan-Hart, all of which involved claims of discriminatory discharge of union employees. Each of these charges was either withdrawn or dismissed by the Regional Office. On June 13, 1979, a union meeting was held in the lunchroom. Klohr was outside the meeting room writing on a clipboard and appeared to write down each employee's name as he left. The president of the union, on June 21, 1979, filed another unfair labor practice charge alleging illegal surveillance of union activities by Klohr at the June 13 meeting.

Klohr received notice and a copy of this latest 8(a)(1) charge on June 22, 1979. He then left his office and, according to the testimony of a Mr. Opelz, approached union Vice-President Leroy Miller and said:

> * * * "There will be no more union meetings in the lunchroom." Leroy just looked at him and he said, "I mean it. There will be no more union meetings in the lunchroom."

Thereafter no union meetings were held in the lunchroom and the union filed a charge

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alleging violations of 8(a)(4) and (1) of the Act. The Board upheld the charge and ordered the company to permit its employees to use the lunchroom for its meetings as before and to post an appropriate notice.

We agree with the Board that the evidence is substantial that the termination of the right of the employees to hold union meetings in the lunchroom resulted from Klohr's anger at the filing of the June 21 8(a)(1) charge. We therefore uphold the Board's determination that the retaliatory action by Klohr was in violation of the Act.

However, our function "in a case such as this is to determine whether the Board, acting within the compass of its power, (1) has held a proper hearing, (2) has made findings based upon substantial evidence, and (3) has ordered an appropriate remedy." *NLRB v. Parkers Prairie Cooperative Creamery Ass'n*, 154 F.2d 455, 457 (8th Cir. 1946). We have no problem with the first two of these prongs, but an analysis of the remedy is in order.

In *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316, 99 S.Ct. 1123, 1132, 59 L.Ed.2d 333 (1979) the Supreme Court set forth this rule for use in determining whether or not the Board has abused its discretion in fashioning a remedy:

> We are mindful that the Board is granted broad discretion in devising remedies to undo the effects of violations of the Act, *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S.Ct. 287, 288, 97 L.Ed. 377; *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233, and of the principle that in the area of federal labor law "the relation of remedy to policy is peculiarly a matter for administrative competence." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271. Nonetheless, the rule of deference to the Board's choice of remedy does not constitute a blank check for arbitrary action. The role that Congress in § 10(e) has entrusted the courts in reviewing the Board's petitions for enforcement of its orders is not that of passive conduit. See *Fibreboard Corp. v. NLRB, supra*, at 216, 85 S.Ct. at 405.

In this case the Board has ordered the company to permit the employees and the union to use the lunchroom for union meetings as in the past. There is no time limitation on the order, no mention of a possible increase in the payment made for the use of the room and no provision permitting a termination of the use either by collective bargaining or for some legitimate and necessary company purpose. It seems to permit the use of the room by the union whether it remains the collective bargaining agent for the employees or not. Under these circumstances, in our opinion, the Board abused its discretion in fashioning the remedy and some modification of the order should be made.[1]

The Board is directed to modify its order as follows:

> 1. The order regarding use of the lunchroom is limited to such period as the union is the certified bargaining agent of the employees. Because of the situation described by the company as set forth in footnote. 1, the union shall be considered the bargaining agent (for the purpose of this order only) until the Board has ruled on the case now pending.
>
> 2. The order may be modified by the parties as a result of collective bargaining between this union and Vulcan-Hart.
>
> 3. If it is finally determined that the union is still the bargaining agent of the employees, the use of the lunchroom by the union may be withdrawn by Vulcan-Hart for any legitimate, nonpretextual reason which does not involve any element of antiunion animus.

The Board is directed to amend its order and notice, and as so amended, its order is hereby enforced.

Hedison Manfacturing Company v. NLRB

643 F.2d 32 (1st Cir.), March 11, 1981—249 NLRB 791

On petition to review and cross-petition to enforce Board Order

Before ALDRICH AND WINTER,* Circuit Judges and WYZANSKI,** District Judge

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ALDRICH, Senior Circuit Judge: Petitioner seeks review of an extensive order of the NLRB, including an order to bargain pursuant to *NLRB v. Gissel Packing Co.*, 1969, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547. The Board has cross-applied for enforcement. In addition to attacking the substantive findings of the administrative law judge, which the Board substantially upheld, petitioner devotes considerable space to the argument that it was denied its constitutional right to a fair trail. We find its contention unreal, and affirm.

The hearing was scheduled to begin on August 28, 1978. On August 23 Board counsel, by registered mail, served a subpoena ad testificandum on petitioner's principal officer, Harry Hedison, directing him to appear at the hearing in Providence, Rhode Island on August 28 at 10 a.m. Because of settlement negotiations throughout the 28th, the hearing did not commence that day. On the morning of August 29 Hedison was called as Board counsel's first witnesses.[1] There was silence. Upon questioning by the ALJ, petitioner's counsel (hereinafter, counsel) stated that he had not seen the subpoena until that morning; that a plant employee must have picked it up; that he had not instructed Hedison to be present; and that in his opinion the subpoena, being for August 28, was void so far as the 29th was concerned. At the same time counsel did not contradict Board counsel's statement that he had told counsel on August 28 that he planned to call Hedison the next day. There is no indication that counsel demurred. In fact, elsewhere in the record, counsel stated that he had asked Board counsel for names, so that company personnel could be scheduled. Further dialogue adduced that "Mr. Hedison yesterday and this morning * * * is engaged in a major business transaction," and that his attendance could be arranged "at a mutually convenient time," although counsel could not reach him to say just when.[2]

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[1] In its brief Vulcan-Hart indicates that the union no longer represents the employees. It indicates that it has withdrawn recognition from the charging party and that the case is presently pending before the Board. Since this is outside the record, we have no way of knowing the true situation and refer to it only as an allegation of one of the parties.

*Of the Fourth Circuit, sitting by designation.

**Of the District of Massachusetts, sitting by designation.

[1] Petitioner in its brief describes this order of witnesses as "trial tactics," as if to suggest it was not Board counsel's aboslute right.

Asked by the ALJ if Hedison could be produced the following morning, counsel replied, "I didn't say tomorrow morning, Your Honor. I know I could have Mr. Hedison here tomorrow," either morning or afternoon. Pressed for which it would be, coun-

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sel replied, "I will go further than that, Your Honor, and say that absent—possibly I will have him here tomorrow morning. I don't see any problem with that." The ALJ replied that it would be satisfactory to have Hedison appear as soon in the day as he could terminate his appointments.

The next morning counsel appeared without Hedison, stated that he did not intend to "assist" Board counsel in "trying my case by way of rebuttal before he's put his own case on," and stated that he would not produce Hedison until petitioner's own case was reached. Board counsel did nothing further to compel Hedison's attendance, but when the time came the ALJ refused to accept him as a witnesses in petitioner's case, invoking the principle of *Bannon Mills, Inc.*, 1964, 146 NLRB 611, a case we have already endorsed. *NLRB v. C. H. Sprague & Son*, 1970, 428 F.2d 938, 942.

This exclusion was clearly warranted. Initially, we would have doubts whether the subpoena was, in fact, defective. *See United States v. Snyder*, 9 Cir., 1969, 413 F.2d 288, *cert. denied*, 396 U.S. 907, 90 S.Ct. 223, 24 L.Ed.2d 183. Still more do we question petitioner's statement in its brief, repeated orally, that "There is no evidence in our case that Mr. Hedison would not have appeared and testified on August 28, if trial had convened * * *." Counsel forgets that he had already put in the record not only that Hedison made no attempt to comply on August 28, but that he had had the same business engagement.

Even were we disposed to grant petitioner the benefit of a technicality, any defect was waived by counsel's representation that he would produce Hedison the next day. The natural effect was to induce Board counsel not to issue a new subpoena, or to seek court enforcement of the old. Basic fairness and the orderly conduct of a hearing require at least a modicum of candor and good faith. *See generally United States v. Bryan*, 1950, 339 U.S. 323, 330–35, 70 S.Ct. 724, 730–32, 94 L.Ed. 884. Such were conspicuously lacking here.

The imposition of the *Bannon Mills* principle was classically called for. A subpoena is not a suggestion to appear when mutually convenient, nor is it "an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase." *United States v. Bryan*, ante, 339 U.S. at 331, 70 S.Ct. at 730. Petitioner's conduct reminds us of our language in *NLRB v. C.H. Sprague & Sons*, ante, 428 F.2d at 942:

> "[T]he company's intransigence gave the trial examiner ample justification for his ruling made in the interest of maintaining the integrity of the hearing process."

Its further contention that instead of invoking *Bannon Mills*, Board counsel should have delayed the proceedings further by seeking court enforcement of its subpoena, 29 U.S.C. § 161, is frivolous. If Board counsel needed Hedison's testimony, that course was open to it, but petitioners is in no position to compel the choice. Equally frivolous is petitioner's assertion that Board counsel's decision deprived it of the opportunity to contest the subpoena. Under Board rules, petitioner had the right to petition the ALJ to revoke the subpoena, and the ALJ "shall revoke the subpoena * * * if for any * * * reasons sufficient in law the subpoena is

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[2] In view of our awarding counsel fees to the Board in this case we take the space to note that during oral argument we asked counsel what would have been the effect of this major business transaction on Hedison's being able to appear on the 28th, if needed, and he replied that Hedison was on call three miles away.

* * * invalid." 29 C.F.R. 102.31(b). Instead, counsel contended himself with the statement that in his opinion "the subpoena by its own terms is void, and there would be no point in my moving to quash it." There is a point, and we must hope petitioner gets it.

Petitioner's recalcitrance contained. Board counsel subpoenaed a tape, made by petitioner, of a speech by its vice president, one O'Brien, which the Board's complaint averred included statements amounting to unfair labor practices. Petitioner declined to produce the tape, and *Bannon Mills* was again invoked against it. The first ground advanced by petitioner for nonproduction, that the tape was the work product of counsel, defies comment. As to the second, that the employes who heard the talk must testify first, it should suffice to quote from petitioner's brief.

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> "[T]he tape was * * * not the best evidence but rather secondary evidence. In short, it was and remains Hedison's position that General Counsel had the obligation of producing affirmative evidence through witnesses that illegal conduct had taken place in the course of O'Brien's speech on March 1 * * *. These witnesses should have been required to testify under oath, thus exposing or establishing their credibility."

We find no more merit to petitioner's remaining procedural arguments. Its assertion that it was entitled to statements made to Board counsel by employees who never testified evidences invincible ignorance of our repeated holdings to the contrary. *P.S.C. Resources, Inc. v. NLRB,* 1 Cir., 1978, 576 F.2d 380, 387 and cases cited; *see NLRB v. Robbins Tire & Rubber Co.,* 1978, 437 U.S. 214, 236–42, 98 S.Ct. 2311, 2323–26, 57 L.Ed. 159. Its claim, as a matter of due process, to notes made but not referred to on the stand by witnesses who did testify likewise comes too late. *Goldman v. United States,* 1942, 316 U.S. 129, 132, 62 S.Ct. 993, 994, 86 L.Ed. 1322; *see* F.R.Ev. 612.

On matters of substance, we have reviewed the findings, and need only say that petitioner has seemingly lost sight of the fact that we do not reverse credibility findings, or choices between reasonable inferences, in routine cases. This is not changed by petitioner's claim of bias on the part of the ALJ. Its charge that his rulings are "evidence of a state of mind which had gone far beyond dislike of a party and had become an advocate of the Union" is not only baseless; it is offensive. *Cf. Scully Signal Co. v. Electronics Corp. of America,* 1 Cir., 1977, 570 F.2d 355, 363, *cert. denied,* 436 U.S. 945, 98 S.Ct. 2848, 56 L.Ed.2d 787. Even had the ALJ's rulings in fact been erroneous, a judicial ruling made in the ordinary course is not to be translated into bias by disappointed counsel. *Johnson v. Trueblood,* 3 Cir., 1980, 629 F.2d 287, 291; *Gallarelli v. United States,* 1 Cir., 1958, 260 F.2d 259, 261, *cert. denied,* 359 U.S. 938, 79 S.Ct. 654, 3 L.Ed.2d 638. In fact, the ALJ's conduct was proper throughout.

As to the *Gissel Packing Co.* order to bargain, there were far too many established unfair labor practices for us to question the Board's decision.

Finally, since this is experienced counsel, the totally frivolous nature of the contentions leads us to conclude that the petition was filed only for purposes of delay. We remind counsel of F.R.Civ.P. 11, a reminder that we shall not, and trust that he will not, forget. Costs will be taxed in favor of the Board, to include counsel fees and all expenses. *General Tire & Rubber Co. v. NLRB,* 1 Cir., 1971, 451 F.2d 257, 259. The petition is denied, and the order will be enforced.

McDonnell Douglas Corporation v. NLRB

655 F.2d 932 (9th Cir.), March 12, 1981; rehearing
denied November 11, 1981; certiorari denied
March 22, 1982—238 NLRB 668

On petition to review Board Order

Before SCHROEDER and CANBY, Circuit Judges and
PFAELZER, District Judge*

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CANBY, Circuit Judge: The National Labor Relations Board found that McDonnell Douglas had committed unfair labor practices in violation of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), by firing Robert Mourning for union activity and by warning Malcolm Campbell not to become involved in union activity. McDonnell Douglas petitioned this court for review under § 10(f) of the Act, 29 U.S.C. § 160(f). The Board cross-petitioned for enforcement of its order to cease the unfair labor practices and to reinstate Mourning with back pay. Mourning intervened in support of the Board. We enforce the Board's order.

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*The Honorable Mariana R. Pfaelzer, United States District Judge, Central District of California, sitting by designation.

I.

McDonnell Douglas employed five transport pilots, including Mourning and Campbell, to ferry company executives and other persons between company facilities in southern California. The transport pilots also flew "chase" missions, photo missions, test flights, and instruction flights for new company pilots. Usually, the transport pilots flew alone, but some flights required a copilot. The transport pilots therefore alternated as pilots in command and copilots; their job required that they serve in each position at different times. Mourning usually flew as pilot in command. On approximately five percent of his fights as pilot in command, he had a copilot. Otherwise, he flew without a crew. On another five percent of his flights, he was accompanied by a pilot trainee. Occasionally, he was accompanied by a photographer or observer.

Mourning because interested in organizing a pilots' union in late 1967. He talked to his fellow pilots about organizing, and mailed them literature from the Airline Pilots Association. He also talked about the union to his supervisor, Orion Quinn. He approached company officials to talk about working conditions. At a meeting in mid-1968, A.G. Heimerdinger, director of flight operations, told Mourning that if he did not like the way the company was being run, he should leave. In May 1968, Heimerdinger sent a memo to the company president to advise him that the pilots were organizing. In June 1968, another memo written by the company's assistant supervisor of labor relations identified Mourning as one of three pilots behind the union movement.

Mourning was fired on November 15, 1968. Heimerdinger told him that he was fired because he had blown out two vacuum pumps during a flight on the preceding September 30. Heimerdinger said the incident was "a matter of misoperation of the aircraft which involved safety considerations." During the September 30 flight, two vacuum pumps had failed. Mourning was pilot in command of the plane but a copilot had actually operated the controls. Mourning reported the failure to company mechanics, and the vacuum pumps were replaced. The mechanics also found scorched paint on the engine cowling, suggesting overheating. Heimerdinger ordered a complete inspection of the plane, but no other damage was found. Mourning was not reprimanded at that time.

After Mourning's discharge, Quinn told Campbell not to get involved in the "politics" that was stirring up the pilots. Quinn said that if Campbell just did his job and avoided the "malcontents", he would be better off in the long run. Quinn told Campbell that the order to fire Mourning had come "from the top," and that if Mourning had not been so open about the union, he

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would not have been fired. Within 30 days of Mourning's discharge, Campbell blew out vacuum pumps on two separate planes, but he was not discharged. On other occasions, pilots blew out tires during landings, flew planes into power lines, and ran planes into fixed objects on the ground, but none of the pilots was fired as a result.

Mourning filed an unfair labor practice charge against McDonnell Douglas. An administrative law judge found that Mourning and Campbell were supervisors who were not protected by the Act. The Board affirmed the ALJ's decision and dismissed the complaint. 221 N.L.R.B. 1180 (1975). On appeal, the D.C. Circuit remanded to the Board to consider whether Mourning's crew ever consisted of persons who were "employees" withing § 2(3) of the Act or were merely pilots of equal rank. *Mourning v. NLRB*, 559 F.2d 768 (D.C. Cir. 1977). On remand, the Board decided that Mourning and Campbell were not supervisors because they exercised authority only over other pilots like themselves, and that in any event the exercise of this authority was too sporadic and routine to make them supervisors. The Board then found that McDonnell Douglas had used the vacuum pump incident as a pretext to fire Mourning, and that his discharge was really intended to discourage union activity. It therefore found that McDonnell Douglas violated §§ 8(a)(1) and 8(a)(3) by firing Mourning. The Board also found that Quinn's comments to Campbell were a warning not to engage in union activity and therefore violated § 8(a)(1).

II.

The initial issue in this case may be simply stated: Are Mourning and Campbell supervisors? If they are, then they are not entitled to the protections of § 7 of the National Labor Relations Act, and the employer, McDonnell Douglas, may fire Mourning for any reason or for no reason. *Kaiser Engineers v. NLRB,* 538 F.2d 1379, 1382 (9th Cir. 1976). The evidence focused on Mourning's status. The Board found that Mourning was not a supervisor. We must accept that decision if it is supported by the record and has a reasonable basis in law. *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944); *Laborers & Hod Carriers, Local No. 341 v. NLRB,* 564 F.2d 834, 837 (9th Cir. 1977).

The definition of supervisor is found in § 2(11) of the Act, 29 U.S.C. § 152(11):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or reponsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

A worker who uses independent judgment to exercise any one of the listed powers in the interest of the employer is a supervisor. *Walla Walla Union-Bulletin v. NLRB,* 631 F.2d 609, 613 (9th Cir. 1980); *Arizona Public Service Co. v. NLRB,* 453 F.2d 228, 230 (9th Cir. 1971); *NLRB v. Fullerton Publishing Co.,* 283 F.2d 545, 548 (9th Cir. 1960). For our purposes, a supervisor is one who uses independent judgment responsibly to direct other employees in the interest of the employer.

The definition of "supervisor" in § 2(11) depends upon the meaning of "other employees." McDonnell Douglas argues that "other employees" should be given its everyday meaning, i.e., other persons who work for the employer. Such a definition would include the copilots who flew with Mourning when he was pilot in command. That would make Mourning a supervisor, since to some extent he directed his copilots when he was pilot in command.

The NLRB, however, accepted the invitation of the District of Columbia Circuit and held that "employees" in section 2(11) must be defined as provided in § 2(3), 29 U.S.C. § 152(3). That definition states:

> § 2. Definitions.
> When used in this subchapter—
>
> * * * * *
>
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>
> (3) The term "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor * * *.

With this definition in effect, it cannot sensibly be maintained that Mourning is a supervisor by reason of his authority over his fellow pilots. The reason for that conclusion is that if Mourning is a supervisor, then so must his copilots be supervisors. Mourning and his fellow pilots serve interchangeably as pilots in command and copilots. If they are all supervisors, they cannot be "employees" by reason of § 2(3). That would mean that the pilots would be supervisors with no employees to supervise. Yet § 2(11) defines "supervisor" as one who exercises authority over "employees." Defining the pilots as "supervisors" therefore becomes a logical impossibility under the Act. The escape from this logical dilemma is to hold, as the Board did, that in their relation to each other, the pilots are employees and not supervisors.

We agree with the Board's conclusion that "employees" as used in § 2(11) must be defined in accordance with § 2(3). In addition to the logical difficulties attending the contrary approach, there are several reasons why we believe the Board was correct and McDonnell Douglas wrong. The first arises from the plain words of § 2. All of the definitions, including that of "employee", apply to the terms "when used in this subchapter." Section 2(11) is not only in the same subchapter, it is in the very same definitional section containing § 2(3). It seems highly likely that Congress, in constructing this definitional section, would intend that the defined terms interrelate.[1]

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[1] As stated in the text, § 2(11) refers to supervisory authority over "other employees." Our conclusion that "employees" is defined by § 2(3) does not render the word "other" superfluous; its import, however imperfectly stated, is to require that the supervisory authority be exercised over other employees of the *same employer. Mourning v. NLRB,* 559 F.2d 768, 770 n.3 (D.C. Cir. 1977); *Illinois State Journal-Register, Inc. v. NLRB,* 412 F.2d 37, 43–44 (7th Cir. 1969).

We reject the argument of McDonnell Douglas that the Board's ruling would render a company president who supervised only supervisors an

Continued

It is true that the § 2(3) definition of "employees" was held not to limit the power of the Board under § 10(c) to order "such affirmative action including reinstatement of employees * * *, as will effectuate the policy of this Act." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941). In that case, however, the Court found that the broad purposes of § 10(c) militated in favor of permitting the Board to reinstate strikers who had found equivalent employment even though they would be excluded from the definition of "employee" provided by § 2(3). No such policy reasons exist in the present case to overcome the usual presumption that the plain words of § 2 mean what they say.

Indeed, the policies underlying the Act militate in favor of applying the definition of § 2(3) in the present case. It is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. *Westinghouse Electric Corp. v. NLRB,* 424 F.2d 1151, 1158 (7th Cir.) *cert. denied,* 400 U.S. 831, 91 S.Ct. 63, 27 L.Ed.2d 62 (1970). The purpose of excluding supervisors from the protection granted bvy the Act to employees is that the status of the two groups in relation to each other is fundamentally inconsistent. Supervisors are not included in the bargaining unit of employees because their supervisory function would create conflicts of interest in dealing with employees in the unit. H.R. Rep.No. 245, 80th Cong., 1st Sess. 14 (1947). No such representational conflict occurs when one pilot deals with another pilot whose relationship to management is exactly the same as his own. In this case, Mourning and the other pilots were equals, each of whom had the job of serving interchangeably as pilot in command and as copilot. As equals, they all had to be regarded as supervisors or all as employees. If supervisors, they were excluded from the benefits of the Act, even though there was no representational conflict to justify the exclusion. The Board chose the better alternative of treating them all as employees and bringing them within the protection of the Act.

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McDonnell Douglas argues that this result is contrary to a trilogy of the Board's prior decisions. In *Douglas Aircraft Co.,* 207 N.L.R.B. 682 (1973), *McDonnell Aircraft Co.,* 207 N.L.R.B. 684 (1973), and *Lockheed-California Co.,* 207 N.L.R.B. 686 (1973), the Board held that pilots in command who flew regularly with non-pilot crews were supervisors. Our review of the record substantiates the Board's finding that Mourning did not exercise supervisory authority over non-pilot crew members. Consequently, we do not see an inconsistency between the result in this case and the Board's decisions in the trilogy.

This case is different from the trilogy in three respects. First, Mourning did not fly regularly with non-pilot crews when he was pilot in command. He had a copilot on five percent of his flights. Otherwise, he flew without a crew. McDonnell Douglas argues that Mourning was accompanied by a pilot trainee on five percent of his flights. The Board has consistently held, however, that an instructor-trainee relationship is different from a supervisor-employee relationship. *See Rub-R Engraving Co.,* 89 N.L.R.B. 475 (1950); *Petroleum Helicopters, Inc.,* 184 N.L.R.B. 60 (1970); *Ball Plastics Division,* 228 N.L.R.B. 633 (1977). McDonnell Douglas also argues that Mourning flew with photographers and observers. The record does show that Mourning occasionally carried a photographer or observer on his flights. The Board found, however, that these employees were mere passengers, not members of Mourning's crew. Authority exercised by a pilot over passengers is not supervisory authority. *Mourning v. NLRB,* 559 F.2d at 771 n.4.

Second, Mourning did not exercise the same type of authority over his copilots as the trilogy pilots did over their crew members. In the trilogy, the pilots exercised supervisory authority in the true sense of the word. The pilots assigned duties to crew members, and on overnight flights decided when the crew worked and when they took time off. In this case, however, Mourning's authority stemmed from his professional expertise. He exercised only the authority needed to insure the safety of the airplane, passengers, and crew. Such authority is an intrinsic part of any pilot's job. Taken alone, it does not necessarily prove that Mourning is a supervisor. *See Kaiser Engineers v. NLRB,* 538 F.2d at 1384; *NLRB v. Doctors' Hospital,* 489 F.2d 772, 776 (9th Cir. 1973).

"employee" within the meaning of the Act. To qualify as a supervisor, it is only necessary that a person supervise statutory "employees" directly or indirectly through a chain of command.

Finally, the Board held that even if Mourning's authority over his copilots were supervisory in nature, it was too sporadic to permit a finding that he was a supervisor within the meaning of the Act. We believe that substantial evidence in the record supports that ruling. Mourning flew with a copilot only about 5% of his overall flight time. Such an infrequent exercise of supervisory authority may reasonably be viewed as insufficient to render § 2(11) applicable. *Plastic Workers Union v. NLRB*, 369 F.2d 226, 230 (7th Cir. 1966); *see NLRB v. Lindsay Newspapers, Inc.*, 315 F.2d 709,712 (5th Cir. 1963). This is particularly true when the occasional direction is exercised over fellow workers of equal rank. *NLRB v. Doctors' Hospital*, 489 F.2d at 776; *see NLRB v. Security Guard Services, Inc.*, 384 F.2d 143 (5th Cir. 1967). Consequently, we do not believe that adherence to the trilogy dictates a decision in favor of McDonnell Douglas in this case.

III.

Once the Board decided that Mourning and Campbell were not supervisors, it faced the question whether McDonnell Douglas had committed the alleged unfair labor practices. We agree that McDonnell Douglas's actions in this case violated §§ 8(a)(1) and 8(a)(3) of the Act.

The Board found that McDonnell Douglas had fired Mourning because of his

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union activity. Specifically, the Board found that the vacuum pump incident was merely a pretext for his discharge. We agree. Heimerdinger said that he discharged Mourning because the vacuum pump incident demonstrated his inattention to safety considerations. Yet Mourning was regarded as a competent pilot by his fellow pilots and by Quinn, his immediate superior. Heimerdinger did not reprimand Mourning immediately after the incident. In fact, Heimerdinger granted Mourning a merit increase in pay after the incident occurred. Other pilots who were guilty of the same or worse conduct were not fired. We think the Board was clearly justified in concluding that Heimerdinger seized upon the vacuum pump incident to rid himself of Mourning. McDonnell Douglas officials were concerned about union activity among the pilots. Mourning had been identified as one of three pilots behind the union movement. Quinn even told Campbell that Mourning would not have been fired if he had not been so open about his union activities. The Board could not avoid the conclusion that Mourning's union activity was the "moving cause" behind his discharge. *Stephenson v. NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980).

McDonnell Douglas argues that it was improper for the Board to make this finding without remanding to the ALJ for credibility findings. We disagree. First, McDonnell Douglas never clearly asked the Board for this relief. In any event, the Board did not act improperly. Contrary to McDonnell Douglas' contention, the Board did not proceed on the erroneous assumption that there was no contradiction in testimony over the ultimate question of antiunion animus. Instead, the Board found sufficient facts established by uncontradicted testimony to permit it readily to conclude that Mourning was discharged for his union activity, and to reject as pretextual the explanations offered by company officials. There was no need in this instance to remand for credibility findings; the Board was free to draw its own inferences from the record *NLRB. v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1347 (9th Cir. 1978; *See Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1079, (9th Cir. 1977). Its opinion clearly sets forth the inferences it drew and the substantial evidentiary bases for them.

The Board also interpreted Quinn's comments to Campbell as a warning not to engage in union activity. That finding was similarly within the power of the Board and was supported by substantial evidence. We will therefore not set it aside. *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 48 (9th Cir. 1970).

We conclude that the Board committed no error and that substantial evidence on the record as a whole supports its findings that McDonnell Douglas' actions violated §§ 8(a)(1) and (3) of the Act. The petition to review and set aside the Board's order is denied, and enforcement of the Board's order is granted.

Service Employees International Union Local 250, AFL—CIO *v.* NLRB

640 F.2d 1042 (9th Cir.), March 12, 1981

On petition to review Board Order

Before DUNIWAY and KENNEDY, Circuit Judges, and CURTIS,* District Judge

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KENNEDY, Circuit Judge: The primary question here is whether an earlier judgment by a Court of Appeals precludes adjudicating other legal aspects of the dispute in further proceedings before the National Labor Relations Board [Board]. The Board, the Union and the employer were previously before the United States Court of Appeals for the District of Columbia Circuit on the Union's petition to review an order determining that the employer committed an unfair labor practice, and on the Board's and the employer's cross-petitions. The judgment was in favor of the employer, reversing the Board's finding that an unfair labor practice had occurred. *Service Employees Int'l Union Local 250 v. NLRB*, 600 F.2d 930 (D.C.Cir. 1979). The Union then went back to the Board. The Union contended that the Court of Appeals' decision was limited to a determination that the employer had not committed unfair labor practices under sections 8(a)(1), (4) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (4) and (5) (1976), and that the Court had not adjudicated a Union claim that the employer had also violated section 8(a)(3), 29 U.S.C. § 158(a)(3) (1976). The Board declined jurisdiction, and the Union now petitions us to order the Board to rule whether the employer has violated section 8(a)(3). We agree with the Board that it lacked jurisdiction to rule on the charge.

The underlying dispute arose in 1974, and the facts are set forth in the first case. 600 F.2d at 933–35. In essence, the employer, E. H. Limited, warned its employees not to leave work to attend a Board representation hearing, although the employer did offer to allow one employee representative to attend. Despite the directive, thirteen employees left work to attend the hearing. They were dismissed for their unauthorized absence from work.

The employees filed charges with the Board, alleging violations of sections 8(a)(1),(3), (4) and (5) of the National Labor Relations Act. The Board ruled that the employer had violated sections 8(a)(1), (4) and (5). In a footnote, the Board expressly declined to pass on the alleged section 8(a)(3) violation. The Board said:

> However, in view of our findings above we need not decide whether, in the circumstances here, Respondent's discharge of the 13 employees violated Sec. 8(a)(3) as well as Sec. 8(a)(4) and (1) of the Act. Furthermore, we believe it important to stress that our decision here protecting the right of employees to attend Board hearings does not rest at all upon whether that right is exercised alone or in concert.

E. H. Limited d/b/a Earringhouse Imports, 227 N.L.R.B. 1107, 1109 n.9 (1977). The dissenting members of the Board explicitly found that the alleged section 8(a)(3) violation was "clearly without merit." *Id.* at 1114–15 n.25.

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Although the Board awarded the Union most of its requested relief, the Union petitioned the United States Court of Appeals for the District of Columbia Circuit for modification and enforcement of the order. The Union specifically claimed that the Board had erred by not deciding the section 8(a)(3) question and by incorrectly computing the amount of back pay awarded for the other violations. The employer and the Board filed cross-petitions, and the actions were consolidated.

The Court of Appeals granted the employer's petition for review and vacated the Board's order, concluding that the Board had erred in finding violations of sections 8(a)(1), (4) and (5). With respect to the Union's claim that the Board erred in not deciding the section 8(a)(3) contention, the court was less clear. In denying the Union's petition for review and enforcement, it said:

> Since No. 77-1165 [the Union's petition] involves only an alleged error as to the date back pay should become effective and whether the discharge of the thirteen employees violated § 8(a)(3) of that Act, and by reason of the conclusions herein reached we deem it unnecessary to give further consideration to No. 77-1165 for the reason that our action in No. 77-1630 [the employer's petition] will render the back pay issue moot.

Service Employees Int'l Union, Local 250 v. NLRB, 600 F.2d 930, 932 n.4 (D.C.Cir.1979). The court did not remand any portion of the case to the Board.

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*Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

The Union petitioned the court for rehearing and suggested the appropriateness of a rehearing en banc. In its petition the Union claimed, among other things, that "the panel failed to consideir the position considered by this petitioner that the employees [*sic*] concerted activity mandating protection under § 8(a)(3). [¶] This Petition for Rehearing and Suggestion of Hearing En Banc is directed to the elements of the case totally ignored by the panel which consider [*sic*] only the implications of § 8(a)(4)." The Court of Appeals denied both the rehearing petition and the suggestion for rehearing en banc on May 31, 1979. No certiorari petition was directed to the Supreme Court.

The Union then promptly went before the Board and moved to "reopen [the] case in order to conclude the remaining allegation." The Board denied this motion, finding that the Court of Appeals, by not remanding the matter, had "concluded" the case and had left the Board with "no authority at this time to consideir the merits of Section 8(a)(3) allegation of the complaint." The Union now petitions this court to direct the Board to hear its section 8(a)(3) claim.

The Union contends the Board still retains jurisdiction to hear the section 8(a)(3) claim. It asserts that since the Court of Appeals' opinion speaks of mootness of back pay in its footnote four, an issue concededly irrelevant to the section 8(a)(3) claim, the court's opinion must be interpreted as having reserved the claim for later Board consideration. The employer contends this interpretation is inconsistent with the Court of Appeals' failure to order a remand, especially after the Union in its failure to address the section 8(a)(3) claim.

A preclusive effect in the Court of Appeals' mandate is fairly implied from the scope of its jurisdiction and the wording of its judgment. In section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1976), Congress provided that "[u]pon the filing of the record with [the Court of Appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final * * *. In *International Union of Mine, Mill & Smelter Workers, Local Nos. 15, 17, 107, 108 & 111 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 65 S.Ct. 1166, 89 L.Ed 1649 (1945), the Court addressed the effect of a "final" judgment of a Court of Appeals.[1] The Court said:

> We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration. (§ 10(e).) But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board, the judgment "shall be final." It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. (§ 10(e) *supra*).

Id. at 339, 65 S.Ct. at 1168 (footnote omitted). *See also Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 287–89 (D.C.Cir. 1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972); *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 997–98 (D.C.Cir. 1971). We think it follows from this that, absent an order to remand or some express qualification in the judgment, finality is presumed.

When the Union originally petitioned the Court of Appeals for the District of Columbia Circuit, it sought a ruling that the Board erred when it declined to pass on the section 8(a)(3) claim. *See, e.g., United Steelworkers of America v. NLRB*, 405 F.2d 1373, 1377 (D.C.Cir.1968). It was open to the Court of Appeals to remand the case to the Board for further proceedings on the section 8(a)(3) claim if the court saw any merit to that contention. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373–74, 59 S.Ct. 301, 306–07, 83 L.Ed. 221 (1939); National Labor Relations Act §§ 10(e), (f), 29 U.S.C. §§ 160(e), (f) (1976). The failure to remand implies a determination that the stipulated facts presented no violation of section 8(a)(3) and the court's written disposition supports this conclusion. After acknowledging that the Union sought adjudication of the alleged section 8(a)(3) violation, the court stated that "by reason of the conclusions herein reached, we deem it unnecessary to give further consideration to [the Union's petition] * * *." 600 F.2d at 932 n.4. This language and the failure to remand are construed most reasonably as a determination that no section 8(a)(3) violation was presented.[2] On such a reading, the court's opinion was final under sections 10(e) and (f), and barred further proceedings arising from the same transaction under the doctrine of res judicata. *Eagle-Picher,* 325 U.S. at 340, 65 S.Ct. at 1168. *See also Montana v. United States,* 440 U.S. 147, 153–55, 99 S.Ct. 970, 973–75, 59 L.Ed.2d 210 (1979); *Mervin v. FTC,* 591 F.2d 821, 829–31 (D.C.Cir.1978); *City of Cleveland v. Federal Power Comm'n,* 561 F.2d 344, 348 & n.39 (D.C.Cir.1977); *Greater Boston Television Corp.,* 463 F.2d at 290–91.

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[1] *Eagle-Picher* involved section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1976), whereas the Union here petitioned the District of Columbia Court of Appeals for enforcement under section 10(f), 29 U.S.C. § 160(f) (1976). Section 10(f), however, provides that "the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction [to grant interim relief], and in like manner to make and enter a decrees * * *." Thus, the preclusive effect of a decree entered under section 10(f) is no less than that under section 10(e).

The Union responds by saying that the Court of Appeals for the District of Columbia Circuit was without jurisdiction to determine the existence of a section 8(a)(3) violation, and cites *NLRB v. Food Store Employees Union, Local 347,* 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974) for the proposition that a Court of Appeals may not

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enlarge the scope of an agency's order. In *Food Store Employees,* the Court of Appeals had said the Board had abused its discretion by omitting a specific remedy, and the court instructed the Board to enter an order accordingly. In reversing, the Supreme Court said that "remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course." *Id.* at 10. *See also South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs,* 425 U.S. 800, 805–06, 96 S.Ct. 1842, 1844–45, 48 L.Ed.2d 382 (1976) (per curiam). There are at least two reasons why we find *Food Store Employees* inapposite. First, although a court may correct or modify its own mandate, *Greater Boston Television Corp.,* 463 F.2d at 276–80; 28 U.S.C. § 2106 (1976), we conclude that it is more consonant with notions of comity, if not actually required, that a party dissatisfied with the mandate apply to the issuing court for correction or interpretation, *see Bergh v. Washington,* 535 F.2d 505 (9th Cir. 1976); *Brittingham v. Commissioner,* 451 F.2d 315 (5th Cir. 1971), or seek appellate review, *see Eagle-Picher,* 325 U.S. at 339, 65 S.Ct. at 1168; *Chicago & N.W. Trans. Co. v. United States,* 574 F.2d 926, 930 (7th Cir. 1978). Here, the alleged error was called to the District of Columbia Court of Appeals' attention in the Union's rehearing petition, and when the court declined to correct it, its judgment became final. Second, and more important, the doctrine in the *Food Store Employees* case is not inconsistent with the judgment of the District of Columbia Court of Appeals. *Food Store Employees* establishes that a court should defer to the Board in fashioning remedies for unfair labor practices. This is analytically distinct from deciding that a stipulated set of facts does not constitute a violation of a statute such as section 8(a)(3). The latter is within the province of the judiciary in our section of separate powers, and we believe that the Court of Appeals for the District of Columbia Circuit observed its proper judicial function in its earlier disposition of this case.

The petition for review is denied.

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[2] Without reaching the merits of the section 8(a)(3) violation, we note that it is not unreasonable to assume that the Court of Appeals ruled against the Union on this point. To begin with, that holding would be consistent with the result the court reached as to the other portions of the statute. Second, there is respectable existing authority to support such a conclusion. It is, for example, well settled that, except in the rarest of cases, some proof of anti-union animus is necessary to establish a violation of section 8(a)(3). *See* R. Gorman, Basic Text on Labor Law 137–38 (1976). The District of Columbia Court of Appeals, however, found this element lacking. "[I]n the case before us . . . there is not the slightest intimation of animous [towards] union activity." *Service Employee Int'l Union, Local 250 v. NLRB,* 600 F.2d 930, 936 n.17 (D.C.Cir.1979).

Statler Industries, Inc. (Statler Tissue Co.) v. NLRB

644 F.2d 902 (1st Cir.), March 12, 1981—244 NLRB 144

On petition to review and set aside Board Order

Before COFFIN, Chief Judge, BOWNES and BREYER, Circuit Judges

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COFFIN, Chief Judge: This petition by Statler Industries, Inc. (Statler Tissue Company) to review a National Labor Relations Board order[1] and the

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[1] Reported at 244 N.L.R.B. No. 19.

Board's cross-application for enforcement raise issues concerning the supportability of findings of violations of Sections 8(a)(1) and (3) of the National Labor Relations Act and the appropriateness of remedy.

The company manufactures household paper products, having its central office and headquarters in Medford, Massachusetts, and a mill in Augusta, Maine, employing some 500 people, of whom approximately a dozen were office employees. The present litigation arises out of efforts by the United Paperworkers International Union, AFL-CIO to unionize the office workers,[2] beginning in August 1976 and extending to May 1977.

Based on incidents occurring in December of 1976 and in May of 1977, the Board found that the company, through the coercive conduct of six of its supervisors, had violated § 8(a)(1) in no fewer than ten ways. In arriving at this result the Administrative Law Judge exercised considerable selectivity, dismissing in their entirety charges of coercive conduct on the part of three supervisors and dismissing particular charges attributed to four others.

THE SUPERVISOR ISSUE

The company's defenses are not only thin but leave many a salient undefended. Its first effort is to challenge the supervisory status of four of the persons charged with exercising coercion. The status of three supervisors (LaPointe, Levesque, and Lord) is nowhere put in issue. Of those selected for criticism, one (Poulin) is one of the supervisors the charges against whom the ALJ dismissed. Of the other three, the company recognizes that as to one, Greenlaw, there was specific testimony that he had the power to hire; the company's only argument is that the ALJ should have believed other witnesses. As to the other two, Jones and Bernier, there is ample evidence of supervisory, training, and disciplinary responsibilities, including that of making generally relied upon recommendations for hiring.

SECTION 8(a)(1) VIOLATIONS

The Board found that one or more of the six supervisors had engaged in the following conduct: threatening employees with reprisals if they associated with union activists; creating the impression of surveillance; threatening to discharge employees who signed union cards; encouraging an employee to withdraw her union authorization card; interrogating employees; promising benefits to employees; changing working hours; instituting a new nonmingling rule; creating other less favorable working conditions; and prohibiting the discussion of salaries.

Of these ten violations, the company has something to say about only two. It criticizes the finding that supervisor Greenlaw created the impression of surveillance and urges that Greenlaw's neutral characterization of his motives be accepted, rather than the credited testimony of an employee. Even more vulnerable is the criticism of the finding that the company engaged in the impermissible interrogation of employees.

Although the Board found that four supervisors had engaged in this activity (Bernier, LaPointe, Levesque, and Lord), the company directs its criticisms against findings relating to only two (Lord and LaPointe). Once again, its only contribution is that the supervisor should have been credited, not the subordinate. We are left with the observation that we cannot fathom why the company deemed it worth the investment to erect this kind of perforated dike against the § 8(a)(1) charges.

THE DISCHARGES

The Board also found the company in violation of § 8(a)(3) of the Act in that, first, it wrongfully discharged three employees, Harwood, Hanley, and Hill, and second, it wrongfully discharged nine employees by relocating certain office jobs from Augusta, Maine, to Medford, Massachusetts. Both issues are somewhat closer than those we have already discussed.

Our analysis is complicated by the fact that both sets of discharges involve a confrontation of an impermissible motive to get rid of reputed union activists, or to frustrate the union organizing campaign by relocating the office functions, and a permissible motive to discharge for reasons of reorganization and poor performance, or to relocate pursuant to a longstanding plan. We have set forth our approach to such dual motive cases in *NLRB v.*

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[2] The union had represented all production employees during the prior 8½ years the company had owned the mill. It had also just been certified, following a consent election, as bargaining agent for a few laboratory employees.

Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979), requiring the Board to demonstrate a "'significant" improper motivation" for a discharge and then requiring "the employer to prove that it had a good reason, sufficient in itself, to produce the discharge." *Id.* at 671. In so deciding we accepted as relevant guides the non-labor cases of *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) and *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

In 1980 the Board similarly accepted *Mt. Healthy* as setting the appropriate analytical framework for testing causality in § 8(a)(3) cases in *Wright Line, A Division of Wright Line, Inc*, 251 N.L.R.B. No. 150. Its statement of the test is as follows:

> "First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct [footnote omitted]." Lab.L.Rep. (CCH) ¶ 17,356, at 32,469 (1980).

We see no difference in formulation between the tests in *Eastern Smelting* and *Wright Line.*[3] It is of course posssible that the approaches to each step and the manner in which motives are assessed may dramatically change the coloration of the test, but at present we see *Wright Line* as a conscientious effort to reduce the confusion and discord in dealing with mixed motive cases.[4]

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Although the Board and we now seem to be on the same analytical track in what has been a vexing area, we deal with a record predating our concord. The ALJ decided this case in March of 1979; *Eastern Smelting* was issued in May; the Board affirmed the ALJ in August of 1979; and it was not until a year later that *Wright Line* was decided. Under these circumstances, having in mind that the now prescribed burden-shifting approach was not applied, but also that a huge investment of time has already been made, we shall view the evidence as to both § 8(a)(3) issues, the discharges of the three men and the relocation of the office jobs, and ask two questions: would a fair reading permit any other conclusion than that a *prima facie* case of anti-union animus was proven?; and, does the record permit a finding that the company had proven by a preponderance of evidence that the three men would have been discharged and the office jobs relocated when they were, even if there had been no union activity? Our test, thus, is not the normal deferential inquiry whether the record substantially supports the Board's findings, but whether "the record in this case does not admit of the argument that petitioner would have been terminated regardless of her [protected activity]." *Givhan, supra,* 439 U.S. at 417 n. 5, 99 S.Ct. at 697 n. 5.

We begin with the March 31, 1977 discharges of Harwood, Hanley, and Hill. Our first inquiry is to see whether there is sufficient evidence of significant improper motivation, not based on suspicion or mere anti-union predilection, but based on direct evidence, the circumstances of discharge, or other acts.

While the circumstances of the discharge, involving sixteen others being discharged for various reasons, are perhaps ambiguous, there was direct evidence from former supervisor LaPointe that Harwood, known to have been active for the union since August of 1976, had been singled out as the principal activist. Other employees had much earlier been warned against associating with him. Incredulous that one man could cause so much activity, company managers sought more names of activists, unsuccessfully at a second meeting, finally succeeding at a third meeting in early February in learning that Hanley and Hill were also involved. LaPointe testified that the three were then listed for termination because of their own union activity. In addition to this direct evidence of animus, there were the numerous threats, interrogations, acts of surveillance, etc. that we have discussed earlier, some of them specifically relating to Harwood and directed to Hanley and Hill. We do not see how, despite Statler's prior generally amicable relationship with the union as to production and laboratory employees, the Board could have come to any other conclusion on this record than that the General Counsel had made a *prima facie* case of discharge for improper motive.

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[3] Although our first step in this two step analysis, requires the Board to prove a "significant" anti-union reason, while *Wright Line* in the passage quoted speaks only of "motivating factor", the quotation marks refer to language in *Mt. Healthy* equating "substantial factor" and "motivating factor". 429 U.S. at 287, 97 S.Ct. at 576.

[4] The company argues at length that we differ from *Wright Line* in requiring the Board to shoulder the burden of proving that there would have been no discharge but for an employee's protected activity. While in cases antedating *Eastern Smelting*, we have used such a formulation, our unequivocal adoption in that case of the *Mt. Healthy* test is determinative. Our subsequent decisions have either reaffirmed our position, *Texas Instruments Inc. v. NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1979), or have dealt with cases that have not involved a weighing of good and bad reasons but rather an absence of any improper reasons, as in *NLRB v. Wilson Freight Co.*, 604 F.2d 712 (1st Cir. 1979) and *Keosaian v. NLRB*, 630 F.2d 36 (1st Cir. 1980), or an absence of any legitimate reason, as in *South Shore Hospital v. NLRB*, 630 F.2d 40 (1st Cir. 1980). In retrospect we do view as erroneous the last sentence of our opinion in *NLRB v. Borden, Inc., Borden Chemical Division*, 600 F.2d 313 (1st Cir. 1979), where we assigned the burden to the Board of establishing that the employer would not have taken an action but for an improper motivation, citing *Eastern Smelting*, 598 F.2d at 671. The page citation there indicates the opposite, the view we now reaffirm.

As to each employee discharged, there are different reasons proffered by the company and different countering observations. Harwood, assistant plant accountant, was allegedly fired because he was not qualified for promotion to take over his supervisor's job, and had, during the previous summer, distributed confidential salary information—an act which had led to the adoption of a company rule. But he had worked for the company for 8½ years, had never been disciplined or warned, had received regular pay increases, and his superior LaPointe proclaimed him "adequate" and would have kept him. What the case against Harwood boils down to is that he should have been fired because he was not qualified for a promotion was yet to be offered [5] and because some months earlier he had done something which if done later would violate a rule. While hardly an overwhelming case, it would be open to the possibility of

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preponderating were it not for the direct evidence that he was the top man on the company's union hit list. This fact is so prominent that we do not see how the Board could have found that the company had carried its burden of proving that Harwood would have been fired even if he had had nothing to do with the union.

Hanley worked half time as a "pulp prep clerk" and half time as a supervisor of production employees [6] in the mill. He had been with the company for nearly four years with no evidence of poor performance. He had been warned to stay away from the office where Harwood worked. The reason given for his discharge was the elimination of his job, another foreman taking over his supervisory duties and a laboratory supervisor taking over his pulp prep duties. Despite his seniority to other production personnel, he was not allowed to take a demotion and return to production work. In light of the total absence of criticism of Hanley, and the absence of any effort to accommodate his seniority, we find the direct evidence of his joining the hit list because of his perceived involvement with union activity compelling.

Finally, Hill, a production and shipping clerk, was discharged allegedly because of his poor performance, being slow and having mental lapses. He was told, however, that the cause of his termination was a "management shuffle". He had worked receiving regular raises, for the company 4½ years without any disciplinary problems, excepting only one occasion three months earlier when, because of medication, he was sleeping on the job. Later the same month his department manager told him he had an "excellent work record" and "management potential". Two weeks before his discharge his evaluation recorded him as improving. Again, the lack of any evidence of increasing dissatisfaction proximately related to the time of his discharge, together with the cogent evidence of his being listed as a target by company management persuades us that this record could not be viewed as preponderating in favor of a discharge that would have been forthcoming without any connection to union activity.

THE RELOCATION OF OFFICE EMPLOYEES

We now consider the Board's § 8(a)(3) finding that nine office employees were wrongfully discharged when the company, because of a motive to frustrate-union organizational activity, moved their jobs from Augusta to Medford. It is the company's position that a Price Waterhouse study in 1973 recommended centralization of all office functions in Medford, that other economic demands caused the move to be postponed for four years, but that in 1977, with the anticipated renovation of a building in Medford, the plan for moving reached fruition—without impact from any anti-union impulse.

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[5] Moreover, this new company standard—of being able to take the number one spot—may rightly be viewed with some skepticism since it resulted in the discharge of only activists Harwood and Hill among the entire work force.

[6] The company argues that Hanley's discharge could not be an 8(a)(3) violation because he was really a supervisor as defined by section 2(11). Not only did the Board supportably find that Hanley's supervisory duties occupied less than half of his time but were exercised in a different location among employees other than those with whom he worked in a non-supervisory status. In sharp contrast to the situation in *NLRB v. Florida Agricultural Supply Co.*, 328 F.2d 989 (5th Cir. 1964), on which the company relies, the separation of Hanley's supervisory and non-supervisory roles was "sharply demarcated". *GAF Corp. v. NLRB*, 524 F.2d 492, 496 & n. 9 (5th Cir. 1975).

This is the chronology. In May of 1973 the accounting firm of Price Waterhouse & Co. submitted a report to the company recommending the merger of "the accounting departments at the Medford location" of the company's two divisions, Sugarmen Brothers and Statler Tissue. This report—or such part of it as in the record—has nothing to say about Augusta office employees. The next relevant communication was from Price Waterhouse in January of 1974, putting forward to the company three proposals for enlisting the help of Price Waterhouse, ranging in fee levels from $120,000 down to $32,000. The proposals included the opaque language that Price Waterhouse "would reorganize and consolidate the accounting functions at Statler Industries, Inc. inclusive of the Augusta facilities." If the company gave instructions to proceed, a "detailed work plan" would be established. So far as the record reveals, no further instructions were forthcoming. In the data constituting what the covering letter called a "work plan", it was specifically acknowledged that the establishment of one central corporate accounting department depended on "a higher level of sales and mix of similar operations". In March of 1974 a "Management Letter" to the company from Price Waterhouse repeated both an interest in meeting with the company's management and the caution that higher sales were a precondition of a merger of all divisional accounting departments.

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What followed was silence for the remainder of 1974, 1975, and all of 1976 until December 30. On that date a confidential message was sent by Medford management to the manager of the Augusta plant that the company had decided to move all office and accounting functions to Medford when the new office complex was completed, estimated then to be in June of 1977. The message concluded with the news that Price Waterhouse would do the necessary evaluations within the next month. In fact, no such evaluations by Price Waterhouse appear.

On April 28, 1977, after the firings of Harwood, Hanley, and Hill, and after continued unionization efforts were reported to management on April 20, a notice was posted in the Augusta plant that certain functions were being relocated to Medford and that the renovation of corporate offices was expected by July. Also on April 20, at a management meeting Vice President Lombardi stated that the company would move its Augusta office functions to Medford rather than recognize the union. At another meeting in early May, hastily convened when news of renewed union activity ws received, when a colleague cautioned Lombardi that a move during a period of intense union activity might be unwise, Lombardi exploded with expletives aimed at the woman organizer who had been the subject of conversation and saying that she would not frustrate his plans. Although the renovated building was not open for occupancy until December of 1977, the company did not wait for that event but moved most of the Augusta office functions to "old corporate offices" in Medford in July and August. It did not offer jobs or transfer to any Augusta employee, despite the seniority of some and the acknowledged superiority of others.

The ALJ (and the Board) ruled: "Contrary to the contention of Respondent that the move of certain clerical functions to Medford was made pursuant to a long established plan which came to fruition in 1977, I find that the transfer of these jobs was discriminatorily motivated." This conclusion was buttressed by reference to Lombardi's April 20 statement that the company would not have a union in the Augusta accounting department; the fact that the news of renewed union activity brought Medford and Augusta executives together in early May within hours; Lombardi's expletives at the meeting; the firings of Harwood, Hanley, and Hill; the various § 8(a)(1) violations we have noted:[7] the fact that six of the nine office employees discharged were known to be involved with union activities; the fact that none were offered the opportunity to move to Medford; and the dual factors of years of inaction followed by decision in the midst of the union campaign.

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[7] It is clear that in considering the events that formed the basis of the earlier § 8(a)(1) charge the ALJ had specifically in mind the teaching of *Local Lodge No. 1424, IAM v. NLRB*, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960) that events occurring prior to six months before the filing of a charge (September 12, 1977) may not constitute the basis of an unfair labor practice but may be used to shed light on events within the six month period.

We begin our two-step analysis by holding that the various statements made by Lombardi, the discharges of Harwood, Hill, and Hanley, the numerous threats and interrogations amply make a *prima facie* case of discriminatory motivation. As for the weight to be accorded to the "legitimate

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business reasons" represented by the Price Waterhouse recommendations, the record forecloses any other reading than that they are too insubstantial to overcome the direct and indirect evidence of a motivation to frustrate union organization of office employees.

A detailed review of the record reveals Price Waterhouse recommendations that at best constitute an invitation to plan. They are directed mainly at Medford operations which were substantially altered when the Sugarman Division was sold. They outlined several approaches involving different levels of Price Waterhouse involvement, leaving the choice up to the company—a choice that was never made. Any action was expressly conditioned on a higher level of sales. Nearly three years passed without a record reference to a single communication referring to the Price Waterhouse proposals.

At the end of December, 1976, a month in which company supervisors had engaged in widespread anti-union threats, interrogations, surveillance and other violations of § 8(a)(1), Medford management communicated in confidence to the Augusta manager its intent to move the office employees when the renovation was expected to be completed in June of 1977. No study led up to this and, despite a reference to Price Waterhouse "evaluations" to be performed during the following month, we are aware of no such work being done. Finally, although the new building did not open for occupancy until December, 1977, the company did not hesitate to post the notice of the move, shortly after learning of renewed union activity, on April 28, 1977, and utilize facilities in Medford which had always been available.

This scenario is unlike that in *NLRB v. Rapid Bindery, Inc.* 293 F.2d 170 (2d Cir. 1961) and cases cited therein, relied upon by the company for the proposition that a change of operations dictated by sound economic reasons does not violate § 8(a)(3) even though decision may have been accelerated by union activity. In such cases the economic necessity of an imminent change of operations had been made manifest; union demands were merely a factor indicating additional costs. We need not in the case at bar decide whether acceleration of a demonstrably economically justified decision to move an operation because of the desire to avoid further union activity would constitute a § 8(a)(3) violation, for the predicate—the legitimacy and immediacy of the underlying decision—is not established by this fragmentary record.

THE REMEDY

The company makes a final argument that the Board's remedy in requiring reestablishment at Augusta of the office and accounting jobs that it had relocated at Medford was unwarranted.[8] It asserts that the move was the result of a legitimate business decision—a proposition we have found unsubstantiated; that the relocation produced improvements in operating efficiency—an assertion without any documentation; and that a major capital investment had been made in new office facilities in Medford—another undocumented assertion with no hint as to the absolute or proportionate amount of investment properly allocable to the jobs moved from Augusta. There is not even any indication of the burden facing the company in relocating the positions.

The company has evidently lost sight of the rigorous task facing an employ-

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er or court who would set aside a remedy fashioned by the Board: to show that "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed.2d 1568 (1943). *See also Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964); *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969).

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[8] The precise words used in the Board's order were:

"(b) Reestablishment at its Augusta, Maine mill the office and accounting jobs which it relocated at Medford, Massachusetts and offer to the following employees immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings they may have suffered in the manner provided in the section herein entitled 'The Remedy.' Francis Harwood, Walter Hill, David Hallee, Shelly Dorr, Lynn Verrell, Arlene Brackett, Normande Beckim, William Nichols Ellen Kinney, Gerald Boulette and Julia Stevens."

In such a case as this, where a union organizational effort was found to be aborted intentionally by removing an entire office operation, restoring the status quo ante would seem to be calculated to effectuate the policies of the Act insofar as it would give the union another chance in a fair fight. Space and equipment problems would seem to be minimal. Lacking here is any evidence of unduly burdensome investment such as was required in *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 68 (3d Cir. 1978) (reopening of uneconomic plant would cost one million dollars plus operating loss of several hundred thousand dollars a year); *NLRB v. Townhouse T.V. & Appliance, Inc.*, 531 F.2d 826 (7th Cir. 1976) (small TV service company required to buy two trucks); *NLRB v. American Mfg. Co. of Texas*, 351 F.2d 74, 80 (5th Cir. 1965) (employer required to purchase "a new fleet of unwanted trucks"). Nor are there other factors present here which have militated against orders to resume operation: disadvantaging the very employees affected by the employer's action. *Jays Foods, Inc. v. NLRB*, 573 F.2d 438 (7th Cir. 1978); giving a bargaining party unfair advantage, *NLRB v. American Mfg. Co. of Texas, supra;* the lapse of a long period of time prior to resumption; the making whole of injured employees through other means; causing injury to an innocent third party. *See generally* Annotation, Propriety of NLRB Order to Resume Discontinued Operations, 42 ALR Fed. 421.

We venture to require only one modification in the terms of the Board's order, to make explicit what may perhaps be implicit. The "reestablishment" paragraph we have quoted in note 8, *supra*, contains no proviso recognizing the right of the company to relocate Augusta office functions "at any time in the future if it deems best for business reasons to do so and is not implelled by the intent to deny to its employees the rights conferred by the statute." *NLRB v. Preston Feed Corp.*, 309 F.2d 346, 352 (4th Cir. 1962). Just as we did in a similar situation in *NLRB v. Kelly & Picerne, Inc.*, 298 F.2d 895, 899 (1st Cir. 1962), we retain jurisdiction and return the case to the Board for appropriate revision of the order, after which we shall issue our mandate enforcing it.

NLRB v. Evans Plumbing Company

639 F.2d 291 (5th Cir.), March 13, 1981

On petition for summary judgment

Before HILL, FAY and ANDERSON, Circuit Judges

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PER CURIAM: This case involves a petition by the National Labor Relations Board ("NLRB") for summary entry of judgment to enforce the Board's decision ordering the respondent Evans Plumbing Company ("Evans") to reinstate with back pay two employees whom it discriminatorily discharged. Evans, who filed a voluntary petition in bankruptcy, opposes entry of judgment on the ground that the proceedings before the NLRB should have been stayed by the automatic stay provision of the Bankruptcy Act of 1978, 11 U.S.C.A § 362(a)(1) (1979). We hold that this NLRB proceeding falls within a statutory exemption to the automatic stay provision and grant the Board's petition for summary entry of judgment.[1]

I.

On or about February 15, 1980, Evans discharged Jack T. Lee and F. J. Meeks for complaining to their union about alleged mismanagement of their vacation funds by Evans. A charge of unfair labor practices was filed and the matter set down for a hearing. On August 8, 1980, the day before the commencement of the hearing, Evans filed a voluntary petition in bankruptcy in the Northern District of Alabama. On the day of the hearing, Evans' counsel appeared and moved to continue the Board proceedings in order that the bankruptcy court might determine whether the proceeding fell within the automatic stay provision of the Bankruptcy Act. Evans' motion was apparently overruled and the hearing was held. On September 30, 1980, the administrative law judge ("ALJ") found that Evans had committed an unfair labor practice by discharging Lee and Meeks and ordered them reinstated with back pay. The order was promptly transmitted to the Board to await the filing of exception by Evans. Evans failed to file any exception within the time provided by the Board's rules and regulations and the Board adopted the ALJ's decision. This petition followed.

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[1] It is appropriate to dispose of this case summarily. See *Groendyke Transportation, Inc. v. Davis*, 5 Cir., 1969, 406 F.2d 1158.

II.

We are faced with a threshold question of first impression under the new Bankruptcy Act: whether the automatic stay provision applies to an enforcement proceeding by the NLRB. We conclude that this action falls within an exception to the automatic stay provision.

The automatic stay provision, 11 U.S.C.A. § 362 (1979), provides in part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose be-
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>
> > fore the commencement of the case under this title;
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> * * * * *
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> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—
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> * * * * *
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> > (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
> >
> > (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

As explained in the legislative history of the Bankruptcy Act of 1978:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of money judgment would give it preferential treatment to the detriment of all other creditors.

House Report No. 95-595, 95th Cong., 2d Sess. at 343, reprinted in 1978 U.S.Code Cong. and Adm.News, 5787, 6299. *See also* Senate Report No. 95-989, 95th Cong., 2d Sess. p. 52, reprinted in 1978 U.S.Code Cong. and Adm.News 5787, 5838. The crucial issue is whether the NLRB is a governmental unit and whether this action is one to enforce police or regulatory powers. It is clear that the NLRB is a governmental unit. This action was undertaken to enforce the federal law regulating the relationship between employer and employee. We can safely conclude therefore that this is an exercise of police of regulatory powers which places it within the § 362(b)(4) exemption to the automatic stay.[2]

We note that our decision today would permit the entry of judgment for injunctive relief and for back pay; however, should it be necessary to enforce the judgment for back pay, a different question would be presented. We express no opinion as to whether an action to execute or enforce a money judgment would be exempt from the automatic stay.[3]

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[2] Our conclusion finds some support, albeit in dicta, in two recent decisions of the Seventh and Ninth Circuits. *In re Bel Air Chateau Hospital, Inc.* 611 F.2d 1248 (9th Cir. 1979), and *In the Matter of Shippers Interstate Service, Inc.*, 618 F.2d 9 (7th Cir. 1980), held that the automatic stay provisions of the old Bankruptcy Act did not operate to stay unfair labor practice proceedings before the NLRB. In *In re Bel Air*, the court stated:

> This result appears harmonious with the new bankruptcy law * * *. Under 11 U.S.C. § 362(a)(1) the filing of a petition will normally operate as a stay of judicial or administrative proceedings. Section 362(b)(4), however, provides that the filing of a petition does not automatically stay an action by a governmental unit to enforce the government's police or regulatory power.

611 F.2d at 1251.

III.

The Board's petition for summary entry of judgment is hereby

GRANTED.

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[3] Similarly, we express no opinion as to whether the bankruptcy court has power under 11 U.S.C.A. § 105(a) (1979) to issue a discretionary stay notwithstanding the exemption of the Board's action from the automatic stay. *See In re King Memorial Hospital, Inc.*, 4 B.R. 704 (Bkrtcy.S.D.Fla.1980); and *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d at 1251.

NLRB v. Schlegel Oklahoma, Inc.

644 F.2d 842 (10th Cir.), March 13, 1981—250 NLRB 20

On petition to enforce Board Order

Before McWILLIAMS, BARRETT, and DOYLE, Circuit Judges

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McWILLIAMS, Circuit Judge: After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R. App.P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

This is a National Labor Relations Board enforcement proceeding. Schlegel Oklaho-

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ma, Inc., an Oklahoma corporation, maintains a place of business in Frederick, Oklahoma, where it is engaged in the manufacture and sale of perimeter sealing and molded rubber products. The present dispute arises out of the efforts of United Steelworkers of America, AFL-CIO-CLC, to organize Schlegel employees at its Frederick plant.

Charles Ingraham was employed by Schlegel at its Frederick plant from June 20, 1979, until August 15, 1979, when his employment was terminated by the company. On August 21, 1979, Ingraham and Mike Wilson, a representative of the union, were distributing handbills to Schlegel employees during a change of shifts. The handbills were notices of a meeting to be held the following day. Ingraham and Wilson were standing at the intersection of a county road and a driveway leading to the west entrance of the company plant.

While they were passing out handbills, Ingraham and Wilson were challenged by the president of the company, Richard Williams. After reading the handbill, Williams first advised Ingraham and Wilson that they were standing on company property. When Wilson disputed that fact, Williams declared that he did not want the two stopping traffic. Wilson denied that they were in anywise impeding traffic. Williams then said that if the two didn't leave, he was going to call the police.

The present complaint is based on a charge, and an amended charge, filed by United Steelworkers, which alleged several violations by the company of Section 8(a)(1) and (3) of the National Labor Relations Act. More specifically, the company was charged with unlawfully discharging Ingraham because of his union activities, and unlawfully interrogating Ingraham, as well as threatening Ingraham with arrest for handbilling on the public thoroughfare in front of the plant entrance.

The Administrative Law Judge, after an extensive evidentiary hearing, dismissed the charges of unlawful termination and interrogation. The Judge also held, however, that the company had violated Section 8(a)(1) of the Act by threatening Ingraham with arrest for passing out handbills on the public thoroughfare in front of one of the plant entrances. The Judge recommended a cease and desist order, and the posting of a notice. The Board affirmed the rulings, findings, and conclusions of the Judge, and adopted the recommended order.

The Board now seeks enforcement of its order. The company resists enforcement on the ground that there is no substantial evidence to support the Board's findings that: (1) the handbilling occurred on public property, and not on company property; and (2) Williams, the company president, had threatened Ingraham with arrest. These objections are without merit, and we conclude that the Board's order should be enforced.

Our study of the record convinces us that there is sufficient evidence to support the Board's finding that the handbilling took place on a public thoroughfare, not on company property. Further, the company's argument that Williams did not threaten Ingraham with arrest is not born out by the record. Both Ingraham and Wilson testified that Williams threatened to call the police if the two did not stop handbilling. Threatening to summon law enforcement authorities for the purpose of inhibiting lawful union activities has long been held violative of Section 8(a)(1) of the Act. *See National Labor Rel. Board v. Revlon Products Corp.,* 144 F.2d 88, 89 (2d Cir. 1944).

Counsel seizes on Ingraham's testimony that Williams stated he was going to call the police and "have us moved." This qualifying statement, *i.e.,* "have us moved," according to counsel, negated the possibility of any threat of arrest. We disagree with this highly semantical argument. The important thing is that, according to both Ingraham and Wilson, Williams stated he was going to call the police. Such statement was made for the obvious purpose of discouraging Ingraham and Wilson from passing out handbills which advised Schlegel employees of the forthcoming union meeting.

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In a proceeding of this type, our only duty is to make certain that the Board's critical findings are supported by substantial evidence. *Universal Camera Corp. v. Labor Board,* 340 U.S. 474, 496–97, 71 S.Ct. 456, 468–469, 95 L.Ed. 456 (1951); *N.L.R.B. v. Pepsi-Cola Bottling Co. of Topeka,* 613 F.2d 267, 270 (10th Cir. 1980); and *Osteopathic Hospital Founders Ass'n v. N.L.R.B.,* 618 F.2d 633 (10th Cir. 1980). We are convinced that in the instant case the Board's findings meet that test.

ORDER ENFORCED.

NLRB v. Actors' Equity Association

644 F.2d 939 (2d Cir.), March 17, 1981—247 NLRB 1193

On petition to enforce Board Order

Before WATERMAN, MANSFIELD and KEARSE, Circuit Judges

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MANSFIELD, Circuit Judge: The National Labor Relations Board (NLRB) and Intervenor, Yul Brynner, petition this court for enforcement of the Board's order dated February 19, 1980, requiring Actors' Equity Association (Equity), a theater actors' union, to cease violating §§ 88(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) and (b)(2) (NLRA), by charging non-uniform dues that unjustifiably discriminate against aliens who belong to the union and are in this country temporarily to perform in stage productions. The order also mandates repayment of all past overcharges from April 6, 1976, to the present. We agree with the NLRB's finding that the assessment of non-uniform dues against aliens without any reasonable basis violates the Act, and find no fault in the Board's choice of remedy. We also agree that intervenor Brynner was an employee subject to the Act's protection rather than a supervisor, and that this suit is not time-barred under § 10(b) of the Act, 29 U.S.C. § 160(b). Accordingly, we grant the Board's petition for enforcement.

Actors' Equity is an employees' association that has entered into collective bargaining agreements on behalf of stage actors with various theater organizations in New York and throughout the United States and Canada. Its bargaining agreements universally contain a "union security clause" providing that the employer will hire only union members to act in its production

Equity has for many years attempted to regulate participation by foreign actors in American theater performances. This regulation has taken several forms. First, since 1964 Equity has participated in an agreement with the United States Department of Labor and the Immigration and Naturalization Service to the effect that the Labor Department would seek Equity's advice on aliens' applications for visas under 8 U.S.C. § 1101(a)(15)(H), which permits resident aliens to obtain jobs in the United States only if they are rendering exceptional or temporary service in jobs which no unemployed Americans are capable of performing. Second, Equity has agreed with New York theater employers' organization—the Council of Stock Theatres (COST), League of Resident Theatres (LORT), and the League of New York Theatres and Producers (Producers)—that members of those organizations (the primary employers of aliens in the

United States) will not hire non-resident aliens without Equity's consent.[1]

Finally, Equity has imposed a separate dues schedule on non-resident aliens. Citizens of the United States and Canada who belong to Actors' Equity, as well as aliens who reside here with the intention of making this country their permanent residence, pay dues according to a sliding scale ranging from $42 per year for an actor earning no more than $2,500 per year to a maximum of $400 for an actor earning more than $30,000 per year. Once a so-called "resident member" makes more than $1,400 per year his dues will never exceed 3% of gross in-

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come, with a $400 per year limit.

Non-resident aliens who are allowed to perform in the United States, on the other hand, must pay 5% of their stage income as dues, with no ceiling. Yul Brynner, the Intervenor, is a Swiss citizen and resident of France who was admitted into the United States to play the King of Siam in *The King and I*, a revival of a play in which he starred some years ago. If he had been a U.S. citizen or resident, his dues to Actors' Equity for the first year of the play's run would have been $400; under the separate schedule for non-resident aliens, he was required to pay $45,000.

Charges were filed with the Board [illegible] October 8, 1976, alleging that the union was violating §§ 8(b)(1)(A) and 8(b)(2) of the Act through employment of its discriminatory dues schedule. Noting that those provisions prohibit discrimination against employees except as provided by § 8(a)(3), which allows unions and employers to enter union security agreements, the charging party relied on the second provison to § 8(a)(3), which states that employees who belong to a union having in effect a union security agreement may be required as a condition of membership only to "tender the periodic dues and the initiation fees *uniformly required* as a condition of acquiring or retaining membership" (Emphasis supplied).

The administrative jaw judge, and later the Board, agreed that the separate dues structure unlawfully discriminated against aliens by violating the union's duty to charge uniform dues or to demonstrate a reasonable justification for the nonuniformity. While it declined to impose a *per se* rule that any discrimination in dues charged to aliens was unacceptable under the Act, it nevertheless found such discrimination presumptively invalid, and declared that absent some justification for the nonuniformity it must be found illegal. It then rejected the justifications claimed by Equity—that the higher dues structure was necessary (1) to limit the number of alien actors in the United States, (2) to prevent reprisals from British Equity, Britain's "friendly adversary" correlative of Actors' Equity, and (3) to counterbalance British Equity's power to exclude as many American actors as it wants simply by telling the British Labor Board whom it wants excluded. Finding no merit in Equity's claim that the suit was time-barred, the Administrative Law Judge ordered Equity to desist from imposing a discriminatory dues schedule and ordered repayment of all amounts collected after April 6, 1976 (six months before the complaint was filed in this case) in excess of what non-resident aliens would have paid if treated like residents or citizens.

DISCUSSION

Equity first contends that the Board has no jurisdiction over the rights of aliens because the NLRA is aimed at protecting American workers only and that non-resident aliens therefore have no cognizable rights under the Act. We disagree. Nothing in the terms or construction of the NLRA limits the meaning of the word "employees" to American citizens or permanent residents. The provisions in question here do not specify "American-citizen" employees as opposed to non-resident aliens. They merely proscribe discriminatory treatment of individuals or groups of employees who belong to unions, without regard to the employees' nationality or residence. For instance, Equity does not deny that Canadian citizens and resident aliens have rights as union members under the NLRA. It would be unthinkable to allow Equity to demand union membership and payment of dues by alien members performing in the United States while denying them rights associated with union membership.[2]

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[1] Equity's agreements with COST and LORT wholly prohibit employment of non-resident aliens without Equity's prior consent. Its agreement with Producers provides that a producer may not apply to the Immigration and Naturalization Service for admission of an alien actor unless Equity and Producers both approve the application, and that differences of opinion between Equity and Producers will be resolved by arbitration.

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Having recognized that aliens possess equal rights as union members, we have no difficulty concluding that the union's two-tiered dues structure discriminates against non-residents by failing to impose uniform dues without some legitimate basis for the discrimination. See *NLRB v. Kaiser Steel Corp.*, 506 F.2d 1057 (9th Cir. 1974); *NLRB v. Electric Auto-Lite Co.*, 92 N.L.R.B. 1073 (1950), *enf'd*, 196 F.2d 500 (6th Cir. 1952). Equity attempts to justify its dues discrimination on three grounds. First, it argues that the 5% dues rate protects employment opportunities for members by limiting alien membership in American productions. Second, it suggests that the rule protects Americans from hostile or retaliatory actions on the part of British Equity, which now reciprocally charges American theater actors 5% dues.[3] Third, and relatedly, it says that the rule (or at least the power to have the rule) provides a needed counterweight to British Equity's influence over alien admissions in England.

We find no merit in these asserted justifications. There is no substantial evidence that the 5% dues assessment, either because of parity between American and foreign pay scales or for some other reason, would inhibit foreign actors from participating in America's comparatively lucrative theater productions. On the contrary, past statements by Equity indicate that the 5% dues rate was adopted primarily as a revenue-producing measure. Moreover, Equity's power to exclude aliens derives from an entirely different source, its agreements with COST, LORT, and Producers. In the face of these agreements, which give Equity effective authority to decide which aliens to admit and which to exclude, the 5% dues rate has no significant exclusionary force.

Similarly, the asserted justification that the higher dues are necessary to protect American actors from retaliatory action on the part of British Equity, which imposes a reciprocal 5% dues rate, lacks rationality. The fairness of discriminatory acts under American labor law does not depend on what is practiced under British labor law. The 5% American dues levy seems more likely to provoke hostility than to eliminate it. Nor has it had much influence upon British Equity's decision-making, since it has been in existence for about 50 years and British Equity's retaliatory 5% dues rate has existed almost that long.[4] Finally, on a narrower level, concerns about British Equity could hardly be relevant as a justification for charging higher dues to Brynner, who is a Swiss citizen and French resident and has never been either a citizen or a resident of Great Britain.

Equity next protests that this action is time-barred under § 10(b) of the Act,[5] since the present policy of charging differential dues is traceable to events that took place many years ago, long before commencement of the six-month period prior to the filing of charges against Equity with the Board, citing *NLRB v. Auto Warehousers, Inc.*, 571 F.2d 860 (5th Cir. 1978). According to its reading of § 10(b) and *Auto Warehousers*, no action may be brought to protest an unfair labor practice more than six months after the first time the unfair labor practice took place, regardless of how many times the practice has been repeated or what present re-

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[2] Although non-resident aliens who belong to Equity are also not allowed to vote or become union officials, the Board has made no effort here to attack these restrictions as violative of the union's duty of fair representation. Whether a union may impose such restrictions on employee rights remains a matter of dispute. Compare *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963), and *NLRB v. Local 485, IUE*, 454 F.2d 17, 21 n.6 (2d Cir. 1972), with *Vaca v. Sipes*, 386 U.S. 171, 177–78, 182, 87 S.Ct. 903, 909–910, 912, 17 L.Ed.2d 842 (1967, and Local 12, *Rubber Workers v. NLRB*, 368 F.2d 12, 17 (5th Cir. 1966), *cert. denied*, 389 U.S. 837, 88 S.Ct. 53, 19 L.Ed.2d 99 (1967). Instead, the Board limits its attack to Equity's alleged discriminatory failure to impose the uniform dues specifically required by the second proviso to § 8(a)(3). Nor does our opinion bear on the union's power to limit the number of aliens who perform on American stages by impeding their entry into the United States or into the union.

[3] Though British Equity serves both theatrical and film actors. unlike American Equity it does not impose differential dues on American movie actors, just as no American union imposes higher dues on British film actors.

[4] Equity places much emphasis on the statement by British Equity's General Secretary that British Equity would not necessarily feel bound to eliminate its 5% dues rate if the Board's enforcement petition is granted. Even assuming that British Equity would impose a non-reciprocal dues assessment on Americans after this case, this argument merely proves that British Equity acts independently of American Equity, shedding doubt on Equity's protest that its dues rates somehow affect British Equity's rates.

[5] Section 10(b), 29 U.S.C. § 160(b), provides in relevant part as follows:

> "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

percussions the past practice causes. We firmly rejected such a reading of § 10(b) in *NLRB v. Local 443, International Bhd. of Teamsters*, 600 F.2d 411 (2d Cir. 1979), stating:

> "To the extent that * * * *Auto Warehousers, Inc.* * * * may be read to suggest that the maintenance of a super-seniority provision unsupported by a present adequate business justificatioin does not constitute a violation of the Act, we decline to follow the reasoning of that case." *Id.* at 413 n.4.

Here the discriminatory non-uniformity in dues charges is unsupported by any presently existing adequate business justification. Indeed, the need to look into the past arises only when Equity attempts to gloss its present practices with a historical justification. Equity's reading of § 10(b) would mean that no union member could challenge the validity of an existing disparate dues schedule where the practice had existed for more than six months prior to the filing of charges. We decline to adopt such a preclusive rule.

The union's remaining claims are equally meritless. Equity claimed before the Board that Brynner has no rights under the Act because he was a supervisor and not an employee according to the reasoning of *NLRB v. Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856 (1980), after abandoning this argument before the administrative law judge. Apart from Equity's waiver of the right to make this argument here by abandoning it below, there is nothing in Brynner's contract with The King of Siam Company that gives him the authority or the trappings of a supervisor rather than an employee.

We also find no impropriety in the remedy imposed by the Board. Though the members of the class of aliens entitled to recover under the Board's order have not all been named, the class has been fully defined as those non-resident alien employees who paid more in dues than they would have paid as residents or citizens from April 6, 1976, to the present. No more is required for the Board to order classwide relief where, as here, at least one non-resident member of Equity incontestably paid higher dues than a citizen would have paid after April 6, 1976. Nor do we find the relief ordered punitive, as claimed by Equity, which relied on *Local 60, United Carpenters v. NLRB, supra.* This order does not require the repayment of all union dues paid under the invalid rule, as the Board's order in that case did. Rather, the wronged employees are being allowed to recover only the difference between what they paid and what they would have paid as American citizens. This reimbursement is clearly remedial and not punitive.

ORDER ENFORCED.

NLRB v. Naum Brothers, Inc.

637 F.2d 589 (6th Cir.), March 17, 1981—240 NLRB 311

On petition to enforce Board Order

Before WEICK, ENGEL and BOYCE F. MARTIN, JR., Circuit Judges

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PER CURIAM: This case is before the Court on the application of the National Labor Relations Board for enforcement of its order.

Naum Brothers is a New York corporation which operates a chain of retail department stores in New York and Michigan. Its Drayton Plains, Michigan facility is the only store involved in this case. After Naum Brothers' acquisition of the store in 1976 the Union [1] began its efforts to organize the store's employees. A petition was filed with the Board and an election was held in which the Union did not receive a majority. The Union subsequently filed objections to the conduct of the election and an unfair labor practice charge, alleging various acts of coercion and interference with employee's protected rights in violation of § 8(a)(1) of the National Labor

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Relations Act. Just prior to the election the Union had filed another unfair labor practice charge, alleging that the Company discriminatorily discharged employee Dean A. Martin in violation of § 8(a)(3) and (1) of the Act.

The Board adopted, with certain modifications, the findings and conclusions of the Administrative Law Judge. It found that the Company violated § 8(a)(1) of the Act by: promulgating and maintaining an overly broad and unlawful prohibition against solicitation on behalf of the Union; interrogating employees about their union activities and desires; creating the impression that its employees' union activities were being kept under surveillance; soliciting employees' complaints and grievances and expressly or impliedly promising to provide remedies; indicating to employees that unionization would be futile and might lead to closure of the store; and promising and granting improved employee benefits and wage increases to discourage adherence to the Union. The Board further found that the Company violated § 8(a)(3) and (1) of the Act by discharging and refusing to reinstate employee Dean Martin in order to discourage union activities.

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[1] Retail and Department Store Employees, Amalgamated Clothing and Textile Workers Union, AFL–CIO.

The Board's order requires the Company to cease and desist from committing unfair labor practices and to take the customary affirmative action. It also orders the Company to bargain with the Union, upon request, as the exclusive representative of all the employees in the bargaining unit.

The Company's first contention on appeal is that it did not violate § 8(a)(1) by prohibiting solicitation on behalf of the Union. We hold that the Board's finding on this issue is supported by substantial evidence. The record shows that the signs prohibiting solicitation were posted after the filing of the petition and removed after the election. It is uncontested that on at least one occasion the prohibition was repeated by a supervisor in the presence of an employee. Although the Company argues that everyone understood that the no-solicitation rule was aimed only at non-employee solicitation, there is no evidence which suggests such a limitation on the applicability of the rule. *See Essex International, Inc.*, 211 N.L.R.B. 749 (1974).

The Company next contends that there is no substantial evidence supporting the finding that its company-wide increase in wages and certain other benefits violated § 8(a)(1). There is testimony in the record (of Susan Adkins, Margaret Bentley, and Richard Cassidy) relating to two meetings of employees and their supervisors which supports the Board's findings that the Company unlawfully solicited employee grievances and expressly or impliedly promised to provide remedies. *See Landis Tool Co., Division of Litton Industries v. N.L.R.B.*, 460 F.2d 23 (3rd Cir.), *cert. denied*, 409 U.S. 915, 93 S.Ct. 237, 34 L.Ed.2d 177 (1972). We also hold that the timing and manner of the wage increases and benefit improvements supports the conclusion that they were instituted by the Company to discourage union activity. *See N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964).

As for the discharge of employee Dean Martin, we find the conclusion of the Board that the Company violated § 8(a)(3) and (1) to be supported by substantial evidence. There is ample evidence in the record supporting the inferences drawn by the ALJ and her credibility determinations. That contrary inferences and credibility determinations may also be supported by the record, as the union Company argues, is not relevant on appeal. Our function is not to make a *de novo* review of the evidence. The decision of the ALJ recites substantial factual support for the Board's conclusion of unlawful discharge. We therefore must uphold that conclusion.

The Company argues that the additional § 8(a)(1) violations are not supported by substantial evidence on the record as a whole. We find that the comments and question of Zipf, Tabb, and Charles Martin to employees provide the requisite support for the Board's finding of unlawful interrogation. We further agree with the ALJ's conclusion that Charles Martin was a supervisor and agent of respondent. *Cf.* Jay's *Foods, Inc. v. N.L.R.B.*, 573 F.2d 438, 444–5 (7th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978). We also note that the fact that Charles Martin's conversation with Olsen may have been "friendly" does not preclude the Board's conclusion. *Cf. Seligman and Associates, Inc. v. N.L.R.B.*, 639 F.2d 307 (6th Cir. 1981).

Similarly, we hold that there is substantial evidence of record, which is cited by the ALJ in her decision, supporting the Board's findings that the Company (a) created the impression that the employee's union activities were being kept under surveillance, and (b) indicating to employees that unionization would be futile and might lead to closure of the Drayton Plains store.

The Company's final contention is that the Board's decision to issue a bargaining order is not support by substantial evidence. The Company argues that neither the ALJ nor the Board engaged in the analysis required by *N.L.R.B v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), before deciding that a bargaining order, rather than a second election, was the appropriate remedy. It contends that the unfair labor practices found by the Board were not egregious, pervasive, or of sufficient lasting effect to warrant a bargaining order.

This Court has refused to enforce bargaining orders in cases where the unfair labor practices would not, in our opinion, prevent a fair election. *N.L.R.B. v. East Side Shopper, Inc.*, 498 F.2d 1334 (6th Cir. 1974). We have also endorsed the view that enforcement will be denied when the reasoning of the Board in ordering bargaining is "a litany, reciting conclusions by rote without factual explication." N.L.R.B. v. Essex Wire Corporation, 496 F.2d 862 (6th Cir. 1972), quoting from *N.L.R.B. v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir.) *cert. denied*, 400 U.S. 957, 91 S.Ct. 356, 27 L.Ed.2d 266 (1970)).

In the portion of her decision subtitled "The Remedy," the ALJ set forth her reasons for recommending a bargaining order: (1) The promise and grant of substantial wage increases and improved benefits given to virtually all of the members of the bargaining unit render it unlikely that a free election could be held; (2) the general and individual communications with employees regarding the possible closure of the store in the event of unionization are among the most flagrant means of interfering with the exercise of employees' § 7 rights; and (3) the discriminatory discharge of Dean A. Martin during the election campaign poses a warning to the employees of the potential high cost of supporting the Union. This is the kind of analysis which the *Gissel* case mandates. Since the Board adopted the ALJ's reasoning, its decision to require the Company to bargain was properly supported and within its power to order the appropriate remedy. *Cf N.L.R.B. v. Delight Bakery, Inc.*, 353 F.2d 344 (6th Cir. 1965). Accordingly, the order of the Board is to be enforced.

NLRB v. Jaggars-Chiles-Stovall, Inc.

639 F.2d 1344 (5th Cir.), March 19, 1981—249 NLRB 697

On petition to enforce Board Order

Before POLITZ, TATE and SAM D. JOHNSON, Circuit Judges

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TATE, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order against Jaggars-Chiles-Stovall, Inc., a Dallas printing firm. The Board found that J-C-S, the employer, had committed an unfair labor practice in violation of section 8(a)(1) and (5)[1] of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5), in failing to provide the Union with certain requested wage data concerning (1) non-union unit members and (2) supervisory workers performing bargaining unit work. J-C-S refuses to furnish

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this information because (1) certain non-union unit members requested it remain confidential and (2) there is insubstantial evidence to establish the relevancy to the union of the wage data of the supervisory workers. Because we find the employer's refusal to furnish the requested wage data to be unwarranted, we grant the enforcement of the order of the NLRB.

Context Facts

In 1978, Dallas Typographical Union No. 173 [hereinafter referred to as the Union] and Jaggars-Chiles-Stovall, Inc., [J-C-S] signed a collective bargaining agreement to cover the period of February 21, 1977, to June 30, 1981. (General Counsel Exhibit 2). In this agreement, J-C-S recognized the Union as the exclusive bargaining representative of all employees covered by this agreement, i.e., the Union was to represent the collective bargaining unit.[2]

In February 1979, the Union representative at J-C-S, "Chapel Chairman" Bates,[3] requested Bob Stovall, president of J-C-S, to furnish monthly earnings figures for the month of January for all unit employees (whether union members or not), as well as for various supervisory employees. The Union sought this data in order to adequately monitor the agreement between the Union and J-C-S: specifically, the Union contended that (1) it needed the earnings data for all unit workers because it was the Union's responsibility to protect the contract's work and pay standards for all unit employees, whether union members or not, and (2) the wage data on certain supervisory personnel was needed because it was alleged that they were performing unit work perhaps in violation of the agreement.

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[1] Section 8(a)(1) and (5), 29 U.S.C. § 158(a)(1)(5), provide:

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

[2] Article II, Section 1 of the agreement defined the bargaining unit:

Jurisdiction of the Union begins with the mark-up of copy and continues on through the printing press (but excluding the making of mats, stereotypes, plastic plates, photoengraving and finishing operations beyond the printing press run.) The appropriate bargaining unit consists of all employees performing such work.

[3] A chapel chairman is the equivalent of a shop steward.

J-C-S refused to furnish this information to the Union, and the Union subsequently filed a charge with the National Labor Relations Board, which filed a complaint alleging J-C-S violated section 8(a)(5) and (1) of the National Labor Relations Act.

A hearing was held before an administrative law judge. The ALJ determined that the information sought by the Union was indeed relevant for the Union to properly monitor the agreement. Furthermore, the ALJ concluded that the wage data was not confidential information, even if the non-Union unit employees had requested it to remain so. As a result, J-C-S was ordered to furnish the wage data sought by the Union. This recommended order of the ALJ was adopted by the NLRB, 249 NLRB No. 108, which now applies to this court for the enforcement of its order.

J-C-S opposes its enforcement for the following two contended reasons:

(1) Certain non-union unit employees specifically requested that their wage data remain confidential, and

(2) There is insubstantial record evidence to establish the relevance of wage data for supervisory personnel.

We disagree with both of these contentions.

Confidentiality

We first note that J-C-S does not challenge the *relevancy* of the wage data for non-union *unit* employees. *See generally N.L.R.B. v. Brazos Electric Power Cooperative, Inc.*, 615 F.2d 1100 (5th Cir. 1980); *San Diego Newspaper Guild, Etc. v. N.L.R.B.*, 548 F.2d 863 (9th Cir. 1977); *N.L.R.B v. Rockwell-Standard Corp.*, 410 F.2d 953 (6th Cir. 1969). However, J-C-S contends that, in situations where non-union unit members specifically request that their wage data remain confidential, employers are under no obligation to disclose this information, relevant or not, to the union.

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This circuit has already addressed the issue of confidentiality of wage data. In *National Labor Relations Board v. Item Company*, 220 F.2d 956 (5th Cir. 1955), this court held that an employer had no confidentiality privilege[4] to withhold from the union relevant wage data, "which the union's own employee-members apparently refused to disclose to it." *Id.* at 959.

J-C-S maintains that *Item* is inapplicable to the instant factual circumstances because, there, no employee had asked the employer to withhold any information. We do not find this distinction to be persuasive.

The union representing a collective bargaining unit has the responsibility to represent both union and non-union members of that unit. *Abilene Sheet Metal, Inc. v. N.L.R.B.*, 619 F.2d 332 (5th Cir. 1980), *In re Carter*, 618 F.2d 1093 (5th Cir. 1980). This duty toward both union and non-union employees of the unit extends not only to the negotiations for an agreement, but also to the enforcement of the provisions of the agreement. *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979). A non-union segment of the bargaining unit, if its claim of confidentiality were recognized, could frustrate the union's attempt to fulfill its obligation to enforce the provisions of a collective bargaining contract intended to benefit both union and non-union employees. As stated in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 912, 17 L.Ed.2d 1842 (1967), "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interest of an individual employee to the collective interests of all employees in a bargaining unit."

Respondent J-C-S, in contending that the Union's right to information is not unlimited, cites *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979). There, the court held that an employer could refuse to provide a union the results (linked with names) of aptitude tests taken by unit employees.[5] *Detroit Edison Co.* is, however, inapposite to the case before us. Wage data, concerning each employee, here involved, is not akin to the sensitive individualized test-result information, as to which a defense of confidentiality was recognized in *Detroit Edison Co.;* nor did that decision cast doubt upon the previously-cited consistent jurisprudence rejecting any claim of confidentiality, where relevant wage data was sought by the bargaining unit's representative.

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[4] Other circuits likewise treat the wage data of unit employees to be non-confidential. See, e.g., *NLRB v. Frontier Homes Corporation*, 371 F.2d 974 (8th Cir. 1967); *Utica Observer-Dispatch, Inc. v. N.L.R.B.*, 229 F.2d 575 (2d Cir. 1956); *Boston Herald-Traveler Corporation v. N.L.R.B.*, 223 F.2d 58 (1st Cir. 1955).

Supervisory Workers

J-C-S correctly argues that wage data on employees outside the bargaining unit must meet a standard of relevance. *Rockwell-Standard Corp., supra,* 410 F.2d at 957. However, as this court has already noted, "[t]he Board's determination of the relevance of the information sought in a particular case must be given great weight by the court, if only because it is a finding of law and fact" within the expertise of the NLRB. *NLRB v. Brazos Elec. Power Coop., Inc.,* 615 F.2d 1100, 1101 (5th Cir. 1980).

The Union sought the wage data on certain foremen and assistant foremen who occasionally performed unit work. The Union needed this information primarily to ensure that article II, section 6 of the agreement was not violated. This section read in pertinent part:

> Foremen may perform production work to expedite the production schedule, but will not perform such work to reduce overtime or to maintain a smaller work force than otherwise would be required. Assistant foremen doing journeymen's work shall be classified as hourly employees and shall be subject to all regulations applying to journeymen.

The Union argues that the earnings data for assistant foremen is necessary to verify the employer's records concerning the amount of overtime unit work performed by them.[6] Furthermore, although Chapel Chairman Bates admitted on cross-examination (Trial p. 64–68) that the amount of overtime hours worked by a foreman would be sufficient (because the foreman worked on a straight salary and received no overtime compensation), the earnings data is relevant as permitting verification that foremen were not being paid for additional hours for performing unit work, perhaps in violation of the agreement between the Union and J-C-S.

Thus, the ALJ and the NLRB properly held that the requested wage data on the foremen and assistant foremen who performed unit work is relevant information for the union's monitoring of the employer's performance of its obligations under the collective bargain contract with regard to the bargaining unit's work and pay standards. In addition to cases previously cited, see also: *Curtiss-Wright Corp., Wright Aero. Div. v. N.L.R.B.,* 347 F.2d 61, 64 (3rd Cir. 1965); *Hollywood Brands, Inc. and United Bakery & Confectionery Workers Local 441-B, 142 N.L.R.B. 304, enforced. Hollywood Brands v. N.L.R.B.,* 324 F.2d 956 (5th Cir. 1963), *rehearing denied,* 326 F.2d 400, *cert. denied,* 377 U.S. 923, 84 S.Ct. 1221, 12 L.Ed.2d 215 (1964).

Conclusion

Under these circumstances, J-C-S was properly found to have committed an unfair labor practice in refusing to furnish the Union with relevant wage data it requested. The Board order will be ENFORCED.

ENFORCED.

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[5] "The sensitivity of any human being to disclosures of information that may be taken to bear on his or her basic competence is sufficiently well known * * *." *Detroit Edison Co., supra,* 99 S.Ct. 1133.

[6] Bates testified:

> Assistant foremen are paid a percentage above journeymen wages. If he works overtime he's paid overtime on the basis of his pay, not journeyman scale, therefore, he would draw overtime on a—time and a half of his regular hourly wages. To know that he was being paid properly it would be necessary to know the amount. To know that the overtime was being distributed equitably we would need to know the number of hours. To compile as to whether the overtime pay and hours did correspond we would need to know them both.

Trial p. 69.

United States Steel Corporation, Inland Steel Company, Bethlehem Steel Corporation v. NLRB

644 F.2d 286 (3d Cir.), March 19, 1981—252 NLRB 1273

On petition to review Board Order

BEFORE HUNTER and GARTH, Circuit Judges, and

SAROKIN,* District Judge

JAMES HUNTER, III, Circuit Judge: Petitioners United States Steel Corporation, Inland Steel Company, and Bethlehem Steel Corporation ("the steel companies") ask us to set aside an order and decision of the National Labor Relations Board ("the Board") requiring petitioners to bargain collectively with intervenor United Steel Workers of America ("the Union") with respect to wages and working conditions at a summer licensing school established by petitioners, intervenor District 2 Marine Engineers Beneficial Association-Associated Maritime Officers. AFL–CIO ("MEBA"), and intervenor District 2 Marine Engineers Beneficial Association-Associated Maritime Officers, AFL–CIO, Safety and Education Plan ("the Plan") to prepare unlicensed seamen for Coast Guard licensing examinations. The Board has filed a cross-application for enforcement of its order.[1] Because we find that the Board's order is not supported by substantial evidence, the petition for review to set aside the decision and order of the Board will be granted, and the Board's cross-application for enforcement will be denied.

I.

The steel companies operate fleets of vessels that carry iron ore from the northern Great Lakes ports to the steelmaking centers in the south. Crews on those vessels are classified as either licensed or unlicensed personnel. Licensed personnel include captains, mates, engineers, and stewards; unlicensed personnel include watchmen, deck hands, oilers, firemen, firemen-maintenance and wipers. Unlicensed personnel on petitioners' iron-ore vessels are represented by Local 500 of the Union. Licensed personnel are either unrepresented or represented by MEBA or the Masters, Mates & Pilots.

To supply petitioners and other employers with sufficient numbers of licensed personnel, MEBA and the Plan have annually operated winter schools in Toledo, Ohio to prepare employees to take Coast Guard licensing examination. Because of a shortage of licensed personnel, MEBA and the Plan had previously conducted summer licensing schools in 1973 and 1974.[2]

By 1978, there was once again a shortage of licensed personnel to operate the Great Lakes vessels. On June 22, 1978, the Joint Training Advisory Committee[3] ordered the establishment of a special summer school to commence on July 31, 1978 for a period of ten to thirteen weeks. Petitioners selected ten unlicensed employees (five from United States Steel, two from Inland, and three from Bethlehem) to attend the school.

There was no provision in the collective bargaining agreement between the Union and the steel companies regarding a special licensing school. Petitioners chose seamen for the school on the basis of recommendations from supervisors. Employees who attended the school were paid sixty percent of their regular wages; the steel companies retained forty percent, its payment contingent upon an employee's return for at least thrity days. Petitioners provided travel and subsistence expenses for employees enrolling in the school. Payment was made twice monthly, rather than once per month as when the employees were sailing. The time spent at the school accrued towards vacation and year end bonuses provided for in the collective bargaining agreement. Petitioners suspended their normal practice of either checking off, or issuing separate checks for, union dues of unlicensed personnel attending the summer school. After successful completion of the course and licensing examination, employees were not obligated to return to their former employers.

On July 19, 1978, the Union filed unfair labor practice charges against the steel companies for refusing to bargain over wages, hours and other conditions of employment for employees attending the summer school. A hearing was held before an administrative law judge ("ALJ") who, in a decision and order issued on September 28, 1979, dismissed the Union's complaint because: 1) employees attending the summer school had no community of interest with unlicensed personnel on petitioners' ships; 2) the summer school students fell outside of the certified bargaining unit; 3) the employees at the summer school were supervisory or managerial trainees, and hence outside of the bargaining unit; and 4) the terms and conditions of employment at the summer school did not vitally affect bargaining unit employees.

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*Honorable H. Lee Sarokin, of the United States District Court for the District of New Jersey, sitting by designation.

[1] Jurisdiction lies to enforce or review the Board's order under sections 10(e) and 10(f) of the National Labor Relations Act, 29 U.S.C. §§ 160(e) & (f) (1976).

[2] Petitioners' obligation to bargain over wages and other terms and conditions of employment in the 1973 and 1974 summer schools is not at issue in the instant case.

[3] The 1968 collective bargaining agreements between the steel companies and MEBA provided for the establishment of a Joint Training Advisory Committee charged with the responsibility for the study and development of training for licensed personnel. The Committee consists of representatives from MEBA and various industry employers (including petitioners), but not the United Steelworkers of America.

In a decision and order of March 31, 1980,[4] the Board reversed the decision of the ALJ. The Board found

> [T]he students here involved did not cease to be employees of Respondents [below] during their summer training but remained members of the units of unlicensed personnel employed by these Respondents. Accordingly, we find that the terms and conditions under which they attended the summer training school were mandatory subjects of bargaining and that Respondents' unilateral actions with respect to such terms and working conditions constituted violations of Section 8(a)(5) and (1) of the Act.

248 N.L.R.B. No. 90 at 6, *reprinted in* Appendix for Petitioners at 465a.

The Board ordered the steel companies to bargain collectively with respect to wages and working conditions of the summer school.

II.

We must accept the Board's findings of violations of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act") 29 U.S.C. §§ 158(a)(1) & (5) (1976), if they are supported by substantial evidence on the record as a whole, even if we would have resolved the issue differently in first instance. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71. S.Ct. 456, 95 L.Ed. 456 (1951). We have examined the record in the case, but are unable to find substan-

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tial evidence to support the Board's finding that the students of the special summer school remained members of the units of unlicensed personnel employed by petitioners. Because we agree with the ALJ that there is no community of interest between the students attending the summer school and the shipbound employees, we decline to enforce the decision and order of the Board.

In our view, the students attending the licensing school were supervisory trainees[5] who lacked a community of interest with the unlicensed personnel remaining on petitioners' vessels. Our community of interest analysis is derived from a long line of decisions of the Board concerning the bargining unit status of supervisory and management trainees. In *WTOP, Inc.,* 115 N.L.R.B. 758 (1956), the Board delineated the factors to be considered in evaluating the interest of supervisory trainees:

> [P]lanned supervisory training program for a definite period of time, selectiveness exercised by the Employer in the acceptance of applicants for this program and the fact that trainees do not continue with the Employer after completion of the training program unless retained as a supervisor.

115 N.L.R.B. at 759.

In *Cherokee Textile Mills, Inc.,* 117 N.L.R.B. 350 (1957), supervisory trainees were found to be excluded from the bargaining unit because of their background and "expectation of supervisory status." In *Diana Shop of Spokane, Inc. and Hughes Apparel, Inc.,* 118 N.L.R.B. 743 (1957), management trainees were excluded from a unit because of their supervisory training and the temporary nature of their employment. The Board in *Montgomery Ward & Co., Incorporated,* 131 N.L.R.B. 1436 (1961), held that management trainees have interests more closely allied with management than with rank-and-file employees. It also found management trainees to be excluded from a bargaining unit of banking employees in *Banco Credito y Aharro Ponceno,* 160 N.L.R.B. 1504 (1966), because they engaged in a formal training program of definite duration. Finally, in *Curtis Industries, Division of Curtis Noll Corporation*, 218 N.L.R.B. 1447 (1975), management trainees were once again found to be excluded from the protection of the National Labor Relations Act.[6]

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[4] *United States Steel Corporation,* 248 N.L.R.B. No. 90 (March 31, 1980), *reprinted in* Appendix for Petitioners at 460a–472a.

[5] The students attended the school to obtain an original engineer's license or an original first class pilot's license which would enable them to become third assistant engineers or third mates. A number of courts have held that these officers are supervisors for the purposes of the Act. *Newport Tankers Corp. v. NLRB,* 575 F.2d 477 (4th Cir.), *cert. denied,* 439 U.S. 928, 99 S.Ct. 313, 58 L.Ed.2d 321 (1978); *International Org. of Masters, Mates and Pilots v. NLRB,* 539 F.2d 554 (5th Cir. 1976), *cert. denied,* 434 U.S. 828, 98 S.Ct. 106, 54 L.Ed.2d 86 (1977); *International Org. of Masters, Mates and Pilots v. NLRB,* 486 F.2d 1271 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 306 (1974).

The community of interest analysis developed in these cases was synthesized by the administrative law judge in *Curtis Noll* who concluded:

> From the above cases it appears that the factors which must be applied in the instant case are fourfold. First, selectivity in hiring based on the management trainee's possession of relevant education or experience; second, a specificity of future employment prospects, that is to say, the management trainees must be shown to have no alternatives other than to go into management ultimately or to leave the employ of the employer. If it appears that they would not be kept on as employees if they failed to qualify in the managerial jobs to which they are assigned, the factor is met. Third, there must be a planned management trainee program. It may be noted that the duration of such program does not appear to be much of a factor; the decisions range from several weeks to several years. Finally, the cases reveal that a considerable factor is a showing of a distinction of wages and working conditions between
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> the management trainees and the employees beside whom they worked.

218 N.L.R.B. at 1452.

Applying these four factors to the instant case, it becomes apparent that the students at the summer licensing school lacked a community of interest with the unlicensed seamen who would later be under their command. With respect to the first factor, selectivity, petitioners unilaterally selected employees for the licensing school on the basis of experience, past record and recommendations by supervisors.[7] Moving to the third factor, a planned training program, it is undisputed that the summer school was a formal ten-to-thirteen week course developed solely to prepare unlicensed seamen for the Coast Guard examinations. As to the fourth factor—the distinction between trainees' and other employees' wages and working conditions--students were physically separated from the unlicensed seamen and performed no bargaining unit work whatsoever. Students were paid only sixty percent of their normal wages and were paid on a different shorebased payroll.[8] Union dues were not checked off or collected from students as from unlicensed personnel. Moreover, and most significantly, students attended the school for the purpose of becoming licensed officers, that is, non-bargaining unit employees.

Despite this disparity between the interests of the students attending the summer school and the unlicensed seamen, the Board concluded that the absence of an "up-or-out" requirement, the second factor in the *Curtis Noll* analysis, allied the students' interests with those of bargaining unit employees. The Board distinguished the result in *Curtis Noll* and *WTOP* from the instant case on the ground that managerial and supervisory trainees in those cases had "no alternative other than to advance into management positions or to leave the employ of the employer,"[9] whereas unsuccessful applicants for licensed positions were free to return to their previous unlicensed positions.

We reject the Board's attempt to make one factor of the *Curtis Noll* analysis determinative of bargaining unit status. The ALJ's opinion [10] in that case clearly stated that all four factors discussed above were to be analyzed in evaluating the interests of managerial and supervisory trainees. The Board's novel interpretation of *Curtis Noll* [11] is not

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[6] The Supreme Court has made it clear that all managerial employees are excluded from the protection of the Act. *NLRB v. Bell Aerospace Co., 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1973).*

[7] General Counsel's Exhibit No. 11, an internal United States Steel memorandum to masters and chief engineers concerning the establishment of the summer school, noted that "[s]election will be based on the individual's past record, the current recommendations, and the number of students we will be able to send." Chief engineers were requested to submit a list of unlicensed crew members expressing an interest in the school, and also to submit "the names of any individuals not expressing an interest in the program, but who the Chief feels would be a qualified engineer."

[8] Attendance at the school was included in the calculations of vacations and year-end bonuses and insurance benefits were retained.

[9] *United States Steel Corporation*, 248 N.L.R.B. No. 90 at 4 n.4, *reprinted in* Appendix for petitioners at 463a.

[10] The Board's decision in *Curtis Noll* affirmed the rulings, findings, and conclusions of the ALJ, and adopted his recommended order. 218 N.L.R.B. at 1447.

[11] The Board read *Curtis Noll* as devising a new test to evaluate the status of managerial trainees dependent solely upon the "up-or-out" requirement. As we have indicated, we believe that *Curtis Noll* is consistent with, not a departure from, the community of interest analysis developed by the Board in a long line of cases. We concur in the fifth circuit's opin-

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a substitute for a reasoned community of interest analysis.

Therefore, we believe that the Board's finding that there was a sufficient community of interest between the unlicensed seamen and the students at the summer licensing school to retain the latter within the bargaining unit is not supported by substantial evidence on the record as a

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whole, and that there was no violation of sections 8(a)(1) and 8(a)(5) of the Act.

Accordingly, we decline to enforce the Board's order and we grant the petition to review and set aside the decision and order.[12]

GARTH, Circuit Judge, concurring, with whom **SAROKIN**, District Judge, joins: I am in complete agreement with the majority's conclusion that the students attending the licensing school were supervisory trainees lacking a community of interest with the unlicensed personnel remaining on the vessels. Thus, I join in the result reached by the majority. I write separately, however, to emphasize that in my opinion the central inquiry in this matter is whether the students attending the summer school remained members of the bargaining unit. My reading of the record satisfies me that the Board improperly included them in the bargaining unit.

The record discloses that the expectations of both the steel companies and those employees selected to attend the school were such that the students involved would graduate to licensed positions. Assuming these expectations were fulfilled, the students would no longer be represented by United Steel Workers. As the majority points out those students who attended the school were paid sixty percent of their regular wages, with the remaining forty percent contingent upon their return to their *former* employers, in either a licensed or unlicensed capacity, for at least thirty days. Thus, although the students had no obligation to return to their former employers, and their former employers, in turn, did not have preferential hiring rights, the employers, in establishing this payment schedule, were clearly offering the forty percent payment as an incentive to both successful and unsuccessful students to return to their former companies.

Viewed in this light, the evidence is compelling that the steel companies at no time intended to maintain the students' status as bargaining unit employees. Given the companies' objective of encouraging qualified employees to participate in the licensing program, the adoption of incentives as well as provisions to insure that unsuccessful students would not be a in worse position than they were before entering the program, is perfectly understandable.

An examination of the language used by the Regional Director in certifying the Steel Workers as the exclusive bargaining representative of the employees of the steel companies and the language found in the relevant collective bargaining agreements, reveals unequivocally that the students were outside the bargaining unit. Both the terms of the Board certification and the terms of the parties' agreements emphasize the physical presence of the employees on the vessel. Neither contemplates the inclusion in the bargaining unit of individuals who are not *on board or employed* on the vessels operated by their employers:

	NLRB Certification Language	Contractual Definition of Bargaining Unit
USS	"All unlicensed seamen *on board the employer's vessels* * * *" (App. 8; 13)	"All unlicensed personnel * * * *employed on the fleet* of Great Lakes vessels." (App. 9; 13).
Bethlehem	"All unlicensed personnel *on board* the vessels, presently operated by the employer * * *" (App. 9; 13)	"All unlicensed personnel * * * *employed on all* of the bulk freight vessels operated by * * *" (App. 10; 13).
Inland	"All unlicensed personnel *on board* all vessels owned and/or operated by employer Inland * * *" (App. 8–9; 13)	"All unlicensed personnel * * * *employed on all* bulk freight vessels * * *" (App. 10, 13).

Thus, the students who spent no time on board were clearly never intended to be members of the bargaining unit.

Moreover, the evidence in this record discloses that any student who successfully completed the

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on that [t]he factors for establishing when participation in a 'managerial rainee program' will amount to managerial status did not originate in *Curtis Noll*, but as the decision itself shows, derive from a series of cases ecided by the Board many years earlier." *NLRB v. Kent Corp.*, 564 F.2d 86, 188 (5th Cir. 1977) (footnote omitted).

[12] Judge Sarokin joins in this opinion in all respects and also joins in e concurring opinion of Judge Garth.

program not only would become a member of a new and perhaps com-

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peting union, but also would assume supervision over Local 5000, United Steel Worker members. The Supreme Court, writing in a similar context, noted that severe internal conflicts might ensue if competing interests were represented in the same unit:

> Here, even if, as the Board found, active and retired employees have a common concern in assuring that the latter's benefits remain adequate, they plainly do not share a community of interests broad enough to justify inclusion of the retirees in the bargaining unit. Pensioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment. Incorporation of such a limited-purpose constituency in the bargaining unit would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.

(footnote omitted). *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172, 92 S.Ct. 383, 394, 30 L.Ed.2d 341 (1971). The potential for conflict which could "impair the unit's ability to function and * * * disrupt the processes of collective bargaining is obvious under the instant circumstances. Taking into account these tensions, together with the lack of community interest discussed in the majority opinion, I conclude that the students were improperly included in the bargaining unit.

I therefore concur in the majority's decision to grant the companies' petition for review and set aside the Board's decision and order.

Anchor Inns, Inc., d/b/a Anchor Inn Hotel of St. Croix v. NLRB

644 F.2d 292 (3d Cir.), March 20, 1981—250 NLRB 767

On petition to review Board Order

Before Seitz, Chief Judge, Gibbons and Rosenn, Circuit Judges

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Rosenn, Circuit Judge: On July 18, 1980, the National Labor Relations Board ("NLRB" or "Board") entered an order finding Anchor Inns, Inc. ("Company" or "Employer") to have violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) & (5) (1976), by refusing to bargain with the Gastronomical Workers Union of Puerto Rico, Local 610, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO ("Union"). The Board ordered the Company to cease and desist in its violations, to post appropriate notices, and to recognize and bargain with the Union upon request. Anchor Inns filed this petition for review under 29 U.S.C. § 160(f) (1976); the Board cross-applied for enforcement pursuant to 29 U.S.C. § 160(e) (1976).

Although Anchor Inns' petition formally seeks review of the unfair labor practice proceedings, it is not disputed that the Company refused to bargain with the Union. The Company's complaints are directed to events surrounding the representation election—alleged coercive activity by the Union, its agents, and adherents, and the Board's failure to deal appropriately with that activity. Because Congress has not provided for direct judicial review of Board representation proceedings, the Employer was compelled to expose itself to unfair labor practice charges in order to gain access to this court. The validity of the unfair labor practice charges depends on the legality of the Union's certification. Therefore, we may address the Company's claims concerning the representation proceedings in our treatment of its section 10(f) petition. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251 (1941);

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NLRB v. Sun Drug Co., 359 F.2d 408 (3d Cir. 1966). We deny enforcement and remand for an evidentiary hearing.

I.

Anchor Inns, Inc. operates the Anchor Inn Hotel in St. Croix, United States Virgin Islands. On October 27, 1978, the Union filed a representation petition with the Board, requesting certification as the exclusive bargaining agent of all service and maintenance employees at the Company's St. Croix hotel, excluding from the proposed bargaining unit office clerical employees, professional employees, guards and supervisors. Although the Company and the Union disagreed about the supervisory status of one employee, Hippolyte Victor, a consent election was held on December 15, 1978. Victor served as the Union's observer at the election. Six votes were cast: four in favor of the Union, one against the Union, and Victor's which was challenged and therefore not counted. Because Victor's vote was not determinative of the election, the challenge was not resolved.

On December 21, 1978, the Company filed objections to the election, claiming that certain Union proponents, notably Victor, had threatened or coerced its employees and thereby disrupted the free and fair atmosphere of the election. The objections were accompanied by an affidavit of Company owner Lon B. Southerland, through which Southerland related conversations between himself and three Anchor Inn employees. Employee Albert Hughes informed Southerland that Victor had told Hughes and other employees that if they did not vote for the Union, they would lose their jobs within 30 days. Employees Hermie Joseph and Lucille Dailey, when separately volunteering to Southerland that they preferred not to have a union despite Victor's pro-Union activities, "check[ed] to see that no one was listening and appear[ed] frightened and apprehensive."

The Board's Regional Director investigated the Company's objection and, without having held a hearing, issued his report and recommendations on March 20, 1979. In his report, the Regional Director concluded, on the basis of his interview with Victor, that Victor had told Hughes that if the Union won the election, Hughes would have to join the Union or lose his job within 30 days. This was inaccurate, the Regional Director found, because it omitted reference to the necessity for successful negotiation of a union security clause before conditioning employment on union membership. He further held that such a "statement made to one employee cannot be said to have interfered with free and unfettered choice by employees in the election." The Regional Director also noted that no evidence had been adduced or discovered that would indicate that Victor was an agent or employee of the Union. As to Southerland's reference to his conversation with employees Joseph and Dailey, the Regional Director found it unpersuasive, deeming it to be an offer of proof that the election results did not reflect the previously expressed views of the voters. For these reasons, the Regional Director recommended that the objection be overruled and the Union certified as the bargaining representative of the Company's employees in an appropriate unit.

The Company thereupon filed exceptions to the Regional Director's report. In essence, the Company urged that the Regional Director should at least have conducted a hearing on the objections tendered to the election. This was especially appropriate, the Employer argued, with respect to Victor's statement to Hughes, which Hughes had interpreted as a threatened loss of employment if he did not vote for the Union. The discrepancy between the evidence offered in support of the objection and the evidence discovered by the Regional Director's investigation demanded, it was urged, a hearing to determine the true nature of Victor's remarks. Next, the Company complained that it should not have been held responsible for failing to produce evidence of Victor's agency status with the

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Union. The strictures of section 8(a)(1),[1] it was argued, precluded the Employer from engaging in the type of investigation that would produce competent evidence of an agency relationship. Further, the Company claimed that even if Victor were not a Union agent, a hearing was required to determine Victor's supervisory status, for if he were found to be a supervisor, as the Company had consistently contended throughout the representation proceedings, his activities on behalf of the Union irreparable tainted the election process. Finally, the Company urged that the actions of Joseph and Dailey, in communicating with Southerland, indicated that more than one employee had been the target of Victor's "threats." Therefore, even absent Union agency or supervisory status, the widespread nature of Victor's coercive conduct raised a significant possibility that "a free expression of choice of representatives [was] impossible."

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[1] Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]." 29 U.S.C. § 158(a)(1) (1976). Questioning employees about union sympathies or involvement may, under certain circumstances, constitute a violation of this section *See Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980) (en banc).

The Board adopted the Regional Director's recommendations and certified the Union on May 8, 1979. The Board noted, however, that it was overruling the objection solely on the ground that the evidence presented by the Company did not establish that Victor was a union agent. Absent such agency, the Board held, a statement such as the one ascribed to Victor by the Regional Director was not grounds for setting aside an election.

On August 10, 1979, the Company filed a motion for reconsideration with the Board, claiming that "new and previously unavailable evidence" had been discovered which established that the employees had been unlawfully coerced in their choice of a bargaining representative and that the election should have been set aside. Attached to the motion for reconsideration were two affidavits. In one affidavit, employee Catherine Wade stated that Victor was the only employee with whom Ralph Mandrew, the Union organizer, had been in contact, and the Victor had advised all the hotel maids that he was the Union representative. The other affidavit, executed by Hermie Joseph, stated that although Victor had threatened her with physical harm and lies which would cause her to lose her job, she had not informed the Regional Director's investigator of the threats. She did not report this, she claimed, because Victor told her not to and she was "afraid" of him. Joseph also stated that Lucille Dailey had heard Victor threaten Albert Hughes because Hughes would not support the Union. The Board denied the Company's motion for reconsideration due to an "insufficient showing that the proffered evidence was previously unavailable and that, if considered, would require a different result."

Having exhausted its ability to initiate review of the representation proceedings, the Company thereupon refused to bargain with the Union. An unfair labor practice charge was then lodged against the Company, a complaint issued, and, on the General Counsel's motion, summary judgment was entered against the Company on July 18, 1980. We are now asked to review that judgment.

II.

The Company's arguments in this court are identical to those raised before the Board in the post-election proceedings. It insists that the evidence presented in the affidavits of Southerland, Wade, and Joseph was sufficient to warrant the setting aside of the election or, failing that, to require an evidentiary hearing on the factual issues raised. We believe the latter contention is meritorious.

A.

Congress has entrusted to the NLRB sole responsibility for conducting election proceedings to select collective bargaining representatives for workers. 29 U.S.C. § 159 (1976.) Courts, sharing only indirectly in the responsibility for monitoring that election process, have afforded the Board a "wide degree of discretion" in the conduct of the election and the attendant proceedings. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946); *NLRB v. El-Ge Potato Chip Co.*, 427 F.2d 903, 906 (3d Cir. 1970), *cert. denied*, 401 U.S. 909, 91 S.Ct. 869, 27 L.Ed.2d 807 (1971). The administrative regulations provide that when a party objecting to an election raises "substantial and material factual issues" before the Regional Director or the Board, either may direct an evidentiary hearing. 29 C.F.R. § 102.69(d) & (f) (1980). It is now well established, however, that the courts will insist on an evidentiary hearing when a party's objection raises substantial and material issues of fact. *NLRB v. Campbell Products Department*, 623 F.2d 876, 879 (3d Cir. 1980).[2] In *Campbell Products*, this court stated:

> A party is entitled to an evidentiary hearing where its objection raises substantial and material issues of fact. . . . As a corollary, no hearing is necessary where the Board assumes the truth of the party's contentions, and then rules as a matter of law that, assuming the facts alleged,

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[2] Other courts of appeals have adopted the same rule. *See NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1365 (5th Cir. 1980); *Methodist Home v. NLRB*, 596 F.2d 1173, 1178 (4th Cir. 1979); *NLRB v. S. Prawer & Co.*, 584 F.2d 1099, 1102 (1st Cir. 1978); *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 706–07 (2d Cir. 1978); *NLRB v. Medical Ancillary Serv., Inc.*, 478 F.2d 96, 98 (6th Cir 1973); *Sonoco Prods. Co. v. NLRB*, 399 F.2d 835, 839 (9th Cir. 1968); *NLRB v. National Survey Serv., Inc.*, 361 F.2d 199, 206 (7th Cir. 1966).

the challenged conduct does not warrant setting aside the election.

Id. (citing *NLRB v. Sun Drug Co.*, 359 F.2d at 414). In *Campbell Products*, the employer had alleged that a union supporter had been electioneering during the course of balloting. The Board assumed the allegation to be true and, relying on the traditional distinction drawn between activities undertaken by the parties to an election and those undertaken by rank and file employees, overruled the objection. This court upheld that action.

In order to obtain an evidentiary hearing, the objector's proffer of evidence must prima facie warrant setting aside the election. The proffer may not be conclusory or vague; it must point to specific events and specific people. On the other hand, an evidentiary hearing is not required when, if all the evidence proffered by the objecting party is accepted as true, no ground is produced which would warrant setting aside the election. *Campbell Products, supra. In NLRB v. Claxton Manufacturing Co., supra,* the Board, as in the case at bar, apparently believed that it was not required to decide whether the objector's affidavits raised substantial and material issues that prima facie warranted setting aside the election. Rather, the Board concluded that it might await the results of the regional director's exparte investigation and credibility determinations before deciding whether a hearing might be warranted. The Fifth Circuit rejected such a procedure and declined to enforce the bargaining order. 613 F.2d at 1373. We find the Fifth Circuit's approach persuasive in this case. It would of course serve no useful purpose to require the Board to hold hearings when the evidence proffered will not affect the validity of the election. However, in order to give the objecting party the full benefit of its statutory and constitutional hearing rights it is necessary that at some point the Regional Director or the Board, in determining the substantiality and materiality of the factual issues raised by an objection, assume that the allegations contained in that objection are true. This was not done in the case at bar. Had the allegations been taken as true, they may have warranted setting aside the election.

After the election, the Company timely filed an objection to claimed "threats by agents or employees of the [Union] to employees of Anchor Inn that if they did not vote for the Union they would lose their jobs," which allegdly affected the outcome of the election. In a supporting affidavit, Southerland, the Company's principal, stated:

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> [O]n December 12, 1978, . . . a bargaining unit employee of Anchor Inn Hotel [Albert Hughes] stated to me that certain statements had been made to this Individual and to other employees by employee representatives of [the Union] that if the employees did not vote for the Union they would lose their jobs within 30 days.

The Regional Director investigated the objection and, in his report and recommendation, observed:

> The investigation revealed that approximately 4 days prior to the election herein, [Hippolyte Victor] engaged in a conversation with [Albert Hughes] during which [Victor] stated his belief that the [Union] was going to win the election and if the [Union] did so, [Hughes] would have to join [the Union] within 30 days or lose his job.

Because the Regional Director believed this statement to have been made to only one employee, Hughes, by one not shown to be a Union agent, he concluded that it had no effect on the employees' exercise of free choice in the election. Accordingly, he chose not to hold an evidentiary hearing and recommended to the Board that the Employer's objection be overruled. The evidence gathered in the Regional Director's investigation does not appear in this record.

A reading of the Regional Director's report demonstrates an inadequate treatment of the Company's objection to the election. As noted above, the allegations of the objecting party must be taken as true in reaching a determination whether or not "substantial and material factual issues" exist. In his treatment of Anchor Inns' objection, the Regional Director substituted "facts" gleaned from his ex parte investigation for the Company's allegations. Anchor Inns was entitled to considered evaluation of the legal effect of Victor's threats as recounted by Southerland, not merely as explained away by Victor himself. However, the Regional Director purposely reserved judgment on the question whether a hearing was justified until after obtaining Victor's statement. Thus, for all that is revealed by this record, Anchor Inns may have established the right to a hearing only to be deprived thereof by

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means of an ex parte administrative investigation. Had this deprivation occurred, the Board's order would not merit enforcement. "Once the right to a hearing is established, the investigation is not a substitute for it." *NLRB v. Claxton Manufacturing Co.*, 613 F.2d at 1366.

We need not actually decide what criteria are to be used by the Regional Director and the Board in determining whether issues raised by an objection are "substantial." However, we make the following observations in connection with certain arguments advanced on behalf of the Board in this case. In his brief to this court General Counsel argues that Southerland's affidavit was properly disregarded because of its hearsay nature. Although we can envision situations in which the inadmissibility of evidence offered in support of an objection would render the issues raised not "substantial," *see, e. g.*, note 3 *infra*, we reject General Counsel's argument in this case for two reasons. First, neither the Regional Director nor the Board advanced this as a reason for ignoring the Employer's allegations and we " 'may not accept appellate counsel's *post hoc* rationalizations for agency action * * * .' " *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962)). Second, although some Board proceedings are to be conducted as nearly as practicable according to the Federal Rules of Evidence, 29 U.S.C. § 160(b), an outright rejectin of a hearsay affidavit in the context of an objection to an election is improper. As evidenced by the facts of this case, there are a variety of circumstances that would render the production of firsthand accounts of unlawful activity extremely difficult, if not impossible.

Here, the Employer alleges that Victor's threats to Anchor Inn employees were so persuasive and effective that one employee lied to the Regional Director's agent during the investigation of the Company's objection. If that allegation is correct, it is not surprising that the Company was unable to obtain signed and sworn affidavits detailing instances of alleged unlawful Union activity.[3] Similarly, unions that lose representation elections may find themselves with a decided lack of access to employees during the immediate post-election period in which objections must be filed. It is quite possible that a union seeking to vacate an election will be forced to rely on hearsay assertions by its organizers that the employer unlawfully coerced rank and file employees, the latter being unwilling to put their jobs in jeopardy for a union that has failed in its organization attempt.

The Board may properly insist on competent evidence at an evidentiary hearing, when its subpoena power is placed at the parties' disposal. 29 C.F.R. § 102.66(c) (1980). However, when material factual issues are raised in affidavit alleging specific instances of unlawful conduct by a party to an election, the allegations giving rise to those issues may not be disregarded, simply because of their hearsay nature, in favor of evidence gathered during an ex parte administrative investigation. Ignoring the Company's allegations was expecially inappropriate because it appears that the Regional Director's investigation corroborated Southerland's assertion that Victor had spoken with Hughes about the Union's ability to cause him to lose his job.

The Board repeated the Regional Director's error when it adopted his recommendation to overrule the objection to the election and certify the Union. Although the board overruled the objection on more narrow grounds than those on which the Regional Director predicated his recommendation, the Board relied on that version of the facts found in the ex parte administrative investigation. The Board stated:

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[3] General Counsel argues that the Company should at least have made " 'some showing of reasonable effort and failure to obtain evidence, or a convincing demonstration that such efforts would necessarily involve risk of illegal action or inequitable or insuperable difficulty.' " Brief of NLRB at 7, citing *NLRB v. National Survey Serv.*, 361 F.2d 199, 208 (7th Cir. 1966); *NLRB v. Hepa Corp.*, 597 F.2d 166 (9th Cir. 1979). Even if this correctly represented the law of this circuit, neither case relied upon by General Counsel convinces us that such a showing was necessary in this case. In *National Survey*, the employer supoorted its allegation of Union electioneering with assertions that union agents " 'were observed in conversation with' " employees in the vicinity of the polls and that " '[i]t is apparent that the Petitioner was electioneering * * *.' " 361 F.2d 208. This is not hearsay, it is simply unfounded speculation and, thus, the court's treatment of it is not relevant to the present inquiry. In *Hepa Corp.*, the affidavit revealed fifth-hand hearsay which is only probative in rare situations and certainly less worthy of reliance than the information contained in Southerland's affidavit.

> The sole objection is that approximately 4 days prior to the election one of the Employer's employees told another employee that *if the Petitioner [Union] won the election the employee would have to join the Petitioner within 30 days or lose his job * * *.* We find it unnecessary to reach the question of whether such a statement, when made by an agent of a labor organization, constitutes conduct which warrants setting aside an election. Here, the evidence fails to support the Employer's contention that the employee who allegedly made the statement was an agent of the Petitioner. While we adopt the Regional Director's recommendation that the objection be overruled, we do so solely because *the statement in question,* when made by one who is not an agent of either a labor organization or an employer, is not so aggravated as to create a general atmosphere of fear and reprisal and, thereby, render a free expression of choice impossible. See *Central Photocolor Company, Inc.,* 195 NLRB 839 (1972).

Anchor Inns, Inc. v. Gastronomical Workers Union of Puerto Rico, Local 610, No. 24-2C-6207 (NLRB Decision and Certification of Representative, May 8, 1979) (emphasis added). That the board's decision rested on its estimation of the effect of Victor's statement as described by the Regional Director is evidenced by its reliance on *Central Photocolor.* Among other alleged instances of

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Union misconduct in that case were "statements that if the Union won the election it would pressure employees who voted against it to join the Union or lose their jobs." 195 N.L.R.B. at 839. The Board held that such statements, when not attributable to union agents or employees, are not sufficiently aggravated to upset the election.

The Company's objection entitled it to a fair determination of whether or not a hearing was warranted. The Board's failure to evaluate properly that objection deprived the Company of such a fair determination. However, because we agree with the Company that an evidentiary hearing should have been conducted with respect to the allegations contained in the motion for reconsideration, re-evaluation of the objection will be necessary only if the validity of the election is upheld after the hearing on the motion for reconsideration is concluded.

B.

Approximately three months after the Union was certified, the Company filed a motion requesting the Board to reconsider its decision. That motion was accompanied by two affidavits: Catherine Wade's asserting facts that would reasonably support an inference of Union agency on the part of Hippolyte Victor, and Hermie Joseph's, claiming among other things that she had lied to the Regional Director's investigator in early 1979, because Victor had threatened her with harm if she told the investigator the truth. The Board denied the Company's motion on the alternative grounds that there was not a sufficient showing of previous unavailability of the offered evidence and that the new evidence, even if believed, did not appear to warrant setting the election aside.

We can find no reasonable basis for the Board's conclusion that Hermie Joseph's affidavit did not contain "previously unavailable" evidence. It certainly was not available until the events it detailed had occurred, which was after the objection to the election had been filed. It is conceivable that the Board found a previous opportunity for the Employer to present this evidence when it filed its exception to the Regional Director's report and recommendation to the Board. However, the allegations themselves provided a compelling justification for their delayed submission—the witness feared for her personal safety. The substance of the charges demanded caution against casual dismissal: allegations of perjury during the course of an official investigation always deserve careful attention. In this case, the alleged perjury took on added significance because the evidence gathered by the investigator to whom Ms. Joseph lied formed the basis for the Regional Director's recommendation that the Company's objection to the election be overruled. In view of the gravity of the allegations, we conclude that the Board abused its discretion in refusing to consider them because of their delayed submission.

We also find ourselves unable to agree with the Board that these allegations, if true, would not affect the validity of the election. *See generally Zeiglers Refuse Collectors, Inc. v. NLRB,* 639 F.2d 1000 (3d Cir. 1981). In part, we decline to accept the Board's holding to this effect because that holding—like the one overruling the objection to the election—is premised on the Regional Director's rejection of Southerland's account of the Victor-Hughes conversation.

Further, the Board's rejection of the Company's "previously unavailable" evidence as immaterial is wholly incompatible with its professed intent "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). *See Zeiglers Refuse Collectors, Inc. v. NLRB*, at 1004–1005. In establishing that goal, the Board charged itself with the "duty to establish those conditions [and the] duty to determine whether they have been fulfilled." *General Shoe Corp.*, 77 N.L.R.B. at 127. Hermie Joseph's affidavit claims that Hippolyte Victor had threatened that "somebody" would get hurt if the Union was not voted in, that Victor and other hotel maids had threatened to lie to the Employer to cause Joseph to be fired, and

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that Victor had threatened harm to Albert Hughes both to his face and to the maids. This is certainly material because the Regional Director had based his recommendation on a finding that Victor had made improper remarks to only one employee.

In a proposed bargaining unit of five or six employees, campaign tactics directed at only two or three employees may still affect the outcome of the election. We believe that there is a substantial likelihood that such a disruption of the electoral process occurred in the case at bar. We will therefore remand the case to the Board for an evidentiary hearing on the allegations contained in the Company's motion for reconsideration.

III.

Accordingly, the Company's petition for review will be granted. The cross-application for enforcement of the order of the NLRB will be denied and the case remanded for an evidentiary hearing and for further proceedings not inconsistent with this opinion.

Costs taxed against respondent.

NLRB v. Charles Batchelder Company, Inc.

646 F.2d 33 (2d Cir.), March 23, 1981—250 NLRB 89

On petition to enforce Board Order

Before FEINBERG, Chief Judge, NEWMAN, Circuit Judge, and MISHLER,* District Judge

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MISHLER, District Judge: The National Labor Relations Board (the "Board") petitions this court pursuant to section 10(e) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 160(e), for enforcement of its order issued against Charles Batchelder Company, Inc. (the "Company") on June 25, 1980.[1] The sole issue is whether the record contains substantial evidence to support the Board's findings: (1) that the Company violated sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1), (3), by discharging one of its employees and by refusing to rehire another and (2) that the Company violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by promising and granting accelerated wage increases to its employees.[2] The Board, adopting in part the recommended order of the Administrative Law Judge (the "ALJ"), directed the Company to cease and desist from certain unfair labor practices and to take affirmative action to remedy its statutory violations. We grant the petition for enforcement only to the extent that the Board's order relates to the Company's promise and grant of accelerated wage increases to its employees.

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FACTS

In April 1978 the Company[3] announced a break with tradition and informed its employees that the annual wage increases which were customarily effected every May 1 would be deferred until September 1978. The employees were advised that the change was being made in order to conform the timing of the wage increases to the Company's new fiscal year end but that the employees would not be penalized as a result since the increases would be retroactive to May 1. Nevertheless, employee objections ensued and employee Steven Carmichael, at the suggestion of fellow employee Edward Fleming, contacted Local 1040 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") on May 8, 1978 and met with a representative that same day.

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*Honorable Jacob Mishler, Senior United States District Judge, Eastern District of New York, sitting by designation.

[1] The decision of the Board is reported at 250 NLRB No. 9 (1980).

[2] The provisions of the Act which are pertinent to our review of this unfair labor practice proceeding read as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of [Title 29 of the United States Code];
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

29 U.S.C. §§ 158(a)(1) and (3).

[3] Charles Batchelder Company, Inc. is a Connecticut corporation engaged in the smelting and manufacture of aluminum ingots. It has a work force of approximately 35 employees and its plant is operated during three separate shifts.

Within a few hours after Carmichael's meeting with Union representative Edward Iula, Carmichael met with Fleming and discussed what had transpired. The two agreed to initiate an organizational campaign and vigorously embarked upon that course through their concerted efforts. Between May 9 and May 12 both employees actively promoted the Union through their discussions with fellow employees and their solicitations of authorization cards.[4] In addition to setting up a meeting for the Company employees on May 14 with Union representative Iulo, Carmichael successfully engaged a fellow employee, Tom Elliot, to assist him in posting Union organizational literature in various locations around the shop, including the restrooms, and an area immediately adjacent to their work place.

Two of the unfair labor practice charges arise out of the discharge of Edward Fleming on the afternoon of Friday, May 12, after he threatened a fellow employee, Joseph Emanuelle, who had indicated that he would not attend the union meeting scheduled by Carmichael for the following Sunday. It is undisputed that Fleming responded to Emanuelle's rejection of his personal invitation by blocking his egress, coaxing him to come to the meeting by stating that it was for Emanuelle's own benefit, and threatening him with physical retaliation. As recounted by Emanuelle, Fleming stated that, "If you don't like it I'll take you out in the parking lot and kick your ass * * *." Emanuelle, who had been on friendly terms with Fleming prior to the May 12 incident, failed to return to his job and immediately reported the incident to shop foreman Plourde. Emanuelle testified that he had been frightened by his encounter with Fleming and this was corroborated by Plourde, who stated that Emanuelle was "shook up * * * pale and scared" at the time he reported the incident.

Plourde reported the incident to Ronald Beilin and Bruce Batchelder.[5] Thereafter Emanuelle repeated his account of what had just occurred and after hearing his statement Beilin and Plourde discussed Fleming in general. All parties then present were aware of Fleming's union activities. In the course of their conversation Beilin requested that Plourde comment specifically on Fleming's work record. He answered that Fleming was a fair worker but he ahd some problems with adsenteeism. Plourde ultimately recommended discharge and Beilin concurred. After Plourde had

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brought a police officer on the scene Fleming was summon into Plourde's office to render his version of the incident. The focus of the discharge interview concerned his threat against Emanuelle though the issue of Fleming's absenteeism record was also raised. Plourde rejected Fleming's version of the occurrence as did the ALJ,[6] and then advised Fleming that he was discharged. The police officer escorted him off the Company's premises.

Shortly thereafter Carmichael learned of Fleming's discharge and confronted shop foreman Plourde stating, "If Fleming is let go, I am leaving too." Plourde cautioned him that, "If you walk out now don't bother to come back," to which Carmichael acknowledged his understanding and left the plant. However, within one-half hour following his departure from the Company plant Carmichael telephoned Plourde requesting to have his job back and stated, "I want to apologize for my hasty decision, and see if I can come back to work." Plourde answered, "I [must] think about it * * *. Call me back Monday morning." When they next communicated on Monday morning Plourde stated that Carmichael could not have his job back. It is undisputed that Carmachael quit and was not discharged.[7]

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[4] All dates refer to 1978 unless otherwise indicated.

[5] The management personnel charged with supervising the daily operations at the plant and who were involved in the alleged unfair labor practices are: Ronald Beilin, the vice president of operations, Armand Plourde, the shop foreman and Bruce Batchelder, son of the president (employed in a supervisory capacity).

Approximately two years prior to the birth of union activity at the Company in 1978, at least one member of management, Bruce Batchelder, had expressed a strong anti-union sentiment to nonsupervisory personnel. When the first overt signs of union activity surfaced on the morning of May 12, Bruce Batchelder called a foreman's meeting "to find out what was going on."

[6] The ALJ found that "[a]s between Emanuelle and Fleming, the testimony of Emanuelle was the more believable." After examining the record, the Board found no basis for reversing the ALJ's credibility determinations, and in doing so, it recognized the great weight to which such determinations are entitled. *NLRB v. Bausch & Lomb, Inc.*, 526 F.2d 817, 822 (2d Cir. 1975). Accordingly, we also accept this determination by the examiner who heard the testimony.

In the wake of these disputes the union meeting which had been scheduled for May 14 went forward as planned. Thereafter, union activity continued. Fleming and Carmichael filed unfair labor practice charges against the Company on May 22. The Board's consolidated complaint issued on June 30, 1978 and stated that the Act had been violated by their discharge in retaliation for their union activity. During the two to three week period following their discharge, Fleming and Carmichael handbilled the Company's plant with the assistance of union agents. Union related activity subsided after this effort and all overt activity cease by early June.[8]

In mid-June the Company notified all employees that the new wage increase would become effective July 1, rather than September 1 as announced prior to the advent of union activity. The proffered explanation for the implementation of accelerated benefits was that the Company desired to quell employee dissatisfaction arising from the uncertainty concerning the amount of wage increases which would be forthcoming.

The Board, in agreement with the ALJ, found that the Company violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by promising and granting wage increases to discourage employees from participating in union activity. Accordingly, the Board ordered the Company to cease and desist from promising and granting benefits for the purpose of inducing employees to refrain from engaging in union activity. However, the Board rejecting a portion of the ALJ's recommendation, found that the Company had violated sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3), by discharging Edward Fleming and by refusing to reemploy Steven Carmichael because they engaged in protected union activity. In overturning the decision of the ALJ with respect to these charges, the Board determined that the asserted grounds for the respective discharge and failure to rehire were merely pretextual an that their employment difficulties sprung solely from their pro-union stand. The Board issued the traditional orders which would be expected in light of its findings and further ordered immediate and full reinstatement, retroactive to May 12, of Fleming and Carmichael.

DISCUSSION

In determining whether the findings of the National Labor Relations Board are supported by substantial evidence, a court "may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*' " *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 405, 82 S.Ct. 853, 854, 7 L.Ed.2d 829 (1962) (per curiam), *quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). We have examained the record keeping in mind this well established proposition.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization * * *." 29 U.S.C. § 158(a)(3).[9] However, even with the protection afforded by the Act to employees who organize and engage in union activities, an employer in the pursuit of the right to manage his enterprise is not left impotent to discipline an employee for misconduct in the course of employment or for other valid reasons.[10] *See e. g., American Ship Building Co. v. NLRB,* 380 U.S. 300, 311, 85 S.Ct. 955, 963–964, 13 L.Ed.2d 855 (1965); *Waterbury Community Antenna, Inc. v. NLRB,* 587 F.2d 90, 96 (2d Cir. 1978); *NLRB v. Advanced Business Forms Corp.,* 474 F.2d 457, 464, (2d Cir. 1973), *citing NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45–46, 57 S.Ct. 615, 628, 81 L.Ed. 893 (1937). There are of course restrictions on this power of management and the Board was corrected in identifying the issue of whether the Company's actions were motivated by lawful or unlawful reasons as the key question for their examination. *See B. G. Costich & Sons, Inc., NLRB,* 613 F.2d 450, 454 (2d Cir. 1980).

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[7] At the hearing before the ALJ, the question of whether Carmichael was discharged or quit was hotly disputed. Carmichael contended that he had departed from the plant after inhaling noxious fumes which were emitted from his furnace and then becoming sick, i. e., he left work because he had fallen ill. The report by the ALJ stated that there was a sharp conflict in the testimony concerning the circumstances under which Carmichael had been terminated. At least five persons testified on this subject. After determining that Carmichael was "an unreliable witness, whose testimony was marked by important contradictions and * * * a lack of candor," the ALJ found that Carmichael quit in the face of Plourde's warning and had not been discharged.

[8] The Company contends that union activity and the union organizational campaign had abated some week before "early June." Their evaluation of the evidence contained in the record is reasonable, and perhaps, it is the preferable view of the facts. Nevertheless, the inference is available from the record that union activity continued through early June and that finding is supported by substantial evidence.

[9] With respect to the employee terminations the complaint also charged, and the Board found, a violation of section 8(a)(1). However, because the alleged violation of that section arises out of the same operative facts that surround the charged section 8(a)(3) violation, the ALJ, the Board, and the petitioner have not treated it discretely, apparently assuming that it stands or falls together with the 8(a)(3) charge. We agree.

When an employer has both valid and invalid grounds for disciplining an employee, commonly referred to as a "dual motive", any action taken against the affected employee will not constitute an unfair labor practice *unless* it is shown that there is " 'a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one.' " *Waterbury Community Antenna, Inc. NLRB,* 587 F.2d at 98, *quoting NLRB v. Park Edge Sheridan Meats, Inc.,* 341 F.2d 725, 728 (2d Cir. 1965). Under this test "[t]he magnitude of the impermissible ground is immaterial * * * as long as it was the 'but for' cause of the discharge." *Id.* at 98 (citations omitted). With respect to the instant controversy, the Board fond that the impermissible ground was the only basis **39** for the Company's action and that the ostensible justification offered by the Company for the respective discharge and refusal to rehire were merely pretextual.[11] The Board has defined a pretextual justification as follows:

> Examination of the evidence may reveal * * * that the [employer's] asserted justification is a sham in that the purported rule or circumstance advanced by the employer *did not exist, or was not, in fact, relied upon.* When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150 (1980) (emphasis added). Accordingly, in reviewing the Board's findings we need not engage in the "but for" analysis since the question before the Board was not the extent to which the Company relied on valid grounds for its action, but whether the stated grounds were the real ones.[12]

Even though the Board accepted the ALJ's credibility findings, it nevertheless overturned the decision of the ALJ and found that Fleming's threat against Emanuelle was not the basis for his discharge. It relied on four facts and circumstances in finding that the discharge was motivated solely by anti-union sentiment. All but the first of these enumerated reasons—the fact that Fleming had been "a long-term satisfactory employee"—are unpersuasive of its conclusion. The Board found that the record was devoid of any indication that Fleming's language was more than a simple angry statement—that his statement was neither intended to be, nor reasonably could have been, interpreted literally. This view is contrary to Emanuelle's credited testimony that he had been frightened by the threat and had a reasonable basis for believing that

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[10] Further, as stated by Judge Friendly, "* * * if an employee is discharged for neglect or delinquency, there is no violation simply because he was engaged in organizing and the employer sheds no tears at his loss." *NLRB v. Park Edge Sheridan Meats,* 341 F.2d 725, 728 (2d Cir. 1965).

[11] The Board's Decision and Order states:

> [W]e must decide whether [the] circumstances support the conclusion urged on us by the General Counsel that Fleming was discharged for unlawful reasons, rather than for the lawful reasons advanced by Respondent.
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> * * * * *
>
> [W]e find * * * that the reasons given by Respondent for Fleming's discharge were wholly pretextual and that Fleming was in fact discharged for his prounion stand.
>
> [W]e find the reason given for the refusal to be pretext and that Carmichael was refused reemployment because of his prounion activity.

250 NLRB No. 9 (1980).

[12] Since the "in part" test is no longer the rule in this Circuit, we could not enforce the Board's order merely because we might conclude that the Company's actions were premised upon legal and illegal motivations. Without deciding whether we should apply the "but for" analysis to the record before us when the Board has not made the necessary findings under that test, we note that our conclusions today would remain unaltered if we were to engage in such an analysis.

Fleming would carry it out.[13] 250 NLRB No. 9 at note 1. Further, in discounting the seriousness of Fleming's threat the Board relied on the Company's settlement offer to hire Fleming made six months after his discharge to show that the Company *never* considered him to have violent tendencies. The subsequent offer, of doubtful admissibility as a settlement offer, does not provide a substantial basis for rejecting the bona fide belief six months earlier that Fleming's threat justified his dis-

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charge. Next, the Board noted that the decision to discharge Fleming was made without affording him an opportunity to present his version of the incident. Under the circumstances, this point warrants no discussion. Finally, the Board also relied on Plourde's reference to Fleming's absenteeism at the discharge interview as evidence of the Company's bad faith since his absentee record was not any worse that other employees who had not been discharged. However, as a matter of credibility, the ALJ found that comment to have been no more than a response to Beilin's inquiry about Fleming's work record and not an independent basis of causation for the discharge. And, the very discussion of Fleming's work record at the management conference prior to management's confrontation with him was relevant to the decision at hand and appropriate. *See Illinois Ruan Transport Corp. v. NLRB,* 404 F.2d 274, 280 (8th Cir. 1968). As stated earlier, only the fact of Fleming's status as a long-term satisfactory employee is persuasive of the Board's conclusion. However, this fact standing alone does not amount to substantial evidence in the face of evidence that the Company has not tolerated similar threats in the past. *NLRB v. Park Edge Sheridan Meats, Inc.,* 341 F.2d at 728 (stating that the General Counsel "will normally lose if the employer can establish a record of discharge for similar conduct").

Our view of the record leads us to the conclusion that the Board's characterization of Fleming's threat and its finding that the threat was not the ground for discharge amounts to nothing more than the mere substitution of its hindsight judgment for a decision which is properly vested in management. the Board engaged in mere speculation when it concluded that the proffered ground for discharge was pretextual. Before an undisputed threat of violence to an employee can be written off as pretextual with the consequent impact of depriving the employer of his right of management, more evidence than is before us now must be presented.[14]

With respect to the unfair labor practice charge arising out of management's refusal to rehire Carmichael, the record is also devoid of substantial evidence to support the Board's conclusion. It is undisputed that Carmichael quit after learning of Fleming's discharge. He abandoned the Company during mid-shift and in the face of Plourde's cautionary instruction not to quit. In doing so, Carmichael committed a serious breach of his employment obligation—the departure of Carmichael and Fleming, both furnace operators, left the Company with only one of the three furnaces attended by a furnace operator. The ALJ found that the Company's decision was not attributable, even in part, to Carmichael's union activity because the only basis for such an inference arises from his key role in the union organization campaign. Nevertheless, the Board found that he was denied reemployment for union-related reasons since the announced basis for the Company's refusal to rehire Carmichael was without a rational foundation.[15]

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[13] In addition to Emanuelle's testimony that he had been scared by Fleming's threat, the record discloses the following answers given by Emanuelle at the hearing before the ALJ:

Q. Why [were you scared]?

A. Well, it's common knowledge at the shop that [Fleming is] an ex-con, and nobody to be messed with.

* * * * *

Q. Did you feel you were going to get hit then and there?

A. I was expecting it.

In face of this credited testimony, the Board suggests that the fact that Emanuelle and Fleming had been on friendly terms provides some showing that Emanuelle did not really fear Fleming. On the facts before us, we believe this inference must be disregarded since it is without a rational basis. *See e.g., NLRB v. Local 50, American Bakery & Confectionery Workers Union,* 339 F.2d 324, 328 n.4 (2d Cir. 1964), *cert. denied,* 382 U.S. 827, 86 S.Ct. 62, 15 L.Ed.2d 72 (1965); *NLRB v. Miranda Fuel Co., Inc.,* 326 F.2d 172, 184 (2d Cir. 1963) (Friendly, J., dissenting).

[14] It is interesting to note that Fleming testified that the union representative, Mr. Iulo, had told Carmichael that his signature on the union authorization card would immunize him from discharge. Based upon this representation, Fleming assumed he too acquired immunity by signing the union authorization card.

[15] The Company contends that the Board unfairly found a different violation than that which was charged in the Board's complaint—refusal to rehire rather than discharge. The transcript of the hearing before the ALJ indicates that the issue as to discharge was hotly contested. On the other hand, only one question at the hearing was directed to why the Company failed to rehire Carmichael. Though we have not been supplied with a copy of the Board's complaint our reading of the record and the report of the ALJ leads us to believe that the General Counsel raised this charge only after the hearing before the ALJ had been concluded. The

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In arriving at this conclusion, the Board relied on three facts: that Carmichael was a satisfactory employee for many years; that the incident occurred shortly after Carmichael became involved in union activity; and that in the Board's view, Carmichael's indiscretion on May 12 which lasted no longer than one-half hour considered together with his prior resignation in 1976 for which he provided the Company with adequate notice did not render him a useless employee.[16] Based upon the foregoing, the Board found there was no justifiable basis for denying reemployment, and therefore concluded that the articulated basis must have been pretextual. We disagree. Carmichael's misconduct was serious [17] and there is no evidence that the Company ever condoned similar conduct. Nor was the Company's belief that Carmichael's history of quitting rendered him unreliable, and therefore "useless," without a rational foundation. There also is merit in the Company's point that it must have some capacity to back up the authority of its supervisors.

Simply stated, the Board has used speculation, rather than substantial evidence, in arriving at its conclusion. The record indicates only a weak showing of union animus at the time Carmichael quit. However, even if the Company had exhibited a somewhat stronger anti-union sentiment, Carmichael's union membership alone does not measure up to substantial evidence in support of the Board's order that Carmichael be reinstated.

As to the July 1978 wage increase, even though the question is a close one, we believe the Board's conclusion is supported by substantial evidence.[18]

The petition for enforcement is granted in part; the order of the Board is modified by vacating paragraphs 1(a), 2(a), and 2(b) thereof and by appropriately modifying the notice which must be posted.

NEWMAN, Circuit Judge, concurring: I concur in all of the conclusions reached in Judge Mishler's thorough opinion for the Court and in virtually all of his opinion, but add these additional views in an attempt to clarify analysis of employer motivation cases under §§ 8(a)(1) and (3) of the Act, especially in the aftermath of the Board's significant opinion in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (slip op. Aug. 27, 1980), [1980] Lab.L. Rep. (NLRB Dec.) (CCH) ¶ 17,356.

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In *Wright Line*, the Board surveyed the assortment of pronouncements in prior decisions of the Board and the Courts of Appeals and concluded that the correct framework for determination of employer motivation is the model adopted by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Applying *Mt. Healthy* to the context of a § 8(a)(3) claim, the Board announced that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected con-

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single question put to Plourde concerning why Carmichael was not permitted to return to work on May 12, in the context of the lengthy hearing before the ALJ, did not by itself provide adequate notice to the Company that this different charge had been placed in issue.

In part, the Board's decision with respect to Carmichael was based upon the fact that the Company failed to advance any reason for its refusal to reemploy Carmichael. However, by virtue of the allegations in the Board's complaint, *see* Decision of Adminstrative Law Judge Joel A. Harmatz (June 13, 1979), and by virtue of what was litigated at the hearing before the ALJ, the Company had no reason to offer evidence on this subject. After establishing that Carmichael in fact had quit on May 12 the Company adequately rebutted the charge in the Board's complaint. The prejudice to the Company in the Board's finding of a different violation is obvious. *See Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1335 (7th Cir.), *cert. denied*, 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 256 (1978); *Engineers and Fabricators, Inc. v. NLRB*, 376 F.2d 482, 485 (5th Cir. 1967); *Steel-Feb, Inc.*, 212 NLRB No. 41 (1974); *Glasgow Industries, Inc.*, 210 NLRB No. 22 (1974); *see generally*, Bernard Schwartz, *Administrative Law*, §§ 96–97 *(1976)*.

Since we have not been furnished with a copy of the Board's complaint and amendments thereto, if any, we hesitate to deny enforcement on the ground that the Company was not properly apprised of the charge against it. However, it is unnecessary to resolve this point since the Board's order with respect to this charge is otherwise unenforceable for a lack of substantial evidence.

[16] On examination by the General Counsel, Plourde testified that he rejected Carmichael's rquest to return to work because his practice of quitting made Carmichael "useless to [him]."

[17] The Board implicitly finds that Carmichael's conduct was not a serious breach of his employment obligation by stating that he "was denied reemployment for a wholly unsubstantial reason." Its decision rejected the ALJ's explanation of the Company's refusal—that Carmichael's conduct threatened the viability of the Company's operations on May 12—since the Company itself did not offer the explanation in its own behalf. This logic is fatally flawed since it appears that the "refusal to rehire" was not litigated before the ALJ, see note 15, *supra*. Such evidence was not introduced since it was irrelevant to the charged unfair labor practice. Accordingly, the Board should not have discounted the seriousness of Carmichael's conduct to the point of ignoring it.

[18] See note 8, *supra*.

duct." Slip op. at 20–21, [1980] Lab.L.Rep., *supra,* at 32469. Thus, the Board has rejected all vestiges of the "in part" test of motivation and adopted the "but for" test, with the burden on the employer, after a *prima facie* case is shown, to establish that he would have taken the same action if only the valid ground had existed. If the employer fails to sustain his burden, then it can be concluded that he would not have acted "but for" the protected conduct, and only in that event is such conduct a legally significant cause of the employer's action; if the employer satisfies his burden, then he avoids liability, even though he may in fact have relied "in part" on the protected conduct when he decided to take action.

The Board suggests in *Wright Line* that "an additional benefit which will result from our use of the Mt. Healthy test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated." Slip op. 20 n.13, [1980] Lab.L. Rep., *supra* at 32472. That suggestion bears examination in this case, because Judge Mishler's opinion analyzes this case as one of pretext, rather than dual motive, thereby implicitly indicating that the distinction serves a useful purpose.

To see why this is so, at least to some extent, requires a clear understanding of the analytical processes involved (1) in examining whether a ground asserted by an employer is a "pretext" and (2) in applying the "but for" test to an employer's dual motivation. Simply stated, "pretext" analysis asks, "What happened?" "But for" analysis asks, "What would have happened?" When we say an asserted ground is a pretext, we mean that we do not believe the employer when he says that he relied upon that ground in taking the challenged action.[1] When we say an employer has not sustained his burden under the "but for" test, we mean that he has not proven that he would have acted the same way if only the valid ground had existed. Of course, "but for" analysis asks the hypothetical question as to what would have happened in order to reach a conclusion as to the legal significance of what did happen, but the fact that both approaches answer the same ultimate legal question should not obscure the different factual inquiries each pursues.

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The Board is correct in suggesting in *Wright Line* that "but for" analysis *can* serve as the sole analytical model, but this does not eliminate the distinction between "but for" and "pretext" analysis. Relying on "but for" analysis subsumes "pretext" analysis within "but for" analysis in some cases and renders it unnecessary in others. In every case, the Board can ask, "Would the employer have taken the same action if only the valid ground had existed?" If the answer is no, the employer loses, and in that event the Board need not determine whether the employer really did rely on the valid ground in the actual case, or whether the employer really would have relied on the valid ground in the hypothetical case where only the valid ground existed. If the answer to the "but for" inquiry is yes, the employer wins, but in order to answer yes, the Board must have concluded that in the hypothetical case where only the valid ground existed, the employer really would have relied on it, and this conclusion will be reached only if the Board concludes that in the actual case the employer really did rely on the valid ground. Thus, to answer the "but for" questions in the employer's favor, the Board will have to have made a "pretext" analysis and found in the employer's favor.

Conversely, the Board can start with pretext analysis, in which event it will have to move on to "but for" analysis only in some cases. In every case the Board can ask, "Did the employer really rely on the asserted, valid ground?" If the answer is no, the employer loses, and the Board need never make the hypothetical inquiry necessary for "but for" analysis. If the answer to the "pretext" inquiry is yes, the case is then one of dual motivation, and the Board must then move on to "but for" analysis and ask, "Would the employer have relied on the valid ground if it had been the only existing ground?"

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[1] In the *Wright Line* excerpt quoted by Judge Mishler, *supra* at ———, the Board maintains that the employer's asserted ground is pretextual if the ground either "did not exist, or was not, in fact, relied upon." It is probably not accurate and certainly not helpful to condsider as pretextual all situations where the employer asserts a ground that does not in fact exist. "Pretext" analysis focuses on the employer's thought process and inquires whether he is to be believed when he says that he relied on an asserted ground. If the employer believes the employee has committed some act of misconduct, and discharges him based on this belief, then the asserted ground is not a pretext, even if the employee in fact is innocent. Of course, the circumstances would have to provide substantial indication that the employee is not innocent before the employer's belief could be credited. However, where the asserted ground for the employer's action is some rule that does not in fact exist, "pretext" analysis is proper. If an employee is five minutes late and the employer discharges him, claiming he relied on a rule that such tardiness always results in discharge, evidence that such a rule does not exist obviously shows that the one instance of tardiness has been seized upon as a pretext for the discharge. Even in this example, the fact of tardiness exists; what does not exist is any rule concerning such tardiness. To say the fact of the rule does not exist is simply another way of saying the employer is not to be believed when he says he relied on the fact of tardiness.

The point is that the *Mt. Healthy* "but for" formula does not always eliminate the distinction between "pretext" and "dual motivation" cases. The further point is that analysis of any § 8(a)(3) case can begin with either the "pretext" inquiry as to what actually happened or the "but for" inquiry as to what would have happened. Whichever inquiry is first made, a no answer ends the case, and the employer loses; a yes answer obliges the Board to move on to the other inquiry, or implicitly to have considered it.

Moreover, as this case illustrates, it will sometimes be more sensible for the Board to start with "pretext" analysis. In this case the Board did not ask, "Would the employer have discharged Fleming if the only existing ground had been his threat to Emanuelle?" Instead the Board pursued "pretext" analysis and asked "Did the employer really rely on the threat episode?" The Board answered that qestion no, and therefore ruled against the employer. By using "pretext" analysis and inquiring as to what actually happened, the Board avoided the need to make the more speculative "but for" analysis and to inquire as to what would have happened if the threat episode had been the only existing ground. Had there been substantial evidence to support the Board's conclusion, "pretext" analysis alone would have sufficed.

An additional complication arises when the Board's decision in a § 8(a)(3) case is reviewed on appeal. In this case, Judge Mishler's opinion for the Court suggests that since the Board used "pretext" analysis, we need not engage in "but for" analysis, *supra* at 39. I can agree that we need not, but I believe we should. Moreover, if contrary to my view, we do not engage in "but for" analysis, then the more appropriate disposition of the appeal would be a remand. To take the second point first, we all agree that the Board made a "pretext" analysis in concluding that the employer did not in fact rely on Fleming's threat when it decided to discharge him. We also all agree that the record lacks substantial evidence to support the Board's conclusion, and we therefore decline to enforce the portion of the Board's order resting on that conclusion. However, if we were to end our consideration at that point, we would, in effect, have decided that the employer really did rely on Fleming's

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threat. As discussed previously, this yes answer to the "pretext" inquiry does not end the case; it simply requires moving on to the "but for" analysis, since at this point all we have decided is that the employer had two motives in mind, Fleming's threat and his protected organizing activity.[2] To sustain his discharge, it is necessary to find that the employer would have discharged Fleming if the threat had been the only existing ground. Therefore, if we are not going to make the "but for" analysis, we should remand to the Board to permit it to make that analysis and then review its conclusion to see if it is supported by substantial evidence.

However, I believe it is appropriate and preferable, at least in a case such as this, for the reviewing court to avoid the delay of a remand and move on to "but for" analysis. I think we can safely assume that since the Board concluded from the evidence that the employer did not really rely on Fleming's threat, the Board, if reversed on that conclusion and obliged to move on to "but for" analysis, would inevitably conclude that the employer would not have discharged Fleming if the threat had been the only existing ground. If the Board throught there was no reliance on this ground, it could hardly think there would have been independently sufficient reliance.[3] Having found no substantial evidence to support the Board's "pretext" conclusion, we should therefore assume the Board would also rule against the employer on a "but for" analysis and proceed to consider whether there is substantial evidence for that conclusion. As Judge Mishler's opinion points out, *supra* at 39 n.12, there is not substantial evidence for that conclusion either, and for that reason enforcement of the order concerning Fleming is properly denied, without the need for a remand. The same reasoning applies to the portion of the order concerning the failure to rehire Carmichael. For these reasons, I join the Court's opinion.

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[2] In saying this, I assume we are not prepared to say that the record lacks substantial evidence to support a conclusion that Fleming's protected organizing activity was part of the employer's motivation in discharging him.

[3] Indeed, in some cases, when the Board applies "pretext" analysis and concludes that the employer did not rely on the asserted ground, it may have intuitively applied "but for" analysis and implicitly concluded that the employer would not have relied on the asserted ground, if it had been the only existing gound.

Precision Striping, Inc. v. NLRB

642 F.2d 1144 (9th Cir.), March 23, 1981—245 NLRB 169

On petition to review Board Order

Before SKOPIL and ALARCON, Circuit Judges, and REED,* District Judge

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SKOPIL, Circuit Judge: Precision Striping, Inc. ("Precision") petitions for review of a decision of the National Labor Relations Boad ("the Board"), 245 NLRB No. 34, 102 LRRM 1264 (1979). The Board cross-applies for enforcement of its order.

In March 1978, Precision informed the Painters' District Council No. 5 of the International Brotherhood of Painters and Allied Trades ("the Union") that the Union had failed to establish majority support among the employees in the bargaining unit, and Precision was repudiating their bargaining agreement. The Union filed charges with the Board.

FACTS

Precision is a construction contractor. In June 1977 Precision signed an agreement with the Union effective through May 1980. This agreement succeeded two prior agreements, covering periods from April 1973 to June 1974, and from June 1974 through May 1977. Each of these contracts contained an eight-day union-security clause. There is some dispute regarding strict enforcement of the security clause. In July 1977 two of Precision's six employees were union members, and by September 1977, four of Precision's five employees were members. The Union never demonstrated that it represented a majority of Precision's employees, prior to the unfair labor practice proceeding.

In March 1978, Precision polled its employees to determine if they wanted to be represented by the Union. There is no dis-

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pute as to the lawful conduct of the poll. Four employees voted against such representation; one voted in favor. Precision repudiated the agreement. It ceased contributing to the pension and health and welfare trusts.

PROCEEDINGS BELOW

The Union filed unfair labor practice charges against Precision. The Board issued a complaint alleging violations of sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act") in refusing to bargain and unilaterally changing conditions of employment.

The Administrative Law Judge ("ALJ") concluded that Precision had violated sections 8(a)(1) and (5) by repudiating a collective bargaining agreement without establishing a good faith doubt, based on objective factors, of the Union's majority status. Precision filed exceptions.

The Board affirmed. It based its conclusion on a finding that:

> When Respondent polled its employees and withdrew recognition from the Union in March 1978, four of the five employees were union members in good standing. It therefore follows that the Union, possessing majority support from Respondent's employees at that time, was their collective-bargaining representative as defined in Section 9(a) of the Act, and was entitled to the irrebuttable presumption of majority status flowing from a valid labor agreement in such circumstances. Respondent thus did not have the right to repudiate its contract with the Union, or to poll its employees on the issue of continued Union representation, irrespective of whether it had a reasonable doubt, based upon objective considerations, of the Union's majority status. We therefore find entirely inapposite, and do not adopt, the Administrative Law Judge's discussion regarding whether respondent's poll was prompted by a reasonable doubt of the Union's majority support grounded in objective criteria.

102 LRRM at 1265.

Precision argues that the Board erred in finding that the Union possessed majority support and that Precision was therefore prohibited from repudiating the bargaining agreement.

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*Honorable Edward C. Reed, United States District Judge for the District of Nevada, sitting by designation.

ISSUE

Did the Board err in finding that Precision committed an unfair labor practice in repudiating its agreement with the Union?

DISCUSSION

I. Standard of Review

The rule adopted by the Board is judicially reviewable for consistency with the Act, and for rationality. If it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced. *Beth Israel Hospital v. NLRB* ,437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978); *NLRB v. International Harvester Co.*, 618 F.2d 85, 87 (9th Cir. 1980). The Board's interpretation of the Act is entitled to considerable deference. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979); *International Harvester Co., supra.*

II. The Nature of the Agreement

The agreements entered into between Precision and the Union are "pre-hire agreements," permitted in the construction industry by section 8(f) of the Act, 29 U.S.C. § 158(f). Such agreements allow an employer to bargain with a union before the union has attained majority status under section 9 of the Act, 29 U.S.C. § 159. to avoid imposing union representation on non-consenting employees, the Act provides that the agreements shall not be a bar to decertification petitions filed pursuant to section 9(c)(1)(A) of the Act. 29 U.S.C. § 158(f). Such agreements permit use of eight-day union security clauses, such as the one used here. *Id.*[1]

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III. Effect of the Section 8(f) Agreement

An employer's duty to bargain and honor a section 8(f) agreement is contingent upon the Union's obtaining majority support in the bargaining unit.[2] *NLRB v. Local 103, International Association of Bridge, Structural and Ornamental Ironworkers ("Higdon")*, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed.2d 586 (1978); *Authorized Air Conditioning Company v. NLRB*, 606 F.2d 899, 907 (9th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1598, 63 L.Ed.2d 785 (1980).[3] When the Union obtains majority support, the parties' pre-hire agreement becomes a collective-bargaining agreement executed by the employer with the Union representing a majority of the employees in the unit. *Higdon*, 434 U.S. at 350, 98 S.Ct. at 660; *Authorized Air Conditioning*, 606 F.2d at 905. The pre-hire agreement is thus transformed into a section 9(a) contract. Upon transformation the contract bar rule applies. That rule prohibits challenges to an incumbent union's majority status during the term of an agreement of three years or less. *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 838 (9th Cir. 1978).

In this case the Board determined that the Union possessed majority support among Precision's employees because a majority of those employees were union members. The Union contends it was entitled to an irrebuttable presumption of majority status flowing from the existence of a valid labor agreement. We disagree. This position is inconsistent with the Act, inconsistent with prior decisional law, and irrational.

The Board has previously concluded that "there is no basis, either in logic or in policy, to extend to the union which is party to [a section 8(f) agreement] an irrebuttable presumption of majority status. Indeed, we conclude that any such presumption, would be irreconcilable with the final proviso to Section 8(f)." *R. J. Smith Construction Co.*, 191 NLRB 691, 695 (1971), *enforcement denied*, 480 F.2d 1186 (D.C.Cir.1973), *remand accepted*, 208 NLRB 615 (1974).[4] The Board also recognized that: "It is possible that, in some situations, at least a rebuttable presumption of majority will arise from an 8(f) contract. This might occur, for example, when a union-security agreement is present in the 8(f) contract and has been enforced." *Id.* at 695 n.5.

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[1] The Board's General Counsel argued below that the latest agreement was not a section 8(f) agreement, but does not press that claim here.

[2] The Board's amended complaint alleged, as alternatives, two appropriate bargaining units. One unit consisted of Precision alone. The other was a multi-employer unit. Precision admitted the appropriateness of a single employer unit in its answer. The Board does not contest the issue here, and apparently assumes that the single employer unit is appropriate.

[3] The instant case was brought as an unfair labor practice proceeding. We need not decide whether the union may be entitled to enforcement of the contract under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185. *See Contractors Health & Welfare Plan v. Associated Wrecking Co.*, 638 F.2d 1128 (8th Cir. 1981).

[4] The Board may change its mind, but when it does so it is "obliged to set forth its reasoning in favor of the change in order to avoid the appearance of arbitrariness." *NLRB v. Mercy Hospitals of Sacramento, Inc.*, 589 F.2d 968, 972 (9th Cir. 1978), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 458 (1979). *See NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965); *Monmouth Medical Center v. NLRB*, 604 F.2d 820, 823 (3d Cir. 1979); *Bay Medical Center v. NLRB*, 588 F.2d 1174, 1177 (6th Cir. 1978), *cert. denied*, 444 U.S. 827, 100 S.Ct. 53, 62 L.Ed.2d 35 (1979); *Retail Clerks Local 560 v. NLRB*, 510 F.2d 802, 807 (D.C.Cir. 1975). The Board has not attempted to do so in this case.

Courts have followed the Board's position that a majority of the employees having become union members pursuant to a union security clause creates only a rebuttable presumption of the union's majority status. *Higdon,* 434 U.S. at 351 n.12, 98 S.Ct. at 660 n.12; *Authorized Air Conditioning,* 606 F.2d at 905–06.[5]

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It is irrational to hold that majority union membership obtained pursuant to a union security clause creates an irrebuttable presumption of majority union support. A union security clause operates "to compel new employees to join the union," because union membership is the price for obtaining a job. *NLRB v. Forest City/Dillon-Tecon Pacific,* 522 F.2d 1107, 1109 (9th Cir. 1975). This court has previously stated that: "It is well established that union membership is not always an accurate barometer of union support." *Authorized Air Conditioning,* 606 F.2d at 906; *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d 293, 307 (9th Cir. 1978), *cert. denied,* 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 289 (1979); *Sahara-Tahoe Corp. v. NLRB,* 581 F.2d 767, 772 (9th Cir. 1978), *cert. denied,* 442 U.S. 917, 99 S.Ct. 2837, 61 L.Ed.2d 284 (1979). In this case the existence of majority union membership is insufficient by itself to raise an irrebuttable presumption of majority support. *See NLRB v. Band-Age, Inc.,* 534 F.2d 1, 4 (1st Cir.), *cert. denied,* 429 U.S. 921, 97 S.Ct. 318, 50 L.Ed.2d 288 (1976).

CONCLUSION

The rule adopted by the Board, that majority union membership obtained pursuant to a union security clause creates an irrebuttable presumption of majority union support, is inconsistent with the Act. Precision's petition for review is granted. The Board's cross-application for enforcement of its order is denied. We remand to the Board for further proceedings not inconsistent with this opinion.

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[5] Our decision is not inconsistent with *NLRB v. Irvin,* 475 F.2d 1265 (3d Cir. 1973). In that case, the pre-hire contract was deemed binding only at those projects at which the union had secured a majority. There is no indication that majority union membership itself raised an irrebuttable presumption of majority union support. *Id.* at 1271. *See Higdon,* 434 U.S. at 345–46, 98 S.Ct. at 67–58.

NLRB v. Trident Seafoods Corp.

642 F.2d 1148 (9th Cir.), March 23, 1981—244 NLRB 566

On petition to enforce Board Order

Before SNEED and FLETCHER, Circuit Judges, and JAMESON, District Judge*

1149

FLETCHER, Circuit Judge: This is an application for enforcement of an order of the National Labor Relations Board requiring respondent Trident Seafoods to cease and desist its unfair labor practices, to post appropriate notices, and to reinstate with back pay certain striking employees. We enforce the Board's order.

FACTS

Trident operates a seafood processing plant aboard a vessel permanently moored in Akutan Bay, Alaska, a remote area in the Aleutian Islands. The employees involved in this proceeding were hired for the 1978 king crab season. On October 15, 1978, midway through the two-month season, thirteen employees went on strike demanding higher wages. The striking employees rejected Trident's compromise wage offer. Management thereupon discharged twelve of the employees for refusal to work and informed them that they would be ineligible for rehire. The thirteenth striker returned to work. The discharged employees returned to Seattle.

By letter dated October 18 and received by the employees about October 20, Trident informed the discharged employees that it had been mistaken in describing their cessation of work as a discharge and in informing them that they were ineligible for rehire. The letter assured the employees that they would be accorded all rights due strikers under the NLRA.

The employees filed an unfair labor practice charge with the NLRB. The Administrative Law Judge found, and the Board agreed, that Trident had violated § 8(a)(1) of the NLRA by discharging its striking employees. 29 U.S.C. § 158(a)(1) (1976). That finding is not challenged here. The Board issued a cease and desist order and awarded the employees back pay from the date of discharge until the date they received Trident's letter. Determination of the amount of the back pay award was left for later compliance proceedings.

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*The Hon. William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

The Board here petitions to have its order enforced; Trident contests only the award of back pay to the striking employees.

ANALYSIS

Trident argues that it is entitled to a hearing on the propriety of a back pay award as to each employee *before* the Board's order is enforced, rather than at the stage of compliance proceedings.

A. The *Abilities & Goodwill* Rule

The Board awarded back pay from the date of discharge, in accordance with its recent change in policy articulated in *Abilities & Goodwill, Inc.*, 241 NLRB No. 5, 100 LRRM 1470 (1979), *enforcement denied on other grounds*, 612 F.2d 6 (1st Cir. 1979). Prior to that case, discharged strikers were required to make an unconditional request for reinstatement before becoming entitled to back pay, unless such a request was shown to be futile. *NLRB v. Ramona's Mexican Foods Prods., Inc.*, 531 F.2d 390, 395 (9th Cir. 1975); *see also NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1303–04 (5th Cir. 1970). Employees discriminatorily discharged, on the other hand, were not required to request reinstatement in order to trigger the employer's liability for back pay. *See Abilities & Goodwill, Inc.*, 241 NLRB No. 5, 100 LRRM 1470 (1979).

The effect of this change in Board policy is to shift to the employer the burden

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of proving that the employee would not have accepted a timely offer of reinstatement, had one been made. This court had approved such an approach long before the Board decision in *Abilities & Goodwill. Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB*, 497 F.2d 1200, 1204–05 (9th Cir. 1974); *accord, NLRB v. Valmac Indus., Inc.*, 533 F.2d 1075, 1077 (8th Cir. 1976); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1303 (5th Cir. 1970). The rule is a reasonable one, well within the Board's discretion to establish. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, *396* U.S. 258, 262–63, 90 S.Ct. 417, 419–420, 24 L.Ed.2d 405 (1969).

B. *The Bifurcated Proceedings*

Trident argues that the Board's refusal to take testimony on Trident's possible defenses to the individual back pay awards goes to its *liability* for back pay, not simply to the amount. Therefore, it contends, the Board's order cannot be enforced unless and until the employees have shown that they would have returned to work had they been offered reinstatement. We disagree.

The Board's right to defer the determination of the amount of back pay liability until after its award has been enforced has long been recognized:

> The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies" of the Act for the Board to order reinstatement with back pay of any employees who were discharged. In such a proceeding the Board does not concern itself with the amount of back pay actually owing. This is excluded from the proceeding in the interest of the efficient administration of the Act. The determination of specific liabilities may involve a protracted contest. . . . Since the determination that the discharge was wrongful is subject to review, extensive proceedings to determine the amount of liability may be rendered superfluous by reversal. And if the determination is sustained and becomes final, it may be expedient for a respondent to reach agreement and avoid further litigation. The propriety of this established two-stage procedure of the Board in these back-pay cases is not questioned.

NLRB v. Deena Artware, Inc., 361 U.S. 398, 411, 80 S.Ct. 441, 447, 4 L.Ed.2d 400 (1960) (Frankfurter, J., concurring) (citations omitted). *Accord, UFI Razor Blades, Inc. v. District 65, Wholesale, Retail, Office & Processing Union*, 610 F.2d 1018, 1023 (2d Cir. 1979); *NLRB v. J.S. Alberici Constr. Co., Inc.*, 591 F.2d 463, 468–69 & n.6 (8th Cir. 1979). In *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255–56 (9th Cir. 1978), this court held that:

> We agree with the Board that questions relating to the exact amount of back pay owing (includ-

ing whether discharged employees made reasonable efforts to secure employment, and whether at some reasonably determinable date employment with [the employer] would not have been available because [its] operations would have ceased * * *) are prematurely raised in this enforcement petition. Those issues may be explored in a compliance proceeding.[1]

In this case, as in *Great Chinese American Sewing Co.*, the Board's order makes it very clear that Trident will have an opportunity at the compliance proceedings to

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present all of its objections to the individual back pay awards.[2]

Accordingly, we conclude that the Board's back pay order was proper and should be ENFORCED.

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[1] Our decision in *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602–03 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980), is not to the contrary. There we refused to enforce a Board order for reinstatement where:

> The precision in the * * * Board's order makes it clear that no further proceedings were contemplated regarding the number of employees to be reinstated.
>
> Enforcement of an order so specific would deny the company an opportunity to show that fewer than 72 jobs would have been available regardless of its unfair practices. The reinstatement order therefore cannot stand.

Id. at 603 (citation omitted).

[2] The Board's decision reads in pertinent part:

> Respondent [Trident] has excepted to the failure of the Administrative Law Judge to permit it to question each striker at the hearing as to whether he or she would have agreed to continue working or to return to work if Respondent's notice of separation had merely stated that they were on strike and remained eligible for rehire. Because there has already been a hearing in this matter, we find that this question is best left for the compliance stage of this proceeding and thus we will allow Respondent to put this question to the dischargees then.

NLRB v. North Electric Company, Plant No. 10

644 F. 2d 580 (6th Cir.), March 26, 1981—240 NLRB 220

On petition to enforce Board Order

Before Brown and Jones, Circuit Judges, and Phillips, Senior Circuit Judge

581

Bailey Brown, Circuit Judge: This case is before the court on the petition of the National Labor Relations Board for enforcement of its order to North Electric Company, Plant No. 10 (North) to bargain with the Communications Workers of America (Union). The Board's decision and order are reported at 240 N.L.R.B. No. 32.

In October, 1974, a representation election was held at North's plant in Gray, Tennessee. The Union lost the election by a two-to-one margin, 1441 to 762. The Union then filed unfair labor practice charges against North, alleging that North had engaged in prohibited activities that undermined the fairness of the election and demanded a new election. A complaint was issued by the General Counsel and a hearing was held before an Administrative Law Judge (ALJ). The ALJ found that North had committed no unfair labor practices during the election campaign and dismissed the complaint. The Board, however, concluded that North had committed unfair labor practices during the campaign, reversed the ALJ and ordered a new election. 225 N.L.R.B. No. 53. This court enforced the Board's order. *NLRB v. North Electric*, 588 F.2d 213 (6th Cir. 1978).

The second election was conducted on October 6 and 7, 1976. This time the Union won by a vote of 682 to 679. There were five void and two challenged ballots. North filed timely objections to the election on the grounds that (1) employees were unlawfully threatened by Union supporters, and (2) material misrepresentations were made on the eve of the election by the Union to employees at a time when North was unable to effectively reply. The Regional Director, in the exercise of his reasonable discretion decided not to conduct a hearing on North's objections, but he did conduct an administrative investigation pursuant to 29 C.F.R. § 102.69(d). On the basis of his administrative investigation the Regional Director issued a report in which he recommended that North's objections be overruled and the Union be certified. The Board adopted the Regional Director's findings and certified the Union.

North then refused to bargain with the Union. In the unfair labor practice proceeding that followed North acknowledged that it had refused to bargain with the Union, but denied that it had violated Section 8(a)(5) because, North argued, the Board had improperly certified the Union. The Board granted the General Counsel's motion for summary judgment and this proceeding followed.

The purpose of North's refusal to bargain was to obtain judicial review of the Board's decision to overrule North's election objections. Here North raises both substantive and procedural complaints about the Board's decision to adopt the Regional Director's report, overrule its objections and certify the Union. The substantive complaint is that the Board, as a matter of law, incorrectly decided the two issues raised by North in the representation proceedings; i. e., employees were unlawfully threatened and material misrepresentations were made by the Union on the eve of the election. The procedural complaint is that the Board did not have the entire record before it when it decided to adopt the Regional Director's report. Since we agree with North that proper procedures were not followed we do not deal with the substantive issues at this time.

The procedural problem with which we are confronted is one that has been recurring with some regularity in the last few years. There seems to have been a rash of cases in which the Regional Director has failed to transmit the record to the Board along with his recommendations. As noted earlier, the Regional Director did not hold a hearing on North's election objections but conducted an administrative investigation. In the process of making his investigation the Regional Director collected and considered a variety of documentary evidence. This evidence is discussed in the Regional Director's report, and, indeed, is relied upon to support the report's conclusions. The Regional Director did not, however, transmit this evidence to the Board as part of the record. The documents that were not transmitted to the Board include a copy of the Union's election eve mailing that North argues contains material misrepresentations, a Union leaflet containing statements related to the mailing, affidavits taken by Board agents of employees who were allegedly threatened and the statement of an employee who was allegedly threatened. Therefore, in considering North's election objections the Board did not have the benefit of actually reviewing the documents in the record. North argues that this was a violation by the Board of its own regulation (29 C.F.R. § 102.69(g)) as well as a denial of procedural due process.

We have considered this issue several times in the past two years and are now called upon to clarify the scope of our prior desisions. The question with which we are confronted is as follows: does 29 C.F.R. § 102.69(g) require the Regional Director to transmit the entire record to the Board in cases in which there is only an administrative investigation and no hearing. 29 C.F.R. § 102.69(g) provides:

> (g) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case. Materials other than those set out above shall not be a part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board.

The plain language of the regulation seems to require the Regional Director to transmit the entire record to the Board in all cases. The Board argues,[1] however, that the Regional Director is required to transmit the entire record only in cases in which there was a hearing. For this proposition the Board relies on the second sentence of 29 C.F.R. § 102.69(g), which provides that in

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[1] It should be noted that the Board did not bother to brief this issue so we only have the benefit of the thoughts of the Board's counsel at oral argument. The Board's counsel was, however, prepared to, and did, discuss this issue at oral argument.

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cases in which no hearing is held the objecting party may submit copies of documents to the Board that were submitted to the Regional Director. The Board's position is that if the Regional Director were required to transmit the record in all cases this provision would be meaningless. The Board also points out that it is not required to hold a hearing on all election objections, nor is it required to make a *de novo* review after the Regional Director has conducted an administrative investigation.

It is clear that a party objecting to an election has the right to have its objections reviewed by the Board. 29 C.F.R. § 102.69. Simply because a party objects to the conduct of an election does not, however, mean it has the right to a hearing. Under Board regulations either the Regional Director or the Board may determine, in the exercise of reasonable discretion,that a hearing is warranted. On the other hand, after reviewing the objections and the evidence, they may decide that no hearing is necessary. Nothing said here should be taken to indicate that the Board is required to hold a hearing in every case raising election objections. In proper cases election objections may be resolved on the basis of an administrative investigation alone. *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), *cert. denied,* 389 U.S. 958, 88 S.Ct. 388, 19 L.Ed.2d 364 (1967).

The present case was decided on the basis of an administrative investigation. North's primary argument is not that it was wrongfully denied a hearing, although that argument is raised, but rather that the Board failed to consider the evidence in the record. The Board argues that it need not review the evidence considered by the Regional Director, and that it may confine its review to the Regional Director's report and the briefs submitted by the parties. We note, though, that even under the Board's interpretation of 29 C.F.R. § 102.69(g), while the Regional Director is not required to transmit the record, the objecting party can submit to the Board all the documentary evidence submitted in this fashion.

We reject the Board's interpretation of 29 C.F.R. § 102.69(g) and hold that the regulation requires the Board to review all the evidence relied upon by the Regional Director. If the Board's interpretation was accepted we think serious due process problems would be presented. *Prestolite Wire Division v. NLRB,* 592 F.2d 302 (6th Cir.1979) established generally that 29 C.F.R. § 102.69(g) requires the Regional Director to trasmit the record to the Board in cases in which no hearing is held. Although *Prestolite* did not expressly hold that the Regional Director must transmit the record in all cases, it is clear that the court felt the burden was on the Regional Director to do so.

> Without expressly ruling that the Regional Director is invariably required under Section 102.69(g) to transmit to the Board all of the materials considered by him (although the language says "shall"), we think that the better practice is to do so and we are unable to fault the company for having failed to anticipate that this procedure would not have been followed here. It is true that subsection (g) does permit the party filing exceptions to "append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision." We cannot, however, construe this language to shift from the Regional Director to the petitioner the responsibility for assembling and transmitting the record. The mechanics for such a transmission are lacking and we believe that the Board's review would be more reliably facilitated by following the plain language of its rule. In addition, the petitioner would be entirely without power to transmit the employee affidavits which the investigating officer had obtained.

Id. at 305. The *Prestolite* reasoning was given its logical extension in *NLRB v. Curtis Noll Corp.*, 634 F.2d 1027 (6th Cir.1980) (per curiam). There we stated as a blanket rule:

> This Court also holds that the Board abuses its discretion by adopting the report
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> of the Regional Director when the Regional Director fails to transmit to the Board the evidence relied upon by the Regional Director.

Id. at 1029.

Without reviewing the evidence it is impossible for the Board to determine whether the Regional Director's recommendations should be followed or set aside. We view the Board's position that it does not have to review the documentary evidence as an abdication of its responsibilities under the National Labor Relations Act. If the Board does not look at the evidence it can do nothing but rubber stamp the Regional Director's decision. Meaningful review is impossible without a review of the evidence. In addition, if the Board does not review the evidence and make it part of the record, it is impossible for a court to review the Board's action, since there is no record to review. We hold that it is an abuse of discretion for the Board to adopt the report of the Regional Director without reviewing the documentary evidence relied upon by the Regional Director.

We further hold that the burden of transmitting the record to the Board lies with the Regional Director. *Prestolite* outlined all the reasons why the responsibility for transmitting the record to the Board should lie with the Regional Director. 592 F.2d at 305. We think the reasons stated in *Prestolite* are persuasive and the responsibilty for transmitting the record should be with the Regional Director. Therefore, we confirm the extension of *Prestolite* that we made in *Curtis Noll* and require the Regional Director to transmit the record, as defined in the first sentence of 29 C.F.R. § 102.69(g), to the Board with the report and recommendations on election objections. This burden is a very slight one and we cannot see that any difficulty will be encountered in complying with it.

Finally, we must determine the appropriate remedy for this violation of procedure by the Board. In both *Prestolite* and *Curtis Noll* the procedural posture of the case was identical to the present case: the Board certified the union over objection by the employer, without conducting a hearing or reviewing the evidence relied upon by the Regional Director in making his recommendations. In both of those cases we remanded to the Board with instructions to conduct a hearing on the employer's election objections. Despite the fact that the procedural posture of these cases is identical, we do not think we should order the Board to conduct a hearing in this case.

We have stated previously where, over objection, the Board certifies the union without the benefit of either a hearing or the full record, we will construe the well-pleaded factual assertions in the employer's objections most favorably to the employer. *Prestolite Wire Division v. NLRB*, 592 F.2d at 306–07. Nonetheless, the question whether a hearing is compelled is to be determined on a case by case basis. In both *Prestolite* and *Curtis Noll*, the employer's objections, on their face, raised material factual disputes with the Regional Director's report, and, as a result, the denial of a hearing was an abuse of discretion.

We have carefully reviewed North's objections to the election and its exceptions to the Regional Director's report. Even construing the objections most favorably to North, the objections do not, on their face, raise such material *factual* disputes to warrant an order to the Board to conduct a hearing. The problem here is more that of interpreting and giving weight to the evidence developed by the Regional Director. Whether these objections, when reviewed with the documentary evidence in the record[2] will be sufficient to require a hearing is a matter better left for the Board to determine. We think the Board is the appropriate body to make this determination in the first instance under these circumstances.

Since the Board adopted the Regional Director's report without viewing the documentary evidence relied upon by the Regional Director, we deny the Board's Petition to Enforce, set aside the certification and remand with instructions to the Board to reconsider the Regional Director's report with the evidence in the record.

Nathaniel R. Jones, Circuit Judge, concurring: Contrary to Circuit precedent, the majority opinion holds that the "plan language" of 29 C.F.R. § 102.69(g) requires the Regional Director to transmit to the Board the entire record of documentary evidence compiled in his administrative investigation. As was aptly stated in *Randall, Burkhart/Randall Division of Textron, Inc. v. NLRB*, 638 F.2d 957 (6th Cir. 1981) at 960–61:

> The regulations that the Board has allegedly violated are found at 29 CFR §§ 102.68 and 102.69(g). Together they state that stipulations, documentary evidence, transcripts of oral arguments before the Regional Director, exhibits, affidavits, etc., are all considered part of the

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[2] Although North has appended the documents in question to its brief, we do not consider this to be a satisfactory method of augmenting an otherwise incomplete record. Therefore, we do not consider the documents properly before us to review.

record to be transmitted to the Board. This court has on several recent occasions condemned the NLRB practice of refusing to have the full record transmitted, *for, even if it does not expressly violate the regulations,* the practice allows the Board greater opportunity to abuse its discretion and complicates the problems faced by the reviewing court. *Prestolite Wire Div. v. NLRB,* 592 F.2d 302 (6th Cir. 1979); *NLRB v. RJR Archer, Inc.,* 617 F.2d 161 (6th Cir. 1980); *NLRB v. Curtis Noll Corp.,* 634 F.2d 1027 (6th Cir. 1980). (emphasis added)

Nor do I believe that due process mandates the majority's construction of 29 CFR § 102.69(g). Such a holding, merely hinted at in the majority opinion, would render their opinion unnecessary and, indeed, misleading. The majority's opinion as currently written "invites" the Board to rewrite 29 CFR § 102.69(g) to clearly require a party other than the Regional Director to transmit to the Board pertinent parts of the documentary evidence compiled in his administrative investigation. At that point, our Court is left where we started.

Because I prefer that we avoid that sense of déjà vu, I would hold that "the Board abuses its discretion when the Regional Director fails to transmit to the Board the evidence relied upon by the Regional Director." *NLRB v. Curtis Noll Corp.,* 634 F.2d 1027 (6th Cir. 1980), at 1029.

Because I believe we are bound by the decision in *Curtis Noll,* I concur in the judgment of the Court. I also concur in the majority opinion's articulation of the appropriate appellate remedies when the Board abuses its discretion.

Karl Kallmann; d/b/a Love's Barbeque Restaurant, No. 62 v. NLRB

640 F.2d 1094 (9th Cir.), March 30, 1981; rehearing and rehearing en banc denied September 18, 1981—245 NLRB 78

On petition to review Board Order

Before Goodwin and Boochever, Circuit Judges, and Harris,* District Judge.

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Boochever, Circuit Judge: Karl Kallmann, d/b/a Love's Barbeque Restaurant (Kallmann), seeks to review and set aside an order of the National Labor Relations Board (Board). The Board cross-petitions for enforcement of its order. The Board found that Kallmann was a successor to Love's Wood Pit Barbeque Restaurant (Love) and that Kallmann had violated section 8(a) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a), by refusing to hire the former Love employees because of their union affiliation and by harassing the former employees during their picketing of Kallmann's restaurant. Consequently, the Board ordered that all forty former employees be reinstated and given back pay. We affirm the part of the Board's order finding violations of the Act, but remand for further proceedings on reinstatement and back pay.

STATEMENT OF FACTS

The Hotel, Motel & Restaurant Employee & Bartenders Union (Union), intervenors in this suit, filed an unfair labor practice suit against Love and Kallmann. The following facts were presented at a hearing before an Administrative Law Judge (ALJ).

Love, a California corporation, operates and franchises restaurants. Love opened Love's Wood Pit Barbeque Restaurant (Restaurant) as a franchise. From 1973 until September 1977 Love operated it as a company-owned restaruant. In 1977, a collective bargaining agreement was in effect between the Union and Love.

In May of 1977, Ronald Mesker, Love's Vice President, spoke with Kallmann regarding the possibility of purchasing the Restaurant. Mesker informed him that Love had a collective bargaining agreement with the Union covering employees at the Restaurant. Franchising negotiations continued during the summer. Love closed the Restaurant at the end of the business day on September 25. The employees were first notified of the closure on September 26. On September 28, Kallmann and Love entered an agreement under which Kallmann became the owner of the Restaurant on a franchise basis.

While the Restaurant was being cleaned, Kallmann prepared to reopen. He rented two rooms at a hotel for interviewing job applicants and advertised at two local colleges and in two newspapers. He interviewed at the hotel for two and one-half days, commencing on October 12. Thereafter, he interviewed at the Restaurant and the advertisements were changed so that the name and address of the Restaurant were provided for the first time. Kallmann conducted all the interviews at the hotel, but David Sebben, assistant manager, conducted some at the Restaurant.[1] Of the 200 applicants, 125 were interviewed. Before October 17, all available positions were filled.

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*The Honorable Oren Harris, Senior District Judge, District of Arkansas, sitting by designation.

Seven former employees of the Restaurant applied for positions, but none was hired. Each indicated on the employment application that he or she was a former employee. The seven were: Malone-Morris, Porter, Hansen, Boyd, Logan, Wadsworth and Bishop.[2] Of these seven, four were interviewed.

Porter applied to be a waiter or cook (he had been the head cook). Kallmann testi-

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fied that although he initially thought that Porter might be a good employee, he subsequently remembered the filthy condition of the kitchen and decided that he did not want that type of employee working for him.

Wadsworth and Logan applied for both dishwasher and cook jobs. Logan testified that after Kallmann read that Logan had previously worked at the Restaurant, Kallmann indicated that there were no positions open except possibly as a dishwasher. After Logan said that he would take a job as a dishwasher, Kallmann told him that he was pretty certain that it was taken. Wadsworth was offered a job as a busboy, but told Kallmann that he was not interested because his seniority warranted a better job. Hansen stated that after she told Kallmann that she had worked at the Restaurant, he exclaimed, "Oh, you were one of them." Kallmann said that he would check her qualifications.

Kallmann initially hired approximately thirty employees, but no former employees were hired. Kallmann established new wage rates and other benefits for his employees. They were lower than those provided to the former employees.

On October 21, the day after the Restaurant reopened, the Union commenced picketing the Restaurant. Although the Union wanted to negotiate a contract, Kallmann declined to discuss the matter. Pingree, a former employee, testified that while she was picketing, Kallmann asked her to lay down her sign and come to work. He said that he would hire her at Union wages, "but it would not be Union."

After the picketing had concluded one day, Logan and Wadsworth were sitting in a car parked near the Restaurant. Sebben, the assistant manager of the Restaurant, testified that he took their picture because he saw the pair rolling what he believed to be marijuana cigarettes.

The ALJ concluded that: (A) by telling employees he did not intend to operate a unionized restaurant and taking pictures, without a valid reason, of employees who had been picketing, Kallmann violated section 8(a)(1) of the Act; (B) Kallmann was not a "successor" to Love; and (C) Kallmann had not violated sections 8(a)(3) and (5) of the Act. Both sides filed exceptions to the decision of the ALJ. The Board upheld the ALJ's decision that Kallmann had violated section 8(a)(1) by it actions during the picketing. It reversed the other findings and concluded that: (A) Kallmann was a successor employer, and therefore violated sections 8(a)(1) and (5) when he refused to recognize and bargain with the Union, and (B) by refusing to hire the former employees because of their Union affiliation, Kallmann violated sections 8(a)(1) and (3). Kallmann petitioned for review of the Board's order and the Board filed a cross-application for enforcement.

A. KALLMANN'S ACTIVITIES DURING THE PICKETING

Kallmann contends that his statement to Pingree and Turner, that he would hire Pingree under the same conditions as before but that the Restaurant "will not be Union," is not a violation of section 8(a)(1)[3] because it was one of fact and one expressing his view and opinion of the status at the time the statement was made. Section 8(c) protects such an expression if it "contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

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[1] Kallmann testified, however, that Sebben did not interview anyone.

[2] Shawver applied after the Restaurant opened. Roy inquired about employment as a hostess, but Sebben told her the position was filled. Although she did not fill out an application immediately, she testified that on the day the Restaurant reopened she left an application with the hostess.

[3] Section 8(a)(1), 29 U.S.C. § 158(a)(1), provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Kallmann, however, was not merely expressing a view of the status at the time he made the statement. One reasonable inference from the remark is that the Restaurant would remain non-union in the future. Moreover, the statement promised Pingree that benefits (i.e., union wages) would be provided even without union protection.

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> [S]tatements * * * made to employees informing them that the company would never bargain with the union and that benefits would be given by the company even without the union * * * violated section 8(a)(1) * * *.

Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542, 545 (7th Cir. 1970). There was sufficient evidence from which the Board could find a violation of section 8(a)(1).[4] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491, 71 S.Ct. 456, 466, 95 L.Ed. 456 (1951) (substantial evidence test for agency findings).

Kallman next contends that Sebben's photographing of Logan and Wadsworth was not a violation of section 8(a)(1) because it was to show that they were rolling a marijuana cigarette, not to harass them for union activity. Neither the ALJ nor the Board, however, believed Sebben's testimony. Thus, there is no basis for overruling the finding that Sebben's actions violated section 8(a)(1). The Board reasonably concluded that such conduct subjected the former employees to harassment.[5]

B. KALLMANN'S FAILURE TO HIRE ANY FORMER EMPLOYEES

The ALJ found that Kallmann did not deliberately refuse to hire the former employees because of their union affiliation. The Board, however, reversed this finding thereby concluding that Kallmann violated sections 8(a)(1) and (3).[6]

Kallmann contends that the Board's finding is not supported by substantial evidence. Moreover, he contends that where, as here, the Board disagrees with the ALJ's findings the evidence supporting the Board's determination must be stronger. This court has rejected Kallmann's second contention.

> The fact that the Board's findings disagree with those of the ALJ does not change this [substantial evidence] standard. The deference accorded to the findings runs in favor of the Board, not the ALJ. It is well settled that we may not substitute our choice between two fairly conflicting interpretations of the facts where the Board's choice is supported by substantial evidence. True enough, the ALJ's determinations on credibility "weigh heavily" in the court's review of the Board's findings contrary to the ALJ's. However, * * * the Board is to be accorded special deference in drawing derivative inferences from the evidence.

N.L.R.B. v. Tischler, 615 F.2d 509, 511 (9th Cir. 1980) (citations omitted).[7]

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Even though the ALJ believed that "Kallmann was not a credible witness when testifying with respect to this very subject [the hiring procedure]," the ALJ found that Kallmann did not refuse to hire the former employees because of their union affiliation. The ALJ based this finding on several factors. First, there was no basis for concluding that any problems between the Union and Love had been brought to Kallmann's attention so that he would be reluctant to hire employees with union sympathies. Second, although Kallmann's testimony was not generally credible, he did appear credible when he stated his belief that when he took over the Restaurant, it would be his choice whether or not there was a union. Thus, Kallmann had no reason to refuse to hire union employees. Third, Kallmann did not refuse employment to all former employees because Wadsworth, and probably Logan, were offered jobs as busboys. Fourth, even though Kallmann's initial advertisements did not list the name of the Restaurant, Kallmann did not interview at the Restaurant during the initial two and one-half days of interviewing, and Kallmann did not give an explanation for these procedures, the ALJ refused to infer that Kallmann was attempting to conceal the reopening from the former employees. Fifth, Kallmann had a valid business reason for not hiring former employees because he felt that the Restaurant had been left in a dirty condition.

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[4] *See N.L.R.B. v. Max Factor and Co.*, —— F.2d —— at —— No. 79-7118 (9th Cir. Sept. 9, 1980) ("[E]mployer violates section 8(a)(1) by offering economic benefits in exchange for ceasing union activity."); *N.L.R.B. v. Interstate 65 Corp.*, 453 F.2d 269, 274 (6th Cir. 1971) (manager's statement that "there would be no union at the motel" and conditioning employment on willingness to work without a union was sufficient to support violation § 8(a)(1)). *Cf. Overnite Transportation Co. v. N.L.R.B.*, 372 F.2d 765, 769 (4th Cir.), *cert. denied*, 389 U.S. 838, 88 S.Ct. 59, 19 L.Ed.2d 101 (1967) (company's statement that "we are not union and we are not planning on being union" was not per se impermissible, but it colored the conduct). *See generally, N.L.R.B. v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 599 n.1 (9th Cir. 1979) (even if the statements were capable of non-coercive interpretation, this court will not weigh differing interpretations as long as the inference drawn by the Board is reasonable).

[5] In the absence of proper justification, the photographing of pickets violates the Act because it has a tendency to intimidate. *See N.L.R.B. v. Associated Naval Architects, Inc.*, 355 F.2d 788, 791 (4th Cir. 1966).

[6] Section 8(a)(3) makes it an unlawful labor practice for an employer:

> by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

29 U.S.C. § 158(a)(3).

[7] When, however, testimonial inferences (credibility determinations based on demeanor) are at issue, the Board's finding will not be sustained when it rests solely on testimony discredited by the ALJ. Even if there is independent evidence, the Board's finding will be more carefully scrutinized. *Loomis Courier Serv., Inc. v. N.L.R.B.*, 595 F.2d 491, 495–96 (9th Cir. 1979). For an extensive discussion of this issue, see *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074 (9th Cir. 1977). It has been stated that " '[w]hile the standard set forth * * * is imprecise, it provides as much clarity as the area affords.' " *Id.* at 1087 (Duniway, J., concurring in part and dissenting in part) (quoting *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir. 1967)).

The Board noted that although the ALJ discredited Kallmann's testimony regarding the hiring procedures, the ALJ nevertheless refused to draw the permissible inference that the hiring actions were taken for an unlawful reason—to conceal the reopening. Finding that Kallmann had deliberately refused to hire the former employees because of anti-union animus, the Board took a contrary view. First, Kallmann's statement that he did not intend to let the employees be represented, far from being a mere opinion, supported a finding of unlawful motive. Second, the Board found that Kallmann's "unusual" hiring procedures, which he failed to explain, were designed to conceal the availability of jobs from the former (Union) employees. Third, it also found that Kallmann made no "offers" to former employees because: (A) the offer to Pingree was itself a violation of the Act; (B) the offer of a "possible" busboy position to Wadsworth was not an offer since it was merely an "expression of a possible potential offer" which Kallmann never actualized, and in any event he knew that Wadsworth applied for the cook position; and (C) there was no basis for inferring that Kallmann offered Logan a position.[8] Fourth, the Board found that there was no valid business reason for not hiring the former employees because Kallmann did not offer the uncleanliness of the Restaurant as a defense at the proceedings before the ALJ.[9] Finally, it noted that Kallmann had violated the Act by photographing picketers and making unlawful statements.

The Board did not disagree with the ALJ's assessment of witness credibility,[10] rather it drew different inferences from the testimony itself. The Board has special expertise in drawings these kinds of inferences, and its determinations are entitled to judicial deference. *N.L.R.B. v. Tischler,* 615 F.2d 509, 511 (9th Cir. 1980).

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The record as a whole indicates that the Board's finding that Kallmann refused to hire former employees because of their union affiliation is supported by substantial evidence. Kallmann's discriminatory refusal to hire constituted a violation of sections 8(a)(1) and (3). *N.L.R.B. v. Tragniew, Inc.,* 470 F.2d 669, 675 (9th Cir. 1972); *K. B. & J. Young's Super Markets, Inc. v. N.L.R.B.,* 377 F.2d 463, 465 (9th Cir.), *cert. denied,* 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed. 2d 105 (1967).

C. KALLMANN AS A SUCCESSOR EMPLOYER

When employees have a collective bargaining agreement and a change in ownership occurs, the new owner must recognize and bargain with the employees' union if the new owner is found to be a "successor employer." *N.L.R.B. v. Edjo, Inc.,* 631 F.2d 604, at 606–607 (9th Cir. 1980); *Bellingham Frozen Foods, Inc. v. N.L.R.B.,* 626 F.2d 674, 678 (9th Cir. 1980). The new owner is a successor employer if: (A) the employer conducts essentially the same business as the former employer, and (B) a majority of the new employer's work force are former employees or would have been former employees absent a refusal to hire because of anti-union animus. *Id.; Pacific Hide & Fur Depot, Inc. v. N.L.R.B.*, 553 F.2d 609, 611 (9th Cir. 1977). The Board found that Kallmann was a successor employer who violated sections 8(a)(1) and (5)[11] by disavowing Love's obligation to the Union.

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[8] The ALJ reasoned that because Logan was interviewed at the same time as Wadsworth and Wadsworth was offered a job, Logan was offered a job.

[9] There was little testimony regarding the Restaurant's cleanliness. The ALJ apparently relied on Kallmann's asserted justification for not hiring Porter.

[10] The ALJ discredited Kallmann's testimony, although the ALJ did believe his testimony regarding his belief that it was his choice whether there would be a union. In reaching its conclusions, the Board did not disagree with the ALJ's assessment of that testimony but drew a different inference, namely that Kallmann, in violation of the Act, did not intend to allow a union.

Kallmann concedes that he conducted essentially the same business as Love. He argues, however, the Board erred in finding that he was a successor employer because the Board impermissibly assumed that "but for * * * Kallmann's unlawful * * * [hiring discrimination], the Union's status as the exclusive collective-bargaining representative would have survived * * * Kallmann's takeover of the Hayward Restaurant." Kallmann contends that this "bootstrap argument" cannot be made without some evidence that Kallmann would have had the opportunity to hire the requisite number of former employees in the absence of his allegedly unlawful conduct. At most, only nine former employees applied for the twenty-eight to thirty available positions. Therefore, Kallmann contends that there was not substantial evidence to find that the Union's majority status would have continued.

Kallmann's argument has been rejected by several courts.[12] For example, in *N.L.R.B. v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974), Foodway purchased a grocery store from Allied. Foodway refused to hire any former Allied employees because of their union memberships. Foodway contended that it was not a successor employer with a duty to bargain because the evidence did not show that the union represented a majority of the employees. The court rejected this argument stating:

> It is manifest that but for Foodway's discriminatory refusal to offer employment to Allied's unit employees, the Union would have continued to enjoy a majority representative status. We decline to permit an employer to rely upon its own wrongdoing and thus avoid its legal responsibilities.

Id. at 120. Where, as here, a successor employer unlawfully discriminates in hiring, an appropriate remedy is reinstatement for all the former employees. *Packing House and Indus. Services v. N.L.R.B.*, 590 F.2d 688, 697–98 (8th Cir. 1978). *See N.L.R.B. v. Tragniew, Inc.*, 470 F.2d 669, 675 (9th Cir. 1972).

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> With such reinstatement ordered, continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate.

K. B. & J. Young's Super Markets, Inc. v. N.L.R.B., 377 F.2d 463, 465 (9th Cir.), *cert. denied*, 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed.2d 105 (1967). The Board properly assumed a majority would have survived the takeover but for Kallmann's discrimination. We conclude that substantial evidence supports the Board's finding that Kallmann was a successor employer and thus violated the Act by refusing to bargain with the Union.[13]

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[11] Section 8(a)(5) provides that it it unlawful for an employer:

> to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(5).

[12] *See Packing House and Indus. Services, Inc. v. N.L.R.B.*, 590 F.2d 688, 695 (8th Cir 1978); *N.L.R.B. v. Houston Distribution Serv., Inc.*, 573 F.2d 260, 266–67 (5th Cir.), *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 705 (1978). *See generally N.L.R.B. v. Foodway of El Paso*, 496 F.2d 117, 120 (5th Cir. 1974); *K. B. & J. Young's Super Markets, Inc. v. N.L.R.B.*, 377 F.2d 463 (9th Cir.), *cert. denied*, 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed.2d 105 (1967) (majority status may be presumed where successor employer discharged former employees to evade bargaining obligations); *Barrington Plaza* and *Tragniew, Inc.*, 185 N.L.R.B. 962 (1970), *enforced in part, N.L.R.B. v. Tragniew, Inc.*, 470 F.2d 669 (9th Cir. 1972).

[13] Kallmann's reliance on *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), is misplaced. In *Teamsters*, the employer committed unlawful discrimination in failing to promote minority employees to certain preferred truck driving positions. The government contended that since all non-applicants were employees, it is likely that they were aware of the futility of applying and, absent the prospect of discriminatory rejection, they would have applied. The court rejected this argument because there were such differences between the "preferred" jobs (those that paid more) and the others that "the desirability of the [former] is not so self-evident as to warrant a conclusion that all employees would prefer [the preferred job] if given a free choice." *Id.* at 369, 97 S.Ct. at 1871–1872. Because the Supreme Court pointed out that Title VII remedies are modeled after the National Labor Relations Act, *id.* at 366, 97 S.Ct. at 1870, Kallmann contends that the reasoning of *Teamsters* is applicable to this situation. Here, however, it is reasonable to assume that the former employees would have desired to remain in their existing jobs at the same benefit level. The *Teamsters* court also noted that the non-applicants might not have possessed the necessary qualifications. *Id.* at 369, 97 S.Ct. at 1871–1872. Here, it is proper to assume that the former employees were qualified to perform the jobs they previously held.

D. THE BOARD'S ORDER OF REINSTATEMENT

Kallmann contends that the portion of the Board's order directing him to reinstate the forty former employees to their old jobs, or to substantially equivalent jobs if the old jobs no longer exist, and to make them whole for any loss of earnings suffered as a result of the discrimination, is punitive and therefore unenforceable. *See N.L.R.B. v. Fort Vancouver Plywood Co.*, 604 F.2d 596, 602 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980).

The Board's order requires Kallmann to offer all forty former employees reinstatement. Kallmann argues that this is punitive because he only hired twenty-eight to thirty total employees when he reopened the Restaurant.[14] Kallmann relies on *Vancouver, id.* In *Vancouver*, the company was a worker-owned corporation. Not all the workers, however, were shareholders. Three of the seven directors (also worker-shareholders) advocated ending the employment of non-shareholders altogether. Eventually, the three convinced another director to join with them and on that day all seventy-two non-shareholders then employed were fired. The court upheld the Board's findings that the firings were for anti-union reasons and that the company unlawfully refused to recognize the nonshareholders' union. The court refused to enforce, however, the Board's remedial order, similar to the order here, that required the rehiring of all seventy-two non-shareholders. The company contended that eventually it would have eliminated or drastically reduced the non-shareholder work force regardless of unionization, and therefore the Board improperly gave the discharged employees more than they would have received without the violation. The court agreed, stating:

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> [T]he Board has a duty to consider how many employees, if any, the company would have continued to employ but for the unfair labor practices, and for how long. The record indicates that * * * the Board in review gave [no] consideration to whether some or all of the temporary employees eventually would have lost their jobs for acceptable business reasons.

Id. at 602.

The *Vancouver* court also rejected the argument made by the Board here, that the exact terms of the reinstatement order are properly left for subsequent determination, and do not affect the order's enforceability. *Id.* at 603. It noted that the order required the reinstatement, not just of some non-shareholders, but of exactly seventy-two discharged workers, and this precision made it clear that no further proceedings were contemplated regaarding the number of employees to be reinstated. Because the order was so specific, it denied "the company an opportunity to show that fewer than 72 jobs would have been available regardless of its unfair practices." *Id.* Therefore, the remedial order of reinstatement was unenforceable.[15] Similarly here, the order requires that Kallmann hire all forty former empmloyees without providing him with the opportunity to show that fewer than forty jobs would have been available. the *Vancouver* decision compels the conclusion that the board's order regarding reinstatement is unenforceable[16] and a remand is necessary.

E. THE BOARD'S BACK PAY ORDER

Kallmann also contends that the order mandating back pay is unenforceable because it requires Kallmann to pay more than he would have paid the former employees. After the takeover, Kallmann established wages and benefits which were less than the former union wages and benefits. The Board ordered Kallmann to pay back wages and benefits at the rate existing immediately before the takeover, after finding that Kallmann violated section 8(a)(5) of the Act by unilaterally reducing rates of pay and benefits provided in the collective bargaining agreement. 29 U.S.C. § 158(a)5. A back pay award is appropriate where a successor refuses to hire fromer employees because of anti-union animus.[17] The only question is whether the award at the higher union rate is a penalty.

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[14] We reject the Board's contention that Kallmann has waived the right to raise this argument on appeal because Kallmann, as the prevailing party before the ALJ, had no remedial order to object to before the Board. *See AMCAR Division v. N.L.R.B.*, 596 F.2d 1344, 135 n.8 (8th Cir. 1979).

[15] *See also Florsheim Shoe Store Co. v. N.L.R.B.*, 565 F.2d 1240, 1247 (2d Cir. 1977) (where jobs affected by illegal activities would have been phased out regardless of the activities, Board must tailor its remedy to reflect the situation). *But cf. Packing House and Indus. Services v. N.L.R.B.*, 590 F.2d 688, 697 (8th Cir. 1978) (where substantial evidence supported the Board's finding that successor refused to hire any former employees because of anti-union animus, the court affirmed the Board's order requiring successor to offer employment to all 83 former employees). The successor made no contention, however, that it intended to reduce the work force. The concurring opinion noted that the Board stated that at the compliance hearing it would determine whether the employees were not rehired "*because of legitimate considerations* [such] *as a reduction in force* * * *." *Id.* at 700 (Ross, J., concurring) (quoting the Board).

[16] The board asserts that *Vancouver* is distinguishable because in the instant case no evidence in the record suggests the company "would not, at least initially, have retained all 40 former employees." The Board found, however, that Kallmann initially hired "approximately 30 employees." Excerpt of Record 97. *See also* Excerpt of Record 27; III Reporter's Transcript at 724, 731.

The Board recognized that, under *N.L.R.B. v. Burns Security Services*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972), a successor employer is ordinarily free to set initial hiring terms without preliminary bargaining with the incumbent union. Where, however, "it is perfectly clear that the new employer plans to retain all of the employees," *id.* at 294–95, 92 S.Ct. at 1585–1586, the successor must consult with the union before altering the terms and conditions of employment. *N.L.R.B. v. Edjo, Inc.*, 631 F.2d 604, at 607 (9th Cir. 1980). The Board found that this exception applied because any uncertainty regarding whether substantially all[18] the former employees would have been retained had to be resolved against Kallmann because he could not benefit from his unlawful conduct. As we have noted, when a successor employer has discriminated in hiring, the appropriate remedy is to offer reinstatement to all the former employees. With such reinstatement ordered, it can be presumed that substantially all the former employees would be retained. We also agree with the Board that the emmployer should not be permitted to benefit from his illegal conduct. Consequently, we hold that Kallmann violated the Act when he unilaterally reduced wages.

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Nevertheless, we disagree with the extent of the remedial order. Even though under the facts of this case Kallmann had a duty to consult with the union before unilaterally changing the terms of employment, as a successor employer he had no obligation to accept his predecessor's labor agreement. *Edjo*, at 606–607. The effect of the Board's order is to force Kallmann to abide by the terms of his predecessor's contract with the employees for the entire period of time Kallmann has owned the enterprise. In *N.L.R.B. v. Dent*, 534 F.2d 844, 846–47 (9th Cir. 1976), this court considered a similar remedial order. The successor employer in *Dent* retained all the former employees, but violated the Act by unilaterally reducing wages. The Board ordered back pay at the pre-reduction levels for all hours worked since the reduction. This court refused to enforce the order because enforcement would, in effect, cause the successor employer to be bound by its predecessor's collective bargaining agreement for the three and one-half years that the successor owned the company, a period longer than the contract period in the union's agreement with the predecessor. We also believe that to the extent that a back pay order requires payment at the higher rate for the entire period of ownership, it acts as a penalty.

The function of the remedy in unfair labor cases is to restore the situation, as nearly as possible, to that which would have occurred but for the violation. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941). We recognize the difficulty in reconstructing the situation in the present case. For guidance, we believe, that an appropriate back pay remedy cannot require Kallmann to pay the higher rate beyond a period allowing for a reasonable time of bargaining. The facts demonstrate that Kallmann would not have agreed to union demands to pay the higher rate. Kallmann's refusal would not be unlawful. In all probability it would have led to an impasse allowing Kallmann to reduce wages. *See N.L.R.B. v. Acme Wire Works, Inc.*, 582 F.2d 153, 156–57 (2d Cir. 1978). After a reasonable period for bargaining, Kallmann would be required to pay only at the rate he set.[19]

We remand this case to the Board to determine the appropriate rate of pay and the number of employees that are entitled to reinstatement. In the Board's discretion, resolution of these issues may be left to bargaining between the parties. We order that the Board's order be enforced in part and denied in part.

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[17] *Packing House and Indus. Services, Inc. v. N.L.R.B.*, 590 F.2d 688, 697–98 (8th Cir. 1978). *See K.B.& J. Young's Super Markets, Inc. v. N.L.R.B.*, 377 F.2d 463 (9th Cir.), *Cert. denied*, 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed.2d 105 (1967).

[18] The Board has construed the Supreme. Court's term "all" to mean "all or substantially all." *Int'l Ass'n of Machinists, Etc. v. N.L.R.B.*, 595 F.2d 664, 671 n.35 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070, 99 S.Ct. 839, 59 L.Ed.2d 36 (1979).

[19] *See* dissent of Judge Bryan in *Overnite Transportation Co. v. N.L.R.B.*, 372 F.2d 765, 770–71 (4th Cir.), *cert. denied*, 389 U.S. 838, 88 S.Ct. 59. 19 L.Ed. 101 (1967).

NLRB v. Borden, Inc., Borden Chemical Division

645 F.2d 87 (1st Cir.), March 31, 1981—248 NLRB 387

On petition to enforce Board Order

Before COFFIN, Chief Judge, ALDRICH and WINTER,* Circuit Judges

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COFFIN, Chief Judge: We previously remanded this case to the NLRB for decision as to whether respondent's failure to pay vacation benefits to strikers was an unfair labor practice. *NLRB v. Borden, Inc.*, 600 F.2d 313 (1st Cir. 1979). We now decide that substantial evidence supports the Board's decision that it was.

The collective bargaining contract in general provided that workers had to take a "vacation" before they could collect vacation pay. *See id.* at 318–19. The workers in this suit informed management that they intended to vacation the first week in October 1976. A strike began on the first day of that month. On October 7, workers asked for their vacation pay. The company replied that it would not give vacation pay to employees on strike. On December 26, 1976, however, the company did pay accrued vacation compensation to the still-striking workers (with one exception not relevant here). *See generally id.* at 319.

The Board ruled that the delayed payment constituted an unfair labor practice. We remanded for the Board to assess respondent's justification for the delay under *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). 600 F.2d at 320–21.

On remand respondent confined its evidence of legitimate business justification to the claim that its reasonable reliance on the terms of the collective bargaining agreement explained its behavior. It argued that strike participation could not constitute a "vacation". Since the workers had taken no qualifying "vacation", respondent concluded that its October 7 refusal to pay vacation benefits was justified by legitimate motivation.

The Board ruled that this logic did not explain the *delay* in payment. It added that respondent's argument that striking did not constitute "vacationing" was undercut by respondent's past indifference as to the nature of "vacations" so long as employees left work and thus did not claim double pay. The Board therefore reaffirmed its finding of an unfair labor practice.

Before us respondent offers no other explanations for its behavior apart from reliance on the terms of the collective bargaining agreement. It likewise does not demonstrate why contract reliance accounts for both its October 7 refusal to pay benefits as well as its December 26 decision to pay benefits. The late payment, made while the strike was still in progress, was explained on the ground that "the contractual vacation period" had expired. But this fact could not convert a "strike" into a "vacation" on respondent's theory. In oral argument respondent described this contradiction as a "difficulty" in its position. Since we agree with this assessment, we hold that the Board's rejection of this illogical justification was supported by substantial evidence.

Respondent further argues that the Board has not proved that respondent's action was improperly motivated as respndent asserts the Board must do when the employer advances a legitimate and substantial justification for its conduct. Because in this case the employer's response to the Board's initial showing of discrimination, *see* 600 F.2d at 320, does not prove a legitimate business justification, however, the Board is entitled to prevail on its initial showing. *See id., Eastern Smelting,* 598 F.2d at 670 & 671.

The petition for enforcement is granted.

Communication Workers of America, AFL–CIO, Local 1051 v. NLRB

American Telephone and Telegraph Company Long Lines Department v. NLRB

644 F.2d 923 (1st Cir.), March 31, 1981—250 NLRB 47

On petitions to review Board Order

Before COFFIN, Chief Judge, CAMPBELL, Circuit Judge, and JULIAN, Senior District Judge*

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*Of the Fourth Circuit, sitting by designation.

*Of the District of Massachusetts, sitting by designation.

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COFFIN, Chief Judge: The question in these petitions for review is whether an employer may, consistent with its collective bargaining duties, insist that a union copy grievance-related documents by hand rather than by mechanical means. The National Labor Relations Board determined that this practice violated §§ 8(a)(5) and (1) of the National Labor Relations Act and ordered the employer to make photocopies available in future cases at the union's expense. We have consolidated the petitions for review filed by the employer and the union, and the Board's cross-application for enforcement of its order. Our curiosity piqued by the stance of a giant of high technology atavistically insisting on a quill and scroll ritual, we have searched diligently for the underlying justification of law or policy. We have found none.

I

At all relevant times, the American Telephone & Telegraph Company, Long Lines Department (the company) and Local 1051, Communications Workers of America, AFL–CIO (the union) were parties to a collective bargaining agreement, which provided for a multi-level grievance process culminating in arbitration. For many years the company has maintained a policy of refusing to provide, or to permit the union to make, exact copies of grievance-related materials. Instead, the company requires union representatives to handcopy documents in the presence of a supervisor or to take notes while a supervisor reads from the employee's personnel file. The policy was announced in the company's Labor Relations Handbook and reiterated in several "policy letters". One such policy letter created an exception to the "no photocopy" rule if the relevant data were so complex and voluminous that the union could not comprehend the information without a copy. It appears, however, that this standard has never been met to the company's satisfaction. One of the company's district operations managers testified that in 16 years the union had not once been supplied with a photocopy. Two lower level managers explained their understanding of the 925 company policy as: no photocopies for the union "in any case". Time spent copying documents on behalf of the union is compensable by the company only when "clearly incidental to a grievance meeting in progress", although the practice of individual managers varies somewhat.

The Administrative Law Judge (ALJ) considered the "no photocopy" rule as applied to four different grievances.[1] In each case the union's request for photocopies of relevant portions of the employee's personnel file was refused, although the company ultimately offered to make all of the requested documents available to the union for the purpose of handcopying.

Company employees David Gagne and Richard Bennett were each disciplined in June 1978 for poor attendance. The union did not accept the company's offering of handcopying, but pressed its request for copies of the two men's attendance records. Gagne's records covered nine years of employment with the company and consisted of 16 pages of partially encoded forms and 7 pages of comments. Bennett's records covered six years of employment and consisted of 11 pages of forms and 12 pages of comments. The ALJ found that it would have required several hours in each case to handcopy the records, that the material was easily susceptible to errors in copying and that, at least in Gagne's case, the company refused to commit itself to pay for copying time.

Employee Eva White was suspended in January 1977 and later discharged in June 1978 for poor attendance. After the initial suspension, two union representatives spent six hours handcopying White's attendance records, which consisted of several pages of comments and 27 typewritten attachments. They worked in a company office under the supervision of an operations manager who put his surveillance time to use in reading a newspaper. The company paid half-wages for the time spent copying but paid nothing for typing the 54 pages of handwritten copies. After grieving White's discharge in June 1978, the union renewed its request for photocopies and once again was offered handcopying. By this time, the file had grown considerably, containing, by the company's reckoning, thirteen additional full pages of information. The union continued to press its demand for copies at higher level grievance meetings, but to no avail.

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[1] Although it is featured prominently in the company's brief, the grievance of a fifth employee, Glennon, formed no part of the decision of the ALJ or the Board.

Employee William Benson was suspended in January 1979 for unauthorized presence in a company cafeteria. At first the company grievance representative refused to permit even handcopying but had operations manager Murphy read the eight relevant pages of Benson's file aloud while the union representatives took notes. Murphy later testified that his reading was "95 per cent verbatim". The company failed to respond to a written request for photocopies submitted by the union that explained in detail the union's need for exact copies and offered to reimburse the company's copying expenses. At a later meeting, the union questioned the accuracy of Murphy's original rendition. After some hesitation, the company agreed to another reading, which proved to be different than the first. Faced with the possibility of a "tie-breaker" third reading, the company finally relented and permitted union representatives, on their own time, to inspect the original documents and make handcopies. That process required another six hours of unpaid union time, including typing.

II

We emphasize at the beginning of our analysis that we are concerned only with *means* by which the union could copy grievance-related materials supplied by the company. Specifically, we are not concerned with relevance. The General Counsel's complaint did not allege a failure to provide relevant information and the company, having provided for handcopying all of the information requested by the union, may not now argue that it had no duty at all to disclose the requested material. Nor is there any issue as to who should bear the

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cost of photocopying. The Board's order provides that the union shall bear the reasonable cost of furnishing photocopies and the union objects only to the Board's failure to set a figure for reasonable copying costs. Thus, the narrow question for review is whether the company could lawfully prohibit the union from obtaining, at its own expense, photocopies of documents provided to it pursuant to the company's statutory duty to furnish relevant information.

During the terms of a collective bargaining agreement an employer must provide information requested by the union that is relevant and necessary to the union's prosecution of employee grievances under the agreement. Failure to do so violates §§ 8(a)(5) and (1) of the Act. *Western Massachusetts Electric Co. v. NLRB,* 589 F.2d 42, 46 (1st Cir. 1978); *Puerto Rico Telephone Co. v. NLRB,* 359 F.2d 983, 986 (1st Cir. 1966). In this case, the Board concluded that the company's ban on photocopying impeded the grievance process and therefore violated §§ 8(a)(5) and (1).

The ALJ's essential findings, adopted by the Board, were first, that the union required accurate and complete copies of relevant personnel records to represent properly grieving employees and second, that handcopying is substantially more prone to error, more expensive and more time-consuming than photocopying. The company does not seriously dispute the finding that it was necessary for the union to make accurate and complete copies in order to fulfill its function as grievance representative. The union must somehow transmit information it has acquired from the company from one stage of the grievance process to the next. Lacking originals, the obvious choice for the union is to send copies and preferably, as the company does, to send photocopies of the original documents. The company's labor relations manager and the union's president both testified to the importance of having an accurate statement of the facts in grievance cases. Union witnesses placed particular emphasis on their need to have an exact account of supervisors' file comments in order to check them against other descriptions of the same events and supporting data for discrepancies.

There was testimony, if any were needed, that handcopying is a laborious process that tends to generate transcribing errors, especially when copying numbers or company codes unfamiliar to the copier. As to cost, the union was required to pay the handcopiers half-pay in one case and full pay in another for several hours of work, as well as to arrange for the handwritten notes to be typed. While these expenses alone certainly exceeded the cost of photocopying, the price of the "no photocopy" rule was still greater for the company, which had to pay a supervisor to observe the union copiers, and representatives for both the union and the company for excess grievance time devoted to reading personnel documents aloud and verifying handcopies. The ALJ found further evidence of the burdensomeness of handcopying in the fact that in no other context, outside of collective bargaining, does the company insist on doing business by way of handcopies.

We are satisfied that there is substantial evidence to support the Board's decision that the company rule impeded the grievance process in these four cases. The evidence establishes that the "no photocopy" rule made it expensive and time-consuming, if not impossible, for the union to obtain the reliable copies it required to discharge its duties as bargaining representative. The rule plainly disadvantaged the union in evaluating and prosecuting grievances and was likely to discourage resort to the grievance process at all in some cases.

In view of the company's vigorous defense of its ban on photocopies, we find it perplexing, to say the least, that it has neglected even to assert a legitimate business justification for its policy. Despite repeated inquiries by the ALJ, the company declined during the hearing to disclose the reason for its rule, and has continued on appeal to rely on its bare legal right to determine, as it chooses, how information will be disclosed to the union. As we said in *NLRB v. Borden, Inc., Borden Chemical*

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Division, 600 F.2d 313, 318 (1st Cir. 1979), management's prerogative to determine the form of information disclosure is not a license to put the union "through the hoops": "The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form" (*quoting The Kroger Company,* 226 N.L.R.B. 512, 513 (1976)). We held in *Borden* that management could not refuse to supply the union with insurance cost data because the same information could be had by polling the employees. We see no reason to accord greater deference to management prerogative, if any exists, when, as here, the employer supplies information in the requested form (original documents) but seeks to limit the means by which the union may make copies. We affirm the Board's decision that application of the "no photocopy" rule in these cases unnecessarily impeded the grievance process.[2]

III

The company's second line of defense is that the union waived its statutory right to receive copies of relevant documents by raising and then abandoning the issue during contract negotiations. The company concedes that the union may relinquish a statutory right only by "clear and unmistakable" waiver. *See NLRB v. Perkins Machine Co.,* 326 F.2d 488, 489 (1st Cir. 1964); *Timken Roller Bearing Co. v. NLRB,* 325 F.2d 746, 751 (5th Cir. 1963), *cert. denied,* 376 U.S. 971, 84 S.Ct. 1135, 12 L.Ed.2d 85 (1964).

The issue of photocopies of grievance-related documents was discussed briefly on three different occasions spanning a three-month period during the 1977 contract negotiations. Number 28 of the union's 42 bargaining demands was for "exact copy of all pertinent local grievance information upon request." At the first bargaining session on June 8, 1977 the following discussion occurred:

> "Company: We already have a big xerox bill.
>
> Union: We'll be willing to give you three cents a copy.
>
> Company: I'm afraid the cost goes much deeper than that. If you are serious about this demand then we might have to include a company demand to have copies of Union documents.
>
> Union: Well, we're serious about this one."

A month later, on July 7, the negotiators returned to the subject of photocopies:

> "Union: I'm sure [the Union] will pay for the cost of the paper. And it is ridiculous that we have a hassle over a sheet of paper when xerox machines are readily available. Hassle is the way we get the information. Let's clear it up.
>
> Company: Tie this Demand to Company Demand #1 [a new strike clause]. Otherwise we are not receptive to discussing it.
>
> Union: I hear you, but we are not ready to tie anything together."

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[2] In *Abercrombie & Fitch Co.,* 206 N.L.R.B. 464 (1973), relied upon heavily by the company, the Board summarily affirmed an ALJ's decision that a single failure to provide copies of some 3½ pages of uncomplicated records did not violate the Act. That case is readily distinguishable from this one by the amount and complexity of the requested data. Further, in that case no mention was made of a need for exact copies by the union nor does it appear that the union sought to make handcopies or offered to pay for photocopies. The union representative, rather, "believed that he had been given an adequate opportunity intelligently to consider and evaluate the requested information." The burden imposed on the grievance process by the company's rule in this case far exceeds the *de minimis* level present in *Abercrombie & Fitch.*

Finally, on August 13, the company declared its unwillingness to discuss the issue any further:

> "Company: Let me respond to Union Demands 22, 22A, 17, 20, 23, 28, 31, 32, 34 and 36, not by just saying 'no', but by saying 'hell, no.' We plan no movement and I'm sure you are not surprised. With the objective of moving on, I thought I would group these together and address other items that need further discussion * * *."

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This sparse bargaining history, which is all that was said on the issue, comes closer to demonstrating a refusal to bargain by the company than it does a "clear and unmistakable" waiver by the union. Based on these few exchanges, the union would no doubt be surprised to learn that it had traded away its valuable statutory right in return for "no movement" on the part of the company. Where a statutory right is involved, the law of this circuit is that "a waiver should be express, and that a mere inference, no matter how strong, should be insufficient." *Perkins Machine Co., supra,* 326 F.2d at 489.

Nor is the requirement of an express waiver satisfied by the standard "zipper clause" included in the final agreement signed by the union and company. The clause provided:

> "The Contract is in final settlement for its duration of all demands and proposals made by either party during negotiations and constitutes the entire understanding between the parties."

The contract, as far as we are informed, is silent on the question of waiver. This clause, which is intended to avoid the implication of contractual rights, is particularly ill-suited to an attempt to infer from the union's lack of success at the bargaining table an affirmative contractual waiver of a statutory right. The record establishes that the union proposal was rebuffed without serious discussion. We affirm the Board's conclusion that the union did not waive its right to obtain photocopies of grievance-related documents.

IV

The company's final challenge is that the Board's order impermissibly sets down a per se rule requiring photocopies in all future cases without regard to the facts of particular grievances. Such a rule, the company urges, conflicts with the Supreme Court's statement in *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 314–15, 99 S.Ct. 1123, 1130, 59 L.Ed.2d 333 (1979) that, "[t]he duty to supply information under § 8(a)(5) turns upon 'the circumstances of the particular case', *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 at 153, 76 S.Ct. 753, 756, 100 L.Ed. 1027, and much the same can be said for the type of disclosure that will satisfy that duty."

In *Detroit Edison* the union sought the test battery used by the company to evaluate applicants for promotion. The company resisted turning over the test questions directly to the union because of the risk that the secrecy of the test questions would be compromised and the test rendered useless. The company offered to disclose the test questions to an independent psychologist selected by the union who would guarantee the confidentiality of the questions. In this manner the union could obtain an expert evaluation of the validity of the test and the company would be protected against the expense of validating a new test battery.

As we have already observed, characterizing the "no photocopy" rule as going to the form or type of disclosure lends the rule undeserved dignity. Unlike the company's offer of indirect disclosure in *Detroit Edison,* the "no photocopy" rule does not determine the content of the information actually disclosed to the union, but relates simply to the physical "form" of copy which the union may create. Even in this superficial sense, the company's rule does not affect the form of *disclosure,* but rather limits the ability to take advantage of it. We may assume that with sufficient skill, patience and time a union copier could create a facsimile that, in form, exactly resembled the original supplied by the company.

More fundamentally, the company misapprehends the significance of the discussion of fact-sensitivity in *Detroit Edison.* The passage quoted only in part by the company continues:

> "Throughout this proceeding, the reasonableness of the Company's concern has been essentially conceded. The finding by the Board that this concern did not outweigh the Union's interest in exploring the fairness of the Company's criteria for promotion did not carry with it any suggestion

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> that the concern itself was not legitimate and substantial [footnote omitted]." 440 U.S. at 315, 99 S.Ct. at 1131.

The fact-sensitivity of the duty to disclose thus derives from a balancing process in which the union's interest in disclosure is harmonized with the company's interest in maintaining confidentiality. In contrast to the legitimate and weighty rationale asserted by the employer in *Detroit Edison,* the company in this case has offered no reason to justify its ban on photocopies. Whether the actual reason is simply to make life difficult for the union, or some unknown justification, there is no basis on this record from which to argue that the strength of the company's rationale for not permitting photocopies is *variable* depending on the facts of each case. Common sense suggests that the burden of permitting photocopying will never exceed that of overseeing union scribes.

There is substantial evidence supporting the Board's conclusion that the union's need for photocopies would in every case outweigh the company's simple wish to deny them. In no reasonably foreseeable set of circumstances could it be said that handcopying is superior to photocopying in terms of efficiency and reliability of duplication. The continued restriction of relevance and the fact that the union must shoulder the cost of copying assures the company that it will not be forced to subsidize fishing expeditions. In sum, we cannot say that the Board exceeded its broad discretion to formulate remedies by concluding that in every situation that might arise between this company and union, a refusal to permit photocopying of information otherwise available to the union would unjustifiably impede the grievance process.

An alternative ground supporting the Board's remedy is what it described as the now nearly universal use of photocopies in business affairs by this employer and other companies. *See NLRB v. Weingarten, Inc.,* 420 U.S. 251, 266, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board"). Where only the bare mechanics of collective bargaining are involved, it is reasonable to expect of the company a standard of conduct comparable to that which it brings to other important business affairs. *Cf. J. H. Rutter-Rex Mfg. Co., Inc.,* 86 N.L.R.B. 470, 506 (1949). We see nothing at odds with the policy of the Act in the Board's order directing the company to take affirmative action to remedy its double standard. Accordingly, we enforce the Board's order in its entirety.[3]

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[3] The union objects to the Board's modification of the ALJ's proposed order deleting a requirement that the company provide copies of witness statements in future cases and requiring the parties to bargain over the reasonable cost of copying to be assumed by the union, rather than imposing the figure of 10 cents per copy set by the ALJ. We believe that by raising these points in its reply to the company's exceptions, the union preserved its appeal rights, but find its objections are plainly without merit. The union's first argument—that by disclosing witness statements in one case the company has forever given up the right to withhold them—borders on the nonsensical. The second point—that the Board erred in refusing to set a reasonable figure for copying costs—cuts against the generally recognized principle that the terms of collective bargaining are to be left, to the greatest extent possible, to the bargaining parties. We see no basis for upsetting the Board's choice of remedies in this case. If the company refuses to bargain in good faith, that is a matter appropriately left to contempt proceedings.

Hall-Brooke Hospital, a division of Hall-Brooke Foundation, Inc. v. NLRB

645 F.2d 158 (2d Cir.), March 31, 1981—250 NLRB 505

On petition to enforce Board Order

Before LUMBARD, VAN GRAAFEILAND and KEARSE, Circuit Judges

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LUMBARD, Circuit Judge: Hall-Brooke Hospital, a division of Hall-Brooke Foundation, Inc., petitions us to deny enforcement of an order of the National Labor Relations Board dated July 10, 1980, requiring Hall-Brooke to bargain with Connecticut Health Care Associates ("the Union") as the exclusive bargaining representative of an approved unit of Hall-Brooke's employees. The Board cross-petitions for enforcement of its order. We deny Hall-Brooke's petition and grant the Board's application for enforcement of its order.

I.

On January 5, 1979, the Union filed a representation petition with the Board seeking certification as the collective bargaining representative of Hall-Brooke's non-supervisory employees.[1] Pursuant to

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[1] The agreed upon unit consisted of:

Continued

a stipulation by the parties, the Regional Director conducted an election on March 8, 1979 to determine whether the Union was the desired representative of the bargaining unit. The Union won the election by a vote of 27 to 18.

Immediately following the election, Hall-Brooke filed objections with the Board, including an objection that the Union had issued campaign literature that had created the impression that the Board endorsed the Union's position in the election. The material objected to was a three-page leaflet which the Union had mailed to the eligible voters. The first page of the leaflet was reproduction of a portion of the Board's official election notice entitled "Rights of Employees," which described various employees rights protected by the National Labor Relations Act (NLRA) and listed various employer practices which are prohibited and may cause an election to be set aside. The notice, near the bottom, states: "The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election." The name and official seal of the Board appear at the very bottom.

The second two pages of the leaflet consisted of a series of typewritten questions and answers which were favorable to the Union's position. At the conclusion of the questions and answers were the words "March 8th—Vote Yes for CHCA!" Under that were the words "Your Committee to Elect CHCA." At the very bottom of the last page was the full name of the Union and its address.

Following an administrative investigation of Hall-Brooke's objections, the Board's Acting Regional Director issued a report that found, as to the objection relevant here, that "the document in issue did not compromise the Board's neutrality nor give the impression of Board endorsement" of the Union. The report therefore recommended that the Board overrule the objections and certify the Union. Hall-Brooke filed exceptions to the report, but the Board, after consideration by a three-member panel, adopted the Regional Director's findings and recommendations. One member of the panel dissented. The Union was therefore certified as the exclusive bargaining representative.

In October of 1979, the Union attempted to bargain with Hall-Brooke. Hall-Brooke, however, chose not to bargain with the Union in order to obtain judicial review of the certification decision.[2] The Board's general

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counsel thereupon issued a complaint against Hall-Brooke for violations of sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1976), for refusing to bargain with a certified representative. In its defense, Hall-Brooke raised the same objections to the Union's certification as before. The matter came before the same three Board members who had initially certified the Union. Once again, by a 2–1 margin, the Board held for the Union and ordered Hall-Brooke to bargain. Hall-Brooke then petitioned this court for review.

II.

Hall-Brooke argues that the Board erred in failing to set aside the election because the circulated leaflet tended to mislead employees into believing that the Board supported the Union's position, thereby destroying the "laboratory conditions" necessary to ensure a fair representation election. *Cf. General Shoe Corp.*, 77 NLRB 124, 127 (1948). Moreover, Hall-Brooke argues that in so doing the Board acted contrary to its own precedent. In reviewing the Board's action, we are mindful that the Board is entrusted with broad discretion in creating and enforcing standards to ensure fair representation elections. *See, e. g., NLRB v. A. J. Towers Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed 322 (1964); *NLRB v. Waterman S. S. Corp.*, 309 U.S. 206, 226, 60 S.Ct 493, 503, 84 L.Ed. 704 (1940); *see also NLRB v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 966, 28 L.Ed.2d 237 (1971). Careful judicial scrutiny of the Board's action is necessary, however, in the face of accusations of failure to abide by precedent since the courts have an obligation to ensure that administrative agencies adhere to enunciated policies and procedures. *See, e. g., NLRB v.*

All full time and regular part-time mental health workers, activity workers, cooks, food service workers, dietary aides, general maintenance workers, grounds men, carpenters, painters, and housekeepers, employed by the Hospital at its facility in Connecticut, excluding guards and supervisors as defined in the Act and all other employees.

[2] Certification decisions are not "final orders" under §§ 10(e) and (f) of the NLRA, 29 U.S.C. §§ 160(e), 169(f) (1976), and are therefore not judicially reviewable. *See A. F. L. v. N.L.R.B.*, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940). Instead, to obtain judicial review, aggrieved employers can refuse to bargain with certified representatives, thus subjecting themselves to unfair labor practice proceedings. *See, e.g. Lipman Motors, Inc. v. NLRB*, 451 F.2d 823, 825 n.3 (2d Cir. 1971).

Osborn Transportation, Inc., 589 F.2d 1275, 1279 (5th Cir. 1979); Memorial Hospital of Roxborough v. NLRB, 545 F.2d 351 (3d Cir. 1976).

Specifically, Hall-Brooke argues that the decision here is flatly inconsistent with the Board's decisions in *Allied Electric Products*, 109 NLRB 1270 (1954), *Rebmar, Inc.*, 173 NLRB 1434 (1968), and *GAF Corp.*, 234 NLRB 1209 (1978). In *Allied Electric*, the Board held that it would set aside any election in which the prevailing party had distributed, as part of its campaign literature, a document purporting to be a sample official ballot which was marked with a vote in either box or which contained similar alterations. In *Rebmar*, the Board set aside an election where the union had circulated a reproduced portion of the Board's official election notice—the same portion at issue here. The circulated document in *Rebmar*, however, was altered by addition of a line at the bottom saying "The Government propects your right to organize yourself in a union." On the reverse side of the document was an explanation of the functioning of a union and of the collective bargaining process. There was no indication as to authorship of the additions to the document. The Board stated that duplication of an official document with a partisan message that might be interpreted as an endorsement by the Board would require that an election be set aside. 173 NLRB at 1434. More recently, in *GAF*, the Board held that placement of the official Board name and seal on a distributed campaign pamphlet entitled "It's the Law" setting out the legal rights of employees, although signed by the Union, created an "ambiguity" as to the Board's neutrality and required invalidation of the election.

In this case, the Regional Director, whose report and recommendations were adopted by the Board, stated that in general the Board will not condone any attempts to suggest Board support for either party. Here, however, the Regional Director found that the mailing of a portion of the "Rights of Employees" could not reasonably be said have created an impression of Board endorsement. First, the document merely set out legal duties of the Board and certain unfair labor practices. Second, it was unaltered and contained no added union propaganda. Third, the document itself stated that the Board endorsed neither party in the election. Fourth, the attached Union material was clearly identifiable as the Union's partisan campaign material. It specifically gave the source of the leaflet as "Your Committee to Elect CHCA" and set forth the full name of the Union and its address. Finally, the Board's complete "Rights of Employees" notice was posted prior to the election so employees could tell it was part of an overall government document and not an endorsement of either party. Therefore, the Regional Director concluded that the circulated materials did not compromise the Board's neutrality or give the impression of Board endorsement.

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Given the ample reasons for the Regional Director's finding that the Board's neutrality was not compromised, we cannot say that the Board erred in failing to set aside the election. Moreover, we conclude that the Board's ruling was consistent with its precedents. It is true, as Hall-Brooke asserts, that *Allied Electric, Rebmar* and *GAF* suggest that the Board will not tolerate the use in campaign material of the Board's name or of Board documents in a manner which suggests Board endorsement of either side in an election. Nevertheless, in this case, as the Regional Director found, there was no reasonable suggestion of Board endorsement. This result is supported by a number of other Board decisions in which the use of Board documents in campaign materials was not regarded as grounds for setting an election aside.

In *Rett Electronics*, 169 NLRB 1111 (1968) and *Associated Lerner Shops of America, Inc.*, 207 NLRB 348 (1973), objections based upon use of a reproduced sample ballot were rejected. Despite the seeming breadth of the *Allied Electric* rule regarding reproduction of sample ballots, in these cases it was held that there was no reasonable possibility that employees were misled into believing that the Board's neutrality was violated. In *Rett* the reproduction was considerably reduced in size without all the language of a ballot, and it appeared as part of a pictorial pamphlet distributed by the union explaining voting procedures. In *Lerner Shops*, although an arrow had been drawn under the reproduced ballot pointing to the "NO" box with the message that a no vote was a vote against the union, the Board found that the document was clearly part of the employer's campaign propaganda and therefore did not suggest Board endorsement.

Even more relevant is the decision in *A. Brandt & Co.,* 199 NLRB 459 (1972), *order to bargain,* 204 NLRB 636 (1973), *enforced,* 496 F.2d 876 (5th Cir. 1974), in which the Board refused to set aside an election where the union had distributed a reproduction of a Regional Director's decision involving the employer on which were added numerous anti-employer notations as well as a concluding plea for a vote for the union. The Board stated that the added comments could not reasonably be construed as part of the official decision, but instead were readily identifiable as partisan commentary. 199 NLRB at 459. Finally, in two very recent cases, *Alyeska Pipeline Service Co.,* 236 NLRB 1082 (1978) and *Monier Roof Tiles,* 249 NLRB No. 92 (1980), the Board has refused to set aside elections in circumstances quite similar to those in this case. In *Alyeska* the Board's "Rights of Employees" document was attached to a four-page campaign pamphlet which was distributed by the union at a pro-union meeting. In *Monier* the "Rights of Employees" document itself contained added pro-union comments, but they were clearly attributed to the union.

Despite this wealth of support for the Board's action,[3] Hall-Brooke argues that the full Board in *GAF* had adopted an extremely broad reading of *Allied Electric* and *Rebmar* to be followed in subsequent cases. Moreover, Hall-Brooke notes that members Penello and Jenkins dissented in *GAF,* yet they have formed the majority in the three member panels in this case, *Alyes-*

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ka and *Monier,* in all of which Chairman Fanning dissented. Hall-Brooke also points to *Monmouth Medical Center,* 234 NLRB 328 (1978), *order to bargain,* 236 NLRB 960 (1978), *enforcement denied,* 604 F.2d 820 (3d Cir. 1979), in which both members Jenkins and Penello participated. In *Monmouth* the employer had objected to a number of different campaign materials. One was a Board pamphlet which contained added pro-union comments. The Board found that the comments did not suggest Board endorsement as they were separated and readily identifiable as union propaganda. The Third Circuit, although reversing on the basis of campaign material other than the altered pamphlet, noted that it had difficulty reconciling the decision on that issue with the thrust of the decision in *GAF.* 604 F.2d at 826–27. The court also pointed out the presence of the *GAF* dissenters on the *Monmouth* panel.[4]

We disagree both with the proposition that *GAF* represented a significant broadening of restrictions against the use of Board documents in campaign materials and with the suggestion that members Penello and Jenkins have failed to abide by *GAF*'s strictures. Although Chairman Fanning, by his numerous dissents, appears to oppose any use of Board documents in campaign literature, nothing in *GAF* suggests that the Board was departing from its previous approach of attempting to determine, in each case, whether the use of Board documents would reasonably suggest the Board's endorsement of a particular party in an election. *GAF* states that an "ambiguity" regarding the Board's position created by use of Board materials is enough to set an election aside, yet that does not require that elections be set aside where comments added to Board documents are clearly separated and attributed to one of the parties.[5] Moreover, we see no merit to the suggestion that two NLRB members are refusing to adopt the position of the full Board.[6] Such a suggestion should not be made or accepted lightly, and we see no reason for overcoming the strong presumption against it. We also note that proposed decisions of three-member panels are circulated to the entire Board, and any non-participating Board member may request that a case receive full Board consideration if the member disagrees with the proposed result.[7]

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[3] The Regional Director's report in this case, adopted by the Board, placed specific reliance upon *Brandt* and cited many of the other decisions discussed here.

[4] The court did not note, however, that member Murphy, who dissented in *Monmouth,* did so on the basis of the other campaign material, so that all three Board members agreed as to overruling the objection to the altered Board pamphlet.

[5] The majority in *GAF* plainly stated that its continued concern was with the possible impact on voters of campaign materials using the Board's name, 234 NLRB at 1210, and that, given the facts of the case, the use of the Board's name tended to mislead employees into believing the Board supported the Union's position. *Id.* at 1210 & n.1. The majority explicitly gave its support to the employer's position that the leaflet there in question, "so structured" with the Board's name, gave the appearance of Board support for the Union. *Id.* at 1209. We therefore do not read *GAF* as establishing a new *per se* approach invalidating any election where campaign material included any reproduction of the Board's name or of a Board document.

[6] Section 3(b) of the NLRA authorizes the Board "to delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b) (1976). Congress added this provision to the NLRA to enable the Board to handle an increasing caseload more efficiently. *See* S.Rep. No. 105, 80th Cong., 1st Sess. 8 *reprinted in* I NLRB, Legislative History of the Labor Management Relations Act 407, 414 (1947); II NLRB, Legislative History of the Labor Management Relations Act 983, 1011 (1947) (remarks of Senators Morse and Taft).

For the foregoing reasons, the Board's order is hereby enforced.

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[7] We also reject Hall-Brooke's argument that the decision be set aside for failing to articulate the reasoning supporting the Board's divergence from prior holdings. As noted above, we find the Board's decision consistent with Board precedent, and the Regional Director's report, adopted by the Board, clearly explained the basis for his recommendations while making reference to prior Board decisions.

J.J. Newberry Co., a wholly owned subsidiary of McCrory Corporation v. NLRB

645 F.2d 148 (2d Cir.), March 31, 1981—249 NLRB 991

On petition to review Board Order

Before MOORE, MANSFIELD and MULLIGAN, Circuit Judges

MANSFIELD, Circuit Judge: J.J. Newberry Company ("the employer") proceeding under § 10(f) of the National Labor Relations Act as amended, 29 U.S.C. §§ 151 *et seq.* ("the Act"), has petitioned for review of a decision and order of the National Labor Relations Board. The Board in turn has filed a cross-application for en-

forcement of its order under § 10(e) of the Act. The Board's decision and order, reported at 249 N.L.R.B. No. 126, found that the employer had committed certain unfair labor practices during the course of an organizational campaign conducted at the employer's Green Acres store in Valley Stream, Long Island, by Local 1102, Retail, Wholesale, Department Store Union, AFL-CIO ("the Union"). The campaign led to a Board-supervised election among the Green Acres store employees, resulting in a 44–44 tie vote. The order requires the employer to cease and desist from the unfair labor practices, to post notices, to make whole all employees who lost earnings as a result of what the Board determined was an unlawful withholding of a planned wage increase and, finally, to recognize and bargain with the Union.

The employer challenges the Board's finding that it committed unfair labor practices. It also contends that the Union's majority showing was tainted by the use of supervisory employees to obtain authorization cards and that a bargaining order is not an appropriate remedy. With the exception of the withholding of the preplanned wage increase we find the Board's unfair labor practice determinations to be supported by substantial evidence. The cease and desist and notice aspects of the order are therefore enforced to that extent. The requirements that the employer make whole the employees for lost wages and bargain with the Union are, however, improper. The bargaining order is vacated and the case remanded so that a return election may be held.

The employer operates numerous retail department stores throughout the country. In July of 1977, the Union began an organizing campaign at the employer's Green Acres store. The bargaining unit at the store consisted of about 105 employees and by August 3, 1977, the Union had obtained signed authorization cards from 73 of those employees. On the basis of this showing the Union petitioned for a representation election. Approximately 34 of the 73 cards had been collected by two individuals named Muriel Hirst and Diane Puglia. The employer, believing these two women to be supervisors, moved on August 12, 1977, to dismiss the election petition on the ground that the Union's showing of interest was tainted by supervisor-participation. This motion was eventually denied by the Regional Director and then by the Board. The election was held on October 28, 1977, with the direction that the votes of Hirst and Puglia be challenged and their supervisory status determined in a post-election hearing if necessary. The result was a 44–44 tie vote.

After the election the Union filed objections and unfair labor practice charges alleging that the employer violated the Act by having *granted* a wage increase some three weeks before the election and by various instances of interrogation, solicitation of grievances and accusations of disloyalty. A hearing was held before an administrative law judge (ALJ) during which the Union's complaint was amended by the Regional Director to add an allegation that the employer had improperly *withheld* a wage increase. The ALJ found that certain conversations which the Green Acres store manager, Mr.

Sweetser, and other higher level company officials had had with employees Rosenburg, Caraprese and Hayes violated § 8(a)(1) and that the employer had also violated § 8(a)(1) by unlawfully granting a wage increase prior to the election. However, the ALJ also found that Hirst and Puglia were supervisors, that the withholding of the wage increase had not been unlawful and that a bargaining order was not warranted.

Upon review a three-member panel of the Board agreed with the ALJ as to the minor § 8(a)(1) violations and the unlawful grant of a wage increase. All three members, however, held that the ALJ had erred in finding that Hirst and Puglia were supervisors and that the withholding of the wage increase had been proper. A two-member majority then concluded that a bargaining order was required. Member Penello, agreeing with the ALJ, dissented from this aspect of the Board's ruling.

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The wage increase dispute, which is the linchpin of the Board's case, stemmed from a decision made by the employer in July of 1977, *before* the beginning of the Union's organization drive, to raise wages at all Long Island stores. The decision was prompted by an expected rise in the minimum wage (which it had always been the employer's policy to anticipate) and by the fact that the employer had opened a new Long Island store in Holbrook where the company found it necessary to pay higher wages to attract employees, which led employees in other Newberry stores to expect comparable increases. No fixed date for the implementation of the wage increase at the Green Acres store was set, but it was expected to occur during August.

Both sides agree that the decision to increase wages had been made by the company without regard to any union considerations. The controversy revolves around the timing of implementation. The employer, on the advice of counsel, did not grant the increase in August or September, since its motion to dismiss the election petition was pending before the Regional Director. On October 3, 1977, after being informed that the Regional Director had upheld the Union's showing of interest and had directed that an election be held on October 28, 1977, counsel advised management that the wage increase could be implemented at the Green Acres store. On October 6, 1977, Vice-President Elliott visited the Green Acres store and in the context of what the Board and the ALJ describe as an "anti-union" speech, announced the wage increase. The speech itself was not found to be an unfair labor practice.

DISCUSSION

1. *The Unfair Labor Practices*

The Board's finding, in agreement with the ALJ, that management's interrogation and solicitation of employees Rosenburg, Caraprese and Hayes amounted to § 8(a)(1) violations is supported by substantial evidence. However, for reasons noted *infra,* these violations were minor and would in no event support a bargaining order or an award of back pay. Although the question is a close one, substantial evidence also supports the Board's acceptance of the ALJ's conclusion that the timing of the employer's eventual announcement and grant of the wage increase was a violation of § 8(a)(1), even though the employer's initial decision to raise wages was perfectly legitimate. The Board's conclusion, which disagreed with the ALJ, that the employer's previous withholding of the increase violated §§ 8(a)(1) and (3), however, is not so supported.

Having previously decided to increase wages, the employer in August 1977 was in the position of being forced to tread on eggshells, being caught in a potential "damned if you do, damned if you don't," situation. *NLRB v. Dorn's Transportation Co.,* 405 F.2d 706, 715 (2d Cir. 1969). The predicament is one in which the employer's motives play an important part in judging the legality of its actions.

> "Employers, with some justification, have argued that there is a potential for confusion and unfairness in rules that may make it illegal, on the one hand, to withhold and, on the other hand, to grant, a wage increase. But neither course has been declared illegal *per se.* It becomes so only if the employer is found to be manipulating benefits in order to influence his employees' decision during the union's organizing campaign." *NLRB v. Otis Hospital,* 545 F.2d 252, 255 (1st Cir. 1976).

See also, *Free-Flow Packaging Corp. v. NLRB,* 566 F.2d 1124 (9th Cir. 1978); *Dorn's Transportation,* *supra,* 405 F.2d at 715 ("The issue under the Act is therefore whether in form and in purpose the withholding or conferring of economic benefits was to discourage and frustrate the statutory right of employees freely to organize and bargain collectively.")

In this case, 20-20 hindsight supports the view that because the employer's decision to increase wages was made prior to and independently of any union activity, it would have gone ahead and implemented the raise in the face of the union drive. But if the

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employer did so it faced the serious risk, as its attorneys recognized, that an increase in wages so soon after the Union petitioned for an election would lead to an unfair labor practice charge. It seems more than likely that if the employer *had* raised wages in August, the Union would not have conceded that the employer was merely implementing a predetermined, non-discretionary, benefit. Thus, in this context the employer's mere withholding of a raise in the face of a union campaign does not automatically amount to an unfair labor practice. The purpose and effect of the employer's action must first be ascertained.

The ALJ concluded that the purpose and effect of the withholding were legitimate. He noted first that the employer had relied on the advice of its lawyers and stated, correctly in both respects, that "while it is clear that Respondent is not relieved from any liability on the grounds that it acted pursuant to the advice of counsel, [*NLRB v. Hendel Manufacturing Co., Inc.*, 483 F.2d 350, 353 (2d Cir. 1973)], this is nevertheless a factor to be considered in determining whether Respondent's motivation was unlawful." 249 N.L.R.B. No. 126 at 25. He then went on to observe that the record was "absolutely barren" of any evidence indicating that the decision to increase pay had ever been communicated to the employees prior to its being implemented at the various stores or that the Green Acres employees were ever aware of management's decision to grant and subsequently withhold a pay increase. "Therefore," the ALJ concluded, "it cannot be said that the Respondent made any effort to capitalize on the initial decision to grant or the subsequent decision to withhold the wage increases from Green Acres employees. In these circumstances, it can hardly be said that the Respondent was seeking to interfere with the employees' freedom of choice . . . by deciding to withhold the wage increases from the employees. [Citations omitted]." *Id.* at 26.

The Board rejected this approach, concluding instead that

> "it is reasonable to presume that Respondent's decision to withhold the August increase at Green Acres was not only likely to become known to the Green Acres employees but also to be understood by such employees as interference with their organizational activities. Thus, the absence of a specific announcement that the increase was being withheld at Green Acres—but being granted at all other Long Island stores operated by Respondent—does not alter the conclusion that Respondent's withholding of the wage increase violated the Act." *Id.* at 7.

The record does not support this presumption. The bulk of the testimony cited by the General Counsel in support of the Board's position reflects only management's knowledge of a general employee awareness that higher wages were being paid at the company's new Holbrook store. It does *not* indicate that the employees knew of the decision to increase their wages or of the subsequent decision to withhold the increases at Green Acres. Only one somewhat confused letter might be construed as supporting the proposition that the employees knew that decisions had been made to grant them increases and then to withhold the raise because of their union activity. As against this confusing letter it appears very probable that if the employees had such knowledge the Union would surely have objected on the ground that a benefit had been unlawfully withheld. But it did not. More important, although the Board's General Counsel called numerous Green Acres employee witnesses, he did not elicit testimony from any of them that they knew during August and September that they were being deprived of a planned increase. On this record the Board's contrary presumption is not supported by substantial evidence.

In light of the undisputed circumstances—the employer's inability to predict with any degree of certainty whether an implementation in August of its previously adopted raise would be viewed by the Board as lawful, its reliance on the good faith advice of counsel, its pains to refrain from

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capitalizing on the withholding, and the Union's failure to complain of the withholding—we agree with the ALJ that the withholding did not have an anti-union purpose or effect and was thus now shown to be unlawful.

2. *The Bargaining Order*

As we have recently reiterated, a rerun election and not a bargaining order is the preferred remedy for employer misconduct which taints a union election. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2d Cir. 1980). The issuance by the Board of a bargaining order in lieu of a new election is "only proper if, after an objective review of all of the relevant surrounding circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, it may reasonably be concluded that the employees will be unable to exercise a free choice in a Board-supervised rerun election." *Id.* We cannot agree with the Board that such a conclusion can reasonably be reached in this case.

The employer's initial withholding of the wage increase was not an unfair labor practice. The interrogations of the three employees, though technically § 8(a)(1) violations, were very minor infractions which could never support the issuance of a bargaining order. As Member Penello correctly observed in his dissent, these violations "involved only 3 employees in a unit of about 100, took place over a period of several months, and would not tend to have a lasting effect on the employees." 249 N.L.R.B. No. 126 at 15 n. 14. Additionally, there is no evidence that the violations were ever communicated to other employees. Thus, the only employer conduct which could possibly provide a framework for a bargaining order in this case was the employer's implementation of the wage increase. That the Board majority did base its decision primarily on that action is revealed by its statement, "Respondent's grant of a substantial wage increase to all unit employees in violation of Section 8(a)(1) of the Act is sufficient to render it unlikely that a fair election could be held." *Id.* at 8–9.

It is true that the improper grant of significant economic benefits to employees is often characterized as a "hallmark" unfair labor practice which will justify a bargaining order in the absence of mitigating circumstances or evidence showing that the conduct is not as serious as it may seem. See, *Jamaica Towing, supra,* 632 F.2d at 212–13. The mere presence of such a violation, however, does not automatically preclude a fair second election or mandate the issuance of a bargaining order. Circumstances may exist where grants of economic benefits, even combined with additional unfair labor practices, are insufficient to support a bargaining order. See, e.g., *First Lakewood Assn. v. NLRB,* 582 F.2d 416 (7th Cir. 1976); *Donn Products, Inc. v. NLRB,* 613 F.2d 162 (6th Cir. 1980). Rather than react in knee jerk fashion to the presence of a hallmark violation, the Board must still analyze the nature of the misconduct and the surrounding and succeeding events in each case in an effort to assess the potential for a free and uncoerced election under current conditions. Undertaking such an analysis here, it is clear that, in the language of *Jamaica Towing,* more than one "significant mitigating circumstance exists," 632 F.2d at 212, both with respect to the violation itself and later events, which render a bargaining order both unnecessary and inappropriate.

In the present case it is undisputed that the employer's decision to raise wages had been made independently of any union considerations and that the earlier withholding was not motivated by anti-union purposes. The normal inference of anti-union animus is difficult to draw from the increase in these circumstances. Nor do they indicate any substantial likelihood that anti-union conduct will be repeated, which is a usual inference from an improper benefit grant. As the ALJ said:

> "Although the granting of the wage increases was found to be unlawful under the circumstances, its history cannot be ignored; i.e., the decision to grant the wage increase was made prior to the advent of the organizing campaign, and the

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> Respondent withheld the wage increase after the filing of the Union's petition in order to avoid an unfair labor practice charge while contesting the validity of the authorization cards." 249 N.L.R.B. No. 126 at 28.

In addition, the ALJ specifically found that the October decision to go ahead with the increase was premised on an "honest but misconceived judgment of counsel." *Id.*

The undisputed surrounding circumstances here further dispel the notion that the wage increase might have a coercive impact on Green Acres employees or be viewed by them in the future as a deterrent against their embracing the Union. The Green Acres employees, aware that the employer had been required to pay higher wages to those at Holbrook, could hardly have viewed the increase as largesse designed to impress them with the enthusiasm for union representation. On the contrary, they understood when the increase was announced that it had been delayed only by reason of the Board's election proceedings. As Member Penello of the Board observed in his dissent:

> "In announcing the raise, Respondent stated that the employees would not receive the increases they deserved. The majority concludes that the employees at the Green Acres store were aware that employees at the other stores had already received raises. Thus, the Green Acres employees would be less likely to see the raise as an inducement to vote against the Union. When informing its employees that the 'logjam' was finally broken, Respondent, in fact, placed the onus for the delay on the Regional Director and the timing of the Decision and Direction of Election rather than blaming employees' union sentiments or activities. While I have no doubt that these actions of Respondent are violations of the Act, they are not of the type to preclude employees' free choice in the election process." *Id.* at 15.

Finally, despite the Board's apparently continuing refusal to consider subsequent events and current conditions in weighing the need for bargaining orders, we hold that both are relevant. *Jamaica Towing, supra,* 632 F.2d at 214–15. In this case there has been a particularly high employee turnover. As of October 6, 1980, only 38 of the 105 employees (or less than 37%) who voted in the original election are still working at Green Acres. The effect of a bargaining order could thus easily be to impose upon the employees a union not desired by the great majority of them. Where, as here, there is no indication that the employer in any way deliberately created delay in order to profit from it and, since the unfair labor practice involved was not egregious in the first place, the risk of this unwanted imposition is unwarranted.

The preferred remedy remains a new election. Only where there is a substantial danger that employees will be inhibited by the employer's conduct from adhering to the union should a bargaining order issue. The Board errs in taking the view that bargaining orders should liberally be granted as remedies despite evidence that a new election would suffice.

3. *The Supervisory Issue*

Finally, the Board's finding that Hirst and Puglia were not supervisors, though in contrast to the ALJ's determination, is supported by substantial evidence. The Board's statement that Hirst, "while an experienced and trusted employee, does not possess any indicia of supervisory status," 249 N.L.R.B. No. 126 at 3, and its characterization of Puglia as a "nonsupervisory leadman," *id.* at 5, both appear to be fair interpretations of the facts. The rule with respect to supervisory determinations is that

> "the Board's findings in this area are entitled to 'special weight,' *Amalgamated Local Union 355 v. NLRB,* 481 F.2d 996, 999–1000 (2d Cir. 1973), *cert. denied,* 414 U.S. 1002 [94 S.Ct. 357, 38 L.Ed.2d 238] (1973), in light of the Board's expertise 'in evaluating actual power distributions which exist within an enterprise,' *NLRB v. Metropolitan Life Insurance Co.,* 405 F.2d 1169, 1172 (2d Cir. 1968)." *NLRB v. Porta Systems Corp.,* 625 F.2d 399, 401 (2d Cir. 1980).

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The employer's claim that the Union's card majority was tainted by supervisory solicitation is accordingly rejected.

4. *Relief*

The cease and desist order as it related to unfair labor practices based on the solicitation and interrogation of employees and grant of benefits is enforced. The bargaining and make-whole orders are vacated and the case is remanded to the Board with directions to order a rerun election.

Liquor Salesmen's Union Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Worker's International Union, AFL–CIO v. NLRB

Charmer Industries, Inc., Star Industries, Inc., Standard Wine & Liquor Co., Inc., Peerless Importers, Inc. and National Distillers Distributing Co. v. NLRB

Park & Tilford & Motel & Club, Divisions of Knickerbocker Liquor Corp. v. NLRB

Amalgamated Transit Union, AFL–CIO, Local Division 1309 v. NLRB

664 F.2d 1200 (D.C. Cir.), March 31, 1981

On petitions to review Board Order

Before TAMM, ROBB and MIKVA, Circuit Judges

Opinion for the Court filed by Circuit Judge MIKVA

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MIKVA, Circuit Judge: These cases are petitions for review of two separate orders of the National Labor Relations Board (Board). In No. 80–2085, the Board granted the General Counsel's motion for summary judgment in favor of the union, awarding the union all the relief it sought. The union filed a petition for review in this court alleging that it was aggrieved by the failure of the Board to rule specifically on the union's motion for summary judgment. In the consolidated cases Nos. 80–1746, 80–2152 and 80–2278, the Board gave another union all the relief sought from the Board save an award of attorney's fees. The union filed a petition for review in this court, alleging that it was aggrieved by this refusal of the Board to grant special relief to the union.

In both cases, the employer moved to transfer the proceedings to another circuit pursuant to 28 U.S.C. § 2112(a) (1976).[1] Because neither union was "genuinely aggrieved" by the Board order of which it sought review, this court transferred No. 80–2085 to the Ninth Circuit and Nos. 80–1746, 80–2152 and 80–2278 to the Second Circuit "[f]or the convenience of the parties in the interest of justice."

I. FACTS.

A. *No. 80–2085.*

On the basis of an unfair labor practice charge filed March 17, 1980 by the Amalgamated Transit Union, Local 1309 (Local 1309), the Board on April 15 issued a complaint and notice of hearing, alleging that Bayshore Transit Management (Bayshore), had refused to bargain with Local 1309 as the certified representative of its employees. On May 9, 1980, Local 1309 filed with the Board a motion for summary judgment, alleging in support that:

(1) Bayshore was seeking to litigate issues in the unfair labor practice proceeding which were or could have been litigated in prior representation proceedings;
(2) Bayshore did not assert the existence of any recently discovered facts or special circumstances justifying litigation; and
(3) Bayshore admitted in its answer that it had refused to bargain at all with Local 1309.

One week later, May 16, 1980, the General Counsel of the Board also filed a motion for summary judgment. Its allegations were identical to those contained in Local 1309's motion for summary judgment.

The Board granted the General Counsel's motion for summary judgment, August 27, 1980, *for precisely the same reasons put forward by both Local 1309 and General Counsel.* It ordered Bayshore to cease and desist from its unfair labor practice, to bargain collectively with Local 1309 upon request, and to post notice. Decision and Order, *Bayshore Transit Mngmt., Inc., and Amalgamated Transit Union,* 251 N.L.R.B. No. 136 (August 27, 1980).

Local 1309 filed in this court a petition to review the Board's order, September 9, 1980. Bayshore filed its petition to review the order September 22, 1980, in the Ninth Circuit (9th Cir. No. 80–7513). On November 3, 1980, the Board filed the certified record with this court as the court of first filing, pursuant to 28 U.S.C. § 2112(a) (1976).

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[1] Section 2112(a) provides, in relevant part,

> If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

Bayshore intervened in this court and on October 23, 1980, filed its motion to dismiss or transfer this case to the Ninth Circuit. The gist of Bayshore's motion was that Local 1309 was not a "person aggrieved" within the meaning of § 10(f) of the National Labor Relations Act (Act), 29 U.S.C. § 160(f) (1976), and therefore lacked standing to petition this court for review. Alternatively Bayshore sought to have this case transferred under authority of 28 U.S.C. § 2112(a) to the Ninth Circuit "for the convenience of the parties in the interest of justice." Bayshore pointed out that, as the truly aggrieved party, it had properly filed a petition to review the Board's order in the Ninth Circuit. Both the company and Local 1309 are located in San Diego, California, where the alleged unfair labor practice took place. The law firms engaged by the parties to represent them are also located in San Diego. There do not appear to be any countervailing considerations.

B. *Nos. 80–1746, 80–2152, 80–2278.*

On September 21, 1979, an Administrative Law Judge (ALJ) found that the unilateral promulgation of new c. o. d. collection procedures by liquor wholesalers imposed substantial additional duties and burdens on the wholesalers' liquor salesmen. The ALJ found this unilateral change in working conditions to violate §§ 8(a)(1), (a)(5) of the Act, 29 U.S.C. §§ 158(a)(1), (a)(5) (1976). The Board on June 30, 1980, affirmed the findings of the ALJ and adopted her recommended order, which directed the companies to cancel the new working conditions, restore the *status quo ante,* make whole the employees for loss of time and expenses incurred as a result of the working conditions, rescind any disciplinary action, bargain with Liquor Salesmen's Union Local 2 (Local 2) upon request, and post the appropriate notice, Decision and Order, *Charmer Industries, Inc., et al. and Liquor Salesmen's Union, Local 2,* 250 N.L.R.B. No. 31 (June 30, 1980). The Board did not specifically address, and therefore left undisturbed, the finding of the ALJ that, because the facts did not support the allegation of frivolous litigation, Local 2 was not entitled to attorney's fees.

Local 2 filed in this court on July 3, 1980, a petition to review the order of the Board denying attorney's fees to the Union. (D.C. Cir. Docket No. 80–1746). On July 29, 1980, Charmer Industries, Inc., and four other liquor wholesalers (the Companies) filed a petition to review the Board's order in the Second Circuit. By stipulation of the parties this later-filed petition was transferred to this court, pursuant to 28 U.S.C. § 2112(a). (D.C.Cir. Docket No. 80–2152). A later petition in the Second Circuit filed by Park & Tilford & Motel & Club, Divisions of Knickerbocker Liquor Corp., was transferred to this court October 20, 1980 by the Second Circuit. (D.C.Cir. Docket No. 80–2278). This court consolidated all three cases.

The Companies intervened in No. 80–1746 and on October 21, 1980, moved to transfer the consolidated proceedings to the Second Circuit. The Companies argued that this court should not respect Local 2's first-filed petition because Local 2 was not "genuinely aggrieved." The Second Circuit, the Companies insisted, is a more convenient forum. The Companies and Local 2 are located in New York, counsel for both parties reside in New York, and the alleged unfair labor practices took place there as well.

II. SECTION 2112(A) AND THE FORUM PREFERENCE IN LABOR CASES

These cases graphically illustrate a problem which has plagued the federal courts for years and which now approaches epidemic proportions: the forum shopping inherent in judicial review of administrative action. A party who has substantially if not completely prevailed before the agency files a petition for review—ofttimes within seconds of the agency order—solely to guarantee that review will occur in the forum of its choice. This initial filing automatically

triggers 28 U.S.C. § 2112(a), the venue provision governing judicial review of administrative action, requiring the agency to file its record in the court of first filing, and directing all other courts of appeals to transfer to the court of first filing any later-filed petitions for review of the same order. Although the court of first filing is authorized to transfer the petions to any court of appeals "for the convenience of the parties in the interest of justice," the transfer authority is not always exercised, even when appropriate.

It is a commonly held belief among members of the bar that the courts of appeals read into § 2112(a) a rebuttable presumption that the court of first filing will also decide the case. Whether or not this view is an accurate one, all too often the court of first filing unwittingly allows § 2112(a) to be used as a tool by private parties to forum-shop among the circuits. We take this opportunity once again[2] to express our disapproval of this "unseemly" practice, and make clear that this court intends to utilize the statutory and inherent authority at our disposal to curb this abuse.

Where a party aggrieved by an order of the Board seeks review of that order, the court will generally respect the petitioning party's choice of forum. But where there are two petitions for review of the same order filed in different circuits, the wishes of both parties cannot, of course, be accommodated. Section 2112(a) permits the court of first filing to transfer the entire proceedings to any other court of appeals "for the convenience of the parties in the interest of justice." Although transfer is discretionary with the court, this discretion is in large part guided by a set of criteria established by case law.

In reviewing orders of the NLRB, the courts of appeals have placed special emphasis on the choice of forum of the truly aggrieved party. Where two parties are genuinely aggrieved by the Board's order, but one manages to race to the courthouse ahead of the other, the rationale for preferring a party's choice of forum found in many § 2112(a) decisions disappears. Nonetheless, the forum preference persists. Employer, union and Board alike perceive that the court of first filing will hear the case absent a good reason to transfer it elsewhere. This accurate perception has encouraged if not demanded a fierce race to the courthouse. The higher the stakes are thought to be by petitioners, the more sophisticated (and certainly the more expensive) the race.

This court has respected and will continue to respect an aggrieved party's choice to file a petition for review in this circuit. Congress, in enacting § 10(f) of the Act, 29 U.S.C. § 160(f) (1976),[3] "place[d] this court on a par with the courts of appeals for the circuits in which the alleged unfair labor practices occurred." *International Union of Electrical, Radio & Machine Workers v. NLRB,* 610 F.2d 956, 962 (D.C.Cir.1979). This is in contrast to § 10(e) of the Act, 29 U.S.C. § 160(e) (1976), which authorizes the Board to seek enforcement of its order only in the circuit in which the unfair labor practice allegedly took place, or in which the respondent resides or transacts business. "By not eliminating, but expressly acknowledging, the District of Columbia as an alternative forum, the apparent aim of Congress is to ease the situation of a losing party desiring review. It affords the losing party a choice denied the Board when it proceeds under section 10(e)." *Ball v. NLRB,* 299 F.2d 683, 688 (4th Cir. 1962), *quoted in International Union of Electrical, Radio & Machine Workers,* 610 F.2d at 962 n.49. This respect due an aggrieved party who chooses to file in this court emanates from the congressional desire to assist *the losing party.* No such respect is due a person who has substantially prevailed before the Board.

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It must be emphasized that § 2112(a) is a mechanical device to determine which court will determine venue, not which court will ultimately hear the case. Transfer is entirely discretionary with the court of first filing.[4] The courts have developed a set of factors to consider when presented with a motion to transfer brought under § 2112(a). In fleshing out the phrase "for the convenience of the parties in the interest of justice," the courts have considered the location of counsel, location of the parties, whether the impact of the litigation is local to one region, whether one circuit is more familiar with the same parties and issues or related issues than other courts, the caseloads of the respective courts, and whether there is but one truly aggrieved party.[5]

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[2] *Natural Resources Defense Council, Inc. v. EPA,* No. 80-1607, slip op. at 14, —— F.2d ——, at —— (D.C. Cir. November 4, 1980); *Industrial Union Department, AFL-CIO v. Bingham,* 570 F.2d 965, 970 & n.9 (D.C.Cir.1977).

[3] That section provides, in pertinent part, that

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

[4] Even without § 2112(a), the courts of appeals have the inherent power to transfer a case to another court of appeals. *Abourezk v. FPC,* 513 F.2d 504, 505 n.1 (D.C.Cir.1976) Bazelon and Wright, JJ., concurring); *Eastern Air Lines, Inc., v. CAB,* 354 F.2d 507, 510 (D.C.Cir.1965). The criteria used in evaluating the propriety of the transfer are largely the same.

In *Public Service Commission v. FPC,* 472 F.2d 1270, 1272 (D.C.Cir.1972), this court observed that any preference for the forum in which the first petition was filed is subject to certain exceptions, including one "[f]or a case where the first petition to review is filed by a party who is not substantially aggrieved, in effect undercutting the assumption of a good faith petition to review." [6] We are presented in these cases with examples of this exception. In *UAW v. NLRB,* 373 F.2d 671, 673 (D.C.Cir.1967), the case relied on by the court in *Public Service Commission,* this court stated that "§ 2112(a) requires respect for the forum where the Union filed its petition for review, since that was the first petition for review filed, and we cannot say either that the Union's claim is frivolous or that it is not genuinely aggrieved." But the court noted that

> [w]e do not think a party's selection of forum is necessarily controlling if it has received substantially all the relief contemplated, and any shortfall is inconsequential even though it does not eliminate the technical status of "aggrievement."
>
> [T]he possibility of a transfer on this ground is not to be taken as permitting trial by affidavit on the issue of motivation. It is reserved for the special case where the "inconsequential" character of the deficiency in findings or relief is established by the petitioner's own stipulation * * * or other pleading or representation.

373 F.2d at 674 (citation omitted).

As this court emphasized in *UAW* and reiterated in *International Union of Electrical, Radio & Machine Workers v. NLRB,* 610 F.2d 956, 962 (D.C.Cir.1979), *Public Service Commission,* 472 F.2d at 1272 & n.2, *Municipal Distributors Group v. FPC,* 459 F.2d 1367 (D.C.Cir.1972), and *Truck Drivers & Helpers Local No. 728 v. NLRB,* 386 F.2d 643, 644 (D.C.Cir.1967), only in the "special case" will transfer be warranted for this reason.

The courts are loathe to examine the merits of the case in order to decide this question. Certainly it is inappropriate to compare the relative aggrievement of the union and the company, where both are substantial.[7] It is normally assumed that the union filed its petition because it was aggrieved, not for the purpose of forum shopping. If it appears from the insubstantiality of the pleadings that the union filed first largely to secure a forum believed favorable to it, then such first filing will be disregarded. With these relatively clear guidelines appropriate for application, we turn to the cases at hand.

III. ARE THE UNIONS GENUINELY AGGRIEVED?

A. *No. 80-2085*

This case is a particularly egregious example of filing solely to forum-shop. It taxes the imagination to find a basis for Local 1309's standing to file a petition for review of the Board's order.[8] Both

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[5] *United Steelworkers of America v. Marshall,* 592 F.2d 693, 696–698 (3d Cir. 1979); *Industrial Union Dept., AFL–CIO v. Bingham,* 570 F.2d 965, 971–973 (D.C.Cir.1977); *American Public Gas Ass'n v. FPC,* 555 F.2d 852, 855 n.5 (D.C.Cir.1976); *McGarity, Forum Shopping For Appellate Review of Administrative Action,* Report to the Administrative Conference, 61–81 (August 15, 1980).

[6] The court's discussion of § 2112(a) suggests that, in the absence of those exceptions, the statute does create a presumption in favor of review in the court of first filing. None of the most recent opinions of this court which discuss § 2112(a) refers to any sort of presumption or forum preference, although the language in *Public Service Commission* has not been disapproved. *See International Union of Electrical, Radio & Machine Workers v. NLRB,* 610 F.2d 956, 961 (D.C.Cir.1979); *Industrial Union Dept., AFL–CIO v. Bingham,* 570 F.2d 965 (D.C.Cir. 1977); *American Public Gas Ass'n v. FPC,* 555 F.2d 852 (D.C.Cir.1976); *Abourezk v. FPC,* 513 F.2d 504, 505 n.1 (D.C.Cir.1975) (Bazelon and Wright, JJ., concurring).

[7] *See also United Steelworkers of America v. Marshall,* 592 F.2d 693, 696 (3d Cir. 1979). It appears that not all circuits have been as reluctant to weigh the comparative aggrievement of the parties. *ITT World Communications, Inc. v. FCC,* 621 F.2d 1201, 1208 (2d Cir. 1980) ("It is a well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency decision."); *J. L. Simmons Co. v. NLRB,* 425 F.2d 52, 55 (7th Cir. 1970) ("The aggrievement, if any, suffered by the company as a result of the Board's order, which granted substantially all the relief requested, is insignificant when compared with that claimed by the union."); *Chatham Mfg. Co. v. NLRB,* 404 F.2d 1116, 1118 (4th Cir. 1968).

> Even if the party first filing a "petition for review" has some legitimate complaint about the board's order, but is substantially the prevailing party, the court has the discretionary right under 28 U.S.C.A. § 2112(a) to transfer the proceedings to any other court of appeals when such a transfer would be for the convenience of the parties and the interest of justice.

[8] Section 10(f) of the Act, 29 U.S.C. § 160(f) (1976), allows "any person aggrieved by a final order of the Board" to petition a court of appeals for

Continued

Bayshore and the Board argue that Local 1309 has received all the relief it requested from the decision of the Board. Local 1309 does not really contest this. Instead, it claims that the failure of the Board to pass specifically on *Local 1309's* motion for summary judgement has "aggrieved" Local 1309 within § 10(f). This argument is so gossamer that it affords no cover for the union's

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attempt to place venue in this court for ulterior purposes.

Local 1309 reads Sections 102.24, 102.25, and 102.50 of the NLRB's Rules and Regulations to require the Board to "issue a written decision with respect to any motion submitted to it."[9] In a burst of hyperbole Local 1309 concludes that "[t]he entire concept of due process as it is expressed in our legal system is based upon the fact that a party making a motion has a right to have a ruling on that motion." If indeed the Board is required to rule on this motion, either by its own regulations or the "entire concept" of due process, then this appears to be the classic case of harmless error.[10]

Local 1309 has failed to point out to this court any additional or different relief the Board or this court can award it, apart from this abstract obligation of the Board to answer all motions in writing.[11] Under these circumstances, the test set out in *UAW* has been satisfied. Local 1309's choice of forum is thus entitled to no weight.

A canvass of the factors which courts employ in discretionary transfer cases brought under § 2112(a) leads to the ineluctable conclusion that the Ninth Circuit is the appropriate forum to hear the case. Bayshore is the truly aggrieved party, and has properly filed there a petition for review of the Board's order. Both the company and the union local are located in San Diego, California, where the alleged unfair labor practices took place.[12] The law firms engaged by the parties to represent them are located in San Diego. Convenience of the parties, and more importantly, convenience of counsel are relevant factors in deciding whether to transfer.[13] The Board itself suggested that this case be transferred to the Ninth Circuit: It is done.

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review of that order. (All the courts of appeals have jurisdiction to review and enforce orders of the NLRB. Section 10(f), which designates the proper fora for review of a Board's order, is concerned only with venue. *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 998 n.12 (D.C.Cir. 1972), and authorities cited therein.) In *Retail Clerk's Union 1059 v. NLRB*, 348 F.2d 369, 370 (D.C.Cir. 1965), this court held that one has standing to appeal an order of the Board within the meaning of § 10(f) if there is demonstrated an "adverse effect in fact" on the petitioner. The refusal to rule specifically on Local 1309's motion for summary judgement arguably does not even amount to technical aggrievement as it is not clear how Local 1309 is adversely affected by such refusal.

If Local 1309 lacks standing to petition this court for review of the Board's order, it would be proper to dismiss the petition. We prefer not to dismiss this petition, however, but to follow precedent and to transfer the Union's petition to the Ninth Circuit where that court may determine, as relevant, the issue of Local 1309's standing.

In *Insurance Workers International Union v. NLRB*, 360 F.2d 823, 827 (D.C.Cir.1966), this court held that because the Union was afforded all the relief it had sought, it was not "such a person aggrieved as to be entitled to seek review of the Board's order in this court * * *." The court did not grant the motion to dismiss, however, but transferred the proceedings to the Seventh Circuit.

> Our denial will be without prejudice to renewal by the [movant] in the transferee court. We should not and we do not undertake to bind the Seventh Circuit on the Union's claim that it is a person aggrieved. That court will be free to rule on the Union's standing. We say only that at this stage of the consolidated proceedings, it has not been made to appear to this court that the Union was entitled to seek here a review of the Board's order.

360 F.2d at 827–828. *Accord: J. L. Simmons Co. v. NLRB*, 425 F.2d 52, 54 (7th Cir. 1970) (Court declined to dismiss on standing grounds, though it had serious doubts whether the company was in fact aggrieved, and transferred the petitions instead).

[9] Section 102.25, triggered by §§ 102.24 and 102.50, provides that a trial examiner shall rule on all prehearing motions and all such rulings and orders shall be issued in writing. "Whenever the trial examiner has reserved his ruling on any motion, and the preceeding is thereafter transferred to the Board * * * the Board shall rule on such motion."

[10] It is not all that clear that the Board erred here. The Board could be said to have "ruled" on petitioner's summary judgement motion by granting the twin motion of the General Counsel. However, the Board expressly stated that it declined to rule on Local 1309's motion, as it was unnecessary to do so. 251 N.L.R.B. No. 136, slip op. at 6 n.5. The Board hinted that Local 1309 might not have standing to file its motion in the first place, *id.* Grounding its decision on the General Counsel's summary judgement motion obviated a discussion and decision on the standing issue.

It certainly cannot be argued, in view of the Board's footnote, that the Board "ignored" petitioner's motion. To argue as Local 1309 does that the failure to "rule" on its motion is the significant fact, disregarding the full consideration the Board gave to each argument contained in the motion, is to exalt form over substance.

[11] In a very similar factual situation, the Seventh Circuit stated that "a serious question is presented whether the Board's refusal to rule on the company's contention on this issue made the company a 'person aggrieved' within the meaning of section 10(f)". *J. L. Simmons Co v. NLRB*, 425 F.2d 52, 54 (7th Cir. 1970). The court did not so hold, however, preferring to rest its decision on the genuine aggrievement doctrine. See note 8 *supra*.

[12] *See* page 1209 *infra*.

[13] *See United Steelworkers of America v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979) ("The only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions."); *McGarity*, *supra* note 5, at 62–64.

B. *Nos. 80-1746, 80-2152, 80-2278*

The petition filed by Local 2 in No. 80-1746 is marginally different from the above case because the petitioning party received all of the customary relief it requested from the Board, but did not receive the special or extraordinary relief it sought in addition. In the process of directing the employer to cancel working conditions which were unilaterally promulgated, restore the *status quo ante,* make whole the employees for loss of time and expenses incurred as a result of the working conditions, rescind any disciplinary action, bargain with Local 2 upon request, and post the appropriate notice, the Board did not specifically address and therefore denied Local 2's request for attorney's fees. Local 2 argues this was error, rendering it substantially aggrieved.

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Each and every aspect of the Board's order is directed to the wholesalers. It is only the denial of attorney's fees which renders Local 2 "a person aggrieved" and permits it to file a petition for review.[14] Because this aggrievement relates to no part of the underlying dispute between employer and union other than fees and costs, it is insubstantial.

This court has held that the Board has the power, pursuant to § 10(c) of the Act, 29 U.S.C. § 160(c) (1976) [15], to award to the charging party counsel fees and litigation costs as additional affirmative relief. *Food Store Employees Union, Local 347 v. NLRB,* 476 F.2d 546, 550-551 (D.C.Cir. 1973), *rev'd in part on other grounds,* 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974). But the Board has determined that such an award is appropriate only upon a showing of "clearly aggravated and pervasive misconduct" or when the defenses are "palpably without merit." *International Union of Electrical, Radio and Machine Workers v. NLRB,* 426 F.2d 1243, 1250 (D.C.Cir.), *cert. denied,* 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256 (1970).[16] Although the union persistently prays for attorney's fees, such fees and litigation expenses are generally not considered by the Board as part and parcel of its usual compensatory remedy. Only in rare cases are attorney's fees granted by the Board, and rarer still the case where a court of appeals will reverse the Board's denial of attorney's fees.[17] The Board's choice of remedies in enforcing the Act is entitled to great deference from the courts. As this court recently stated, "the imposition of remedies is a matter of special administrative competence, subject to very limited judicial review." *United Steelworkers of America v. NLRB,* 646 F.2d 616, at 629 (D.C.Cir.1981). With these considerations in mind, we believe that a petition for review, filed solely to fight an uphill battle with respect to no part of the underlying dispute between employer and union other than litigation expenses, may be considered so "inherently implausible or insubstantial" that it should not be determinative of the forum for review.[18]

We do not intend to suggest that a request for extraordinary relief denied by the Board will never render the charging party genuinely aggrieved. But it is for the Board in the first instance to determine if the facts justify such an award. Our review of that decision is "very limited."

Prior opinions of this court wisely caution the court of first filing not to delve into the merits of the underlying dispute lest there be an appeal within an appeal. *UAW,* 373 F.2d at 364; *International Union of Electrical, Radio & Machine Workers,* 610 F.2d at 962. We observe that stricture, but here it is manifest from the parties' moving papers that Local 2's protest of a routine denial of counsel fees and litigation expenses was at best ancillary to the dispute. In such circumstances, the court of first filing can subordinate the forum preferences of a party who has substantially prevailed before the Board and seeks review only of the Board's refusal to grant it

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[14] *See* note 8 *supra.*

[15] Section 10(c) provides in relevant part that the Board "shall take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

[16] *District 65, Distributive Workers of America v. NLRB,* 593 F.2d 1155, 1167 (D.C.Cir.1978).

[17] Local 2 has not cited us to any decision of this court *ordering* the Board to award attorney's fees and this appears to be foreclosed by the Supreme Court's opinion in *NLRB v. Food Store Employees Local 347,* 417 U.S. 1, 10, 94 S.Ct. 2074, 2080, 40 L.Ed.2d 612 (1974), where the Court stated:

> [W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course.

[18] *See American Public Gas Ass'n. v. FPC,* 555 F.2d 852, 858 n.5 (D.C.Cir.1976).

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additional ancillary relief. The court may then engage in an appropriate exercise of discretion under § 2112(a) to retain the case or to transfer the case to an appropriate circuit "for the convenience of the parties in the interest of justice."[19]

The Second Circuit is the convenient forum in which this case should be heard. Local 2 and the Companies are all located in New York, and both sides have enlisted counsel from New York City on their behalf. The unfair labor practice allegedly occurred in New York.

Local 2 argues without citation that case law forbids the court of first filing room considering the residence of the parties and the situs of the alleged unfair labor practice. These arguments are incorrect. Residence of the parties, although not a major factor, nevertheless has been considered by this court. *E. g., Industrial Union Dept., AFL-CIO v. Bingham,* 570 F.2d 965, 971 (D.C.Cir.1977). Indeed, the plain wording of § 2112(a) belies any notion of its irrelevance. It is not true that where the unfair labor practice occured is immaterial. This court has noted only that the locus of the unfair practice should not be dispositive of a motion to transfer. *International Union of Electrical, Radio & Machine Workers,* 610 F.2d at 962.

IV. CONCLUSION

It may be naive to hope that the bar would view all courts of appeals, and their judges, as fungible. We need not pause to determine whether the failure so to view the federal appellate process reflects on the bar or on the bench. In either event, courts need not and should not cater to the disingenuous reasons lawyers and parties give in seeking out one tribunal over another.

We believe that to be "genuinely aggrieved" by a decision of the Board, such aggrievement must result from a significant part of the Board's action. A party, whether it be employer or union, should not search out a remedy to request from the Board in an effort to choose a forum of review. Because it cannot be said that either union here was genuinely aggrieved by the Board's decision granting substantially all the relief it requested, this court has ordered No. 80-2085 transferred to the Ninth Circuit, and Nos. 80-1746, 80-2152 and 80-2278 transferred to the Second Circuit.

NLRB v. Manufacturer's Packaging Co., Inc.

645 F.2d 223 (4th Cir.), April 1, 1981—247 NLRB 1117

On petition to enforce Board Order

Before BRYAN, Senior Circuit Judge, PHILLIPS and ERVIN, Circuit Judges

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ERVIN, Circuit Judge: The National Labor Relations Board (the Board) has petitioned this court for enforcement of its order directing Manufacturer's Packaging Co., Inc. (the company) to bargain with Local 387, International Union of Operating Engineers, AFL-CIO (the union) upon the union's request, and to take other remedial action, for violating section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(5) and (1). We grant enforcement.

I.

The union was certified as the exclusive bargaining representative of the company's production employees after it prevailed by a vote of 47 to 22 in a Board conducted representation election held on April 27, 1979. The company and the union met several

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times prior to the election to discuss the election. Initially, the parties disagreed on the proper bargaining unit: the union felt that the sub-supervisors should be included, and the company contended that they should be excluded. On March 9, 1979, the union and the company stipulated that sub-supervisors should be excluded. The stipulation was approved by the Board's Regional Director.

The company filed a timely objection to the election, contending that it had been tainted by the pro-union activities of certain sub-supervisors. Among the challenged activities were the following: two out of the ten sub-supervisors distributed one union card each to an employee, four wore union buttons, three attended union meetings, one signed a union authorization card, one transmitted an employee's signed union card to another employee and five made pro-union statements. The evidence shows that many of the Sub-supervisors' pro-union statements were made in response to employee inquiries. Furthermore, with the exception of one pro-union comment by a sub-supervisor, all the challenged activity took place prior to the March 9th stipulation which was made a full seven weeks prior to the election.

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[19] Of course, the court of first filing may determine in its exercise of discretion that the convenience of the parties and the interest of justice demonstrate that the court should decline to transfer and instead entertain the case. But the court will reach this conclusion upon a consideration of the relevant factors and, more importantly, liberated from the forum preference.

The Regional Director found the company's objection to the election to be without merit and recommended in his written report that the Board certify the union as the exclusive bargaining agent. The company then filed exceptions to the report requesting either that a hearing be held on its objection or that the election be set aside or both. The Board denied the company's hearing request and adopted the recommendation of the Regional Director that the union be certified as the employees' exclusive bargaining representative. Shortly thereafter the union wrote the company requesting it to bargain with it, and the company refused.

II.

The question we must resolve is whether the Board's conclusion that the election was not tainted by the sub-supervisors' union activities should be upheld. The burden is on the party objecting to an election to show that the challenged activity has prejudiced the outcome of the election. *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir.), *cert. denied*, 389 U.S. 917, 88 S.Ct. 238, 19 L.Ed.2d 265 (1967). An election will not be set aside unless the conduct of one of the parties has prevented employees from making their collective desires effective. *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 378 (4th Cir. 1968). The determination of a valid election is within the sound discretion of the Board, and the Board should be reversed only when it has abused its discretion. *Id.*

The Fourth Circuit has taken a strict approach to extensive supervisory participation in union campaigns. In *Turner's Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972), for example, in which the employer petitioned the court to set aside a Board bargaining order, the employer contended that the election should be set aside because of the pro-union activities of two supervisors. Two shop foremen of a trucking outfit, who had significant input into hiring, firing, and wage decisions, had voiced strong support for the union. Their union activities were substantial. They were largely responsible for bringing in a union organizer. They both interrogated employees about whether they intended to sign union authorization cards and to vote for the union, and they warned the employees that if they voted against the union, "things were going to get tough, and they would start paying for it after the election." *Id.* at 292. They told employees that they would get higher wages and more benefits if they voted for the union. Both supervisors also threatened employees who did not support the union. In finding that the supervisors' activities warranted setting aside the election, the court noted that it is not necessary for the employer to prove that supervisor pressure and coercion actually affected the result of the voting. *Id.* at 291.

We do not read *Turner's Express, Inc.* as establishing a per se rule invalidat-

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ing a union election if there is any evidence of pro-union supervisory activity. Instead, whether pro-union supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case. The critical inquiry is whether the supervisors' pro-union activities prevented employees from freely effectuating their collective choice. *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 378 (4th Cir. 1968). Employees' free choice is stifled and an election may be set aside if the supervisors' activities "contain the seeds of potential reprisal, punishment, or intimidation." *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980), *citing NLRB v. WKRG-TV, Inc.* 470 F.2d 1302, 1316 (5th Cir. 1973); *accord, Global Marine Development of California, Inc. v. NLRB*, 528 F.2d 92, 95 (9th Cir. 1975), *cert. denied*, 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 83 (1976). The activities of the supervisors in *Turner's Express* were obviously egregious, and there is no doubt that they were pervasive, coercive, and upsetting to election conditions.

In contrast, the sub-supervisors' pro-union activities in our case were minimal; most occurred more than seven weeks prior to the election and prior to the time that the sub-supervisors were excluded from the bargaining unit. Unlike the situation in *Turner's Express,* there is no evidence in our case that the sub-supervisors initiated or were significantly involved in an offensive strategy to get the company organized. In fact, much of the sub-supervisors' activities, particularly their pro-union comments, were not initiated by the sub-supervisors but were made in response to employee inquiries.

The Board's conclusions, based upon inferences drawn from conduct, should not be set aside unless the conclusions transgress the bounds of reasonableness. *See Catholic Medical Center of Brooklyn and Queens, Inc. v. NLRB,* 620 F.2d 20, 22 (2d Cir. 1980). We hold that there is substantial evidence to support the Board's conclusion that the sub-supervisors' pro-union activities did not taint the election.[1]

Even if we were to adopt a per se rule, the record shows that the company knew of sub-supervisory union activity both prior and subsequent to the date when the sub-supervisors were specifically designated supervisors and made no attempt to disavow it. If an employer is aware of a supervisor's union activities and then stands idly by, the employer cannot subsequently rely on the supervisor's conduct for setting aside a representation election. *NLRB v. Decatur Transfer & Storage, Inc.,* 430 F.2d 763, 764 (5th Cir. 1970). *See NLRB v. Lord Baltimore Press, Inc.,* 300 F.2d 671, 673 (4th Cir. 1962) (advocacy of union by supervisor *unbeknownst to employer* is cause for annulment of election). Because of the company's knowledge of the sub-supervisors' activity, we find it estopped to complain about an unfair election.

We cannot conclude that the Board abused its discretion in refusing to overturn the election. We thus hold that the election was valid, that the company had a duty to bargain with the union, and that its refusal to bargain constituted an unfair labor practice. Accordingly, we grant enforcement of the Board's order.

ENFORCEMENT GRANTED.

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[1] The company claims that is was entitled to a hearing on its election objections. A hearing is necessary if there are substantial and material issues of fact relating to the validity of the election. *NLRB v. Bata Shoe Co.,* 377 F.2d 821, 825 (4th Cir.), *cert. denied,* 389 U.S. 917, 88 S.Ct. 238, 19 L.Ed.2d 265 (1967). To be entitled to a hearing, the objecting party must make a proffer of evidence "which *prima facie* would warrant setting aside an election." *Id.* at 826, *quoting NLRB v. O.K. Van Storage, Inc.,* 297 F.2d 74, 75 (5th Cir. 1961). A hearing is unnecessary when, if all the facts supporting the position of the objecting party were credited, no ground is shown for setting aside the election. 377 F.2d at 826. In light of our conclusion that the supervisors' pro-union activities were minimal, we conclude that the Board did not abuse its discretion in refusing to accord the company a hearing.

Cook Paint and Varnish Company v. NLRB

648 F.2d 712 (D.C. Cir.), April 2, 1981—246
NLRB 646

On petition to review Board Order

Opinion for the court filed by Circuit Judge
HARRY T. EDWARDS

Opinion dissenting in part filed by Circuit Judge
ROBB

Dissenting opinion filed by Circuit Judge J.
SKELLY WRIGHT

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HARRY T. EDWARDS, Circuit Judge: At issue in this case is whether an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act")[1] by seeking to compel employees, at an investigatory interview, to respond to questions raised by company counsel relating to a union grievance that has been scheduled for arbitration. The National Labor Relations Board ("NLRB" or the "Board") held in this case that Cook Paint & Varnish Company (the "company") violated Section 8(a)(1) of the Act by threatening two employees with suspension or discharge if they refused to respond to such questions, and ordered the company to cease and desist from this allegedly unlawful conduct. In reaching this conclusion, the Board adopted what appears to be a *per se* rule that an employer may never use a threat of discipline to obtain information from an employee concerning a matter that has been set for arbitration. On petition for review brought by the company, and cross-application for enforcement by the Board, we decline to enforce the order of the Board and remand this case to the Board for further proceedings.

I. BACKGROUND

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[1] 29 U.S.C. §§ 151-69.

The facts are not in dispute and may be stated briefly.[2] On February 3, 1978, in incident occurred at a company facility that contrbuted to the eventual discharge of employee Paul Thompson.[3] This discharge led to the filing of a contract grievance by the Paintmakers and Allied Trades Local 754 (the "union"), the certified, bargaining representative of the company's employees. When the grievance was not resolved successfully under the established grievance provisions of the collective bargaining agreement between the company and union, the union appealed the case to binding arbitration.

After the matter had been scheduled for arbitration, the company called in William Nulton, its outside labor relations attorney. A. 110.[4] The company presented Nulton with a case file on the dispute, which included information concerning two proceedings related to the Thompson discharge that had been decided adversely to the company. In one proceeding, Thompson had been awarded unemployment compensation from the Missouri Employment Security Division, after a hearing in which the company's contention that Thompson had been fired for cause was rejected. ALJ 3.[5] In the second proceeding, the Occupational Safety and Health Administration (OSHA) had issued a citation and fined the company $450 following an administrative investigation of the February 3 incident. A. 77, ALJ 3.

Believing that, as a result of the outcome of these two related proceedings, the arbitration case perhaps should be settled, Nulton decided to interview persons potentially knowledgeable of the February 3 incident. A. 77–80. In particular, Nulton sought to interview Jesse Whitwell and Doug Rittermeyer, two employees who had been interviewed by the Government investigator prior to the issuance of the OSHA citation. A. 76. Both Whitwell and Rittermeyer worked in the same area in which Thompson had been employed at the time of the February 3 incident; Whitwell was also the union steward responsible for that area.[6]

On April 21, Whitwell was called to the office of the employer's general superintendent for a meeting with company counsel. Nulton informed Whitwell that he was preparing for the forthcoming arbitration and wanted to find out what Whitwell knew of the incident involving Thompson that had occurred on February 3. ALJ 4. Whitwell was told that he was not the subject of the investigation and would not be disciplined for truthful answers, but that the company had a legal right to question him. Nulton also informed Whitwell that if he refused to answer questions posed by company counsel, he would be subject to discipline. *Id.* After consulting with Robert Reinhold, counsel for the union, Thompson decided to answer "under protest." *Id.*[7]

After Whitwell's interview was concluded, Nulton similarly attempted to question employee Rittermeyer. When Rittermeyer expressed reluctance to answer questions about the Thompson matter, he was told by Nulton that he would be suspended or discharged if he refused to do so. ALJ 5. As a result of this threat, Rittermeyer responded to Nulton's question. *Id.*

The questioning of Whitwell and Rittermeyer was purely factual in nature, concerning solely the events that occurred at the plant on February 3. A. 94–97, 104–05.[8] Neither employee was asked

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[2] A complete statement of the facts of this case is contained in the decision of the Administrative Law Judge, appended to the Decision and Order of the Board, 246 N.L.R.B. No. 104 (Nov. 30, 1979).

[3] The incident involved a "spill" in the Tank Washing Room, which allegedly caused Thompson to slip and fall.

[4] "A." refers to the Appendix submitted in this case. There is some dispute concerning the acutal date that Nulton was called into the case. The Board apparently admits, however, that the company referred the Thompson matter to Nulton after the union requested arbitration. Brief for NLRB, p. 3

[5] "ALJ" refers to the decision of the Administrative Law Judge, appended to 246 N.L.R.B. No. 104.

[6] Under the terms of the collectve bargaining agreement, Whitwell was to serve as Thompson's representative in the first two steps of the grievance procedure. ALJ 14.

[7] In the course of the interview, Whitwell revealed that he had taken contemporaneous notes of the Thompson matter. Nulton "ordered" Whitwell to produce the notes (ALJ 4); Whitwell refused "because it was [his] union notebook." *Id.* The ALJ found that Whitwell reasonably could not have interpreted the "order" as anything other than a threat that he would be disciplined for failing to turn over the notes. *Id.* Whitwell did not produce the notes; no disciplinary action, however, was taken. A. 123.

[8] At the hearing before the Administrative Law Judge, the following exchange took place between Whitwell and Board Counsel Waers:

> Q [Waers.] What did he [Nulton] ask you questions about?
>
> A [Whitwell]. He just asked me questions pertaining to the Paul Thompson case, the happenings on February the third pertaining to the spill, Mr. Thompson's cleaning of the spill[,] of the conversations taking place between myself, Mr. Thompson, Mr. Malott, Mr. Wollery.

A. 26. Similarly, between Waers and Rittermeyer.

Continued

whether he would testify at the upcoming arbitration, or whether he had been requested to testify. A. 105–06. Nor were the employees questioned concerning statements that had been given to the OSHA investigator. A. 111.

After the interviews were concluded, the union filed an unfair labor practice charge, alleging that the company had violated Section 8(a)(1) of the Act [9] by threatening employees with disciplinary action "because of their engaging in concerted activity." ALJ. 1. A complaint was issued by the Regional Director of the Board, and a hearing was conducted before Administrative Law Judge Josephine Klein.

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At the hearing, Nulton explained his insistence on questioning Whitwell and Rittermeyer. As described by Administrative law Judge Klein:

> Nulton testified that he had not been consulted until after Respondent had lost the unemployment compensation case and had been fined by OSHA. Although there had been hearings in the compensation case, the OSHA investigation had been confidential. It was known that OSHA had spoken to Whitwell and Rittermeyer, but Respondent's representatives had no inkling of what the employees had said. Nulton said he believed he could successfully handle the matters involved in the unemployment compensation case, but he felt he needed to know what Whitwell and Rittermeyer had told OSHA because OSHA rarely issued citations or imposed fines without sound reason.

ALJ 5. Nulton testified that he sought the information in an attempt to determine whether the case should be settled. A. 80. Nulton stated further that there "very definitely" had been occasions when he had convinced employer clients to settle cases after arbitration had been set but before a hearing had been conducted. A. 78.

The Administrative Law Judge found a violation of Section 8(a)(1) as charged. The ALJ concluded that "Respondent improperly coerced employees Rittermeyer and Whitwell when it threatened them with discipline if they refused to cooperate by providing information to Respondent in the course of its preparation for arbitration of employee Thompson's discharge." ALJ 14. In addition, as an alternative holding, the ALJ stated that, "[e]ven if it were to be held that employees generally may not refuse to be interviewed by their employers in preparation for arbitration of a grievance, such rule could not appropriately be applied to Whitwell, who was the shop steward in Thompson's department." *Id.* The ALJ thus found the interrogation of Whitwell to be an independent violation of the Act.

Upon the filing of exceptions the Board concluded that "[w]e agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) of the Act by threatening employees Jesse Whitwell and Douglas Rittermeyer with suspension and or discharge if they refused to respond to questions posed by Respondent's counsel relating to a grievance proceeding which was scheduled for arbitration." *Cook Paint and Varnish Co.*, 246 N.L.R.B. No. 104 at 1–2 (Nov. 30, 1979) (footnote omitted). The Board opinion states what appears to be a blanket or *per se* rule that

> an employer that seeks to compel its employees to submit to questioning in such circumstances violates Section 8(a)(1).

Id. at 3.[10] Since the Board found that *all* employees are protected from such questioning, the Board found it "unnecessary to pass on the question of whether a union steward is entitled to different treatment in the type of situation presented here

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Q [Waers]. And what did he [Nulton] ask you questions about, just briefly?

A [Rittermeyer]. The spill and how I cleaned it up and if there were tanks on racks or whatever.

A. 57.

[9] 29 U.S.C. § 158 (1976):

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

Section 157 (§ 7 of the Act) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1976).

[10] Member Truesdale, concurring, described the Board decision as announcing "a blanket rule that an employer may not, under any circumstances, threaten to discipline, or discipline, an employee for refusing to participate in an interview concerning a work-related incident once the employer has disciplined the participants in the incident and the grievance machinery has been invoked." 246 N.L.R.B. No. 104 at 6.

than are employees generally." *Id.* at 2 n.2. The Board thus did not adopt the alternative holding of the ALJ.

II. GENERAL RIGHTS TO INFORMATION UNDER THE NATIONAL LABOR RELATIONS ACT

A. *Introduction*

The Board has established in this case what appears to be a *per se* rule that an employer is barred by Section 8(a)(1) of the Act from using a threat of discipline to obtain information from an employee concerning a matter that has been set for arbitration pursuant to a contractual grievance-arbitration procedure. The right of an employer to interview employees during the pendency of an arbitration hearing has never been addressed by the courts. Before turning to this novel question, however, it may be helpful to note briefly certain established tenets concerning general rights of parties to obtain information under the National Labor Relations Act.

B. *The General Duty to Furnish Information In the Context of Collective Negotiations and Grievance Handling*

The Supreme Court has rejected a rule that would automatically result in a finding of bad-faith bargaining under Sections 8(d) and 8(a)(5) of the Act whenever an employer rejects a request from a union for information related to collective negotiation.[11] Rather, the Court has held that "[e]ach case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 153, 76 S.Ct. 753, 756, 100 L.Ed. 1027 (1956). Nevertheless, as a general proposition, it is well-accepted that, "if [an] employer is in possession of information which is necessary or relevant to the union in discharging its function as bargaining representative, the employer will normally be required to turn over that information upon request of the union." Gorman, Basic Text on Labor Law 409 (1976).

A similar rule has developed in the context of grievance handling. In *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967), the Court enforced a decision of the Board that an employer violated the duty to bargain by refusing to furnish requested information that would allow a union to decide whether or not to process a grievance to arbitration. This decision was held to be consistent with "the national labor policy favoring arbitration." 385 U.S. at 439, 87 S.Ct. at 569. As explained by the Court:

> Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim.

Id. at 438, 87 S.Ct. at 569.

The duty of an employer to furnish information relevant to the processing of a grievance does not terminate when the grievance is taken to arbitration. In *Timken Roller Bearing Co. v. NLRB,* 325 F.2d 746 (6th Cir. 193), *cert. denied,* 376 U.S. 971, 84 S.Ct. 1135, 12 L.Ed.2d 85 (1964), the court considered a union request for information concerning five grievances that awaited hearings before a chosen arbitrator. The employer refused to disclose the information, and was found by the Board to have violated Section 8(a)(5). The Sixth Circuit enforced the order of the Board, stating that the union had a statutory right to obtain the information pursuant to the duty to bargain requirement of Section 8(d) of the Act.

In *Fawcett Printing Corp.,* 201 N.L.R.B. (64 (1973), the Board similarly affirmed, without comment, the rulings, findings, and conclusions of an

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[11] Section 8(d) provides in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession[.]

29 U.S.C. § 158(d) (1976). Violation of this duty to bargain collectively is made an employer unfair labor practice by § 8(a)(5) of the Act, and a union unfair labor practice by § 8(b)(3).

Administrative Law Judge that an employer violated Section 8(a)(5) by refusing to comply with a demand for information in connection with a grievance scheduled for arbitration. The company had argued that the union's agreement to submit the grievance to arbitration

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deprived it of any right that it otherwise may have had to obtain the information. The ALJ rejected this argument, stating that "the statute has been interpreted to require the provision, after as well as before a grievance has been submitted to arbitration, of requested information necessary to its intelligent evaluation and processing." 201 N.L.R.B. at 972.

The Administrative Law Judge went on to explain the decision in *Fawcett* at length, in part as follows:

> Like requiring the production of such information during earlier stages of the grievance procedure, requiring its production on request made after arbitration has been sought, "[f]ar from intruding upon the preserve of the arbitrator," would "aid * * * the arbitral process" (*Acme, supra,* 385 U.S. at 438 [87 S.Ct. at 569]). Thus, here, as in *Acme,* the burden on the arbitral system would be lessened if information provided by Respondent either persuaded the [union] that its grievance lacked merit and should be dropped, or induced the [union] to offer a compromise which might prove acceptable to Respondent. Indeed, the entire class of cases which impose the duty to provide relevant information are based on the view that such information will contribute to the resolution of industrial differences by mutual agreement—a principal statutory purpose. Fulfillment of this purpose would be impeded by withdrawing from the parties at any stage the rights and duties calculated to promote the possibilities of settlement.

201 N.L.R.B. at 972. The ALJ further observed that disclosure was necessary because provisions governing the grievance-arbitration process may substantially limit the time available for investigation before a decision must be made whether to take a grievance to arbitration, and because skilled and sophisticated representatives of the parties may not become involved in the case until the later stages of the arbitration process. *Id.* Thus, "the period during which Respondent would exclude any duty to provide information might well be the very period during which its provision might contribute the most toward settlement of the grievance without arbitration." *Id.*[12] Finally, it is significant to note that the ALJ in *Fawcett* expressly rejected a contention of the employer that "the adversary nature of the arbitration proceedings" renders inappropriate the requirement that relevant information be supplied. *Id.*

Not surprisingly, the general duty to furnish information also has been held to impose certain obligations on unions—as well as employers—during the course of collective bargaining. In *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB,* 598 F.2d 267 (D.C. Cir. 1979), this court enforced a decision of the Board that a union violated its duty to bargain by refusing to disclose certain information requested by the employer during the course of contract negotiation. The court noted that an employer has a duty to disclose relevant information to a union upon request, and stated that a union is "likewise obliged" to furnish the employer with relevant information. 598 F.2d at 271.[13]

The Board also has held that an employee must furnish information to an employer during an investigation of alleged employee misconduct. As the Board recognized in the present case, "the Board has previously found that an employer can, without violating Section 8(a)(1), seek to compel its em-

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ployees to submit to questioning concerning employee misconduct when the employer's inquiry is still in the investigatory stage and no final disciplinary action has been taken." 246 N.L.R.B. No. 104 at 2. *Service Technology Corp.,* 196 N.L.R.B. 845 (1972); *Primadonna Hotel, Inc.,* 165 N.L.R.B. 111

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[12] The ALJ also noted that production of relevant information after the case has been submitted to arbitration would assist the parties in preparing the case for arbitration and thereby tend to shorten the arbitration hearing and to make the evidence received at the hearing more complete. 201 N.L.R.B. at 972.

[13] In *Tool and Die Makers' Lodge No. 78,* 244 N.L.R.B. 111 (1976), an Administrative Law Judge found that a union violated § 8(b)(3) by refusing to furnish information requested during a grievance proceeding. The Board assumed "arguendo," without deciding, that a union's duty to furnish information is parallel to that of an employer. The Board declined to adopt the findings and conclusions of the ALJ, however, on the ground that it had not been established that the information requested was relevant to the bargaining process.

(1967). As explained by an Administrative Law Judge in *Service Technology*:

> [A] proper balance must be struck between the Company's right to uncover improper conduct on the part of certain employees in its endeavors to maintain order in its business and the rights of those employees. I find in these circumstances that no right accrued to the employees under the Act, which protected their refusal to talk or to remain uncooperative, and that, therefore, these threats were not violative of the Act.

196 N.L.R.B. at 847.

C. *Board Deference to Arbitral Judgments Regarding the Duty to Disclose Information In Grievance Handling*

In *Pacific Southwest Airlines, Inc.*, 242 N.L.R.B. No. 151 (June 14, 1979), the Board considered a case virtually identical to the present action. In *Pacific Southwest*, as in the present case, an employer's attorney attempted to interview two employees before a scheduled arbitration hearing, in order to prepare for the arbitration and to review the employer's position. The two employees refused to be interviewed, and consequently were suspended and thereafter discharged. The union filed grievances to protest these discharges, and pursued the grievances to arbitration. Following a hearing, the arbitrator found that the employer had acted within its rights in attempting to interview the employees, and that disciplinary action therefore was justified.[14]

Following the completion of the arbitration, the union filed an unfair labor practice charge alleging that the disciplinary action taken violated Section 8(a)(3) of the Act. A complaint was issued by the Regional Director, but the Board dismissed this complaint. Under the principles of *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), both the Administrative Law Judge and the Board deferred to the decision of the arbitrator that the disciplinary action taken by the employer was lawful.[15] The Board explained its decision to defer as follows:

> The arbitrator found that [the employees] were the witnesses to the drinking incident whose interviews had been the basis of Respondent's action to the incident; that, as an almost routine practice, a party to arbitration interviews its witnesses in preparation for the hearing to permit, as here, its attorney to view the evidence first hand and to assess the evidence in light of a possible settlement; that Respondent sought to question on-duty employee witnesses about the conduct of other on-duty employees during the drinking incident; and that therefore Respondent had the right to expect good-faith cooperation. The arbitrator also found that Respondent did not seek disclosure of what [the employees] would testify to at the hearing or the details of the Union's position; that Respondent did not go beyond legitimate inquiry into job-related conduct; that the interviews were not coercive; and that therefore Respondent did not wrongfully intrude upon or interfere with the grievance procedure. *For the above reasons* and those set forth in detail by the Administrative Law Judge, we find that the arbitration award with respect to the suspensions of [the employees] is not repugnant to the purposes and policies of the Act and fully meets the *Spielberg* standards for deferral.

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242 N.L.R.B. No. 151 at 4–5 (footnote omitted; emphasis supplied).

Because of these reasons cited in *Pacific Southwest*, the Board held that a decision of an arbitrator that an employer had an enforceable right to interview employees the day before a scheduled arbitration hearing was not repugnant to the purposes and policies of the Act. In the present case, however, the Board rejected those same reasons and established a "blanket rule" that such employer conduct violates Section 8(a)(1) of the Act.

The company advances two principal arguments in support of its contention that the decision of the Board in the present case is improper. First, the company asserts that under the duty to bargain requirement of Section 8(d) of the Act, Whitwell and Rittermeyer had an obligation to furnish the company information relevant to the pending arbitration. Second, the company contends that there is no substantial evidence to support the Board's finding that the employer conduct at issue here violated Section 8(a)(1). Against the background of the established principles described above, we turn to consider these arguments.

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[14] The arbitrator determined, however, that the discharges should be converted to suspensions. The two employees were awarded reinstatement without any retroactive compensation.

[15] Under *Spielberg*, the Board will defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. 112 N.L.R.B. at 1082.

III. PRE-ARBITRATION INTERVIEWS AND SECTION 8(a)(1)

In considering the decision of the Board in this case, we emphasize at the outset that "[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB v. Truck Drivers Local 449,* 353 U.S. 87, 96, 77 S.Ct. 643, 648, 1 L.Ed.2d 676 (1957). As further provided by Section 10(e) of the Act:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

29 U.S.C. § 160(e) (1976). Moreover, this court has stressed very recently that the Board possesses an unmatched expertise in distilling and identifying the coercive effects of employer conduct. *United Steelworkers v. NLRB,* ——— F.2d ——— at ——— No. 79–1943 (D.C.Cir. Feb. 25, 1981).

At the same time, the Supreme Court has made clear that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951).[16] This court has refused to enforce orders of the Board that have not been supported by substantial evidence. *Midwest Regional Joint Board v. NLRB,* 564 F.2d 434 (D.C.Cir. 1977); *Local 433, United Brotherhood of Carpenters v. NLRB,* 509 F.2d 447 (D.C.Cir. 1974).[17]

The Board in the present case has established a *per se* rule that an employer may never use a threat of discipline to compel employees to respond to questions relating to a grievance proceeding that has **720** been scheduled for arbitration. Upon a careful examination of the record, we are unable to find substantial evidence to support this finding. As set forth more fully below, pre-arbitration interviews are a matter of routine practice in many sectors of industrial relations. In these sectors, investigatory interviews are conducted by advocates in preparation for a pending arbitration without any infringement of protected employee rights. Indeed, although the Board has been in existence for nearly a half century, and private arbitration for almost as long, we are unaware of any prior Board or judicial decision even suggesting that *all* pre-arbitration interviews are *per se* coercive of employee rights under the Act.

We believe that the rule announced by the Board in the present case unnecessarily and impermissibly interferes with the manner in which parties to a collective bargaining relationship structure the arbitration process. As a result, we hold that the legality of pre-arbitration interviews is generally a *contractual* matter to be determined by the parties in establishing a grievance-arbitration procedure, subject only to the normal restraints imposed by the Act that employer conduct not be unlawfully coercive in a particular case.

The prevalence of pre-arbitration interviews has been noted by one of the industry's most preeminent arbitrators. In the arbitration case preceding the Board decision in *Pacific Southwest Airlines, supra,* Professor Edgar A. Jones, Jr., a professor of labor law and evidence at UCLA Law School and President-elect of the National Academy of Arbitrators, observed in his opinion that:

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[16] The Supreme Court also stated in *Universal Camera*:

> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

340 U.S. at 490, 71 S.Ct. at 466.

[17] *See also International Brotherhood of Electrical Workers v. NLRB,* 487 F.2d 1143 (D.C.Cir. 1973) (*en banc*), *affirmed, Florida Power & Light Co. v. Electrical Workers Local 641,* 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974).

> It is almost routine for a union or an employer advocate—lawyer or not—to go to the locale of pending arbitration a day or two before a scheduled hearing in order to interview witnesses and plan the details of the morrow's presentation. It is not at all unusual for that pre-hearing occasion to be the first time that the advocate has had the chance to get first-hand accounts of witnesses, to identify possible discrepancies among their accounts, to press them as a cross-examiner is apt to, to observe their demeanor and evaluate their credibility, to assess the potential influence on the course of the hearing of what they have to say and how they are apt to say it in the context of the hearing.
>
> Contrary to the impression expressed by the Union representatives and the potential witnesses in this case, that kind of encounter immediately before a hearing is simply not in itself a "dirty pool" situation. Instead, it is an important part of the administration of the grievance procedure. It is by no means unusual for cases to be settled on the day—or even the hour—before the hearing is to convene based on the advocate's last-minute, eye-opened assessment of the significance of these pre-hearing contacts.

Pacific Southwest Airlines, Inc., 242 N.L.R.B. No. 151 (June 14, 1979), Appendix A to decision of Administrative Law Judge, at 14.[18] In *Pacific Southwest*, both the Ad-

ministrative Law Judge and the Board made reference to these findings of Professor Jones in concluding that his decision that an employer has an enforceable right to conduct pre-arbitration interviews was not repugnant to the policies of the Act.

Given this practice in industrial relations, acknowledged by the Board in *Pacific Southwest*, we do not believe that the Board in the present case has established by substantial evidence that an employer demand for a pre-arbitration interview coerces employees in the exercise of protected legal rights. At that interview, an employer advocate may, perhaps for the first time, obtain factual information from witnesses, observe demeanor, and in general evaluate the merits of a pending dispute. On the basis of the record established by the Board, we are unable to perceive the manner in which such a limited investigation coerces protected employee rights. As a result, we hold that an employee does not have an automatic right to refuse to respond to questions concerning a matter that has been scheduled for arbitration.

This decision is consistent with the fundamental nature of the arbitration process. Arbitration is a matter of *contract* between the parties, noted for its flexibility and informality. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The Supreme Court has stated that "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58, 94 S.Ct. 1011, 1024, 39 L.Ed.2d 147 (1974). As noted in Abrams, *The Integrity of the Arbitral Process*, 76 Mich.L.Rev. 231, 235 (1977), "[a]rbitration procedure remains for the most part, a matter of the parties' choice."[19]

Into this flexible and informal process, the Board here has injected a fixed law of precedure that an employer may not, under any circumstances, conduct a compulsory investigatory interview in preparation for a pending arbitration. As noted above, this rule is contrary to the practice established by the parties under many collective bargaining relationships. We do not believe that the Board has presented sufficient evicence to justify this interference with the arbitral process.

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[18] Professor Jones has more than twenty-five years of experience as a labor arbitrator. *See, e.g., Douglas Aircraft Co.*, 28 Lab. Arb. 198 (1957). In addition, Jones is a prolific labor arbitration scholar. As a sample of his legal writings, *see* Jones, *"Truth" when the Polygraph Operator Sits as Arbitrator (or Judge): The Deception of "Detection" in the "Diagnosis of Truth and Deception,"* Proceedings of the Thirty-First Annual Meeting, National Academy of Arbitrators (BNA, Inc. 1979); Jones, *The Accretion of Federal Power in Labor Arbitration—The Excmple of Arbitral Discovery*, 116 U.Pa.L.Rev. 830 (1968); Jones, *Blind Man's Bluff and the NOW-Problems of Aprocrypha, Inc. and Local 711—Discovery Procedures in Collective Bargaining Disputes*, 116 U.Pa.L.Rev. 571 (1968); Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 U.C.L.A.L.Rev. 1241 (1966); Jones, *Autobiography of a Decision: The Function of Innovation In Labor Arbitration and the* National Steel *Orders of Joinder and Interpleader*, 10 U.C.L.A.L.Rev. 987 (1963); Jones, *Arbitration and the Dilemma of Possible Error*, 11 Lab. L.J. 1023 (1960); Jones, *Specific Enforcement of "Hot Cargo" Provisions In Collective Bargaining Agreements by Arbitration and Under Section 301(a) of the Taft-Hartley Act*, 6 U.C.L.A.L.Rev. 85 (1959); Jones, *Labor Arbitration and Stare Decisis: Some Introductory Comments*, 4 U.C.L.A.L.Rev. 657 (1957).

[19] The Supreme Court stated in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960):

> Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U.S.C. § 173(d), states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement * * * ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

363 U.S. at 566, 80 S.Ct. at 1345.

Counsel for the Board has made a somewhat extraordinary, and gratuitous, suggestion that:

> The most favorable time for settling grievances is at the outset, before the parties' positions have hardened; and the most favorable situation for settlement is where the parties have come to share a complete and comprehensive view of the relevant circumstances. *An employer may be spurred to a painstaking investigation at the outset if he knows that further investigation is restricted once a grievance is headed for arbitration.*

Brief for NLRB, p. 13 (emphasis supplied). This suggestion is extraordinary because it fails to comprehend that it is not the function of the Board to structure the manner in which parties to a collective bargaining agreement process and resolve contract grievances. Just as the Board may not decree the time in which a party must respond to a filed grievance, the Board may not attempt to spur an employer to "a painstaking investigation at the outset" once a grievance is filed. The method in which disputes are resolved through a grievance-arbitration process is a contractu-

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al matter to be determined by the parties. The Board may not construct an inflexible rule that any compulsory interview conducted in preparation for a pending arbitration violates the Act.

In so holding, we do not suggest that limits do not exist on the permissible scope of a legitimate pre-arbitration interview. An employer may in certain cases be forbidden from inquiring into matters that are not job-related. An employer also may be prohibited from prying into union activities, or using the interview as an excuse to discover the union strategies for arbitration. In short, we do not here suggest that employers have a carte blanche license to interrogate employees prior to arbitration; the limits provided by Section 8(a)(1) remain available to prohibit coercive employer conduct in an individual case.

Similarly, the parties to a collective bargaining agreement may themselves decide, in establishing a grievance-arbitration procedure, that investigatory interviews will *not* be allowed prior to arbitration, or indeed at any time during the grievance resolution process. As emphasized above, the structure of a grievance-arbitration process is a matter of *contract* to be determined by the parties.[20]

Our decision here is consistent with decisions of the Supreme Court and the Board requiring the disclosure of information in order to further the efficacy of the arbitral process. As suggested by the Supreme Court in *NLRB v. Acme Industrial Co., supra,* for arbitration to be most effective, mechanisms must exist that sift out unmeritorious claims. In *Fawcett Printing Corp., supra,* the Board affirmed a conclusion of an Administrative Law Judge that the statutory goal of mutual agreement as the means of resolution of industrial differences "would be impeded by withdrawing from the parties at any stage the rights and duties calculated to promote the possibilities of settlement." 201 N.L.R.B. at 972. As developed at length above, these cases have imposed upon an employer the duty to disclose information concerning a grievance both before and after the grievance has been appealed to arbitration.

The policies incorporated in these decisions do not evaporate when it is the employer who seeks information before arbitration to assess the merits of his or her case. Access to relevant information has a comparable effect on the likelihood that an employer will settle a pending dispute. In the present case, the employer's advocate, who had not been brought into the dispute until arbitration had been set, sought to evaluate the employer's position because of the fact that the company had not prevailed in two closely related proceedings. Though arbitration had been set, settlement remained a distinct possibility.

We acknowledge that this policy favoring settlement may not be fostered at the expense of protected employee rights. An employer demand for information from employees can exert pressures on those employees that are not present when a union demands information from an employer. For this reason, we do not hold that an employer has an inflexible right under Section 8(d) of the Act to seek information from employees concerning a pending grievance.[21] Interrogation of employees remains subject in each case to the limitations of Section 8(a)(1) described above. We simply note that our decision here is consistent with the strong policy announced both by the Supreme Court and by the Board favoring the peaceful resolution of industrial dispute by mutual agreement.

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[20] Violation of an agreement not to interview would of course be a violation of contract to be resolved through contractual dispute mechanisms.

In addition, our decision is consistent with those cases, acknowledged by the Board in this case, that establish that an investigatory interview conducted by an employer *before* disciplinary action is taken does not violate Section 8(a)(1). *Service Technology Corp.*, 196 N.L.R.B. 845 (1972); *Primadonna Hotel, Inc.*, 165 N.L.R.B. 111 (1967). While an employer's purpose in conducting an investigatory interview before disciplinary action is taken may not always be the same as that after a grievance is filed, we fail to see that the effect on employees is materially different. We find it anomalous for the Board to suggest that an interview conducted in the former situation is protected under the Act, while the same interview conducted in the latter situation automatically violates Section 8(a)(1). In either case, we believe that an investigatory interview is permissible as long as held within the bounds of Section 8(a)(1) described above.

Finally, we believe that the Board has totally failed to reconcile this case with its earlier decision in *Pacific Southwest.* It is true that in *Pacific Southwest* the Board "deferred" to the decision of an arbitrator that an employer has an enforceable right to conduct a per-arbitration interview. As recognized by the Board, however, such deferral is appropriate only if the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955). Therefore, the decision in this case, establishing a *per se* rule, makes no sense whatsoever in the light of the Board's contrary judgment in *Pacific Southwest.* The Board has not reconciled the inconsistency between *Pacific Southwest* and the "blanket rule" announced here, as it must do. *See Local 777, Democratic Union Organizing Committee v. NLRB,* 603 F.2d 862, 871–72 (D.C.Cir. 1978); *Kohls v. NLRB,* 629 F.2d 173 (D.C.Cir. 1980).[22]

For all of these reasons, we find that the inflexible rule established in this case is not supported by substantial evidence and may not be enforced.

IV. DISPOSITION OF THE PRESENT CASE

We have concluded that the blanket rule announced by the Board, that any compulsory pre-arbitration interview violates Section 8(a)(1), is not supported by substantial evidence and cannot stand. As part of a contractural arbitration procedure, an employer may conduct a legitimate investigatory interview in preparation for a pending arbitration. As outlined above, however, that interview may not pry into protected union activities. It is against these standards that the interviews conducted in the present case must be evaluated.

In resolving this case, we believe that it is necessary to distinguish the company's demand to interview Rittermeyer, a plant employee, from the demand to interview Whitwell, a plant union steward. While we refuse to enforce the finding of the Board that the interview of Rittermeyer violated Section 8(a)(1), we remand this case to the Board for further consideration or whether the interview of steward Whitwell violated the Act.

The record demonstrates that in the case of employee Rittermeyer, the company conducted a limited, investigatory interview concerning solely the employee's knowledge of the events that occurred on February 3 that led to the discharge of fellow employee Paul Thompson.[23] As developed above, employer counsel Nulton did not inquire as to whether Rittermeyer would testify at the upcoming arbitration, nor did he question Rittermeyer concerning the statement Rittermeyer had earlier given to OSHA. In short, Nulton conducted a legitimate inves-

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[21] We also do not consider here the extent to which individual *employees* may be subject to the duty to bargain requirement of § 8(d).

[22] In *Kohls*, this court refused to enforce an order of the Board, in part because the Board had failed to explain an inconsistency similar to that present here. As stated in *Kohls:*

> In *Bloom* [603 F.2d 1015 (D.C.Cir.)] the Board deferred to an arbitral judgment that the employer had not breached the collective bargaining agreement when it discharged an employee for refusing to work because he believed a truck to be unsafe. The arbitrator's finding disposed of the alleged unfair labor practice charge, apparently to the Board's satisfaction. It is difficult to understand how the Board could come to the opposite conclusion here, finding both an unfair labor practice and breach of the contract, in a case involving facts identical in all material respects to those in *Bloom.* The Board has given no rational reason for its contradictory decision in this case.

629 F.2d at 178.

[23] *See* note 8, *supra.*

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tigatory interview concerning a job-related incident in order to determine whether the company should proceed with a pending arbitration.[24] In these circumstances, the attempt by the company to compel Rittermeyer to respond did not violate Section 8(a)(1).

The questioning of Whitwell, however, must be viewed in a separate light. Had Whitwell been solely a fellow employee, as Rittermeyer, our analysis would parallel that above. However, Whitwell also served as the union steward responsible for the Thompson dispute. In her decision, the Administrative Law Judge stated, as an alternative holding, that the questioning of Whitwell violated Section 8(a)(1) because Whitwell was the shop steward in Thompson's department and was "duty bound to serve Thompson's interest." ALJ 14–15. The ALJ found that to require Whitwell to submit to an interview would place him in a position of sharp conflict of interest. As a result of the "blanket rule" announced by the Board in this case, the Board did not adopt this alternative holding of the ALJ. As stated by the Board, "we find it unnecessary to pass on the question of whether a union steward is entitled to different treatment in the type of situation presented here than are employees generally." 246 N.L.R.B. No. 104 at 2 n. 2.

As a result of our rejection of the Board's blanket rule concerning employees, we believe that the Board must be given an opportunity to consider whether Whitwell was entitled to special protection due to his status as a union steward. As described by the ALJ, there are fundamental differences between an interview of an employee and an interview of a union steward. Most significantly, a steward may be acting pursuant to his position as a representative of the employees, responsible for processing

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the grievance at issue. To require collective bargaining *representatives* to submit to compulsory interviews might seriously infringe on protected activity. Since the Board explicitly chose not to consider this question, however, we remand this case to the Board for further proceedings on this issue.

In remanding, we do not mean to suggest that a "blanket rule" concerning union stewards is any more appropriate than a "blanket rule" concerning employees. For example, a union steward who has no representational responsibilities in a particular case, or one who may be directly involved in alleged acts of misconduct, may not be entitled to any special protection. *See* ALJ 15 n. 22; *see also Service Technology Corp.*, 196 N.L.R.B. 845 (1972). We simply note that very different considerations may be relevant in considering the legality of an interview of a union steward that are not present in the case of employees generally.

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[24] One piece of evidence in the record deserves comment here. In its decision, the Board stated, almost as an aside and entirely out of context, that: "Indeed, the attorney who conducted the questioning on behalf of Respondent candidly stated at the hearing that one of the reasons for the interview was to discover 'what the union's position would be if it went to arbitration.' 246 N.L.R.B. No. 104 at 3 n. 3. As noted above, an investigatory interview may not seek to uncover the union's theory or strategy for the upcoming arbitration. We do not believe, however, that this observation by the Board requires a determination here that the interviews in this case violated § 8(a)(1).

We decide so for three reasons. First, it is critical to note that the Board in the present case did not make a *finding* that the attorney attempted to discover the union's position at arbitration; the Board merely noted, out of context, an off-hand remark by the attorney. The Administration Law Judge made no reference to this statement. Neither decision relied upon this evidence, and the Board has made no reference to it on this appeal.

Second, this statement of Nulton must be viewed in its full context. On direct examination by the company, Nulton described his involvement in, and preparation for, the Thompson arbitration. After discovering that OSHA had issued a citation based on the February 3 incident, Nulton became concerned over the merits of the company's position, and the extent to which the company was prepared for the pending arbitration. As fully stated by Nulton:

> So I asked what had been done. I ascertained that nothing had been done. I then made the suggestion that I thought somebody should interview these people to find out just what they might know as to the happenings of February the 3rd, so that 1) I would know what the union's position would be if it went to arbitration or, if the testimony was as bad as, at least, OSHA had seen it to be, that the case would be, perhaps, settled.

A. 80. It appears likely from Nulton's remarks that he sought nothing more than knowledge of what had occurred on February 3 in order to consider the propriety of settlement. In so doing, he would of course learn the strength of the case against him, or what may loosely be described as "the union's position." It simply cannot be assumed to discover the union's strategy for the case.

Third, and most importantly, the actual inquiry of the employees was solely job-related and in no way sought to discover the union's position. *See* note 8, *supra.* Nulton did not inquire whether the employees would be witnesses at the arbitration, or into the content of any statement made to any other party. Absolutely no questioning was conducted concerning the union's strategy for the hearing, or its proposed legal theory.

For these reasons, we conclude that there is no substantial evidence to support a finding that Nulton sought to use the interviews to discover the union's position, at the upcoming arbitration. We thus refuse to find a violation of § 8(a)(1) based on this limited out of context statement made by company counsel.

Enforcement of the order of the Board is denied. The case is remanded for further proceedings consistent with this opinion.[25]

So Ordered.

Robb, Circuit Judge, dissenting in part: I concur in Judge Edwards' opinion except that I would not remand to the Board the matter of the Steward Whitwell.

On the remand the Board of course will be required to reach a conclusion based on the evidence in the record. In my judgment however there is nothing in the record to suggest that Whitwell was entitled to special protection because of his status as a union steward. As Judge Edwards points out the questioning of Whitwell "was purely factual in nature, concerning solely the events that occurred at the plant on February 3." (Op., at 714). In other words Whitwell was interviewed simply as a witness, not as a steward, and the questioning had nothing to do with his activities or functions as a steward. On these facts I think Whitwell's status as a steward did not insulate him from his duty to disclose what he knew about the incident of February 3.

J. Skelly Wright, Circuit Judge, dissenting: In discovery interviews conducted after a dispute had been submitted to binding arbitration, the Cook Paint & Varnish Company coerced two employees to answer questions and threatened one with discipline for refusing to produce a union notebook. The National Labor Relations Board (NLRB or Board) held this action to constitute an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act (NLRA).[1] This court today sets aside the decision of the Board. As an integral part of its reasoned opinion the Board articulated a rule of decision that would have clarified the rights of employees in similar cases—a rule that would have protected employees from coercive interview and discovery techniques after resort to arbitration had established an adversary relationship between labor and management. This court today strikes down that rule, holding that employer threats and other coercion may produce desirable results, such as promoting settlement of disputes slated for arbitral resolution. Unable to agree with either the majority's reasoning or its conclusions, I dissent.

In my view the majority's opinion is based on an improvident and unwarranted construction of the Board's announced rule of decision. Reading that rule more broadly than is required by the context of its assertion, the majority holds it to be inconsistent with the letter and policies of the NLRA; finding the Board's order against Cook to be based largely on that rule, the court denies the Board's petition for enforcement. I regard the majority opinion as a premature decision against the rule's validity that produces a wrong result on the instant facts and unnecessarily restricts the authority of the Board to protect important rights of employees under the NLRA. Reading the Board's decision much more narrowly, I would uphold its articulated rationale as applied to the facts of this case. The Board's announced rule of decision was supported by both a reasoned explanation and substantial evidence. Moreover, there are important benefits to be derived from the Board's articulation of a rule-like *ratio decidendi,* which provides much clearer guidance to interested parties than would an *ad hoc* balancing of factors peculiar to a particular controversy. In the absence of a clear rule defining their rights, employees may possess no rights effectively enforceable against employers bent on coerced extraction of privileged information. I cannot agree that the NLRA denies the Board the authority to develop enforceable standards. The Board should be given the opportunity to do so, including the opportunity to construe its own rule, and perhaps to limit it, if necessary, in future cases.

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[25] Judge Wright has set forth at length some dissenting views in this case. We simply wish to note the fundamental difference between the position taken by the majority and that advanced by Judge Wright in this case. Essentially, we view pre-arbitration interviews as an integral part of the grievance-arbitration process; Judge Wright apparently does not. Given our assumption that per-arbitration interviews are part of the grievance-arbitration interviews are part of the grievance-arbitration process, it clearly follows that whether an opposing witness may be interviewed prior to arbitration is a matter to be decided by the parties, and not by Board rule. The Supreme Court has stated unequivocally that arbitration is a matter of contract, and that contractual matters are to be resolved without interference from the Board. In *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967), the Court stated:

> To have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements. We view Congress' decision not to give the Board that broad power as a refusal to take this step.

385 U.S. at 427–28, 67 S.Ct. at 563.

As recognized by Professor Jones, "[i]t is almost rountine for a union or an employer advocate—lawyer or not—to go to the locale of a pending arbitration a day or two before a scheduled hearing in order to interview witnesses and plan the details of the morrow's presentation." Parties clearly have felt free to detemine that an opposing witness may be interviewed before a scheduled arbitration. In addition, we find that the lack of precedent in this area is further evidence that parties have viewed this issue as one to be determined by contract. The institution of labor arbitration is nearly as old as the NLRA itself, yet not one case has been cited in which this issue has been taken previously to the Board. The question of whether an opposing witness may be interviewed prior to arbitration has been viewed as a matter to be decided pursuant to collective bargaining, and not by a *per se* Board rule. We see no reason to change that practice.

Judge Wright relies heavily on a long line of cases that have prohibited employer interrogation of an employee during the pendency of a case scheduled for a hearing before the NLRB. *See* Statement of Judge Wright, *infra, p.* 730 n. 29. There is a critical difference, however, between cases set before the NLRB and cases set for arbitration. Proceedings before the NLRB are instituted to protect employees rights arising under the National Labor Relations Act. Proceedings before an arbitrator are instituted to resolved contractual disputes arising under a collective bargaining agreement. As stated above, it is for the parties to determine the manner in which *contractual* disputes are resolved.

We again emphasize that an employer may not overstep the bounds of an investigatory pre-arbitration interview and pry into protected activity. The Board retains the authority to declare that such conduct is unlawful. In light of the traditions of collective bargaining in this country, however, we do not believe that the Board has the authority to announce a *per se* rule prohibiting all investigatory pre-arbitration interviews. Since the Board has advanced no reasoning or analysis in this case other than that all pre-arbitration interviews are unlawful, the order of the Board may not be enforced.

[1] 29 U.S.C. §§ 151–169 (1976).

I

A.

The issues presented by this case involve interrelationships among at least three provisions of the National Labor Relations Act: Section 7, Section 8(a)(1), and Section 8(d).

Section 7 of the NLRA[2] guarantees the right of employees "to engage in * * * concerted 727 activities for the purpose of * * * mutual aid or protection * * *." It is established that Section 7 protects an employee's participation in grievance and arbitration proceedings.[3] An employer may not seek to deter an employee from involvement in such proceedings, nor may an employer sanction an employee for giving adverse testimony. Both the courts and the NLRB have also held that employees' Section 7 rights to make common cause would sometimes encompass a right to decline to give testimony adverse to the interests of one or more of their fellows.[4]

Section 8(a)(1) of the NLRA [5] prohibits employers from engaging in "unfair labor practices." The section states explicitly that it shall be "an unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed" by Section 7.[6]

Section 8(d) of the NLRA [7] imposes a duty on "the representative of employees" as well as on employers to "confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." Despite the Section 7 right of employees to engage in concerted activity for mutual protection, the NLRB has inferred from this and other sections of the Act an employer's right to require employee cooperation in investigations of mishaps and misbehavior in the workplace. The employer has a legitimate interest in maintaining discipline, order, and safety in his place of business.[8] And, in a limited range of cases, the NLRB has upheld an employer's use of coercive interviews to secure information needed to protect this interest.[9]

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[2] Section 7, 29 U.S.C. § 157 (1976), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[3] *See, e. g., Keokuk Gas Service Co. v. NLRB,* 580 F.2d 328, 333–334 (8th Cir. 1978); *Daphne San Francisco Funeral Service,* 224 NLRB 461, 463 (1976).

[4] Conduct of coercive discovery interviews during the pendency of a case before the NLRB has repeatedly been held to violate employee rights under § 7. *See, e. g., International Union, United Automobile, etc. Wkrs of America v. NLRB,* 392 F.2d 801, 809 (D.C. Cir. 1967), *cert. denied,* 392 U.S. 906, 88 S.Ct. 2058, 20 L.Ed.2d 1364 (1968); *Joy Silk Mills, Inc. v. NLRB,* 185 F.2d 732, 743–744 (D.C.Cir. 1950); *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), *enforcement denied,* 344 F.2d 617 (8th Cir. 1965). A similar recognition that § 7 provides employees at least a *prima facie* right to resist discovery interviews in the arbitration context is implicit in the NLRB's balancing of employer interests against employee rights in right-to-information cases. *See Service Technology Corp.,* 196 NLRB 845, 847 (1972); *Primadonna Hotel Inc.,* 165 NLRB 111 (1967).

[5] 29 U.S.C. § 158(a)(1) (1976).

[6] *Id.*

[7] 29 U.S.C. § 158(d) (1976).

[8] *See Service Technology Corp., supra* note 4; *Cross Baking Co.,* 186 NLRB 199 (1970).

[9] *See Service Technology Corp., supra* note 4; *Primadonna Hotel Inc., supra* note 4.

B

In the instant case the NLRB was called upon to strike a balance between protection of employee rights to engage in concerted activity, secured under Section 7, and preservation of employer interests in attaining information about possible employee misconduct.[10] In the context of an arbitration proceeding, the fourth and most formal level of dispute resolution procedure provided by the collective bargaining agreement,[11] two employees asserted a Section 7 right to refuse participation in pre-arbitral interviews conducted by the employer. The employer proceeded to coerce their cooperation by threatening them with suspension or other retaliation. The union thereupon invoked the jurisdiction of the NLRB, charging the employer with commission of unfair labor practices under Section 8(a)(1). In defense the employer argued that its threats of punishment were not unfair within the meaning of the statute, because they were necessary to vindicate legitimate employer interests.

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In a careful and detailed opinion an Administrative Law Judge (ALJ) held that the coercive interviews conducted by the employer constituted "unfair labor practices" condemned by the National Labor Relations Act.[12] The ALJ reached her decision by articulating a general legal principle, itself reached through a balancing of statutory interests and policies, that applied to the largely undisputed facts. The ALJ's opinion recognized the employer's legitimate interest in obtaining information about employee misconduct and necessary discipline. It dealt carefully and thoroughly with prior cases in which coercive procedures to obtain such information had been upheld.[13] According to the ALJ, the prior cases decided on their merits by the Board and by the courts had all involved attempts by an employer, in the context of an investigatory effort, to obtain information helpful in determining whether discipline was appropriate.[14] Neither the Board nor the courts had stated rules for determining the propriety of coercive interviewing in the context of an arbitration proceeding. And, the ALJ observed, pre-arbitral interrogations are importantly different from the kinds of investigatory interviews considered in other cases. By the time a dispute reaches arbitration, the employer has already taken a decision to impose disciplinary sanctions; his investigation of the facts underlying the grievance has presumably come to an end; the context is irreducibly adversary. Based on these considerations the ALJ determined that arbitration represented an appropriate point for linedrawing in defining the Section 7 rights of employees under the Act:

> There obviously is a world of difference between an employer's trying to obtain factual information helpful in determining whether an employee should be disciplined, on the one hand, and, on the other hand, his attempting to obtain information to justify discpline already imposed. In the former case, the employer is legitimately concerned about maintaining order in the operation of his business; in the latter case, he is concerned only to vindicate action he has already taken. In the former case, an employee's statutory right to make common cause with his fellow employees may well have to yield to the more urgent need of orderly conduct of the business, a necessity to management and labor alike; in the latter case, however, there is no apparent reason why an employer's vindication of action he has already taken should be allowed to override the emloyees' concern for solidarity. * * *[15]

On administrative appeal the NLRB explicitly adopted the ALJ's conclusions regarding coercive interviews in the arbitration context.[16] Its short opinion also included an independent statement of justification for the principle that a line was appropriately drawn at this point:

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[10] *Cook Paint & Varnish Co.*, 246 NLRB No. 104 at 2 (Nov. 30, 1979), *reprinted* in Appendix (App.) 198, 199. The Decision and Order of the Board (Decision of the Board) affirmed "the rulings, findings, and conclusions of the Administrative Law Judge [ALJ]," *id.* at 1, App. 198, whose opinion (ALJ Opinion) asserted the need to engage in a balancing of statutory interests. *See* ALJ Opinion, *reprinted at* App. 173, 179 & n.7.

[11] ALJ Opinion, *supra* note 10, at 3, App. 175.

[12] ALJ Opinion, *supra* note 10. The ALJ also held, as an alternative ground, that the company was barred from compelling testimony from one of the employees, a union steward, because of the latter's quasi-fiduciary role as an employee representative in certain contractual grievance proceedings. *See id.* at 14–15, App. 186–187. Upholding the ALJ's decision on the main ground, the Board explicitly declined to rest its decision on this basis, Decision of the Board, *supra* note 10, at 1–2, App. 198–199.

[13] *See* ALJ Opinion, *supra* note 10.

[14] The ALJ distinguished the case of *Pacific Southwest Airlines, Inc.*, 242 NLRB No. 151, 101 LRRM 1366 (1979), on the ground that the Board, in deferring to an arbitrator's ruling, expressly declined to express its view on the merits. *See* ALJ Opinion, *supra* note 10, at 12–14, App. 184–186.

[15] *Id.* at 7, App. 179 (footnote omitted).

[16] Decision of the Board, *supra* note 10, at 1, App. 198.

> In [prior] cases, we have been required to balance the right of employees to make common cause with their fellow employees against the need for an employer to maintain the orderly conduct of its business. Where the employer's questioning takes place in an investigatory context
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> prior to disciplinary action, we have struck the balance in favor of the interests of the employer. Our decision today does not alter that balance.
>
> In the instant case, however, [the employer] had already completed an investigatory process pursuant to which it was determined that discipline of an employee was justified. Disciplinary action was taken, the grievance machinery was activated, and the dispute was to be submitted to arbitration. At this juncture, when an employer seeks to question its employees, it moves into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position, and moves away from the legitimate concern of maintaining an orderly business operation. In this context, for the reasons stated by the Administrative Law Judge, we find that the delicate balance must be struck in favor of the employees, and that an employer that seeks to compel its employees to submit to questioning in such circumstances violates Section 8(a)(1).[17]

Following the Board's decision the employer petitioned for review in this court. The Board filed a cross-application for enforcement of its order.

II

Because the Board justified its resolution of the present case by invoking a general rule of decision, the validity of that rule is squarely and indisputably before this court. We could not affirm the Board's decision except on the reasoning advanced by it to support its conclusions.[18]

Unlike the majority, however, I believe that the underlying facts are important both to understanding the decision of the Board and to appraising its legality. In articulating an interpretive rule for application of Section 8(a)(1) in the arbitration context, the Board was entitled to rely at least partly on its general expertise concerning the purposes and illegitimate coercive effects of compulsory interviews of employees after grievances have been set for arbitration.[19] But the facts of the present case also provide substantial evidence for the Board's conclusion that, after an employer has imposed disciplinary sanctions and a dispute has been submitted to arbitration, an employer who threatens his employees with suspension or dismissal for noncooperation in a discovery interview "moves into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position, and moves away from the legitimate concern of maintaining an orderly business operation." [20]

Because of their importance to the case, certain operative facts deserve close scrutiny.

A.

The dispute involved in the present case grew out of a decision by the Cook Paint & Varnish Company to fire an employee named Paul Thompson.[21] The firing oc-

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curred on February 6, 1978, triggered by events that had occurred three days earlier. It is undisputed that Thompson had left work early on February 3, 1978, allegedly to see a doctor. The record reflects a dispute between company and union whether Thompson did or did not carry out his assignments on that date, and whether in performing his assignments he slipped and fell.[22]

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[17] *Id.* at 2-3, App. 199-200 (footnotes omitted).

[18] As the Supreme Court held in *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943), "The ground upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Chenery* recognized an apparent exception for cases in which the decision could be affirmed on purely legal grounds, not requiring judgments of fact or policy. *Id.* at 88, 63 S.Ct. at 459. Here, however, any decision whether Cook committed an "unfair labor practice" depends on a balancing of statutory interests entrusted by Congress to the Board, not to this court.

[19] *E. g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (general experience of Board appropriately invoked by it in construing statutory term to apply to broad classes of employees without *ad hoc* decisions in individual cases); *United Steelworkers of America v. NLRB*, ——— F.2d ———, at ——— (D.C.Cir. No. 79-1943, decided Feb. 25, 1981) (Board entitled to rely on special expertise in identifying coercive practices and their effects).

[20] Decision of the Board, *supra* note 10, at 2-3, App. 199-200 (footnote omitted).

[21] The facts are set out in detail in ALJ Opinion, *supra* note 10, at 2-5, App. 174-177.

[22] *Id.* at 2, App. 174.

On February 6 Thompson was summoned to the office of the company's labor relations manager.[23] The meeting began with an announcement that Thompson was to be discharged that day for insubordination and insufficient production. It continued thereafter for approximately three hours, as company and union representatives discussed the events surrounding Thompson's departure from work on February 3. Among those present was union steward Jesse Whitwell, who participated freely in the discussion and answered company questions about the incident.[24] The company apparently made no effort at that time to secure information from Doug Rittermeyer, the employee who had cleaned up the spilled material left by Thompson upon his departure on February 3.

Immediately following Thompson's discharge the union filed a grievance on his behalf. Apparently satisfied with the fact-finding that had preceded Thompson's firing, the company made no effort to obtain evidence from other employees prior to the initial hearing provided by the collective bargaining agreement. It clearly could have done so under a string of NLRB decisions, the validity of which the Board affirmed in the present case.[25] Only when the initial procedure failed to resolve the dispute, and the union invoked arbitration, did the company's outside labor attorney, William Nulton, summon union steward Whitwell to a discovery interview.[26] It was at this point—more than two months after the company had completed its initial investigation of the incident, more than two months after it had fired Thompson, and after it had brought in an outside lawyer to represent its adversary position in binding arbitration—that Whitwell attempted to assert a Section 7 right not to be interviewed. Company spokesmen thereupon threatened him with suspension if he failed, not only to answer questions, but also to disclose the contents of his union notebook.[27] Rittermeyer was similarly threatened that he must answer questions or face suspension.[28]

B.

The majority holds that management coercion of employee testimony in a pre-arbitral context is not necessarily violative of employee rights protected by Section 7. So long as the company has a legitimate interest in the information it seeks, the majority would tolerate threats of suspension or other coercive techniques. Its implicit assumption seems to be that attempts to coerce employees in ways violative of legitimate Section 7 interests are rare or that the Section 7 interests of employees are relatively narrow or insignificant.

In holding as it does the majority not only overrides the considered judgment of the Board; it ignores a line of cases recognizing that the employees' Section 7 right to engage in concerted action for mutual aid and protection encompasses an interest in maintaining silence in the face of questioning by an adversary employer.[29] The leading cases prohibiting coerced discovery of employees testimony have involved unfair labor practice proceedings before the NLRB itself. *See, e. g., International Union, United Automobile, etc. Wkrs of America v. NLRB,* 392 F.2d 801 (D.C.Cir.1967), *cert. denied,* 392 U.S. 906, 88 S.Ct. 2058, 20 L.Ed. 2d 1364 (1968); *Joy Silk Mills, Inc. v. NLRB,* 185 F. 2d 732, 743–744 (D.C.Cir.1950). In this context the law is clear: Once a grievance is scheduled for hearing before the NLRB, the employer may not force an employee to give discovery testimony adverse to his own interests, those of a fellow employee, or those of his union, nor may an employee be subject to interrogation that he might construe as threatening or coercive of his possible testimony before the Board itself. The rationale for these cases following from the clear language and policy of the statute, which aims to protect the interest of workers in engaging in joint action for their mutual protection after lines are drawn and labor and management are locked into adverse roles. As this

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[23] *Id.* at 3, App. 175.

[24] *Id.*

[25] Decision of the Board, *supra* note 10, at 2, App. 199.

[26] ALJ Opinion, *supra* note 10, at 4, App. 176.

[27] *Id.*

[28] *Id.*

[29] Both the courts, *see e. g., International Union, United Automobile, etc. Wkrs of America v. NLRB, supra* note 4, 392 F.2d at 809; *Joy Silk Mills, Inc. v. NLRB, supra* note 4, 185 F.2d at 734–744, and the NLRB, *see e.g., Johnnie's Poultry Co., supra* note 4, 146 NLRB at 775, have held explicitly that employer interrogation of an employee during the pendency of a case before the NLRB is inherently coercive of employee rights protected by § 7. A similar recognition that § 7 provides employees at least a *prima facie* right to resist discovery interviews in the arbitration context seems implicit in the NLRB's balancing of employer interests against employee rights in *Service Technology Corp., supra* note 4, 196 NLRB at 847, and *Primadonna Hotel Inc., supra* note 4, 165 NLRB 111.

court held in the *International Union* case, *supra*, "*employer interrogation of employees during a labor dispute*" possesses an "inherently coercive nature * * * in violation of an employee's Section 7 rights * * *." 392 F.2d at 809 (emphasis added).[30]

Ignoring cases holding that Section 7 prohibits coercive interviews once a dispute has been scheduled for hearing before the NLRB, the majority finds its main support for the legitimacy of coercive interrogation in decisions arising from one very different context: cases upholding the legitimacy of coercive interviews during predisciplinary investigations of employees misconduct.[31] Yet, as the Board recognized, it is crucial that these cases involved questioning conducted *prior* to an employer's determination that discipline was required. Like those cases forbidding discovery in cases before the Board, these cases called for a balancing of employer against employee interest.[32] And, in predisciplne cases, the employer's interest in attaining information essential to the orderly conduct of his business—without resort to the NLRB or other authority to obtain a discovery order—has been held to predominate over the employee's statutory interest in providing mutual support and protection. However, as is demonstrated by the cases involving proceedings before the NLRB, the statutory balance will at some point tip the other way, as the parties become entrenched adversaries in a labor dispute. In this context the employer's interest in the orderly conduct of business gives way to an adversarial interest in prevailing in the forthcoming adjudication. Because the employer's adversarial interest may embrace such illegitimate aims as intimidation of a potential witness, discovery of litigating strategy or bargaining positions, and coercion of other protected information, this court has followed the NLRB in establishing stringent safeguards concerning the conduct of discovery interviews in unfair labor practice cases pending before the Board. In *International Union, supra* for example, this court embraced the prophylactic standards enunciated by the NLRB, under which "the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning * * * must not be itself coercive in nature." [33] Employer questioning not in accordance with this standard has generally been held by the courts to constitute a violation of the unfair labor practices prohibition of Section 8(a)(1).[34] And no court has yet upheld the legality of coercive interviews in this advanced adversarial context.[35]

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In the present litigation this court is called upon to review the NLRB's balancing of employer and employee interests in the context of compulsory arbitration proceedings—the most advanced form of dispute resolution provided by the collective bargaining agreement. Although the majority holds otherwise, I believe that the balancing question her is closely analogous to that presented in "unfair labor practice" cases before the Board—more analogous, surely than it is to the question involved in cases of employer investigations to determine whether to discipline an employee.

The Board held in this case that once a grievance has reached the state of arbitration, an employer seeking to compel testimony from its employees "moves into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position, and moves away from the legitimate concern of maintaining an orderly business operation."[36] The facts illustrate the total reasonableness of this conclusion. The company here sought to interview a union steward. It atempted to coerce production of a union notebook.[37] And, even regarding his questioning of the employee who was not a union officer, the company lawyer in the present case stated plainly that one of his aims in seeking the interviews was to discover "what the union's position would be if it went to arbitration." [38] Based on these situational facts, I would regard this case as falling within the persuasive rationale of the cases prohibiting coerced discovery of employees testimony in cases pending before the NLRB.[39]

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[30] The majority disparages the significance of these cases by distinguishing between protection of rights arising under law and rights arising under contract:

> There is a critical difference, however, between cases set before the NLRB and cases set for arbitration. Proceedings before the NLRB are instituted to protect employee rights arising under the National Labor Relations Act. Proceedings before an arbitrator are instituted to resolve contractual disputes arising under a collective bargaining agreement. * * *

Majority opinion (Maj. op.), 648 F.2d at 730 n.25. This attempted distinction would seem to suggest that the § 8(a)(1) prohibition of "unfair labor practices" has no application in the arbitration context. The case law, however, makes it abundantly clear that the NLRB bars certain coercive actions by employers as inherently unfair and unlawful, without reference to the terms of individual contracts. *See, e.g., Keokuk Gas Service Co. v. NLRB, supra* note 3, 580 F.2d at 333–334; *Daphne San Francisco Funeral Service, supra* note 3, 224 NLRB 461: *El Dorado Club*, 220 NLRB 886, 889 (1975).

[31] Although the majority points to a number of cases holding that employers and employees are obliged to exchange information prior to arbitration, it cites only two, *Service Technology Corp., supra* note 4, and *Primadonna Hotel Inc., supra* note 4, in which it has been approved by a court of law.

[32] This was explicitly recognized by the Board in both *Service Technology Corp., supra* note 4, and *Primadonna Hotel Inc., supra* note 4.

[33] *International Union, United Automobile, etc. Wkrs of America v. NLRB, supra* note 4, 392 F.2d at 809, *quoting Johnnie's Poultry Co., supra* note 4, 146 NLRB at 775.

[34] *See, e.g., International Union, United Automobile, etc. Wkrs of America v. NLRB, supra* note 4; *NLRB* v. *Neuhoff Bros., Packers, Inc.* 375 F.2d 372, 378 (5th Cir. 1967); and *Montgomery Ward & Co. v. NLRB*, 377 F.2d 452, 456 (6th Cir. 1967), all applying the *Johnnie's Poultry* standard quoted at text accompanying note 33 *supra*.

[35] Indeed, in circuits that have adopted a "totality of circumstances" test to identify unfair labor practices in this context, the relevant question has typically been framed as whether "coercion" occurred. *See, e.g., A & R Transport, Inc v.* NLRB, 601 F.2d 311, 317 (7th Cir. 1979); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 492 (2d Cir. 1975).

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C.

The majority concludes otherwise. In its view, the lawyer Nulton's declaration of purpose—to discover what the union's position would be if it went to arbitration—requires heavy discounting. The "most important[ ]" reason for finding no violation of Section 8(a)(1), it asserts, is that "there is no substantial evidence to support a finding that Nulton" did in fact "use the interviews to discover the union's position at the upcoming arbitration." [40] Assuming *arguendo* the absence of "substantial evidence" showing that Nulton did discover the union's bargaining position or litigating strategy in this particular case, I would still uphold the Board's conclusion that employer coercion of employee testimony in the pre-arbitral context—"once arbitration is invoked [and] the fact is in the fire and the parties are unquestionably 'adversaries' " [41]—is violative of employee interests protected by Section 7. First, unlike the majority I would take cognizance of the Board's special expertise in identifying the regular and predictable—if not necessarily invariant—effects of certain employer practices. Apparently unlike the majority, I take seriously what this court said recently in *United Steelworkers of America v. NLRB,* ——— F.2d ———, at ——— (D.C.Cir. No. 79-1943, decided Feb. 25, 1981):

> Coercive effects are difficult to prove, yet at the same time the most important to dissipate. Certainly in this setting even more so than in other areas, the Board possesses an unmatched expertise * * * . We believe that the Board may rely on that expertise, and on the cumulative experience of past cases, to *presume* that certain employer conduct will inevitably produce certain effects on employees.

(Emphasis added.)

Against this realist view of the difficulty of demonstrating coercive effects in a particular case, the current majority would seemingly insist that every case should be decided on a balancing of its unique facts. In an ideal world, I would agree. In labor disputes in the real world, however, an employee whose rights must be culled from a complex body of uncertain facts and arcane decision law may have no rights that he can enforce effectively, the NLRA's Section 7 notwithstanding. Indeed, the facts of this case amply illustrate the impossibility of the employee's problem under such circumstances. Jesse Whitwell, the union steward whose testimony and notebook were sought by the employer, was summoned to the office of the company president and threatened with suspension if he did not cooperate.[42] The lawyer Nulton there advised him of the legality of the threatened sanction.[43] Although Whitwell was permitted to consult a union attorney, the lawyer had no opportunity to conduct legal research before giving his apparently tenative opinion that Whitwell could not be punished for refusing to submit to discovery. Under the circumstances, it is not surprising that

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[36] Decision of the Board, *supra* note 10, at 2-3, App. 199-200 (footnote omitted).

[37] ALJ Opinion, *supra* note 10, at 4, App. 176.

[38] Decision of the Board, *supra* note 10, at 3 n.3, App. 200 n.3.

[39] Indeed, given the acceptance by the Board and by the courts of the so-called *Spielberg* doctrine, see note 53 and accompanying *text infra,* the danger and injustice of permitting employer coercion of employee testimony may be even greater in the context of an arbitration than in disputes before the Board itself. Under *Spielberg* the Board will sometimes defer to an arbitrator's decision, even though it might have decided an issue differently had it reached the merits. The benefits of the Board's special expertise in detecting the wrongful effects of coercive practices, *see United Steelworkers of America v.* NLRB *supra* note 19, ———F.2.d at ———, are thus more likely to be lost in an arbitration case than they are in a controversy before the Board for decision on the merits.

[40] Maj. op., 648 F.2d at 723-724 n.24.

[41] ALJ Opinion, *supra* note 10, at 11, App. 183.

[42] *Id.* at 4, App. 176.

[43] *Id.*

Whitwell dared not refuse to answer questions and presumably would not have dared to refuse, no matter how legally intolerable the scope of the employer's inquiry. As the situation was aptly summarized for him by the company lawyer, "You have the opinion of two attorneys here *but it is your job that is on the line.*"[44]

Against a realist backdrop, a principal virtue of the Board's enunciated rule would lie in its simplicity and enforceability. This court should not strip the NLRB of power to propound enforceable standards.

III

As I read its opinion, the majority rests its decision on two principal bases. Both assume an unnecessarily broad and therefore unwarranted reading of the Board's decision. Because no such reading is necessary to support the decision under review, this case presents no necessary or proper

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occasion to invalidate a rule that could reasonably be construed in a manner obviating the majority's asserted objections.

As construed by the majority, the Board's order establishes a *per se* rule that an employer can never have a *right* to discover facts from an employee after a labor dispute has reached the stage of arbitration.[45] The majority finds this rule impermissible for two reasons. First, it argues that arbitration rights and procedures are appropriately governed by contract. It therefore holds that the Board acted impermissibly in establishing a standard that would limit the right of parties to bargain for alternative dispute settlement procedures.[46] Second, the majority argues that the Board's decision destroys the statute's intended parity of labor and management obligations to supply information.[47]

As I read the Board's opinion, however, it need not be construed as holding that an employer may never have a right to obtain evidence from its employees in pre-arbitral interviews; it definitively establishes only that unilateral coercion and intimidation are not legitimate mechanisms for enforcing such a right in the advanced adversarial posture of an arbitration proceeding.[48] Although it may be possible to understand the Board as having said more, it is unnecessary and therefore inappropriate for this court to do so at this time. I would assume only what is essential to the Board's decision of this case: that it forbids employers to obtain evidence by threats of dismissal or other unilaterally coercive and intimidating measures after a dispute has gone to arbitration. Similarly, although the majority is again eager to read the Board's opinion as broadly as possible and thus to resolve issues that might or might not arise in future cases, I see nothing in the Board's opinion upsetting any statutory parity of labor and management rights to information, or the parity of their rights to bargain for access to information either during arbitration or during any other grievance proceeding. Although the Board holds management coercion to be an unfair tactic in pre-arbitral interviews, it leaves open all other avenues by which an employer might obtain testimony from an employee after a dispute has gone to arbitration. For example, an employer might rely on the compulsory process of tribunals created either by contract between the parties or by statute—just as a union must do if it wishes to obtain information from an unwilling employer.

Certain portions of the majority opinion suggest that coercion is itself a proper and accepted mechanism of information procurement, which should be upheld on policy grounds as coducive, at least indirectly, to the settlement of labor grievances.[49]

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[44] *Id.* (emphasis added).

[45] *See* Maj. op., 648 F.2d at 721–722.

[46] *Id.*, 648 F.2d at 721–722.

[47] *Id.*, 648 F.2d at 716–717.

[48] The relevant portion is printed in text preceding note 17 *supra.*

At least in certain portions of its opinion the majority refuses to acknowledge any distinction between unilaterally coercive and non-coercive procurement of information. *See especially* Maj. op., 648 F.2d at 725 & n.25. Although the majority suggests otherwise, I believe that the difference between my analysis and that of the majority stems more from disagreement about the significance of coercion than from disagreement about the relevance of contract. I do not disagree with the majority view that "pre-arbitration interviews are part of the [contractually created] grievance-arbitration process." *Id.* I do not, however, see how "it clearly follows," *id.* that pre-arbitral threats and similar coercion—any more than firings and beatings—are insulated from condemnation under the NLRA as "matter[s] to be decided by the parties." *Id.* To respect a contractual ageement to supply information is one thing; to uphold the legitimacy of unilateral coercion to enforce rights claimed under an ageement is quite another—especially where, as here, the rights claimed may themselves be matters of dispute. Here, it may be worth recalling, the company threatened Whitwell with coercive reprisal if he failed to turn over his union notebook.

[49] *See* Maj. op. 648 F.2d at 720 (suggesting employer coercion needed to make rights "enforceable").

Such judgments of disputed fact and policy are more properly made by the NLRB than by this court, especially when statutory interests in information procurement threaten to conflict with employee interests protected **735** by Section 7. *See, e.g., NLRB v. Truck Drivers Local 449,* 353 U.S. 87, 96, 77 S.Ct. 643, 647, 1 L.Ed2d 676 (1957) ("The function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which Congress has committed primarily to the National Labor Relations Board, subject to limited judicial review.").

Moreover, from a legal perspective the chain of argument supporting the majority position is not strong. The majority cites cases supporting the proposition that provision of information is necessary if arbitration is to work effectively, relying especially on *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967), and *Fawcett Printing Corp.,* 201 NLRB 964 (1973). But the majority fails to establish a persuasive link between *Acme* and *Fawcett* and those cases in which the Board has recognized the legitimacy of employer efforts to coerce testimony—cases generally involving inquiries into employee misconduct *prior* to imposition of final disciplinary action. The link is highly questionable. Although the language of *Acme* suggests the desirability of an information exchange, it nowhere suggests that the best time for this exchange to occur is during the arbitral process. Thus the underlying policy aims of *Acme* would seem satisfied as long as there is an opportunity for the parties to procure proper information at some stage of the dispute resolution process. And certain language in the *Acme* opinion seems to suggest that national labor policy is best served when information is provided and disputes resolved, not after the invocation of arbitration, but at the *earliest point possible:*

> [I]f all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what [the employer's asserted right never to provide information except in an actual arbitration hearing] would require. It would force the union to take a grievance *all the way through to arbitration* without providing the opportunity to evaluate the merits of the claim. * * *[50]

The ALJ, whose conclusions the Board adopted, reasoned explicitly from this premise. Permitting coercive discovery at the arbitral stage, she stated, "would make a sham of the prearbitral grievance procedures carefully spelled out in most union contracts; if the parties know that they can lose nothing by postponing their investigations until the the grievance step, * * * [t]he result will inevitably be delays, the avoidance of which is a major purpose of grievance and arbitration provisions." [51] The majority takes issue with this position at least partly on factual grounds, suggesting that grievances will be better resolved if employers are able to conduct coercive interviews at any state of the dispute resolution process. For reasons that seem to me to be obvious, I cannot join this court in lecturing the NLRB about how the statutory policy of promoting settlements can best be effectuated.

The majority's second main argument against the Board's decision topples with the first. Far from destroying the parity between labor and management obligations to supply information, the Board's holding serves to place them in positions of practical as well as theoretical equality. Common sense suggests that an employee has no effective means of coercing an employer to comply with its discovery requests prior to an arbitration. It seems to be no accident that the company ignored union requests for information in the present case.[52] An employer, on the other hand, will, as a practical matter, frequently be able to use the threat of discipline or dismissal to extract information—including information to which it has no legal right—from an unwilling employee. In removing this unfair advantage held by the employer, the Board, in my judgment, acted entirely consistently with the statutory policy of mutuality of labor and management obligations to sup- **736** ply information. The majority's second argument is therefore also mistaken.

The majority also advances, but relies less heavily upon, a third argument that the Board failed to reconcile its decision in this case with the result in *Pacific Southwest Airlines, Inc.*, 242 NLRB No. 151, 101 LLRM 1366 (1979). In that case the Board explicitly invoked the so-called *Spielberg* doctrine, *see Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), under which the Board defers to the decision of an arbitrator without endorsing his analysis. The majority rightly argues that deference, as acknowledged by the Board, is appropriate only if the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act.[53] It then argues that, if upholding the coercive interview in *Spielberg* was not inconsistent with the Act, then the Board cannot now propound a decision rule holding that coercive interviews are violations of Section 8. The majority's argument may be rejected on either of two grounds. First, the Board gave a reasoned explanation for its *Pacific Southwest* decision and who it lacked binding force in the present controversy. Consistent with its analysis of the underlying factual situation as presenting a conflict of legitimate employee interests with legitimate employer interests, the Board stated that "an award vindicating either of the conflicting rights cannot be viewed as being clearly repugnant to the policies of the Act." [54] Second, the arbitrator in *Pacific Southwest* found only that the employer had not violated Section 7 in a particular case. But the decision of a particular case should not bar the Board from developing a rule permitting the presumption that a certain kind of employer conduct will have predictable and impermissible effects in *most* cases, particularly when "[c]oercive effects are difficult to prove, yet * * * important to dissipate," and "the Board possesses an unmatched expertise"[55] in identifying the harmful conduct.

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[50] *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 438, 87 S.Ct. 565, 569, 17 L.Ed. 495 (1967).

[51] ALJ Opinion, *supra* note 10, at 13, App. 185.

[52] *See id.* at 9, App. 181.

IV

Properly construed, the Board's decision in this case, in my view, is supported by substantial evidence and otherwise free of legal error. Like the NLRB, I would therefore think it unnecessary to reach the question whether Jesse Whitwell, because of his position as a union steward, enjoyed special statutory rights that were violated by the coercive interview conducted in this case. Because the majority rejects the Board's stated rationale for finding an unfair labor practice, however, questions about the relevance of Whitwell's union office and functions become central to a fair adjudication of the union's claim under Section 8(a)(1). Under the circumstances, I agree that the Board must be given an opportunity to consider whether Whitwell was entitled to special protection because of his status as a union steward. Forced by the majority to reach this issue, I concur that the case should be remanded to the Board for further findings regarding the legality of a coercive interview of a union steward in the factual setting prosented by this case. As to the main issue in the case, however, I respectfully dissent.

NLRB v. International Medication Systems, LTD

640 F.2d 1110 (9th Cir.), April 2, 1981; rehearing
denied September 18, 1981; certiorari denied
March 22, 1981—244 NLRB 861

On petition to enforce Board Order

Before WRIGHT, KENNEDY and ALARCON, Circuit Judges

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EUGENE A. WRIGHT, Circuit Judge: The Board seeks enforcement of its order directing the respondent to cease and desist from unfair labor practices and to reinstate two employees with back pay. 244 NLRB No. 136 (1979).

In 1978 Lavendera and Guzman led an effort to secure union representation for the respondent's employees. During that effort, several company supervisors communicated with employees about the consequences of involvement in union activity. Lavendera and Guzman were ultimately discharged.

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An administrative law judge and the Board concluded that the respondent interfered with union activity and discharged the two employees in violation of § 8(a)(1) & (3) of the National Relations Act (NLRA), 29 U.S.C. § 158(a)(1) & (3).

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[53] Maj. op., 648 F.2d at 729–730.

[54] Decision of the Board, *supra* note 10, at 5, App. 202.

[55] *United Steelworkers of America v. NLRB*, *supra* note 19, ——— F.2d———; *see Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 374, 93 S.Ct. 1652, 1663, 36 L.Ed. 2d 318 (1973) ("[A] requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape * * * entirely.").

In determining that the dismissals were discriminatory, the Board relied on secondary evidence of the respondent's policy toward absenteeism and layoffs introduced by the general counsel after the respondent refused to produce subpoenaed personnel records. No effort was made to seek enforcement of the subpoena in district court. Instead, the administrative law judge barred the respondent from rebutting the general counsel's evidence on these issues by cross-examining witnesses or presenting other evidence.

We review the sufficiency of the evidence and the propriety of the sanctions imposed by the administrative law judge.

I.

The Board found that the respondent interfered with, restrained, and coerced employees engaged in union activity, in violation of NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1), by interrogating and threatening them, creating the impression of surveillance, and otherwise creating a coercive atmosphere.

These findings must be upheld if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 485–87, 71 S.Ct. 456, 463–464, 95 L.Ed. 456 (1951).

Company supervisors Ruiz, Aparicio, Chai, and Hinderer asked numerous questions of employees about union activities and the identity of union leaders and supporters. These were coupled with express or implied threats of reprisal. Viewed separately or as a pattern, they could fairly be interpreted as tending to interfere with protected activity. *See NLRB v. Silver Spur Casino,* 623 F.2d 571, 584–85 (9th Cir. 1980) (NLRA § 8(a)(1) is violated by questions that can fairly be interpreted as threats); *NLRB v. Hotel Conquistador, Inc.,* 398 F.2d 430, 434 (9th Cir. 1968) (statements that create the impression of surveillance are unlawful).

Aparicio, Hinderer, and Contreras made other statements about the probable firing of union supporters which could fairly be interpreted as threats of reprisal. Hinderer and Contreras directly or indirectly threatened that the company would close if the union prevailed. *See NLRB v. Prineville Stud Co.,* 578 F. 2d 1292, 1295 (9th Cir. 1978) (threat to close a plant unless union activity ceases is unlawful).

The respondent contends that Contreras was not a supervisor and that her actions were not attributable to it. We need not resolve that question.[1] Even if the actions of Contreras may not be imputed to the respondent, there is abundant evidence of interference, restraint, and coercion. We grant enforcement of the Board's order that the respondent cease and desist from interfering with union activity and post an appropriate notice.

II.

The Board found that the respondent dismissed Lavendera and Guzman in retaliation for their union activities, in violation of NLRA § 8(a)(1) & (3), 29 U.S.C. § 158(a)(1) & (3).

In connection with this question, the Board issued a subpoena duces tecum calling for production of personnel records for all employees which would show hiring, firing, and layoff practices and actual treatment of absenteeism.

The respondent complied with the portion of the subpoena calling for the records of Lavendera and Guzman, and other materials, but refused to comply with the portion calling for records of employees not within the bargaining unit. It contended that these were irrelevant. Its petition to revoke the subpoena was denied, but the general counsel did not seek enforcement of the subpoena in district court and the preclusion order followed.

A. *Nature of evidence admitted and excluded*

1. *Discharge of Lavendera*

Lavendera was a leader of the organizing effort. Prior thereto, the company had trained her and taken steps to ensure that she would continue to be available. Before a union meeting at her home on

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[1] Contreras was a "lead person," and in another setting, "lead persons" who were deemed "low-level" supervisors were held not to speak for the company in the absence of other anti-union activity. *Hecla Mining Co. v. NLRB,* 564 F.2d 309, 315 (9th Cir. 1977).

But an employer is properly held responsible for anyone acting as its agent when employees could reasonably believe that the agent was speaking for the employer. *NLRB v. Pacific Southwest Airlines,* 550 F.2d 1148, 1150 (9th Cir. 1977).

Contreras acted in the context of other antiunion activity by persons whose supervisory status is undisputed, unlike the "lead persons" in *Hecla Mining Co.* Under these circumstances, employees might reasonably have believed that she was speaking for the respondent.

April 6, she received assurances that she would have her anniversary raise and was told that her services were needed.

April 7, the day after the union meeting, was the turning point in Lavendera's relationship with the respondent. Her value to the company apparently evaporated. Her supervisor, Chai, asked another employee about her involvement with the union, implying that he would retaliate. The administrative law judge credited Lavendera's account of her discussion with Chai in which she said he told her, on the morning of April 7, that he would find an "excuse" to discharge her "after lunch." That afternoon, she was discharged. At least one supervisor said that Chai dismissed her for union activity.

Chai maintained that Lavendera was "laid off" because her services were no longer needed. The general counsel introduced evidence that no one else was let go that day and that layoffs at the company normally occurred en masse. The administrative law judge did not allow the respondent to rebut this evidence.

"A discharge for which the employer has a justifiable ground" nevertheless violates the statute "if it is in fact motivated by antiunion sentiment." *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980). When motives are mixed, "the improper motive must be shown to have been *the dominant one.*" *Id.* (quoting *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977) (emphasis added in *L'Eggs*)).[2]

In *L'Eggs*, an employee was dismissed "very soon after L'Eggs received reports that [she] was interested in unions and would support a union * * * at L'Eggs." *Id.* at 1342. There was "little doubt" that she was "a poor employee, and could have been fired for that reason." *Id.* at 1343. But there was substantial evidence, in view of inquiries by supervisors about her union activities and the timing of her discharge, that the dominant reason was her union activity. *Id.* at 1343–44.

There is no suggestion that Lavendera was not a good employee. Her services were valued by the company until she held a union meeting in her home. Then she became expendable. Even if other layoffs occurred contemporaneously, this one might still fairly be interpreted as retaliation.

Nevertheless, it is possible that similar or contemporaneous layoffs of employees with comparable training and value to the company would have established, under the circumstances, that the business reason given for Lavendera's discharge was not pretextual and that antiunion motivation was not dominant. The secondary evidence, which shows that Lavendera was the only employee laid off on April 7 and that layoffs normally occurred en masse, eliminates this possibility. This evidence is therefore essential to the Board's finding that Lavendera's discharge was improperly motivated.

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2. *Discharge of Guzman*

Guzman took two weeks' vacation and one week's leave of absence in July 1978. She knew that one day of her vacation, Independence Day, was a paid holiday and that company policy was to extend vacations one day under such circumstances. She believed that her total time off would be three weeks and one day.

The respondent had reduced her leave of absence by one day, however, and when she did not return to work after three weeks, she was "terminated." No one telephoned her first, and she had previously received only one oral and one written warning for tardiness.

The general counsel's evidence showed that other employees had missed one or more days without notifying the company and had not been discharged, and that company policy permitted two unexcused absences before dismissal. Again, the respondent was not permitted to rebut the evidence because it had refused to produce personnel records that presumably would have resolved the issue.

Refusal to give a day off when an employee was hired with the understanding that she could take occasional days off and had been allowed to do so before her union involvement was held to be an unfair labor practice in *NLRB v. Sacramento Clinical Laboratory, Inc.*, 623 F.2d 110, 113 (9th Cir. 1980).

Nevertheless, the respondent might be able to rebut this evidence of improper motive by establishing that Guzman did not receive disparate treatment. *See NLRB v. Best Products Co., Inc.*, 618 F.2d 70, 72, 74 (9th Cir. 1980). In *Best Products*, the employee was "frequently absent from work." *Id.* at 72. The court upheld the administrative law judge's finding that, although the company's action in suspending the employee for two months may have been harsh, it did not represent disparate treatment and was proper. *Id.* at 72, 74. Here, the secondary evidence established that Guzman received disparate treatment.

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[2] Although other standards have appeared occasionally in Ninth Circuit cases, *see L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980) (citing cases), the NLRB has now adopted substantially the test used in *L'Eggs*. *See Wright Line*, 251 NLRB No. 150 (1980).

B. *Effect of preclusion order*

Because the secondary evidence is essential to the Board's findings that Lavendera and Guzman were improperly discharged and rebuttal evidence might have changed the result, we must determine the propriety of the preclusion order.

When the respondent refused to comply with the subpoena, the general counsel could have sought judicial enforcement. Section 161(2), 29 U.S.C., confers jurisdiction on the district courts to enforce NLRB subpoenas through contempt penalties.

The district court will enforce an agency subpoena "if the investigation is legitimate, the subpoena is not needlessly broad, and the records sought are relevant to the inquiry." K. Davis, *Administrative Law* § 3.08 at 67 (3d ed. 1972). *See United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 505, 90 L.Ed. 614 (1946).[3]

The Board contends that the subpoenaed records were "clearly relevant to major issues in the case." There is no apparent reason for confining the inquiry to members of the bargaining unit, and the respondent offers none. Under these circumstances, it seems likely that a district court would have enforced the subpoena.

The respondent maintains, however, that 29 U.S.C. § 161(2) grants exclusive enforcement power to the district courts and that the agency lacks statutory or constitutional authority to impose sanctions for noncompliance.

Although the issue apparently has not arisen in this circuit, similar sanctions were imposed in *NLRB v. C. H. Sprague & Son Co.*, 428 F.2d 938 (1st Cir. 1970). The em-

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ployer refused to comply with any part of a subpoena though it contended that only one part was irrelavent. *Id.* at 942.

The court held that the employer lost the right to rebut evidence on matters covered by the subpoena because it would be unfair to allow it to do so when it had documents that would be decisive (some were of undisputed relevance) but refused to produce them. *Id.* The *Sprague* court stated, however, that "if the company were taking the position that all the information sought by the subpoena was irrelevant, we might agree with its position." *Id.*[4]

The respondent takes the position that all information sought but not produced (or offered) is irrelevant. The Board replies that the respondent's assertion of irrelevance is frivolous. Were the issue to arise in a discovery proceeding, Rule of Civil Procedure 37(b)(2) would authorize the court to impose sanctions for bad faith refusal to comply with discovery orders. The sanctions could include dismissing a party's claim or precluding introduction of evidence on relevant issues as well as imposing penalties for contempt and awarding expenses to opposing parties. *Id.*

The Rules of Civil Procedure are applicable to NLRB proceedings "so far as practicable." 29 U.S.C. § 160(b).[5] But, as one commentator notes,

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[3] The district court "may undertake only an extremely limited inquiry" in deciding whether to enforce the subpoenas. *NLRB v. Frederick Cowan & Co., Inc.*, 522 F.2d 26, 28 (2d Cir. 1975). "[T]he agency need not even show probable cause to believe that the law has been violated," *id.* (citations omitted), only some reasonable basis for believing that the information will prove relevant. *Id.*

[4] *See also NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1229–30 (5th Cir. 1969), *cert. denied*, 397 U.S. 990, 90 S.Ct. 1122, 25 L.Ed.2d 397 (1970); *Bannon Mills, Inc.*, 146 NLRB No. 81 (1964).

The instant case does not involve the "best evidence" rule. The precluded evidence would not merely prove the contents of documents but prove facts independent of the documents.

Cf. UAW v. NLRB, 459 F.2d 1329, 1346–47 (D.C. Cir. 1972) (Board erred in failing to draw adverse inference from party's failure to produce subpoenaed documents, even though enforcement had not been sought in district court.)

The administrative law judge here indicated that he would draw adverse inferences from the respondent's failure to produce the personnel records, but concluded that "for the most part it was unnecessary" to do so.

We agree that "the adverse inference rule in no way depends on the existence of a subpoena," *UAW v. NLRB*, 459 F.2d at 1338, though we doubt, in view of our present holding, that "the willingness of a party to defy" an NLRB subpoena, prior to any district court proceeding, "strengthens the force of the preexisting inference." *Id.*

[5] This provision probably does not require the agency to follow district court discovery procedures, *see P. S. C. Resources, Inc. v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978), but once a subpoena is issued these discovery procedures may be generally analogous to the methods sought to be used here.

"although courts can only impose rule 37(b)(2) sanctions after a ruling on all objections, and then only for disobedience of a judicial order compelling discovery," an agency imposing such sanctions "asserts that for disobedience of its orders directing discovery, it can impose the sanctions first and let the judicial questions be asked later." Williams, *Authority of Federal Agencies to Impose Discovery Sanctions: The FTC—A Case in Point,* 65 Geo.L.J. 739, 756 (1977).[6]

In *Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894), the Supreme Court stated:

> The inquiry whether a witness before the [Interstate Commerce] Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination.

Id. at 485, 14 S.Ct. at 1136.

This language makes clear that challenges to agency subpoenas must be re-

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solved by the judiciary before compliance can be compelled. The agency "could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." *Id.* Nor, we believe, may the Board impose discovery sanctions, which may have more serious consequences than a fine, before the judicial questions have been asked and answered.[7]

"Congress has made elaborate provisions for obtaining and enforcing [NLRB] subpoenas," and "[i]t was obviously its intention that this machinery be utilized." *NLRB v C. H. Sprague & Son Co.,* 428 F.2d at 942. We may not infer that Congress intended to authorize agencies to bypass district court enforcement proceedings. An efficient and fair enforcement mechanism has been provided and was meant to be used. We therefore conclude that Congress granted the district courts exclusive authority to compel compliance with NLRB subpoenas.

Because the secondary evidence is essential to the finding that Lavendera and Guzman were improperly discharged and the Board lacked authority to bar rebuttal of it, we remand this portion of the case for the taking of additional evidence and an opportunity to seek enforcement of the subpoenas in district court. *See* 29 U.S.C. § 160(e).

Application for enforcement GRANTED in part, REMANDED in part.

KENNEDY, Circuit Judge, concurring specially: I concur in the result.

NLRB v. Haberman Construction Company

641 F.2d 351 (5th Cir.), April 3, 1981—236 NLRB 79

On petition to enforce Board Order

Before GODBOLD, Chief Judge, BROWN, COLEMAN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges

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RANDALL, Circuit Judge: In this case the National Labor Relations Board (the Board) seeks to enforce its order in *Haberman Construction Co.,* 236 N.L.R.B. 79 (1978). Adopting the findings of the administrative law judge, the Board found that Haberman Construction Co. (the Company) had by its actions adopted a prehire contract in effect between Local 1266 of the United Brotherhood of Carpenters and Joiners of America (the Union) and the Austin Chapter of the Associated General Contractors (the AGC). On this basis, the Board found that the Company had committed unfair labor practices by unilaterally refusing to make further union benefit payments as required by the Union-AGC contract, by announcing to its employees that it intended to go "open shop," and by constructively discharging certain employees who resigned in response to the Company's decision to cease union benefit payments and to go "open shop." Although the Board generally adopted the remedies proposed by the administrative law judge, it rejected his suggestion that, since the projects on which the employees had been working were in all likelihood completed by the time of his decision, the employees should be made whole only for losses incurred until the end of those projects. Rather, the Board ordered that those employees who would have continued in the Company's employment but for the unfair labor practices be reinstated to substantially equivalent positions on new projects and that they be made whole for all losses incurred by them as a result of the unfair labor practices (such losses not being limited to the projects under way at the time of the unfair labor practices).

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[6] Williams suggests that the power to impose discovery sanctions (and to determine the propriety of a subpoena) is inherently judicial and emerges from the contempt power. Williams, *Authority of Federal Agencies to Impose Discovery Sanctions: The FTC—A Case in Point,* 65 Geo.L.J. 739, 744 (1977). "Because the contempt power is not and cannot be vested in administrative agencies, those agencies lack the authority to impose discovery sanctions." *Id.*

He concludes that Congress has not vested agencies with this power and could not do so without violating due process by denying the party a fair opportunity to object to the discovery order. *Id.*

[7] Although *Brimson* makes reference to "fine or imprisonment" to compel obedience, its essential import is that a federal agency lacks authority to make a "final determination" whether a witness is "bound" to produce subpoenaed documents. The use of different sanctions does not render the agency's assertion of authority to make such a determination any less a usurpation.

A panel of this court granted the Board's petition to enforce its order in *NLRB v. Haberman Construction Co.*, 618 F.2d 288 (5th Cir.), *vacated and rehearing en banc granted* (July 15, 1980). The panel enforced the Board's order in all respects. In so doing, the panel interpreted the Board's opinion as having adopted the rule that a prehire contract between a project-by-project employer in the construction industry and a union, entered into pursuant to section 8(f) of the National Labor Relations Act (the Act), becomes and continues thereafter to be an ordinary section 9(a) collective bargaining agreement once the union has achieved majority status in the relevant bargaining unit. As a section 9(a) agreement, the panel reasoned, a presumption of continuing union majority applies, and the union is not required to establish its majority status at each succeeeding job site in order to enforce its contract with the employer. Accordingly, the panel concluded that the Board's remedy approximately extended to projects not yet begun at the time of the unfair labor practices.

We have reheard this case *en banc* primarily to consider whether the panel misinterpreted the remedial portion of the order and opinion of the Board in this case. For the reasons set forth below, we have decided that the panel did misinterpret the order and opinion of the Board. Further, reading the Board's order in the context of the explanation provided in its opinion and of its own prior precedents, we conclude that we cannot enforce that portion of the Board's remedial order which extends to projects not yet begun at the time of the unfair labor practices at issue.

The Facts

The dispute in this case derives from the disruption of the relationship between the Company, a construction firm operating in Austin, Texas, and the Union. This relationship had its origin in 1973 when the Company hired Jessie Beshears, a union member, to be its carpenter foreman, and began paying Beshears' benefits into the carpenters' welfare, pension and apprentice training fund in accordance with the contract then in effect between the Union and the AGC. Under Beshears' tutelage, this burgeoning relationship grew to significant propotions since Beshears, according to his own testimony hired "strictly union carpenters." Some of the Company's growing complement of union carpenters were hired by Beshears on the basis of his personal knowledge of their work; others were procured through his use of the union hiring hall.

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Although the Company never formally executed a collective bargaining agreement with the Union, and despite the fact that respondent was not a member of the AGC, by May 1973 respondent was remunerating its carpenters at the pay scale provided by the Union-AGC contract. Furthermore, when this contract expired on August 31, 1974 and was replaced by a contract effective from September 1, 1974, through March 31, 1977, the Company instituted the new contract's higher wage scale. The Company also submitted payments for its carpenters' benefits to the Union and allowed the employees to maintain a job steward at the worksite.

This amicable relationship ended abruptly on February 14, 1977. On that date, the Company informed its carpenters that is would cease paying for their union benefits, and that it was going "open shop." In response, the carpenters sought the advice of their union business agent. Acting on his advice, at the end of business of February 16, 1977, five of the Company's carpenters relinquished their positions because of the Company's actions.

The Union's charges of unfair labor practices were tried before an administrative law judge. He found that in February, 1977, the Company operated two Austin projects and that the carpenters employed at these two projects constituted one bargaining unit because the employees were freely shifted by the Company between the two projects. He further found that on the date of the discharges, the Union represented at least seven of the eleven rank-and-file carpenters in this unit. Hence, it represented a majority of the employees.

The administrative law judge found that the Company was a project-by-project employer, having no regular complement of workers but rather hiring as the need arose. The Company's two Austin projects were almost completed at the time of the unfair labor practices and were considered by the administrative law judge to have been completed by the time of the administrative hearing.

The administrative law judge also found that the Company had adopted the Union-AGC contract. Since the Union enjoyed majority status at the time of the breach of this contract, the administrative law judge concluded that the Company's unilateral cessation of paying union benefits constituted a refusal to bargain in violation of section 8(a)(1) and (5) of the Act; that the Company's announcement that it was going "open shop" was coercion in violation of section 8(a)(1) of the Act; and that the Company's unilateral changes in terms and conditions of employment constituted a constructive discharge of the five employees who quit their employ, and thus amounted to a discriminatory discharge in violation of section 8(a)(1) and (3) of the Act.

After adopting the administrative law judge's findings as to the violations, the Board ordered the Company to reinstitute the terms and conditions of the Union-AGC contract, to reinstate the five dischargd employees and to make them whole for the projects under way at the time of the violations and for new projects on which they would have been hired but for the violations, and to bargain with the union.

I. *Existence of a Collective Bargaining Agreement*

It is well settled that a union and employer's adoption of a labor contract[1] is

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not dependent on the reduction to writing of their intention to be bound. *See, e. g., Certified Corp. v. Hawaii Teamsters Local 996*, 597 F.2d 1269, 1272 (9th Cir. 1979); *Warrior Constructors, Inc. v. Operating Engineers Local 926*, 383 F.2d 700, 708 (5th Cir. 1967); *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952). Instead, what is required is conduct manifesting an intention to abide by the terms of an agreement. *See, e.g., Warrior Constructors, Inc., supra*, 383 F.2d at 708–09; *NLRB v. George E. Light Boat Storage, Inc.*, 373 F.2d 762, 766 (5th Cir. 1967); *Rabouin, supra*, 195 F.2d at 909–10.

The conclusion that the Company manifested an intent to abide by the Union-AGC contract, by enjoying its benefits and abiding by its provisions, *see id.* 910, is well supported by the findings of the administrative law judge:

> [T]he evidence in the instant case of Respondent's adoption of the Union-AGC agreement must be regarded as substantial. Respondent's contributions to the Union's trust funds from May 1973 through February 1977, its use of union members exclusively as far as the record shows, it [sic] observations of the Union-AGC holidays, its use of the union for referrals, its payment of the union wage scale, its allowance through Beshears of the appointment of a union job steward, and the undisputed testimony of Beshears, whom I credit, to the effect that on some

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[1] By use of the term "labor contract" here, we refer to both a collective bargaining agreement and a section 8(f) prehire contract. Section 8(f) of the Act, 29 U.S.C. § 158(f) (1976), provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, of (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later * * * *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) of 159(e) of this title.

but not all occasions when he wanted to start work at an earlier hour than called for in the union agreement he will check with business agent Rosentritt, all reflects [sic] an intention to adhere to the terms of the Union-AGC agreement.

Since these findings are supported by substantial evidence on the record as a whole, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), we conclude that the Company had adopted the Union-AGC contract.[2]

The Company asserted below that it was free to repudiate the Union-AGC contract because its adoption of that agreement did not create a collective bargaining agreement, but created instead a "prehire contract." It is true that section 8(f) of the Act creates a unique situation with respect to the formation of contracts between employers in the building and construction industry and unions. Section 9(a) of the Act, which otherwise would govern, provides that the exclusive representative of all the employees in a bargaining unit shall be the "representatives designated or selected for the purposes of collective bargaining by the majority of the employees" in the unit. 29 U.S.C. § 159(a) (1976). Accordingly, the Supreme Court has held that it is an unfair labor practice for an employer under section 8(a)(1) and (2) and for a union under section 8(b)(1)(A) to enter into a collective bargaining agreement recognizing the union as the exclusive bargaining representative when only a minority of the employees have authorized the union to represent them. *Garment Workers v. NLRB*, 366 U.S. 731, 737, 81 S.Ct. 1603, 1607, 6 L.Ed.2d 762 (1961). Section 8(f) of the Act specifically provides, however, that it shall not be an unfair labor practice for an employer to make an agreement with a labor organization covering employees engaged in the building and construction industry prior to the establishment of majority status for the labor organization. In *NLRB v. Local 103, International Association of Bridge Workers (Higdon Construction Co.)*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978), the Supreme Court determined the binding effect of prehire contracts entered into pursuant to section 8(f). The Court adopted the longstanding position of the Board that a section 8(f) prehire contract is voidable until such time as the union achieves majority support in the appropriate bargaining unit. *Id.* at 341, 98 S.Ct. at 655–656. The Court made clear, however, that "when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Id.* at 350, 98 S.Ct. at 660. Since a majority of the employees in the relevant unit in the Company's employment supported the Union on February 14, 1977, the Company's actions of that date were taken in the face of a valid collective bargaining agreement.

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II. *The Unfair Labor Practices*

A. *Cessation of Benefit Payments*

It is well settled that an employer violates section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5) (1976),[3] by unilaterally changing the terms and conditions of employment without first granting its employees' exclusive bargaining representative the opportunity to bargain about "mandatory" subjects. *See, e. g., NLRB v. Katz*, 369 U.S. 736, 747–48, 82 S.Ct. 1107, 1114, 8 L.Ed.2d 230 (1962). It is equally well established that contributions to a health, welfare and pension fund constitute mandatory subjects of collective bargaining. *See, e. g., NLRB v. SAC Construction Co.*, 603 F.2d 1155, 1156 (5th Cir. 1979); *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343, 1349 (5th Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978); *United Brick & Clay Workers v. District 50, UMW*, 439 F.2d 311, 314 (8th Cir. 1971); *Hinson v. NLRB*, 428 F.2d 133, 137 (8th Cir. 1970).

Given the existence of these two principles, we have no difficulty in affirming the Board's finding of an unfair labor practice here, for the Company does not dispute that it ceased payments of the benefits without bargaining with the Union. Since that action accomplished a unilateral alteration in terms and conditions of employment which are mandatory subjects of bargaining, the Company violated section 8(a)(1) and (5) of the Act.

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[2] We need not here decide whether the Company's payment of the wage scale and benefits provided by the Union-AGC contract would in itself indicate respondent's intention to be bound by that agreement. *Cf. Roadway Express, Inc. v. Teamsters Local 249*, 330 F.2d 859, 865 (3d Cir. 1964) (acceptance of wages by employees does not bind labor union on issue of existence of labor contract). Rather, we focus on the fact that respondent both enjoyed the benefits of the contract and abided by its provisions. *See Rabouin, supra*, 195 F.2d at 910.

[3] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

B. *"Open Shop" Announcement*

The Board found that the Company's communication of its intention to go "open shop" coerced its employees in violation of section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1),[4] because "such announcement by Respondent conveyed to employees an intent of Respondent to refuse to abide by the terms of an applicable contract and to discontinue dealing with a union with which it was obligated to deal." In contrast, the Company contends that its statement was simply an announcement of its intention to abide by the Texas "right to work law" which prohibits closed shops. *See* Tex.Stat. Ann. art. 5207a (Vernon 1971).

In essence the Company asks us to reject the Board's inference that its statement conveyed an intention to repudiate its bar-

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gaining obligations. Even were we to disagree with the Board's assessment of the character of the Company's statement, we cannot reverse its finding, for it is not the province of this court to substitute its judgment for that of the Board when the Board has drawn a plausible inference from competent evidence. *See, e. g., NLRB v. United Insurance Co.,* 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968). Indeed, we find the Board's inference to be quite plausible. Given the fact that the Company's announcement was made simultaneously with its repudiation of its obligation to pay the carpenters' benefits, its statement is quite easily interpreted as a message to its employees that it would not recognize and bargain with the Union. The Board's inference of coercion is supported by substantial evidence on the record as a whole.[5]

C. *Constructive Discharge*

There are two elements to a contructive discharge violative of section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976).[6] First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted "to encourage or discourage membership in any labor organization" within the meaning of section 8(a)(3) of the Act. *See, e. g., Cartwright Hardware Co. v. NLRB,* 600 F.2d 268, 270 (10th Cir. 1979); *J. P. Stevens & Co. v. NLRB,* 461 F.2d 490, 494 (4th Cir. 1972); *NLRB v. Holly Bra of California, Inc.,* 405 F.2d 870, 872 (9th Cir. 1969); *Montgomery Ward & Co. v. NLRB,* 377 F.2d 452, 459 (6th Cir. 1967); *NLRB v. Tennessee Packers, Inc., Frosty Morn Division,* 339 F.2d 203, 204–05 (6th Cir. 1964). We must therefore determine whether the Company's conduct created intolerable conditions and was accomplished to discourage union membership.

1. *Intolerable Conditions*

Five of the Company's employees resigned in response to the Company's decision to go "open shop" and to unilaterally cease payment of all union benefits. Although the payment of union benefits was a mandatory subject of bargaining, *see* Part II(A) of this opinion, we need not decide whether that fact alone would render the cessation of such payments an "intolerable condition" sufficient for a finding of a constructive discharge. As dicussed above, the administrative law judge also found that the Company's announcement that it intended to go "open shop" conveyed to its employees an intent to refuse to abide by the terms of a binding labor contract and to refuse to deal with the union with which it was obligated to deal, and thereby forced the Company's employees to choose between quitting its employ or continuing in the face of the Company's unlawful repudiation of its bargaining obligations under the Act. The Board has repeatedly held that employees who decide to quit in circumstances similar to those in this case have been constructively discharged. *See, e. g., Superior Sprinkler, Inc.,* 227 N.L.R.B. 204 (1976) (refusal to negotiate new collective bargaining agreement, and unilateral cessation of contributions to the union's vacation fund and health and welfare fund); *Marquis Elevator Co.,* 217 N.L.R.B. 461 (1975) (withdrawal of recognition from union with statement that employer would operate as nonunion shop, with institution of new wage guidelines and discontinuance of payments to various union trust funds); *Lifetime Shingle Co.,* 203 N.L.R.B. 688 (1973) (conditioning of continued employment upon employees giving up union membership); *Barwise Sheet Metal Co.,* 199 N.L.R.B. 372 (1972) (conditioning of continued employment upon employees' giving up union membership); *Johnson Electric Co.,* 196 N.L.R.B. 637 (1972) (unilateral change in wages and benefits provided for in new contract, with requirement that employees work with nonunion workers under circumstances which would require employees to lose union membership); *Blue Cab Co.,* 156 N.L.R.B. 489 (1965), *enforced sub nom. Teamsters Local 782 v. NLRB* 373 F.2d 661 (D.C. Cir.), *cert. denied,* 389 U.S. 837, 88 S.Ct. 54 19 L.Ed.2d 100 (1967) (unilateral change in method of operation from use of commission drivers to nonunion lease arrangement, thereby forcing employees to choose between new conditions and union representation).

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[4] The text of section 8(a)(1) of the Act is reprinted at note 3, *supra.*

[5] The Company contends that its "open shop" announcement is speech protected by section 8(c) of the Act, 29 U.S.C. § 158(c) (1976), which provides that "[t]he expressing of any views, argument, or opinion * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefits." This argument is merely a reformulation of the Company's attack on the Board's finding of coercion because section 8(c) does not protect speech which is in itself coercive. *See generally* R. Goerman, Basic Text on Labor Law Unionization and Collective Bargaining 148–51 (1976). Since we have accepted the Board's determination that the Company's announcement conveyed its intention to withdraw its recognition of the Union—its determination to commit an unfair labor practice—the statement is coercive and not protected by section 8(c).

[6] Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), in pertinent part, provides that "[i]t shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

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2. *Conduct to Discourage Union Membership*

The font of our analysis of the Company's motivation for its conduct is of course the paradigm for section 8(a)(3) established by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed2d 1027 (1967):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34, 87 S.Ct. at 1798.

Our research has revealed that at least two categories of conduct are "inherently destructive of important employee rights." One type of such conduct is that which jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit. *Inter-Collegiate Press, Graphic Arts Division v. NLRB,* 486 F.2d 837, 845 (8th Cir. 1973), *cert. denied,* 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed.2d 288 (1974); *see Portland Willamette Co. v. NLRB,* 534 F.2d 1331, 1334 (9th Cir. 1976). This action "creates visible and continuing obstacles to the future exercise of employee rights." *Inter-Collegiate Press, supra,* 486 F.2d at 845 (footnote omitted); *Loomis Courier Service Inc., v. NLRB,* 595 F.2d 491, 495 (9th Cir. 1979). Examples of such conduct include the grant of super-seniority to returning strikers, *see NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963), the institution of fixed work shifts to non-striking workers, action that insured that the strikers, upon return, would be permanently relegated to less desirable shifts, *see NLRB v. Moore Business Forms, Inc.,* 574 F.2d 835, 840–41 (5th Cir. 1978), and the cessation of payments of insurance premiums for strikers conduct which assured that the employees would be unable to obtain renewed insurance coverage for ninety days past the date of their reemployment. *See id.* at 841–42.

The second type of conduct inherently destructive of important employee rights is that which directly and unambiguously penalizes or deters protected activity. *Kaiser Engineers v. NLRB,* 538 F.2 1379, 1386 (9th Cir. 1976); *Portland Willamette Co supra,* 534 F.2d at 1334; *see NLRB v.*

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Lantz, 607 F.2d 290, 299 (9th Cir. 1979); *Indiana & Michigan Electric Co. v.* NLRB, 599 F.2d 227, 232 (7th Cir. 1979). Examples of such action include discharges occurring because of the employees' expressed desire to obtain union assistance in attaining compliance with the collective bargaining agreement, *see Lantz, supra*, 607 F.2d at 299, and a discharge resulting from an employee's lobbying of legislators regarding changes in national policy affecting the employee's job security. *See Kaiser Engineers, supra*, 538 F.2d at 1384–86.

We have no difficulty placing the Company's action within both of these categories [7] as we have discussed in Part II(A) and (B) of this opinion, the Company's conduct amounted to a repudiation of the bargaining obligation. It would be a complete contradiction to state that such action did not jeopardize the Union's position as bargaining agent or diminish its ability effectively to represent the carpenters. Furthermore, no conduct could more efficaciously convey to the employees the futility of engaging in concerted activity, and thereby directly and unambiguously deter the exercise of that right, the guarantee most fundamentally protected by the Act. From the carpenters' standpoint, it would be futile to engage in collective bargaining through a representive if the Company would repudiate any resulting agreement at will. Accordingly, the Company's conduct was inherently destructive of important employee rights, and no proof of antiunion motivation is required.[8]

III. *The Remedy*

A. *Our Interpretation of the Board's Opinion in this Case*

The administrative law judge recommended the following remedies in his proposed order; that the Company cease and desist from its violations of the Act; that the Company bargain collectively and in good faith with the Union; that the Company **361** restore all terms which it had unilaterally changed in its agreement with the Union; that the Company pay the union benefits it had unlawfully refused to pay; and that the Company make whole the five employees it had forced to resign for any loss of wages or benefits caused by the Company's wrongful conduct. Because the jobs on which these employees had been working appeared to be completed, and because the Company was a project-by-project employer in the construction industry, the administrative law judge expressly declined to order reinstatement:

> From the record it appears that the jobs from which the employees were constructively discharged were almost completed at the time of the discharge and most likely by now, have been long since completed. Since it appears that the job complement of carpenters was not always the same from job to job reinstatement in the sense of restoring a carpenter to a particular job from which he has been discharged is neither practical or required.

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[7] In two prior cases involving an employer's unilateral diminution of wages and benefits, the courts have required proof of antiunion motivation to establish constructive discharges violative of section 8(a)(3). *See J. P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972); *NLRB v. Brennan's Inc.*, 366 F.2d 560, 563–65, *modified*, 368 F.2d 1004 (5th Cir. 1966). However, both cases are distinguishable from the instant action because in neither case was there a collective bargaining agreement in existence at the time of the employer's unilateral acts. Thus, the employer's conduct was not taken in abrogation of an existing collective bargaining agreement. As a result, the conduct did not have quite the devastating effect on employees' rights as that which we here condemn; rather, the conduct in those two cases had only a "comparatively slight" adverse effect on employee rights.

In *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268 (10th Cir. 1979), proof of antiunion motivation was also required. The employer was found to have violated section 8(a)(5) of the Act because, without first bargaining with the union, he instituted a new wage and benefits schedule at the expiration of a collective bargaining agreement. At the same time, the employer announced that he would not abide by the contract's union security provision past the date of contract expiration. Subsequent to these actions, the union employees quit. The court required proof of antiunion motive because it found that the employees resigned not because of the unilateral wage and benefits changes, but due to the employees' belief that "they could not work in an open shop without sacrificing their union memberships." *Id.* at 271. Since "a union shop provision does not survive contract termination," *id.* at 272, the employer's action did not deny the employees a right guaranteed by the Act. Proof of antiunion motivation was therefore properly required since the conduct was not inherently destructive of employee rights. In contrast, in this case, the Company's conduct violated the carpenters' rights under section 8(d) and thus was inherently destructive of the employees' rights.

[8] The Company argues that no unfair labor practices should be premised on the resignation of the carpenters since the Union-AGC contract contained a grievance procedure. The short answer to this contention is that the existence of a contractual remedy does not deprive the Board of jurisdiction to condemn conduct which constitutes an unfair labor practice. *See Great Dane Trailers, supra*, 388 U.S. at 30 n.7, 87 S.Ct. at 1796 n.7.

The Company also argues that the carpenters should have remained on the job in order to "mitigate" the Company's liability. This argument is completely frivolous since it is totally at war with the constructive discharge doctrine. An employer may not impose intolerable conditions in his workplace and expect his employees to remain and acquiesce.

236 N.L.R.B at 87.

The Board adopted the proposed remedies of the administrative law judge but rejected his suggestion that remedies be limited to projects in progress at the time of the unfair labor practices. Instead, the Board ordered that those discriminatees who would have been rehired absent the Company's unfair labor practices be reinstated "to their former positions of employment or, if those jobs no longer exist, to substantially equivalent positions of employment." *Id.* at 80. The Board's rationale for this order was set out in four sentences in its opinion:

> We are aware that, even absent the unfair labor practices, Respondent, which hired employees on a project-by-project basis, might have discharged the discriminatees in the normal course of business when the projects were completed. However, there is a distinct possibility that, absent its discrimination, Respondent would have retained transferred, or rehired at least some of the discriminatees for new projects. Accordingly, to remedy fully Respondent's unfair labor practices and protect the discriminatees' rights, we shall order Respondent to reinstate the discriminatees to their former or substantially equivalent positions and to make them whole for any losses they suffered as a result of the discrimination against them * * *. The determination of which employees, if any, would have continued in Respondent's employment and for how long can best be made at the compliance stage of the proceedings, to which we defer the matter.

Id. at 79 (footnotes omitted). This explanation was rendered without so much as a single citation to the Board's previous decisions or to those of the courts. Moreover, this extremely brief and unenlightening opinion was issued despite the order's possible conflict with a principle previously articulated by the Board—that a union must reestablish its majority status at each new jobsite before it can enforce a section 8(f) prehire agreement with a project-by-project employer. This principle which is discussed in more detail *infra,* was clearly expressed by the Board in an opinion issued less than eight months before its decision in this case. *See Dee Cee Floor Covering,* 232 N.L.R.B. 421 (1977).

Although the remedial power of the Board is "a broad and discretionary one, subject to [a] limited judicial review," [9] the Board may not order remedies which are in fact punitive. The purpose of a remedial order under the Act is to restore conditions that existed in the absence of unfair labor practices; a remedy which grants rights to which a party would not have been entitled in the absence of the violations is punitive as to the other party and is therefore unenforceable.[10] In light of these principles, the holding of *Dee Cee Floor Covering* appears to preclude remedial relief which extends beyond the projects in progress at the time of the Company's unfair labor practices. If the Company was, as *Dee Cee Floor Covering* indicates, bound by the Union-AGC prehire contract only to the extent of the particular projects at which a union majority had been established, then it could lawfully have ended its relationship with the Union at the conclusion of those jobs. A remedy reaching future projects (on which a union majority was not yet established) would in effect hold the Company to a labor contract which has not become enforceable as to those projects.

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[9] *Fibreboard Corp. v.* NLRB, 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964). *See also* NLRB v. *J. H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 262–63, 90 S.Ct. 417, 419–420, 24 L.Ed.2d 405 (1969); *NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375, 377 (5th Cir. 1979).

[10] Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), requires the Board upon finding that an unfair labor practice has been committed "to take such affimative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." The Board's duty under § 10(c) is to make "the employees whole and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [acts]." *NLRB v. Rutter-Rex, supra* 396 U.S. at 263, 90 S.Ct. at 420 *See also Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 1266, 47 L.Ed.2d 444 (1976); *NLRB v. Hyde,* 339 F.2d 568, 572 (9th Cir. 1964). While the Board's mandate is to "take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice," *Carpenters v. NLRB,* 365 U.S. 651, 675, 81 S.Ct. 875, 878–879, 6 L.E2d 1 (1961) (Harlan, J., concurring), the Board's remedial orders must be appropriate and adapted to the situation which calls for redress, *NLRB v. United Mine Workers,* 355 U.S. 453, 458, 78 S.Ct. 386, 389–390, 2 L.Ed.2d 401 (1958), and they are unenforceable to the extent that they become punitive rather than remedial. *see Carpenters v. NLRB,* 365 U.S. 651, 654–55, 81 S.Ct. at 877–878 (1961); *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 11–12, 61 S.Ct. 77, 79, 85 L.Ed. 6 (1940); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 236, 59 S.Ct. 206, 220, 83 L.Ed. 126 (1938); *NLRB v. Florida Medical Center, Inc.*, 576 F.2d 666, 673 (5th Cir. 1978). Thus, the courts have refused to enforce remedies which seek to ameliorate conditions which would have existed in any event and are, therefore, not dependent upon the existence of an unfair labor practice. *See, e.g., NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 945–46 (2nd Cir.), *cert. denied,* 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978); *Trico Products Corp. v. NLRB,* 489 F.2d 347, 353 (2nd Cir. 1973); *NLRB v. Charley Toppino & Sons, Inc.*, 358 F.2d 94, 96 (5th Cir. 1966); *Nabors v. NLRB,* 323 F.2d 686, 690 (5th Cir. 1963), *cert. denied,* 376 U.S. 911, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964).

Such a remedy would be punitive rather than remedial and we therefore could not enforce it.

The panel opinion interpreted the Board's opinion in this case as having rejected the principle enunciated in *Dee Cee Floor Covering.* The panel found that the Board had instead adopted the rule that a section 8(f) prehire contract is transformed into an ordinary section 9(a) collective bargaining agreement when the union first achieves majority status in the relevant bargaining unit; the panel concluded that a presumption of continuing union majority applies to project-by-project employers in the construction industry despite the origination of their agreement in a section 8(f) prehire contract. Crucial to the panel's analysis, therefore, was its conclusion that the holding in *Dee Cee Floor Covering* has "met its well-deserved demise." 618 F.2d at 309.

Although the panel's reading of the Board's opinion in this case is a possible one,[11] we do not think it appropriate to read a change of that magnitude into such a brief and ambiguous opinion. The Board does not discuss or even cite *Dee Cee Floor Covering,* despite the dissent of one of its members on the basis that the Board's action conflicts with that case. 236 N.L.R.B. at 79 n.5 (Member Penello, dissenting). We recognize that the Board is authorized to change its mind and "modify its construction of the Act in light of its cumulative experience." *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 508, 98 S.Ct. 2463, 2477, 57 L.Ed.2d 370 (1978). But "when it does it must at least carefully explain its reasons justify the change and follow

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controlling law." *Seafarers v. NLRB,* 101 L.R.R.M. 2628, 2631 (D.C.Cir.1979). As the Supreme Court made clear in *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 443–44, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965), it is highly improper for "reviewing courts to substitute counsel's rationale or their discretion for that of the Board." It is the duty of the Board—not of the courts—to clearly set forth the intent of its decisions and to explain the basis of departures from its own precedent. Although the Board is entrusted with considerable discretion in its interpretation and application of the Act,[12] "[w]hen it so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *Id.* at 443, 85 S.Ct. at 1064. *See Central Power & Light Co. v. United States,* 634 F.2d 137, 149 (5th Cir. 1980); *Mitchell Energy Corp. v. FERC,* 580 F.2d 763 (5th Cir. 1978); *NLRB v. Sunnyland Packing Co.,* 557 F.2d 1157, 1160 (5th Cir. 1977). There is no such indication in the Board's opinion in this case. Furthermore, several cases subsequent to the Board's decision in this case, discussed *infra,* have made it clear that the Board did not intend to overrule *Dee Cee Floor Covering.*

Accordingly, we must interpret the Board's decision in this case in the context of the holding in *Dee Cee Floor Covering* that a union must reestablish its majority status at each new jobsite before it can enforce a section 8(f) prehire contract with a project-by-project employer. Reading the Board's opinion in this light, the Board appears to have found that while the Company was not bound by the Union-AGC contract at subsequent jobsites, relief extending beyond the termination of an enforceable contract was nevertheless required in order to fully restore the employees to the *status quo ante.* This apparent holding requires a factual finding (which the Board does not make, but instead leaves to the compliance stage of these proceedings) that particular employees would have been rehired by the Company despite its lawful option not to rehire them at the conclusion of ongoing projects. We hold that such a finding is precluded as a matter of law by factual findings already made by the administrative law judge and accepted by the Board. Therefore we must refuse the Board's application for enforcement of its order insofar as that order extends relief to projects not yet begun at the time of the unfair labor practices. In order to understand our interpretation of the Board's opinion and our conclusion as to its validity, it is necessary first to review the history of section 8(f) and its interpretation by the Board and by the courts; we will then describe the Board's apparent holding and apply that holding to the facts of this case.

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[11] We need not decide whether the holding which is suggested by the panel's reading of the Board's opinion is a *permissible* interpretation of the Act. Since, as discussed *infra,* we concude that the Board has *not* abandoned *Dee Cee Floor Covering,* we expressly decline to decide whether such a course of action would in fact be within its authority.

[12] Congress has entrusted to the Board the task of "'applying the general provisions of the Act to the complexities of industrial life.'" *NLRB v. Weingarten, Inc.,* 420 U.S. 251, 266, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975) (citations omitted), quoting *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 236, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963). "Its special competence in this field is the justification for the deference accorded its determination[s]." *NLRB v. Weingarten,* 420 U.S. at 266, 95 S.Ct. at 968.

B. *The History of Section 8(f) and its Interpretation by the Board and by the Courts.*

The Board declined to exercise jurisdiction over the construction industry before 1947. As a result, "[c]oncepts evoked by the Board * * * developed without reference to the construction industry." H.R.Rep.No. 741, 86th Cong., 1st Sess. 19 (1959), Reprinted at [1959] U.S.Code Cong. & Admin.News 2318; 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959; p. 777 [hereinafter cited as Leg.Hist.], *quoted in Higdon Construction Co.*, 434 U.S. at 348, 98 S.Ct. at 659. In 1959, Congress added section 8(f) [13] to the Act in response to the special characteristics and needs of the building and construction industry.[14] The short duration and occasional nature of employment in that industry make ordinary collective bargaining negotiations—which must await the employees' choice of a bargaining representative—difficult at best. Under section 8(f), the execution of an agreement with a minority union by an employer in the construction industry does not constitute an unfair labor practice. This exception to the requirement of majority support at the time of the execution of the contract is limited, however, by a proviso to the section which states that a contract which would be invalid but for section 8(f) "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." Under this proviso, the employer, employees or union may request a bargaining representative election at any time.

In *NLRB v. Local 103, International Association of Bridge Workers (Higdon Construction Co.)*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978), the Supreme Court discussed the legislative history of section 8(f) and the effect to be given section 8(f) agreements in the building and construction industry. Higdon Construction Co. and Local 103 of the International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO (Local 103), after several years of collective bargaining, entered into a prehire agreement requiring Higdon to abide by the terms of an "understanding" between Local 103 and a multi-employer association. There was no union security clause in the Local 103-Higdon agreement. When Higdon later undertook construction projects (through an alter ego company) with nonunion labor, Local 103 picketed those projects (one for more than 30 days) with signs stating that the employer was violating the agreement with the union. The union did not represent a majority of the employees at the job sites and had not petitioned for a representation election. The employer filed a charge with the NLRB alleging that the union was violating section 8(b)(7)(C) of the Act, which makes it an unfair labor practice for an uncertified union to picket for more than 30 days for the purpose of forcing an employer to recognize the union as the bargaining representative of his employees unless a petition for an election has been filed within that period. Local 103 argued that its picketing did not constitute an unfair labor tice because, since Higdon had entered into a ul section 8(f) prehire contract with Local 103 nising to abide by the multi-

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[13] Labor-Management Reporting and Disclosure Act of 1959, Pub.L.No. 86-257, § 705(a), 73 Stat. 545. For text of section 8(f), see note 1, *supra*.

[14] The House and Senate Committee Reports on section 8(f) reveal Congress' awareness of the transistory nature of employment in the construction industry:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.
>
> * * * * *
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> In the building and construction industry it is customary for employers to enter into collective-bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements sometimes apply to jobs which have not been started.

H.R.Rep.No.741, 86th Cong., 1st Sess. 19 (1959), Reprinted at [1959] U.S. Code Cong. & Admin.News 2318; 1 Leg.Hist. 777. *See also* S.Rep.No.187, 86th Cong., 1st Sess. 28 (1959); 1 Leg.Hist. 424.

The Senate Report also noted that "[r]epresentation elections in a large segment of the industry are not feasible to demonstrate * * * majority status due to the short periods of actual employment by specific employers." S.Rep.No.187, 86th Cong., 1st Sess. 55 (1959), Reprinted at [1959] U.S.Code Cong. & Admin. News 2318; 1 Leg.Hist. 451-52.

The Supreme court, drawing from the legislative history of section 8(f), has noted:

> There were two aspects peculiar to the building trades that Congress apparently thought justified the use of prehire agreements with unions that did not then represent a majority of the employees:
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> "One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral."

Higdon Construction Co., 434 U.S. 335, 348, 98 S.Ct. 651, 659, 54 L.Ed.2d 586 (1978) (citations omitted), *quoting* H.R.Rep.No.741, 86th Cong., 1st Sess. 19 (1959); 1 Leg.Hist. 777.

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loyer standard, the purpose of the picketing to obtain compliance with an existing contract er than to obtain recognition or bargaining as nitial matter.

he Supreme Court approved the longstanding tion of the Board, *see R.J. Smith Construction* 208 N.L.R.B. 615 (1974), and held that the eting by Local 103 was for recognitional pur- es and constituted an unfair labor practice er section 8(b)(7)(C). The court explained that picketing was recognitional because

> prehire agreement does not entitle a minority nion to be treated as the majority representative f the employees until and unless it attains ma- ority support in the relevant unit. Until that me the prehire agreement is voidable and does ot have the same stature as a collective-bargain- ng contract entered into with a union actually epresenting a majority of the employees and ecognized as such by the employer. According- y, * * * picketing by a minority union to en- orce a prehire agreement that the employer re- uses to honor, effectively has the object of at- aining recognition as the bargaining representa- ive with majority support among the employees, and is consequently violative of section 8(b)(7)(C).

4 U.S. at 341, 98 S.Ct. at 655–656.

In accepting the Board's position in *Higdon Con- uction Co.*, the Supreme Court emphasized the ique nature of prehire contracts under section f). A prehire contract is a "preliminary step" hich allows an employer in the construction in- istry to negotiate and to reach a tentative agree- ent with a union before that union becomes the ajority representative of its employees. *Id.* at 345. he Court also emphasized the significant limita- ons which are implicit in any prehire contract. ection 8(f) was not intended to undermine the em- loyees' right to bargain collectively through a epresentative of their own choosing. Hence the roviso to section 8(f), which states that a prehire ontract "shall not be a bar to a petition filed pur- uant to section 9(c) or 9(e)" of the Act. That is, a argaining representative election may be called at any time—despite the existence of a prehire contract between the employer and a union. Accordingly, the exeption embodied in section 8(f) and allowing negotiations between an employer and a union which has not achieved majority status "is nevertheless of limited scope, for the usual rule protecting the union from inquiry into its majority status during the terms of a collective-bargaining contract does not apply to prehire agreements." *Id.* at 345, 98 S.Ct. at 657–658. Of course, the Supreme Court recognized that once the union does establish its majority status, its prehire contract with the employer "attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Id.* at 350, 98 S.Ct. at 660. Prior to that time, however, section 8(f) agreements are entirely voidable; since the union does not represent a majority of the employees, it is not entitled to enter into a binding collective-bargaining agreement with the employer.

Before the Supreme Court decided *Higdon Construction Co.*, the Board had already reiterated its analysis of section 8(f) in *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977). After reaffirming its conclusion that section 8(f) prehire contracts do not become enforceable until the union demonstrates majority support, the Board unequivocally adopted the related principle which concerns us today, that is, that a union must *reestablish* its majority status at *each* affected job site before it can enforce a section 8(f) agreement with a project-by-project employer. Dee Cee Floor Covering, a seller and installer of carpeting in the construction industry, did not maintain a regular complement of employees, but hired workmen as the need arose. In April 1973, Dee Cee entered into a collective bargaining agreement with the union. In April 1975, Dee Cee went out of business and Dagin-Akrab Floor Covering, Inc. (Dagin-Akrab), an alter ego of Dee Cee, came into being and entered into a contract identical to the 1973 Dee Cee-union contract. In August 1975, Dagin-Akrab was awarded a contract to buy and install

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carpeting at the Ft. Riley military installation. In recruiting workmen for the project, Dagin-Akrab informed several union members that work at the project would be on a nonunion basis only and, if they wished such employment, they would have to withdraw from the union. Dagin-Akrab told them that they would pay union scale wages but would not pay any union fringe benefits as required by the April 1975 agreement. Some workers accepted employment with Dagin-Akrab and others, refusing to abandon the union, did not. The administrative law judge found that Dagin-Akrab, by making unilateral changes in the terms and conditions of employment and by refusing to bargain with the union, violated section 8(a)(5) and (1), and found, in addition, that Dagin-Akrab violated section 8(a)(3) by conditioning employment at the Ft. Riley project upon employees withdrawing from the union.

The Board affirmed the administrative law judge on the section 8(a)(3) finding, but refused to accept his recommendation on the section 8(a)(5) and (1) violations. The Board reasoned:

> [Section 8(f)] merely immunizes the parties to such agreements from liability under section, 8(a) and (b) of the Act. Such prehire agreements do not, however, give rise to a presumption of majority status on behalf of the union. Thus, where a union fails to prove that it has obtained majority status among the employer's employees, an employer may withdraw recognition from that union and/or make unilateral changes in the contractual working conditions without thereby violating Section 8(a)(5) of the Act.
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> While the April 1975 agreement was validly entered into pursuant to Section 8(f) of the Act, that agreement was not binding on the Respondent for purposes of Section 8(a)(5) until such time as the Union demonstrated that it enjoyed the support of a majority of the Respondent's employees employed at the Ft. Riley project. However, in light of the fact that Respondent had no employees working for it either at the time that it executed the contract or when it unilaterally set the conditions of employment at the Ft. Riley project and refused to bargain with the Union, it is obvious that the Union could not have had a majority status.
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> Furthermore, the mere fact that the Union might indeed have represented a majority of the employees of Respondent Dee Cee's previous job sites is of no consequence inasmuch as the Union must demonstrate its majority at each new job site n order to invoke the provision of Section 8(a)(5) of the Act. As the facts here show that the Respondent has no employees at the Ft. Riley job when it decided to abrogate its prehire agreement with the Union, no violation of Section 8(a)(5) of the Act can be found. Moreover, although Dagin-Akrab as the *alter ego* of Dee Cee would normally have been bound to Dee Cee's 1973 agreement, no violation can be found in its failure to apply that agreement at the Ft. Riley job, since it had no employees working at that job when the unilateral changes were made. Therefore, a refusal-to-bargain violation also cannot be predicated on the breach of the 1973 agreement.

232 N.L.R.B. at 422 (footnotes omitted).[15]

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[15] Although the Board did not explicitly adopt this analysis until *Dee Cee Floor Covering*, it seems to have implicitly followed it in previous cases. In *Ruttman Constr. Co.*, 191 N.L.R.B. 701 (1971), the Board refused to apply a presumption of majority status to a new project where the employer had executed a prehire agreement containing a union security clause with one union but signed and put into effect a new prehire agreement with another union while the first prehire agreement was still in effect. The Board stated that a prehire agreement "is merely a preliminary step that contemplates further action for the development of a full bargaining relationship: such actions may include the execution of a supplemental agreement for certain projects or covering a certain area and the hiring of employees who are usually referred by the union or unions with whom there is a prehire agreement." *Id.* at 702. *See also Roberts & Schaefer Co.*, 193 N.L.R.B. 860 (1971) (citing *Ruttman* in holding that a section 8(f) nationwide bargaining agreement between the company and a union "never matured into a full bargaining relationshop between [the company and the union] as to a new project begun by the Company during the contract term). In *Irvin-McKelvy Co.*, 194 N.L.R.B. 52 (1971), *enforced in part sub nom. NLRB v. Irvin*, 475 F.2d 1265 (3rd Cir. 1973), the Board held that by virtue of compliance with union security provisions in a section 8(f) contract the union had majority status at those projects still underway, but dismissed the complaint with respect to projects not yet begun at the time the employer terminated the union contract and entered into a contract with a rival union.

In *Iron Workers Local 103*, 216 N.L.R.B. 45 (1975), the Board cited *Ruttman* for the proposition that section 8(f) contracts "do not carry, even with union-security provisions, a presumption of majority status until such time as employees for particular projects have been hired." *Id.* at 46 (footnote omitted). In addition, the Board cited its dismissal in *Irvin* of the compliant concerning unfair labor practices with respect to projects not yet begun at the time the employer terminated the section 8(f) contract at a time when the union enjoyed majority support.

Although the precedential value of *Ruttman* and *Irvin* might properly have been discounted before *Dee Cee Floor Covering* because of their somewhat unusual factual contexts, see King & LaVaute, *Current Trends in Construction Industry Labor Relations—The Double-Breasted Contractor and the Prehire Contract*, 29 Syracuse L. Rev. 901, 932-37 (1978) (emphasizing that the *Irvin* prehire contract was converted into a "project only" contract by virtue of a "most favored nations" clause in the contract and the execution of a "project only" contract by the union with another contractor, and that the *Ruttman* contract may not have been strictly applicable to the new project undertaken by the Company), our reading of *Dee Cee Floor Covering* dispels any doubts about the Board's position which the limited factual contexts of *Ruttman* and *Irvin* might have en-

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In recent cases the Board has distinguished *Dee Cee Floor Covering,* which

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involved a "project-by-project" employer, from cases involving an employer with a "stable work force." *See Hageman Underground Construction,* 253 N.L.R.B. No. 7 (1980); *Corrugated Structures, Inc.,* 252 N.L.R.B. No. 79 (1980); *Land Equipment, Inc.,* 248 N.L.R.B. No. 98 (1980); *Precision Striping, Inc.,* 245 N.L.R.B. No. 34 (1979). The Board has held that where an employer employs a stable work force (rather than employing new workers on a project-by-project basis) the union need not reestablish its majority status at each successive jobsite in order to enforce a section 8(f) agreement with the employer. As the Board explained in *Hageman Underground Construction:*

> [W]here an employer employs a permanent and stable work force to work on a multisite basis, and the union, initially recognized under section 8(f), subsequently achieves majority status in that stable work force, the employer is then under a statutory duty to recognize and bargain with that union at all projects without requiring the union to demonstrate majority status at each one. It logically follows, and we so held in *Precision Striping,* that where there is a majority status in a permanent and stable work force, and a contract in effect between the parties covering that work force, the union not only becomes the employees' statutory bargaining representative for all present and future sites but, as in a typical industrial setting, also enjoys an irrebuttable presumption of majority status for the duration of the agreement.

253 N.L.R.B. at —— (footnotes omitted). We need not decide whether this interpretation of the Act is a permissible one and need not examine precisely where the Board has drawn the line between "project-by-project" and "stable work force" employers, for the Board has explicitly affirmed the finding of the administrative law judge that Haberman Construction Co. was a *project-by-project* employer. The cases which draw this distinction themselves reaffirm the rule of *Dee Cee Floor Covering* in the context of a project-by-project employer. As the Board explained in a footnote to the above text from *Hageman Underground Construction:*

> This contrasts with a situation in which a construction industry employer has no stable complement and hires its employ-
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> ees on a project-by-project basis with little carryover from site to site. In such situations majority status among employees at a given jobsite is not presumed to carry over automatically to future sites and "the union must demonstrate its majority status at each new jobsite in order to invoke the provisions of Section 8(a)(5) of the Act." *See Dee Cee Floor Covering, Inc. and its Alter Ego and/or Successor, Dagin-Akrab Floor Covering, Inc.,* 232 N.L.R.B. 421 (1977).

253 N.L.R.B. at —— n.7. In fact, the Board specifically referred in *Hageman* to its opinion in *Haberman,* distinguishing *Haberman* as a case involving a project-by-project employer. *Id.* at n.9. We can only conclude, therefore, that the Board continues to adhere to the rule enunciated in *Dee Cee Floor Covering:* in order to enforce a section 8(f) contract with a project-by-project employer, the union must reestablish its majority at each successive jobsite.

C. *The Affirmative Remedy Ordered by the Board and Its Validity in This Case*

The Board appears to have applied the rule of *Dee Cee Floor Covering,* and concluded that the Company was not bound by the Union-AGC contract at subsequent jobsites. Although the Board did not cite *Dee Cee Floor Covering,* it explicitly recognized that the Company, "which hired employees on a project-by-project basis, might have discharged the discriminatees in the normal course of business when the projects were completed." 236 N.L.R.B. at 79. It does not appear, therefore, that the distinction between "project-by-project" and "stable work force" employers was an issue considered by the Board in this case. This contrasts with the recent cases of the Board discussed *supra,* in which the determinative issue was whether a valid contract existed at the particular project on

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gendered. In *Dee Cee Floor Covering,* the Board unequivocally stated, in the context of a section 8(f) contract which was not limited to current projects only and where a majority of the employees on the company's projects had supported the union, that the union must reestablish its majority status of each new project.

which an alleged unfair labor practice had occurred. Here the Board accepted at the outset that the Company was a project-by-project employer and that the Union would therefore have to reestablish its majority status at each succeeding jobsite. The Board does not assert that the Company would be bound by the contract at subsequent jobsites; to the contrary, the opinion states that the Company could have "discharged the discriminatees in the normal course of business" at the conclusion of ongoing jobs. The determinative issue seems instead to have been the applicability of a remedial order which admittedly extended beyond the term of an existing contract but was nevertheless required in order to restore the economic *status quo ante* to particular employees who would have been rehired on subsequent projects, despite the termination of the Company's obligations under the Union-AGC contract, were it not for the unfair labor practices committed while the contract was in force. The Board explained that, while the Company could have replaced its employees at the conclusion of ongoing projects, there was nevertheless "a distinct possibility that, absent its discrimination, Respondent would have retained, transferred, or rehired *at least some of the discriminatees* for new projects." *Id.* (emphasis added). On this basis the Board ordered the Company to reinstate on its current projects *those particular employees* who would have been retrained but for their wrongful discharge, and to make those employees whole accordingly. *Id.* at 80. Thus, the Board's opinion and order appear to restore the discriminatees to an economic position to which they were not contractually entitled (since the Company could have terminated its obligations under the Union-AGC contract at the conclusion of ongoing projects), but which the Board felt they might nevertheless have attained (since the Company might have rehired some employees even if not contractually bound to do so). Underlying this holding is the proposition that an affirmative remedial order extending beyond the termination of ongoing projects is necessary to restore the economic *status quo ante* to those particular employees who would have been rehired absent the Company's unlawful discrimination against them. This proposition is implicit in the Board's brief explanation of its decision; after the opinion suggests the possibility that some of the discriminatees might have been rehired absent the Company's unfair labor practices, it explains:

> *Accordingly, to remedy fully Respondent's unfair labor practices and protect the discriminatee's rights,* we shall order Respondent to reinstate the discriminatees * * * and to make them whole * * *.

Id. at 79 (emphasis added). As we read the Board's opinion, then, it seeks to restore the discriminatees to an economic position they might in fact have attained despite the Company's lawful right not to rehire them at the termination of projects in progress.

We recognize that the remedial authority of the Board may at least in some cases be used to restore the parties to economic positions they reasonably expected to occupy in the absence of unfair labor practices, whether or not those expectations rest on legally enforceable obligations. As we explained in *Nabors v. NLRB,* 323 F.2d 686 (5th Cir. 1963), *cert. denied,* 376 U.S. 911, 84 S.Ct. 666, 11 L.Ed.2d 609 (1964) (including profit shares, which had been voluntarily but consistently awarded by the employer in the past, in the computation of back pay awards):

> In effectuating the policies of the Act, the Board has taken the position that the "make whole" concept does not turn on whether the pay was wholly obligatory or gratuitous, but on the restoration of the *status quo ante.* See *Moss Planing Mill Co.,* 110 NLRB 933, 935, enforced as modified on other grounds, *NLRB v. Moss Planing Mill Co.,* 4 Cir., 1958, 256 F.2d 653, 654. In that case there was included in back pay an amount representing clothing given grauitously as Christmas gifts. The Board's discretion to take such affirmative *remedial* action as will effectuate the purposes of the Act includes more than placing the employee in position to assert contractual or legally enforceable obligations. "Back pay" as used in section 10(c) includes the moneys, whether gratuitous or not, which it is reasonably found that the employee would actually have received in the absence of the unlawful discrimination. That principle seems to us so clear as to make unnecessary a discussion of the many persuasive authorities cited in the briefs of both parties.

323 F.2d at 690. See *McCann Steel Co. v. NLRB,* 570 F.2d 652, 656 (6th Cir. 1978) (overtime pay or-

dinarily received may be included in back pay); *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1312 n.9. (D.C. Cir. 1972) (Christmas bonuses included in back pay); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572 (5th Cir. 1966) (safe driving award included in back pay); *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832 (5th Cir. 1965) (Christmas bonus included in back pay).

We note that none of the cases we cite here for the proposition that the Board may order relief to which a party would not have been contractually entitled in the absence of an unfair labor violation involves a dispute arising in the special context of section 8(f) and the construction industry. We need not decide, however, whether this principle does or should extend to this area, for it clearly has no application to the particular facts of this case. The Board did not explicitly reach the factual questions raised by our interpretation of its action; instead, it left "[t]he determination of which employees, if any, would have continued in respondent's employment and for how long" to "the compliance stage of the proceedings." 236 N.L.R.B. at 79. But although the Board did not predetermine the results of such an inquiry, it at least suggested the possibility of a factual finding that the Company would have retained, transferred, or rehired some of the discriminatees on subsequent projects.

This suggestion ignores the factual findings already made by the administrative law judge and adopted by the Board. In the first place, the administrative law judge described as follows the Company's decision to go "open shop" and to cease paying union benefits:

> In November, 1976, Beshears' employment with the Respondent ceased. His duties, if not his title, were assumed by Carpenter Foreman Randolph Whitfield. About February 1977, Respondent hired a new Superintendent, Robert McElyea. According to Respondent's general manager, Howard Haberman, after McElyea was hired Haberman and Bert Speed talked to McElyea who expressed the opinion that he could "do the job that we had on an open shop basis, without us having to pay the union pension thing * * *." *It was concluded that the Respondent should proceed on that basis because the pension "thing" was a costly item running a $1000 to $1200 a month toward the latter part of the year 1976.*

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236 N.L.R.B. at 82 (emphasis added). In the second place, the administrative law judge found that the two Austin projects from which the employees were constructively discharged were "almost completed" at the time of the unfair labor practices. *Id.* at 87. These findings must be read in the context of the Company's right to terminate its obligations under the Union-AGC contract at the conclusion of ongoing projects. Since the purpose of the Company's actions was to cut its expenses, and since these actions could lawfully have been taken at the conclusion of ongoing projects (which were almost completed), one can only assume that in the absence of the unfair labor practices the Company would lawfully have decided to go "open shop" and to cease paying union benefits at the conclusion of the projects from which the discriminatees were constructively discharged.

A factual finding that any particular employee would be rehired depends, therefore, on the assumption that that employee would have returned to work on a subsequent project despite the Company's decision to go "open shop" and to cease paying union benefits. As the administrative law judge found, however, the employees quit the Company's employment precisely because of these actions:

> The testimony of all of the foregoing named employees at the hearing with respect to the reasons for quitting was not contradicted by Respondent. I therefore credit their testimony which clearly establishes that *the basis for their quitting was Respondent's decision to go "open shop" and no longer pay their "fringes," i.e., payments to the Union's funds.*

Id. at 86 (emphasis added). Because the discriminatees (according to their own testimony) were unwilling to work under the conditions which it is clear the Company would have lawfully offered, we can only conclude that none of them in fact would have accepted employment by the Company on subsequent projects. We hold, therefore, that a factual finding that the Company would have "retained, transferred, or rehired at least some of the discriminatees for new projects" is foreclosed as a matter of law by factual findings already adopted by the Board. Absent such a finding, there is no basis in the facts of this case for the Board's order insofar as that order extends relief to projects not yet begun at the time of the Company's unfair labor practices.

Accordingly, the application for enforcement of the Board's contract restoration order (paragraphs 1(a), 2(b), and 2(c)) is DENIED insofar as it applies to construction projects commenced by the Company after February 16, 1977. The application for enforcement of the Board's reinstatement order (paragraph 2(d)) is DENIED. The application for enforcement of the "make whole" portion of the Board's reinstatement order (paragraph 2(e)) is DENIED insofar as it applies to construction projects commenced after February 16, 1977. The application for enforcement of the Board's bargaining order (paragraphs 1(b) and 2(a)) is DENIED.[16] In all other respects, the Board's order is ENFORCED.

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JERRE S. WILLIAMS, Circuit Judge, with whom, RUBIN, KRAVITCH, HATCHETT, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges, join, concurring in part and dissenting in part: The Court in a through and scholarly presentation upholds the order of the National Labor Relations Board in full in finding appellant Haberman Construction Company violated §§ 8(a)(1), (3) and (5) of the National Labor Relations Act. I concur fully in that decision as set out in parts I and II of the opinion. My dispute is wholly with part III in which the Court permits only a truncated and ineffectual remedy to the Board to cure the impact of the unfair labor practices committed by Haberman.

The statement of facts in the majority opinion is complete and objective. The key facts in evaluating the remedy are: 1. The company disavowed the collective agreement under which it was operating during its existence but not long before, it was to expire. 2. The construction projects upon which the employed carpenters were working were also soon to end. 3. This employer did not have a steady workforce but hired on a project-by-project basis. The Court uses the soon-to-expire contract, the soon-to-end projects, and the projet-by-project hiring to enable the employer to escape the full impact of the Board's remedies for his unfair labor practices. It is at this point that I must part company and register this dissent.

No assertion is made that the Board had no legal power to act beyond the termination of the then current contract and the then current jobs. The Court correctly concedes that the Board does have such power. But applying such power in this case, the Court concludes, is punitive. This opinion will undertake to demonstrate that this exercise of power by the Board is not punitive but strives only to reconstruct the status quo as if the employer had not engaged in the unfair labor practices. This is the proper power for the Board to exercise in formulating its remedies. *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263–65, 90 S.Ct. 417, 420–421, 24 L.Ed.2d 405 (1969).

The clearest way to see the impact of the refusal to allow the Board to extend its remedies beyond the contract expiration and the project terminations is to evaluate the situation of the employer if he had not breached the contract, refused to bargain, and discharged the employees, but had waited until the contract expired and and the jobs were over. The Court relied upon the fact that the employer then could have discharged the employees, declared an "open shop", hired employees for new projects and paid them without regard to union working conditions.

While factually true as far as it goes, this conclusion needs amplification. In the first place, the "discharge" of the employees from the concluded projects would have been no more than ending the work and paying off employees after the work is over. It had no relationship whatsoever to possible rehiring on later projects in a project-by-project situation. In the second place, the announcement that the company was going "open shop" itself would be an unfair labor practice if the company meant to guarantee there would be no union recognition and no collective bargaining. Assuming that the company know it could not follow the classic definition of "open shop" and hire so as to insure there would not be a union majority,[1] the employer by declar-

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[16] In denying enforcement of the Board's bargaining order, we do not rely on the Company's argument that the order is unenforceable because it mandates bargaining without regard to the majority status of the Union. The propriety of a bargaining order does not normally depend upon the existence of majority status throughout the period between the time of the unfair labor practices and the time for enforcement of the Board's order. On the contrary, the relevant date for determining the extent of the Company's duty to bargain and, thus, the propriety of a bargaining order is the time of the unfair labor practices. *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 64 S.Ct. 817, 88 L.Ed. 1020 (1944). The Board therefore properly ordered bargaining. Nevertheless, in view of the lapse of time between the unfair labor practices and our consideration of the order, the special nature of employment in the construction industry, and out holding that the employer's unfair labor practices were not the reason for loss of majority status after the termination of the current projects, we do not think a need for enforcement of the order exists at this time. *See NLRB v. Irvin*, 475 F.2d 1265, 1271 (3d Cir. 1973) (denying enforcement of a bargaining order in light of length of time between end of projects to which order applied and court's decision); *cf. NLRB v. American Cable Systems, Inc.*, 427 F.2d 446, 448–49 (5th Cir.) *cert. denied*, 400 U.S. 957, 91 S.Ct. 356, 27 L.Ed.2d 266 (1970) (recognizing the necessity under certain circumstances for consideration of changed circumstances in context of *Gissel*-type bargaining order).

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ing an open shop would be doing no more than declaring that there is now no binding contract and that it is going to offer its self-determined wages and working conditions. Under the law an employer has no power to select employees on the basis of union membership or attitudes toward unions or collective bargaining. He must consider all applicants regardless of their union affiliation, attitudes, or activities. 29 U.S.C. § 158(a)(3) (1976); *Local 357, Internat'l Bro. of Team., Etc. v. N.L.R.B.*, 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961).

This in turn means that there is no obligation to bargain on a new project only so long as the union lacks a majority. The employees hired will have the right to try to organize the project and gain a majority. If they do, the employer will be required to bargain with them collectively. They may use the usual self help devices in trying to organize the new project such as recognitional picketing, striking, the collecting of authorization cards, and petitoning for an election. *See, e.g., N.L.R.B. v. Phil-Modes, Inc.*, 396 F.2d 131 (5th Cir. 1968); *Smitley v. N.L.R.B.*, 327 F.2d 351 (9th Cir. 1964).

So it is that an employer in the construction industry in no way avoids his elemental obligations under the statute by hiring on a project-by-project basis. The fundamental protection of the rights of employees to organize and bargain collectively and not to be discriminated against because of their union activity or interest remains intact.[2]

By refusing to extend the Board's remedies beyond the expiration of the prior contract and the expiration of the prior projects, the Court leaves this employer in precisely the same situation he would have been in after such expiration if he had not committed the serious unfair labor practices revealed by this record. And the Court insists that going beyond allowing him this easy escape from his serious practices is punitive and therefore barred to the Board.

The Board's remedies are punitive only if the employer's unfair practices made no change in the situation of the union and the employees which carries its impact beyond the expiration of the contract and the prior projects. Yet, the impact of the employer's unfair practices does extend beyond that time and does have a serious continuing effect. The employer has prejudiced the entire situation with respect to his future business activities and the hiring of employees by the actions which he took. We should not close our eyes to whatever impact the employer's unfair labor practices had after the contract expired and the projects ended.

The heavy lingering effect of the employer's unfair labor practices is manifest. This employer has by his actions told his present and future employees that he cannot be trusted to bargain with the union even though he is lawfully bound to do so and that he may well discriminate against union employees in his future conduct. The Court labors under a misapprehension. The employees involved did not quit because they did not like to work under nonunion working conditions. They were discharged, as the Court concedes, because the employer's unfair labor practices (1) created intolerable conditions of employment and (2) constituted conduct to discourage union membership. This employer has committed these offenses. For an employee who was a union member or inclined toward union membership to go to work for this employer after the commission of these offenses would require acceptance that the employer has

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[1] The original meaning of "open shop" was a business where the employer announced he would not deal with a union regardless of union majority and usually carried with it the further implication that any employee who joined a union would be discharged. Taft, Organized Labor and American History, p. 360–1 (1964). The National Labor Relations Act, of course, outlawed such open shops. 29 U.S.C. § 8(a)(1), (3), (5). Yet note the close parallel of this employer's unfair labor practices to the classic "open shop" concept.

[2] The purpose of the 1959 amendment contained in § 8(f), 29 U.S.C. § 158(f), providing for pre-hire agreements, was to add to the rights of employees to organize and bargain collectively in the building construction industry, not to take any rights away from them. Gorman, Basic Text on Labor Law 667–8 (1976). While the collective bargaining agreement involved in this case began as a pre-hire agreement under § 8(f), at the current stage of this case pre-hire agreements are irrelevant. *See* fn. 4, *infra*.

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tainted the work relationship and can reasonably be expected to engage in conduct which discriminates against union membership and creates intolerable working conditions for those who are union members. Why? Because he has already done so even in a situation where under contract he was bound to do otherwise.

The Court attempts to avoid the significance of the impact of the constructive discharge on the employees by asserting that they were not guaranteed steady employment by the employer and that in any event they would not work for wages and working conditions short of the union requirements.

Neither assumption is warranted. The Court undertakes to establish the proposition that none of the past employees of Haberman could be expected to be hired on new projects. Recent NLRB cases such as *Hageman Underground Construction*, 253 N.L.R.B. No. 7 (1980),[3] make a distinction between construction contractors who have a "stable" workforce and those who hire on a project-by-project basis. It is accurate that the Board properly referred to the *Haberman* case in *Hageman* as a case involving project-by-project hiring.

Next, the Court goes to *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977), and notes that there was no likelihood of the union's obtaining a majority on the specific project involved in that case. Then it concludes that this is true in the instant case also. Succinctly, the position is that there are only two alternatives in the construction industry. Either there is a steady workforce of regular employees or there is no possibility of continuity of employment at all.

There is no justification in the law for such an either/or requirement. *Dee Cee Floor Covering* involved an employer who committed an unfair labor practice by announcing that he would not hire union employees for a large new project when there were no projects currently going on, there was no contract in effect, and there was no proof of carryover of employees. In contrast, in this case the Board found specifically and accurately, without dispute, that a number of employees of Haberman at the time of the unfair labor practices "enjoyed continued employment with Respondent over several projects." *Haberman Construction Co.*, 236 N.L.R.B. 79, n.3 (1978). This finding, coupled with the fact that the employer by law had no right to discriminate against union employees in hiring for new projects, justifies the Board's conclusion that "there is a distinct possibility that, *absent its discrimination*, Respondent would have retained, transferred, or rehired at least some of the discriminatees for new projects." *Id.* at 79. (Emphasis added).

The Court usurps the function of the Board when it concludes that prior employees of Haberman would not have worked for Haberman on new projects absent the unfair labor practices. This conclusion is supported by saying that the employees quit because Haberman would no longer pay the union pension benefits. But as is pointed out above, the employees did not quit; they were discharged. We do not know what their attitude would have been to offers of employment if there had been no discrimination and the employees could be confident that the employer would obey the law.

The employees had at least the right to consider if they would accept employment free of employer anti-union coercion and to apply if they would. That right was destroyed by the employer's unfair labor practices. Without the Board's order, the likelihood that Haberman would offer employment to the employees it discharged is nil. Further, the employees frequently hired by the employer in the past had the right to hope that they could organize the next projects and then require bargaining, since the employer could not discriminate against the union in hiring tenure policies. They had the right to be considered for work in the hope that they could get the pension benefits later through bargaining by establishing a majority at the projects.

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And they had the right to engage in organizational activities including picketing and striking to accomplish these objectives. These lawful employee/job applicant opportunities were destroyed by the unfair labor practices of the employer.

Instead of the employees finding themselves free to consider whether they would be willing to work at less than full union working conditions either because they needed employment or because they hoped in the future to organize the business, the employer through his unfair labor practices notified the employees that he would discharge them for union activity, that he would breach collective bargaining agreements, that he would refuse to bargain, and that he would make working conditions intolerable for union employees. That basic employer attitude which the Board is trying to remedy by its order is not at all eliminated by the expiration of the earlier contract and the ending of the earlier projects. The employer is allowed to exculpate himself merely by the passage of a short period of time with the expiration of a collective agreement and the ending of work projects.

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[3] *See also Corrugated Structures, Inc.*, 252 N.L.R.B. No. 79 (1980); *Land Equipment, Inc.*, 248 N.L.R.B. No. 98 (1980); *Precision Striping, Inc.*, 245 N.L.R.B. No. 34 (1979).

When this employer committed the unfair labor practices his actions were in the face of the even more stringent situation where he was bound not only by law but by contract not to do so. This was a strong antiunion message to employees and job seekers. There is nothing in the National Labor Relations Act nor in the jurisprudence of the Board and courts which justifies saying that an employer may so easily avoid the impact of such unfair labor practices. To allow him to bear no further responsibility is to thwart the valid concerns of those who work for him or wish to do so.

As a result of the unfair labor practices in this case, the employees are faced with a wholly distorted situation in making a decision as to whether to apply for employment in new projects with this employer. The possibility of actually being hired, let alone the prospect of gaining a majority of the next projects, which normally was a good chance because past projects did have union majority, has been all but destroyed by the employer's action. It would be foolish for these employees, innocent of any wrongdoing, now to assume that they have nothing to fear from an employer who has acted as this employer acted just a few months before. It is not enough to limit the Board to saying he should not have done it, and then allow only a brief and transitory remedy.

The Board in fashioning its remedy said that the only way it can make these employees whole for the violations of the law which have been committed to their disadvantage is to require that they be given the opportunity to be hired on future projects and to be awarded back pay for their losses. All parties are agreed that the pre-hire contract, converted to a collective bargaining agreement, has expired and its terms are no longer in effect. The Board concedes that this is so.[4] Establishing the back pay liability for these employees requires the determination of whether they would have been given the opportunity to work[5] and what their pay would have been absent employer unfair labor practices. The Board may very well have difficulty establishing the fact that they would have been hired **375** and the amount of back pay because there is unavoidable conjecture about what they would have gotten if they had gone to work on future projects and whether projects would have been organized or not.[6]

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[4] The panel opinion required the pre-hire agreement's terms to be carried over into the new projects but the Board order did not do so. The Board order stated:

> The Administrative Law Judge includes a brief statement in the remedy section which arguably suggests that he is ordering Respondent to comply with Union-AGC agreements which succeed the 1974–77 agreement. However, it is clear from the terms of his Order, which we are adopting in relevant part, that Respondent need not honor any such agreement unless it agrees to do so after bargaining with the Union.

236 N.L.R.B. at 79, n.2. The Board in its enbanc brief attempted to uphold the conclusion of the panel decision but had not taken this position earlier in its orginal brief to the Court.

[5] The Board did not automatically require that all prior employees who quit be reinstated. The Board saved for the compliance stage the determination of which employees would have otherwise been rehired. In the last sentence of its opinion, the Board stated:

> [T]he determination of which employees, if any, would have continued in Respondent's employment and for how long can best be made at the compliance stage of the proceedings, to which we defer the matter.

236 N.L.R.B. at 79.

[6] The order of the Administrative Law Judge, adopted by the Board with modification, must be read and evaluated carefully. As the Board indicated in its statement quoted above in footnote 4, the order could be read as a requirement that the terms of the existing contract would be continued after it expired, and that all employees were entitled to reinstatement. But that order was directed at the situation of a contract assumed to be still in effect and of projects which were still going on. Reinstatement in those projects and backpay awards under that contract obviously were justified. Of course, at that time, the purpose of couching the order in those terms was to entitle them to back pay in accordance with the contract terms then in existence before the projects were over. The Board's decision makes clear that the Administrative Law Judge's order is to be read this way and not as requiring the terms of the expired contract to be carried over into new projects. Further, the Board makes clear that after the projects expired the order does not apply to employees who would not have been hired again even if there had been no unfair labor practices in the past and if the employer in hiring did not discriminate on the basis of union membership, activity, or sympathy among the prospective employees.

But that is not for this Court to decide. All this Court is called upon to decide is whether the Board should undertake to make these employees whole from the effect of the unfair labor practices. The Court does not allow the Board even to try to make them whole. The excised order it sanctions ignores that they were discharged and that the conduct of the employer made clear they were unwelcome in the future. The issues of which employees are to be reinstated and the amount of back pay are not before us.

The Board also includes in its order the obligation on the employer to bargain collectively. This is a standard order in situations where a bargaining relationship was established and it is shown to be destroyed because of the unfair labor practices of the employer. We should not draw a speculative conclusion that the employees would not have obtained a majority in the future projects. The employer made it impossible for them to do so through his unfair labor practices. Orders to bargain collectively when the employer has destroyed the union majority through unfair labor practices are the usual Board remedy. *N.L.R.B. v. Warren Co., Inc.,* 350 U.S. 107, 112, 76 S.Ct. 185, 188, 100 L.Ed. 96 (1955); *N.L.R.B. v. Alterman Transport Lines, Inc.,* 587 F.2d 212, 228 (5th Cir. 1979); *N.L.R.B. v. Poultry Enterprises, Inc.,* 207 F.2d 522, 525 (5th Cir. 1953). *Dee Cee Floor Covering* is in no way contrary to such an order. In this case the employer destroyed the collective bargaining relationship while it was in existence. This was not the *Dee Cee Floor Covering* situation. The employer cannot now escape the collective bargaining relationship by saying it might have escaped such a relationship if it had not violated the statute. It might or it might not have. But its unfair labor practice precluded the continuation or reestablishment of the bargaining relationship by destroying continuation in employment.

It is true we do not presume a union majority on each new project in a project-by-project hiring situation. But the Court in this case presumes a lack of majority. The presumption is correct but only because the employer's unfair labor practices made it so. Yet the Court authorizes the employer to act exactly as if he had not prejudiced the situation of prospective employees by his violations of law. The only way to remedy the alteration of the status quo by the employer's unfair labor practices is to issue a bargaining order which compels bargaining until the effects of the employer's unfair labor practices no longer have a significant impact. This is elementary law under the National Labor Relations Act. Gorman, Basic Text on Labor Law 532–39 (1976).

There is, of course, no way actually to restore the situation which existed when the employer committed the unfair labor practices. There are too many variables as to the future actions and attitudes on the part of both employees and employer. It follows that someone must bear the losses brought about by the inability wholly to restore the status quo. The compelling irony of the Court's view is that it does not place the losses upon the wrongdoer but instead upon those who were the victims.

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The Court properly reminds us that the "remedial power of the Board is 'a broad and discretionary one, subject to limited judicial review.' *Fibreboard Corp. v. N.L.R.B.,* 379 U.S. 203, 216 [85 S.Ct. 398, 406, 13 L.Ed.2d 233] (1964)." It is well to add the early admonition of the Supreme Court that a remedial order may not be overturned "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943). With all due respect such a showing is not even close to being made in this case. Since it is clear the impact of employer's actions persists in this construction industry context, the remedies are not punitive but designed only to do the best that can be done to reconstruct the status quo.

These employees are entitled to this remedy and the public is entitled to the vindication of its statutory policy until the vestiges of employer's unfair labor practices have been dissipated. The order of the National Labor Relations Board in this case should be enforced in full.

Peerless Roofing Co., LTD v. NLRB

641 F.2d 734 (9th Cir.), April 6, 1981; rehearing denied June 3, 1981—247 NLRB 500

On petition to review Board Order

Before TANG and FLETCHER, Circuit Judges, and

EAST, District Judge*

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FLETCHER, Circuit Judge: Peerless Roofing Co., Ltd., petitions for review of an order of the National Labor Relations Board requiring Peerless to contribute sums owing to the Union's trust fund, to post notices, and to cease and desist from related unfair labor practices. The Board makes cross-application for enforcement. We enforce the Board's order in full.

I

REFUSAL TO BARGAIN

The Board found that Peerless had committed an unfair labor practice by ceasing to make contributions to union trust funds after its collective bargaining agreement with the Union expired. A new agreement was under negotiation at that time. Peerless contends that its failure to make contributions to the union trust funds beginning in May, 1978, was not an unfair labor practice because the change was reasonably comphrehended in the terms of its contract offers to the Union,[1] and was implemented after a valid impasse in negotiations was reached. Because we hold that the change was not reasonably comprehended, we do not reach the question of impasse. *NLRB v. Yutana Barge Lines, Inc.*, 315 F.2d 524, 529–30 (9th Cir. 1963); *see also NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225, 69 S.Ct. 960, 963, 93 L.Ed. 1320 (1949).

The Board found that during negotiations Peerless never proposed terminating all payments to the union trust funds. We must accept this finding if it is supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S.Ct. 456, 463–64, 95 L.Ed. 456 (1951). If the change was not comprehended in any of Peerless' proposals, its unilateral implementation amounts to a refusal to bargain in violation of 29 U.S.C. § 158(a)(1) & (5). *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729–30 (9th Cir. 1980). *See NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962).

The record is clear that, while fringe benefits including trust fund contributions were among the subjects of negotiation, Peerless never proposed the substitution of cash wages for trust fund payments. The Union must be given a chance to discuss the specifics of any proposal before it is implemented, *id.* and this was not done.

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II

THE REMEDY

Peerless also argues that the remedy ordered by the Board is illegal. The Board ordered Peerless to make trust fund payments for months of May through August, 1978. Peerless contends that these payments would be illegal under section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) (Supp. II 1978).

Section 302(c)(5) prohibits all payments by an employer to an employee representative (here, the trustees of the union trust funds) unless there is a specific written agreement covering the payments, and the money is for the sole and exclusive benefit of the employees. 29 U.S.C. § 186(c)(5). Peerless argues that because the collective bargaining agreement between it and the Union expired in April, there is no such written agreement.

This argument must be rejected for two reasons. First, it appears from the record that the trust funds were established by documents separate and apart from the collective bargaining agreement. Second, the collective bargaining agreement itself survives its expiration date for some purposes. During negotiations, the employer is required by section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1976), to maintain the status quo as to wages and working conditions, even following the expiration date of the agreement. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980). If the employer's obligation to make trust fund payments were terminated by the expiration of the agreement, the union would never have an opportunity to bargain over those contributions. This result would not advance national labor policy as articulated in the National Labor Relations Act.

We conclude that the trust fund agreements and the collective bargaining agreement sufficiently protected the employees' interests as required by section 302(c)(5), 29 U.S.C. § 186(c)(5). *See Hinson v. NLRB*, 428 F.2d 133, 137-39 (8th Cir. 1970).[2] The remedy ordered by the Board was therefore not illegal and should be enforced.

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*The Honorable William G. East, Senior United States Distict Judge for the District of Oregon, sitting by designation.

[1] The Union, Local 221, United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Assoc., is not a party to this proceeding.

III

STATUTE OF LIMITATIONS

Peerless finally argues that the Union's charge is barred by the six-month statute of limitations in the National Labor Relations Act, 29 U.S.C. § 160(b). The charge was filed on December 7, 1978. The first trust fund contribution which Peerless failed to make would ahve been due on June 20, 1978, although the obligation to make the contribution had accrued in May. The Union had no notice prior to June 20 that Peerless would not make the required contributions; the record suggests, in fact, that it may not have known until October. We therefore hold that the limitations period did not begin to run until at least June 20. The unfair labor practice charge was timely.

Since we find no merit in any of Peerless' objections to the order of the NLRB, the order will be Enforced.

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[2] Petitioners rely heavily on *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969). *Moglia* is not on point, however. The employer in that case had neglected to sign any of the agreements governing the union pension fund, and the court held that payments into the fund were therefore prohibited by section 302(c)(5). We also note that *Moglia* was a private suit between a pension beneficiary and the trustees of the fund, so the court had no occasion to consider the coollective bargaining obligations of the employer or the requirements of the national labor policy.

NLRB v. Sambo's Restaurant, Inc.

641 F.2d 794 (9th Cir.), April 6, 1981—247 NLRB 777

On petition to enforce Board Order

Before Skopil and Farris, Circuit Judges, and MacBride, District Judge*

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Skopil, Circuit Judge: The National Labor Relations Board ("the Board") seeks enforcement of its order, 247 NLRB No. 122, requiring Sambo's Restaurant, Inc. to cease and desist from unfair labor practices at its San Bruno restaurant and to take other specific remedial actions. We grant enforcement.

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I.

Local 340 of the Hotel and Restaurant Employees and Bartenders Union ("the Union") began a campaign to organize the employees at Sambo's San Bruno restaurant. Approximately 45 employees worked at the restaurant during the campaign. Fourteen employees signed valid authorization cards in support of the Union. The Union lost the representation election and filed charges of unfair labor practices with the Board.

The Administrative Law Judge ("the ALJ") found that Sambo's Restaurant, Inc. ("the Company") violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) by engaging in various unfair labor practices. The ALJ issued a cease and desist order, set aside the election and ordered a new election to take place, and further ordered the Company to post a specified notice at the restaurant.

The Company, the Union, and the General Counsel all filed exceptions to the ALJ decision. At the Board hearing, the General Counsel sought the remedy of a bargaining order,[1] while the Company urged that no remedy other than a rerun election was necessary. The Board refused to issue a bargaining order because there was no evidence that the Union had obtained authorization cards from a majority of employees in the unit. The Board adopted the findings and conclusions of the ALJ, and ordered the election set aside and a rerun election held.

The Board found that the Company's unfair labor practices were "outrageous" and "pervasive". It therefore issued a broad cease and desist order and ordered additional remedial actions by the Company "to dissipate as much as possible the atmosphere of fear created by Respondent's unlawful conduct."

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*Honorable Thomas J. MacBride, Senior United States District Judge for the Eastern District of California, sitting by designation.

[1] *See NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

The additional remedial actions required the Company to: (1) mail a copy of the notice to each employee of the restaurant; (2) include the notice in appropriate Company publications; (3) read the notice out loud to current employees assembled for that purpose with reasonable opportunity for a Board agent to attend; (4) accord the Union upon request reasonable access to bulletin boards, posting places and non-work areas during non-work time for six months; (5) supply the Union with names and addresses of current restaurant employees; (6) provide the Union notice of and equal time to respond to any company address on the subject of Union representation; and (7) afford the Union to right to deliver a 30-minute speech to employees on work time prior to any Board election.

The Company did not request a rehearing or reconsideration of the Board's decision pursuant to 29 CFR § 102.48(d). The Board applied to this court for enforcement of its order. The Company does not contest the Board's findings that the Company committed unfair labor practices. It contests only the validity of the Board's additional remedies.

II.

Section 10(e) of the NLRA, 29 U.S.C. § 160(e), pursuant to which the Board filed its petition for enforcement in this case, provides:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

The Board's regulations, 29 CFR § 102.48(d)(1), provide:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

The *sua sponte* action of the Board in ordering remedies that were not argued

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before it has been held to be "exactly the kind of extraordinary circumstances for which the option to move for rehearing or reconsideration is provided." *NLRB v. Allied Products Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). Thus, because of the availability of a rehearing before the Board, the Board's *sua sponte* adoption of an unargued remedy is not a statutory extraordinary circumstance under section 10(e) that would allow the Company to assert an objection for the first time on appeal. *United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054 (3d Cir. 1980); *NLRB v. Allied Products Corp.*, *supra* at 654; *Garment Workers Union v. Quality Manufacturing*, 420 U.S. 276, 95 S.Ct. 972, 43 L.Ed.2d 189 (1975). *See also, Teamsters Local 115 v. NLRB (Hadden House)*, ——— F.2d ——— at ———, No. 79-1619, slip op. at 12 (D.C.Cir. January 26, 1981).

This court has observed that:

> A review of the cases shows that the 'extradordinary circumstances' provision of Section 10(E) [29 U.S.C. § 160(e)] (excusing the losing party's failure to make objections to the Board) has been applied only in rare cases, as when a snow storm closes the Board's offices, or when a telephone and taxi strike prevent delivery of the objections, or when an unusually early mail pickup delays delivery.

NLRB v. STR, Inc., 549 F.2d 641, 642 (9th Cir. 1977) (citations omitted). The rationale for the provision in section 10(e) precluding the losing party from raising an issue in this court that was not raised below, is that it

> affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that [the court] may have the benefit of [the Board's] opinion when [the court] reviews its determinations.

NLRB v. Allied Products Corp., *supra* at 653.

The Company's argument that the section 10(e) restriction applies only to factual issues, and not to the issue of appropriate remedies, is simply incorrect. In *United Dairy Farmers*, *supra*, the Board also ordered similar additional remedies *sua sponte*. The Third Circuit held that

> [t]he various additional remedies specifically ordered *sua sponte* by the Board so as to undo the effects of the employers' action on the election process were not challenged before the Board * * *, and therefore, under Section 10(e), 29 U.S.C. § 160(e), may not be challenged before this court.

United Dairy Farmers Cooperative Association v. NLRB, supra at 1064. *See also Hedstrom Co. v. NLRB,* 629 F.2d 305 (3d Cir. 1980) (en banc) (company precluded from asserting objection to bargaining order issues *sua sponte* by Board since it did not move for reconsideration below); *NLRB v. Allied Product Corp., supra,* 548 F.2d 644 (company barred from objecting to status quo ante remedy granted *sua sponte* by Board since company did not file motion for reconsideration).

The Company further contends that since it presented all the factors that it would have presented during a motion for reconsideration when it argued to the Board against a bargaining order and for the sole remedy of a rerun election, a motion for reconsideration was unnecessary. This argument misconstrues the purpose of such a motion. While the same factors might properly be considered by the Board in determining whether to order either a bargaining order or other remedies, the Company never addressed these factors directly to the specific remedies adopted *sua sponte* by the Board. Neither did the Company contest before the Board the appropriateness of these specific remedies.

Since the Company failed to file a motion for reconsideration to contest the appropriateness of the additional remedies, it is barred from raising such arguments for the first time in this court.

The Board's order is hereby ENFORCED.

Blaw-Knox Foundry & Mill Machinery Inc., Wheeling Works Division v. NLRB

646 F.2d 113 (4th Cir.), April 7, 1981–247 NLRB 333

On petition to review Board Order

Before WINTER, SPROUSE, and ERVIN, Circuit Judges

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SPROUSE, Circuit Judge: This case is before us on the petition of Blaw-Knox Foundry & Mill Machinery, Inc. (the Company) to set aside an order of the National Labor Relations Board and the Board's cross-application for enforcement. The Board found that the Company violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C § 158(a)(1), by discharging Larry Jordan for engaging in protected concerted activity. Finding that Jordan had not engaged in protected concerted activity we deny enforcement.

I.

The Company operates a foundry and mill facility in Wheeling, West Virgina. Larry Jordan's discharge from employment at that facility arose from his reaction to a foreman's alleged sexual harassment of Jordan's first cousin, Sharon Asher. Jordan filed an unfair labor practice charge with the Board alleging that he had been discharged for concerted activity protected by section 7 of the National Labor Relations Act, 29 U.S.C. § 157. After a hearing before an administrative law judge, the Board sustained the charge and ordered Jordan's reinstatement.

The following facts were developed at the hearing. Asher had worker for the Company for some time and was a member of the union with which the Company had a collective bargaining agreement. Jordan was a new, probationary employee and was not a member of the union. On August 17, 1977, foreman Leonard Lewis encountered Asher and had a brief conversation with her. Although Lewis denies it, Asher claims that Lewis indecently touched her. Asher went to the foremen's office and in Lewis's presence informed her supervisor that she wanted to register a complaint about Lewis. She reported that Lewis had "grabbed" her and that although she "wasn't putting in a grievance," she did not want it to happen again.

After leaving the office, she told several coworkers of the incident with Lewis. When Asher described Lewis's alleged misconduct to Jordan, the latter suggested that he and Asher confront Lewis. The two of them proceeded to the foremen's office, where several supervisors were present. Jordan asked Asher to identify the man who had touched her and Asher pointed to Lewis.

Precisely what happened thereafter is sharply disputed. Lewis and two other foremen who were present testified that Jordan threatened to kill Lewis if Lewis ever touched Asher again. Asher and Jordan both denied this. As Jordan recounted the incident to the administrative law judge:

> I said * * * you are a foreman, you shouldn't even consider doing anything like that, and he said, it was his word against hers, and if she wanted to go into the office, that they could * * *. I said that was between you and

> her * * * and then he said, what are you going to do about it anyway?

* * * * *

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> I said, if you do it again, we'll take some sort of action or steps necessary to get something done about it.

According to Jordan, Lewis again asked him "in a different way" what he planned to do about it. Jordan testified:

> I said just don't touch her again, or we'll find out, and that's that's when Larry Gribben touched me on the shoulder and we left.

Asher's testimony corroborated Jordan's:

> [M]y cousin said to [Lewis], he said, you don't put your hands on her no more * * *. [Lewis] asked my cousin, what was he going to do about it anyway, and my cousin said, just don't put your hands on her no more * * * or you'll see, or something like that * * *

The adminstrative law judge credited the testimony of Asher and Jordan, discounting the alleged threat upon Lewis's life.

In a subsequent conversation with Lewis and another foreman, Jordan indicated that he would have no further involvement with the matter. So far as he was concerned, any further action was up to Asher and Lewis. Jordan filed no grievance in the matter and did not participate in Asher's grievance.

II.

Counsel for the Board maintains that in coming to his cousin's assistance and protesting the alleged sexual harassment, Jordan was engaging in "classic concerted activity." The Company contends that Jordan's own testimony demonstrates he was not engage in "concerted" activity within the meaning of the statute. Alternatively, the Company urges that the Board's finding that Jordan did not threaten Lewis's life is unsupported by substantial evidence. Since we agree with the Company's first contention, we need not reach the other.

III.

Section 7 of the Act, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concered activities for the purpose of collective bargaining or other mutual aid or protection.

In *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967), the Court of Appeals for the Second Circuit stated that the efforts of an individual employee acting alone to enforce the provisions of a collective bargaining agreement may be deemed "concerted," and thus protected, at least when the individual's interpretation of the agreement has a reasonable basis. *See NLRB v. John Langenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049, 89 S.Ct 685, 21 L.Ed.2d 691 (1969). *Cf. Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980). The rationale for this rule, as expressed by the Board, is that "implementation of such agreement by an employee is but an extension of the concerted activity giving rise to that agreement." *Bunney Bros. Construction Company*, 139 N.L.R.B. 1516, 1519 (1962). Reaching substantially the same result are *NLRB v. Ben Pekin Corp.*, 452 F.2d 205, 206 (7th Cir. 1971); *Randolph Division, Ethan Allen, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975); and *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970). Other courts have held that to be protected, a single individual's activity must have been undertaken with the purpose of inducing or preparing for group action, *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884–85 (3rd Cir. 1971); *Mushroom Transport Co. v. NLRB*, 330 F.2d 383, 385 (3d Cir. 1964), or on behalf of a group of employees in a representative capacity. *ARO, Inc. v. NLRB* 596 F.2d 713, 718 (6th Cir. 1979); *NLRB v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8, 12–13 (6th Cir. 1960). *See Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28, & n. 10 (7th Cir. 1980).

This court reviewed these interpretations of section 7 in *Krispy Kreme Doughnut*

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Corp. v. NLRB, 635 F.2d 304(4th Cir. 1980). There we declined to enforce a Board order finding protected concerted activity in an individual employee's refusal to forego a workmen's compensation claim. We recognized in *Krispy Kreme* that individual action may constitute protected concerted activity when it is " 'intended to enlist the support and asssistance of other employees' * * *." at 308 (quoting *Owens-Corning Fiberglas Corp. v. NLRB,* 407F.2d 1357, 1365 (4th Cir. 1969)). But there was no evidence that the employee involved in *Krispy Kreme* had contemplated group activity. And because of the absence of a collective bargaining agreement, the *Interboro* rule—deeming protected an individual employee's efforts to enforce a collective bargaining agreement—was inapplicable.

Here, as was the case in *Krispy Kreme,* the record fails to reveal protected concerted activity under any standard. Jordan was neither attempting to enforce a collective bargaining agreement, seeking to induce group action, nor acting on behalf of a group. His altercation with foreman Lewis manifested a purely personal concern. Such personal missions are not deemed concerted activity under any test. *Joanna Cotton Mills Co. v. NLRB,* 176 F.2d 749, 753 (4th Cir. 1949). *See NLRB v. Buddies Supermarkets, Inc.,* 481 F.2d 714. 717 (5th Cir. 1973); *NLRB v. Ben Pekin Corp.,* 452 F.2d 205, 206–07 (7th Cir. 1971).

Unlike the situation in *Interboro,* nothing in the evidence here suggests Jordan was seeking to implement the terms of the agreement between the Company and the union when he confronted Lewis. He made no reference to the collective bargaining agreement during the confrontation. Instead of seeking out a union representative or even his own supervisor, Jordan went directly to Lewis. The vague threat to "take some sort of action or steps necessary to get something done about it" does not evince reliance on any substantive rights guaranteed in the agreement. *See NLRB v. C & I Air Conditioning, Inc.,* 486 F.2d 977 (9th Cir. 1973); *NLRB v. Ben Pekin Corp.,* 452 F.2d 205 (7th Cir. 1971).

However chivalric Jordan's actions, his purpose was personal and private; it was not to induce group activity. After thrusting himself upon the scene, Jordan disassociated himself from the incident and its principals. He told Lewis that any further action was "up to you and Sharon [Asher]" and that "if you never touch her, I won't have to come over to your area again." He took no part in Asher's grievance. In so quickly eschewing any representative role, Jordan revealed not concern for the welfare of workers generally, but rather the personal object of his brief intervention. We do not believe Jordan's actions can be deemed "concerted" for the purpose of section 7.

Considering the record as a whole, we conclude that the decision and order of the Board in this case are not supported by substantial evidence. *Universal Camera v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Enforcement of the decision and order of the Board is denied and the order is set aside.

ENFORCEMENT DENIED; ORDER SET ASIDE.

NLRB v. Datapoint Corporation

642 F.2d 123 (5th Cir.), April 8, 1981—246 NLRB 234

On petition to enforce Board Order

Before AINSWORTH, and SAM D. JOHNSON, Circuit Judges, and HUNTER,* District Judge

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AINSWORTH, Circuit Judge: The National Labor Relations Board seeks enforcement of its order requiring Datapoint Corporation to reinstate former employee R. Bradley Clark with backpay and to restore all seniority rights lost as a result of his discharge. The Board, disagreeing with the conclusions of the Administrative Law Judge who heard the case, found that Clark was terminated for having engaged in concerted activities protected under Section 7 of the labor act, 29 U.S.C. § 157,[1] and thus held that Datapoint had violated Section 8(a)(1) of the act, 29 U.S.C. § 158(a)(1),[2] 246 N.L.R.B. No. 39 (1979). The company contends that the Administrative Law Judge correctly found that Clark had not been engaged in protected concerted activity, "but rather was discharged because of a series of temper displays indicating his inability to work with some of his fellow employees which culminated in an arrogant act of insubordination toward his immediate supervisor." Record on Appeal at 346. We agree that there was not substantial evidence to indicate that Clark was involved in concerted activity within the meaning of Section 7 and therefore deny enforcement of the Board's order.

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*District Judge of the Western District of Lousiana, sitting by designation.

[1] Section 7 provides, in pertinent part, that "[e]mployees shall have the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." 29 U.S.C. § 157.

[2] Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restraint, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1).

The Facts

Datapoint Corporation, a manufacturer of computer systems, employs approximately 2300 workers at its San Antonio, Texas, plant. This case, however, involves only one of the approximately twenty-two production employees in the printing services department. On Friday, July 14, 1978, Mrs. Lois Jeane Davis, the manager of the department, met with the production employees and announced that the long-rumored move of the department to larger quarters was to take place during the first week of August. In addition to describing the new

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location and answering questions about the facilities, Davis informed the employees that all but three of the employees would either have to use vacation time or take the week off without pay while the department was relocated. Clark, the operator of a high-speed photocopying machine used to print urgently needed items, was among the three who would not be laid off during the week of the move. After the meeting with Davis, the employees returned to work but continued to discuss the move and the layoff. At this time, Clark told other employees that the layoff was illegal and contrary to company policy. Word filtered back to Davis that "Brad [Clark] was rather loudly proclaiming all over the Printing Production area that the action Mrs. Davis had taken was illegal * * *." (T. 94.)

Davis decided to discuss the matter with Clark the following Monday; since Clark was not at work on Monday, she met with him early Tuesday morning.[3] The accounts of that meeting vary considerably, but both the Administrative Law Judge and the Board found that the meeting included topics other than the layoff,[4] and that Clark raised his voice in the meeting. Although Clark flatly denied discussing the Tuesday meeting with any of the other employees, there was considerable testimony, and both the Board and the Administrative Law Judge found, that Clark "gave an account of the meeting to fellow employees," stating "that he had stood up to Davis and told her what he thought about the layoff." 246 N.L.R.B. No. 39 at 2. The uncontradicted testimony, again credited by the Board and the hearing judge, indicated that Davis was told "that Clark, using profanity, had loudly proclaimed for all to hear that he had told her off in no uncertain terms." 246 N.L.R.B. No. 39 at 2. Davis was told that Clark was "bragging" that he "cussed her out" at the meeting. That afternoon, Davis discussed Clark's behavior with James Simonsen, Datapoint's Vice President of Industrial Relations, and they jointly decided to terminate Clark as part of a "reduction in force" then in progress. (Tr. 91-94, 323-24, 246 N.L.R.B. No. 39 at 2.) Clark was discharged the next day.

The NLRB Proceedings

Clark filed charges with the NLRB on July 20, 1978, alleging that Datapoint had violated Section 8(a)(1) by discharging him on account of concerted activities protected under Section 7. The NLRB Regional Director issued a complaint on September 1, and the matter was heard before an Administrative Law Judge on January 9 and 10, 1979. The judge heard over three hundred transcript pages of testimony from Clark, Davis, Simonsen and six other present or former Datapoint employees. After reviewing the testimony and the exhibits, and making the necessary credibility choices based on first-hand observation of the witnesses, the judge found that Clark had been discharged not because of any protected activity, and not merely because he believed the layoff was illegal or because he expressed that belief to other employees, but instead because he, "in a deprecating, insulting and insubordinate manner, had arrogantly told other employees how he had told Mrs. Davis off * * *." The Administrative Law Judge found that the inci-

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[3] Mrs. Davis held another meeting with the department employees on Monday, July 17, which Clark missed. While details of the relocation were discussed at that meeting, the layoff apparently was not discussed.

[4] Mrs. Davis testified, and the Administrative Law Judge found, that Clark complained about the failure of Buddy Sauls, his supervisor, to give him overtime work when he wanted it, and also criticized the overall performance of his supervisor, stating "that he, Bradley Clark, could run the print shop a lot better than Buddy Sauls."

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dents surrounding the relocation layoff were merely the culmination "of a series of temper displays indicating his inability to work with some of his fellow employees," and that he was discharged because of his overall poor attitude.

A three-member panel of the Board disagreed with the judge's conclusions. The Board apparently accepted most of the Administrative Law Judge's credibility choices, for example finding, despite his denials, the Clark raised his voice during the July 18 meeting with Davis and that he told other employees "that he had stood up to Davis and told her what he thought about the layoff." 246 N.L.R.B. No. 39 at 2. Nevertheless, the Board, essentially giving credence to Clark's version of why he was discharged, discrediting the version given by Datapoint officials and credited by the Administrative Law Judge, found that Datapoint discharged Clark not for insubordination but because he "refus[ed] to accept [Davis's] explanation that the layoff was proper" and continued to make statements to fellow employees that the layoff was illegal. 246 N.L.R.B. No. 39 at 5. Even though Clark acted alone, the Board specifically found that he was engaged in concerted activity:

> [A] conversation may constitute concerted activity although it involves only a speaker and a listener. Further, an individual's actions may be considered concerted in nature if they relate to conditions of employment that are matters of mutual concern to the affected employees * * *. Nor does the fact that Clark's fellow employees chose not to take any action disqualify Clark's statements from protection. Discussion among employees concerning working conditions is a necessary initial step in concerted activity and to deny protection to this type of discussion because of a lack of fruition would be to nullify the rights guaranteed by Section 7 of the Act.

246 N.L.R.B. No. 39 at 5-6 (footnotes omitted). The Board therefore ordered Datapoint to reinstate Clark with back pay and all lost seniority rights.

Were Clark's Statements Concerted Activities?

In proceedings to enforce an order of the National Labor Relations Board, we must defer to the Board if there is substantial evidence in the record to support its factual findings. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456(1951). However, in cases where the Board does not accept the findings of the Administrative Law Judge, our examination of the record and the Board's findings must be especially critical. *Syncro Corp. v. NLRB,* 597 F.2d 922, 924–25 (5th Cir. 1979); *NLRB v. Florida Medical Center, Inc.* 576 F.2d 666, 674 (5th Cir. 1974). Particular scrutiny is appropriate where the Board disagrees with some of the credibility choices made by the judge who had the opportunity to see and question the witnesses himself. *Cf. NLRB v. Brazos Elec. Power Co-op, Inc.,* 615 F.2d 1100, 1101–02 (5th Cir. 1980).

In this case, the difference between the Board and the Administrative Law Judge rests on both a credibility determination and a conclusion of law. The Board disagreed with the judge's determination of the underlying reasons for the termination of Clark (basically a credibility determination) and also disagreed with the judge's legal conclusion that the statements made by Clark constituted protected concerted activity. After throughly examining the record, we hold that there is not sufficient evidence to support the Board's conclusion that Clark was terminated "in an attempt to muzzle him regarding his statements to fellow employees about their working conditions * * *." 246 N.L.R.B. No. 39 at 6. We also hold, as a matter of law, that even if Clark was terminated for his statements about the layoff, the termination did not violate Section 8(a)(1) since the statements did not constitute protected concerted activity.

In support of its finding that Clark was not discharged because of insubordination the Board quoted extensively from the testimony of Mrs. Davis.[5] Although these excerpts do make Davis's motivation seem

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[5] The Board cited the following testimony:

Upon examination by the General Counsel regarding Clark's contention that the layoff was improper, Davis testified as follows:

> Q: What did you do?
>
> A: I told him that it was not illegal, that I would not do anything knowingly that was illegal or immoral or hurtful to the corporation, or anything like that, and that I had checked it with Personnel, the Industrial Relations Department, and it was approved before I announced it to the employees.
>
> Q: And so, based on his challenging the legality of that decision, you determined to discharge him.

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ambiguous, and may lend some support to the Board's conclusion that Clark was discharged because of his continuing assertion that the layoffs were illegal, upon reading the whole record we cannot agree that Davis's testimony supports the Board's position. Her testimony, taken as a whole, clearly indicates that she was upset with the rude and belligerent manner Clark displayed in the Tuesday meeting and that she was even more aggravated by the reports of Clark, using profanity, "loudly proclaiming for all to hear in the production area that he had told [her] off in no uncertain terms * * *." (Tr. 92, 290—91).

Davis reported the incident to James Simonsen, Vice President of Industrial Relations, and they jointly decided to discharge Clark. Simonsen testified about the reasons for the discharge:

> JUDGE RASBURY: I have a question. Mr. Simonsen, can you tell me why Brad Clark was terminated?
>
> THE WITNESS: Brad Clark was terminated as a result of, I think, a series of incidents over a period of his employment that made it, as far as an employee, he was not an acceptable employee.
>
> JUDGE RASBURY: Was the incident in connection with the moving of the Printing Shop sort of a culmination of a series of events, in your opinion?
>
> THE WITNESS: Well, that was the last incident. I say that that certainly had some bearing on it.
>
> * * * * *
>
> JUDGE RASBURY: Would you classify this as insubordination or inability to get along with his fellow workers?

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> THE WITNESS: I would say it was more in the area of insubordination and inability to work and be part of a productive work team.

(Tr. 331-332.) There is extensive testimony in the record, and several exhibits, relating to other incidents of the failure of Clark to cooperate and get along with his fellow employees. In light of all of the testimony of Davis and Clark, we cannot agree that the rather ambiguous testimony cited by the Board substantially supports its conclusion that Clark was discharged in an effort to "muzzle" his criticism of the layoffs.

Even if we assume, for the sake of argument, that Clark was terminated for the statements he made in regard to the layoffs, we hold that the statements did not constitute protected concerted activity. The Administrative Law Judge found that there could be no concerted activity absent at least the contemplation of group action:

> A: No, sir. No, sir.
>
> Q: Well, can I find out, please—
>
> A: You surely can, becasuse if—if he had accepted that and gone on to work, everything would have been fine because I had had previous incidents with Brad, we've had altercations with different people in the department, he has, that I have had to resolve.
>
> *But he continued to say that it was illegal, and to say his before all the group.* [Emphasis supplied.]

Upon questioning by the Administrative Law Judge, Davis further testified as follow:

> Judge Rasbury: Mrs. Davis, I would like for you to reflect very carefully on this question, but I want to know when did you first determine that Brad Clark should be terminated?
>
> The Witness: I determined it on Tuesday, July the 18th. I believe it was.
>
> Judge Rasbury: Now, was that following the meeting you had with Mr. Clark, or at what time?
>
> The Witness: It was that afternoon.
>
> Judge Rasbury: And what has caused you to make up your mind in the afternoon?
>
> The Witness: After I had learned from him that he still said the actions were illegal and that it was presenting a problem, then I made my call to Mr. Simonsen and talked it over with him, and I told him I felt like he should be terminated. And that's when he reminded me of the corporate reduction-in-force that was in effect.

Finally, Davis gave this account of her conversation with Simonsen.

> Q: Would you tell us what you said to Mr. Simonsen, please?
>
> A: I'll do my best to recall it, to the best of my knowledge. "Jim, this is Lois Jeanne. I have a great problem that I want to discuss with you and you can probably guess the nature of the person involved, because it's one I have discussed with you before. It's Bradley Clark.
>
> "He is insisting that we have taken an illegal action in asking our production people to take vacation, or time without pay, during the time the department was to make a move from one location to the other.
>
> "I had talked to Bradley that morning * * *. He was very belligerent in his discussions with me, very rude, and other adjectives of that type, and that the discussion became very heated because Bradley raised his voice. He began to challenge the supervison of Mr. Sauls; who is the supervisor of Printing Production, and intimated that he could run the Printing Services Department much better than Mr. Sauls, and could schedule things in a lot better manner."
>
> Q: Now, is that what you told Mr. Simonsen?
>
> A: Yes, in essence it is, yes.
>
> And that Bradley—well, I completed by telling him that Brad said that he still—that it was still illegal, and I told him that he had a right to his opinion, but that it was not illegal action; that I had, of course, discussed it with the Personnel officals before taking that action.

Record at 371-73.

> In order to be protected, group talk or activity must look toward some kind of group action. There is not one scintilla of evidence in this case to indicate that the employees of the printing services department of Datapoint desired, contemplated or even wished to take any kind of group action or have an individual represent them in their gripes regarding the one week's plant closure. In other words this was nothing more than the griping of a group of employees to the announcement of a change in working conditions, but hardly rises to the level of concerted activities.

Record at 345. In holding that Clark's actions did constitute concerted activity, the Board applied a standard which would, in effect, protect any actions "relate[d] to conditions of employment that are matters of mutual concern to the affected employees." 246 N.L.R.B. No. 39 at 6. The Board apparently believes that griping about working conditions is a necessary precursor to any concerted activity and therefore must itself be protected as concerted activity.

The Board's notion of concerted activity run contrary to the law of this circuit, however. In *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1974), this court squarely faced the identical issue involved in the present case and held that, absent substantial evidence that the discharged employee "was seeking to instigate some form of group action," griping or complaning by a single employee does not constitute concerted activity. The court explicitly adopted that standard for determining concerted activity established by the Third Circuit in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.
>
> This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.
>
> Activity which consists of mere talk must, in order to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."

The present case clearly fails to meet the *Mushroom Transportation* standard.

The Board, in its brief, argues that the precedential value of *Buddies Supermarkets* was weakened, if not eliminated, by this court's decision in *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980). In dicta, that case implied that the *Mushroom Transportation* standard may have been discarded by the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). However, the *Anchortank* court explicitly declined to decide whether *Weingarten* overruled the *Mushroom Transportation* standard, noting that the results in the two cases were consistent with each other. *Anchortank, Inv. v. NLRB, supra*, 618 F.2d at 1161 & n.10. Without a clearly contrary opinion of the Supreme Court or of this court sitting *en banc*, we cannot overrule a decision of a prior panel of this court, and we decline to hold that the dicta of *Anchortank* did so. Moreover, we would not overrule *Buddies Supermarkets* even if we could do so. The Board asks us to set too far-reaching a precedent, one by which virtually any action taken by a single employee in any way related to wages, hours or the terms and conditions of employment would be considered protected concerted activity. If Congress had intended Section 7 to be read so broadly, it certainly could have done so with much more definite language, and courts would have discovered that intent long ago.

Accordingly, enforcement of the order of the National Labor Relations Board is hereby

DENIED.

NLRB v. E-Systems, Inc., ECI Division

642 F.2d 118 (5th Cir.), April 8, 1981—244 NLRB 231

On petition to enforce Board Order

Before GODBOLD, Chief Judge, TUTTLE and HILL, Circuit Judges

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JAMES C. HILL Circuit Judge: The National Labor Relations Board (NLRB) found that the ECI Division of E-Systems, Inc. (E-Systems) violated sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) (1976), by refusing to place on a preferential rehire list and eventually discharging four economic strikes who had engaged, E-Systems believed, in strike misconduct. The NLRB ordered E-Systems to rescind its termination of the four strikers' recall rights, to offer immediate and full reemployment to those strikers who would have been recalled had their recall rights not been terminated, to pay their lost wages, and to post appropriate notice concerning this disposition of the dispute. *E-Systems, Inc., ECI Division,* 244 N.L.R.B. No. 36 (Aug. 15, 1979). E-Systems, seeking judicial review, has refused to obey the order. Thus the NLRB petitions for enforcement. We have decided to enforce the order insofar as it concerns two of the employees, but to deny enforcement insofar as it concerns the remaining two.

The Strike

The United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, (Union) represents the production and maintenance employees at E-Systems' St. Petersburg, Florida plant. The Union, seeking agreement on the terms of a new collective bargaining contract, called for a strike. There is evidence in the record indicating that the ambience at the plant during this economic strike, which began on February 7, 1978, was tense.[1] Over two months later, on April 11, accord was reached and the strike ended. A "settlement agreement" provided, *inter alia,* that the strikers be placed on a preferential rehire list. Four days earlier, however, E-Systems informed the Union that a number of striking employees would not be included on that list because, E-Systems maintained, those employees had engaged in strike misconduct. On April 13, E-Systems formally discharged them.

This appeal concerns four of the discharged strikers: John Ferguson, William Chapman, Edwina L. Russ, and Antoinette Rhoads. The administrative law judge (ALJ) found, and the NLRB agreed, that the discharge of these employees was a violation of the Act.

Judicial Review of the NLRB's Conclusions

Both statutory and case law circumscribe our factual review of the NLRB's

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conclusions: we are to determine only if those conclusions are supportd by substantial evidence on the record as a whole.[2] Thus, "[i]f the evidence before the Board is conflicting, and the Board's decision rests on credibility, then we are bound by the credibility choice." *N.L.R.B. v. Moore Business Forms, Inc.,* 574 F.2d 835 843 (5th Cir. 1978). The issue is not whether this court, confronted by the same evidence, would have come to different factual conclusions, but whether substantial evidence[3] supports the factual conclusions of the NLRB.

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[1] During the administrative hearing concerning the allegations leading to this litigation, the administrative law judge (ALJ) properly narrowed the issue to whether the discharged employees had engaged in strike misconduct, not whether the strike itself was violent. Nevertheless, we think some consideration must be given to the context in which the events precipitating the discharges took place. *See generally N.L.R.B. v. Moore Business Forms, Inc.,* 574 F.2d 835 (5th Cir. 1978).

[2] "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive" 29 U.S.C. § 160(e) (1976). *See Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

[3] "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938). However, this court is not

> to determine the substantiality of evidence suporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn * * *. The substantiality of evidence must take into account whatever in the record fairly de-

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There is, however, a purpose to this appellate review. This court is not so constrained that we must uncritically accept the NLRB's order. As we have explained, "[i]f * * * The credibility choice is based on an inadequate reason or no reason at all, we are not compelled to respect it, and shall not do so. Obviously, if the order is based on an invalid legal reason it will not be enforced." *Id.* With this in mind, we turn to cases of the discharged strikers before us.

John Ferguson

Melvin Frank Brown, an E-Systems employee who did not participate in the strike,[4] testified that he saw John Ferguson "shooting a slingshot towards the main entrance of the plant" during the strike. Record, Vol. II, at 135. Brown reported the incident to a security guard. On the basis of the report, E-Systems discharged Ferguson.

The evidence in the record concerning the incident, however is conflicting. William J. Peterson, the personnel manager at the plant, testified somewhat vaguely that Brown reported "[s]omething to the effect that he [Brown] did observe him [Ferguson] attempting to load a slingshot." *Id.* at 80. Brown himself admitted that he could not state whether there was anything in the slingshot when Ferguson allegedly shot. *Id.* at 137. Ferguson, on the other hand, denied having or discharging a slingshot at the plant. *Id.* at 156–57.

The ALJ, finding Ferguson "a most truthful and forthright witness," concluded "that he did not engage in the act of strike misconduct of which he was accused * * *." *See id.*, Vol. I, at 304 (Decision of the Administrative Law Judge). The ALJ accordingly concluded that E-Systems had violated the Act by discharging Ferguson. The NLRB adopted this conclusion and added that E-Systems had further violated the Act by not including Ferguson on a preferential rehire list.

These findings and conclusions are not based on inadequate reason and they are supported by substantial evidence. Thus we will not disturb them. We want to emphasize, however, that there is nothing in the record suggesting that E-Systems was not acting in good faith when it discharged Ferguson (or, not incidentally, any of the strikers before us). Substantial evidence, reading the record as a whole, does support the conclusion that Ferguson did not engage in strike misconduct, but there is also evidence supporting E-Systems' allegation that he did. Nevertheless, it is clear that an employer's good faith belief that he is acting lawfully is not a defense to an unfair labor practice charge:

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> § 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred * * *. In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity and that the employee was not, in fact, guilty of that misconduct.

N.L.R.B. v. Burnup & Sims, 379 U.S. 21, 23, 85 S.Ct. 171, 172, 13 L.Ed.2d 1 (1964) (citations omitted).[5]

Thus we enforce the order of the NLRB insofar as it concerns Ferguson.

William Chapman

Rocky Rothwell, another non-striking E-Systems employee,[6] reported that the side of his truck was scratched while he was passing through the picket line. Rothwell identified William Chapman as the picketing employee who scratched his truck; Rothwell testified that Chapman "stuck his umbrella in the right-rear quarter panel of my truck and scratched it." Record, Vol. II, at 142. Chapman did not deny that he had scratched Rothwell's truck.

> tracts from its weight. This is clearly the significance of the requirement * * * that courts consider the whole record.

Universal Camera Corp. v. N.L.R.B., 340 U.S. at 487–88, 71 S.Ct. at 463–64.

[4] Brown was employed as a design engineer and as such was such was not included in the bargaining unit.

[5] We note the line of cases decided in this circuit in which it has been held that section 8(a)(1) or (3) is not violated when an employer discharges an employee for good cause, unless it is proved that the discharge was motivated by antiunion animus. *See, e.g., Florida Steel Corp. v. N.L.R.B.*, 587 F.2d 735 (5th Cir. 1979); *Firestone Tire & Rubber v. N.L.R.B.*, 449 F.2d 511 (5th Cir. 1971). These cases must be distinguished from the one before us. Althought E-Systems' discharge of Ferguson was in good faith, the ALJ properly found that there was not good cause for the discharge.

[6] Rothwell, like Brown, was neither covered by the collective bargaining contract nor employed in a managerial capacity.

Rather, he testified that if he did, he did so unintentionally. He explained that is was cold, raining and windy the day of the incident and that at the time Rothwell's truck passed by him his "umbrella turned inside out because of the wind. I lowered it and adjusted it * * * and the truck passed and I proceeded to picket." *Id.*, Vol. III, at 204–05. Later Rothwell and Chapman appeared at a voluntary proceeding before a citizen's dispute settlement board. Chapman agreed to make restitution in the amount of $36.92; he testified he did so in order to keep his "involvement in the strike to a minimum." *Id.* at 206.

The ALJ concluded, and the NLRB agreed, that Chapman had misconducted himself during the strike, but that the misconduct was accidental in nature and thus not sufficiently serious to disqualify him for employment. *See id.*, Vol. I, at 305–06 (Decision of the Administrative Law Judge). Although we are not comfortable with the ALJ's labeling of accidental conduct as misconduct, we do accept his legal appraisal of the incident and find that the conclusion that E-Systems did not have good cause to discharge Chapman is supported by substantial evidence. Thus, we enforce the order of the NLRB insofar as it concerns Chapman.

Edwina L. Russ

Peterson, the personnel manager, testified "[t]he basis of [Edwina L. Russ'] termination was destruction of property and tearing of an aerial off of a vendor's car as he was leaving the vicinity. This was reported to us by the vendor." *Id.*, Vol. 11, at 61. Robert J. Braher, an employee of the vendor,[7] witnessed the incident. Braher was following the vendor in another car as both left the plant through the main gate. He saw a picket, whom he later identified as Russ, bend the aerial. The aerial was rendered unusable. *Id.*, Vol III, at 183, 196.

Russ testified that, as the cars approached the gate, she and the other pickets stepped aside to allow passage. As they did so, according to her testimony, the "car speeded up * * * to get to the street, and as it did it brushed me and I * * * it hit me and as it hit me my hand reached up and I just happened to grab that antenna and I bent it." She explained that "[i]t was just a reflex, and I was angry, I guess, because he was trying to get out in a hurry and he did brush me as he went out." *Id.* 219–20. Criminal action based on this incident was later instituted against Russ. She pleaded *nolo contendere* to a criminal mischief charge, agreed to make restitution in the amount of $146 to the vendor, and was put on probation for three months. *Id.* at 224–25.

The ALJ concluded, and again the NLRB agreed, that Russ' behavior was reflexive and provoked, and thus not sufficiently serious to warrant her discharge. We agree insofar as substantial evidence indicates that Russ' behavior was impulsive, but we disagree that such impulsive, uncontrolled behavior is protected by the Act. Therefore we reject the ALJ's legal appraisal of the incident and do not enforce the order of the NLRB insofar as it concerns Russ. *See NLRB v. Moore Business Forms, Inc.*, 374 F.2d at 844 (Neida Morrow).

Antoinette Rhoads

Two incidents led to the discharge of Antoinette Rhoads. Evidence in the record indicates that she blocked passage of automobiles at the plant while picketing and that she hit another E-Systems employee who had abandoned the strike and was returning to work. Peterson, the personnel manager, testified that on March 7, 1978, he was informed that strikers at the plant's main gate were preventing automobiles from leaving the plant. He observed the incident, noting that one of the strikers was Rhoads, and called the police. The police spoke to the pickets and the blocked automobiles were driven out through the gate. Record, Vol. II, at 32–33. The driver of one of the blocked cars, an E-Systems employee named Deloras Lees, who had joined the strike initially but later opted to return to work, testified that her egress was prevented partly by the pickets and partly by a stalled car; she further testified that Rhoads was not in the picket line during the entire incident, but that Rhoads replaced one of the pickets who had initially blocked the cars. *Id.* at 99–100. The testimony of another driver buttresses this testimony. *Id.* at 120–21. Both drivers however, testified that Rhoads prevented their passage.

The following morning, pickets, again including Rhoads, prevented some cars from entering the plant. Peterson testified that when he came to work he noticed two cars one of which was driven by Lees, in the plant's main gate driveway. Rhoads again was not initially on the picket line, but she later joined it and blocked the passage of one car "by standing in front of it; [the pickets] were not walking, as pickets had been directed to walk." *Id.* at 35. The pickets directed other cars around the ones stopped in the driveway. Management personnel eventually escorted the drivers of the blocked cars into the plant. *Id.* at 37–39. Lees' testimony echoes Peterson's, *id,* at 100–102, as does that of another driver, *id.* at 121–23.

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[7] Neither the vendor nor Braher was employed by E-Systems.

Rhoads herself testified that, while picketing the gates, she and other pickets "moved back and forth from one end of the driveway to the other" and that she did not stop "in front of [Lees'] car" but was "walking in front of [Lees'] car." *Id.* at 235–36. Rhoads admitted, however, that on the morning of March 8 she in fact stood in front of Lees' car, thus blocking its passage for some fifteen minutes. *Id.* at 239.

The second incident occurred the morning of March 8, while Lees was being escorted from her car and into the plant by a management employee. Lees testified that as she passed Rhoads, she "felt something hit me, and I winced and turned my head * * * . I saw [Rhoads'] hand coming down—her arm coming down." *Id.* at 103. Lees later felt some stiffness in her shoulder, so she reported to the plant nurse, who discovered a bruise. Rhoads testified that, at the time Lees passed her, she carried a piece of

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string in her hand and that she "threw [her] arm out and shook [her] hand and hollered 'Scab!' " *Id.* at 245. She further testified that she did not intend to hit Lees and, to the best of her knowledge did not do so. *Id.* Another picket's testimony concurs with Rhoads' description of the incident. *Id.* at 280. No one testified that he had in fact seen Rhoads strike Lees.[8]

The ALJ concluded "that the operative course of the Rhoads discharge was, solely, Respondent's belief that that employee had assaulted Lees." *See id.*, Vol. I, at 307 (Decision of the Administrative Law Judge). Thus the ALJ discounted the car blocking incidents.[9] He did find that the evidence warranted the inference that Rhoads struck Lees and thus that Rhoads had engaged in strike misconduct. He concluded, however, that the incident was not so serious that it required a forfeiture of her reemployment. The NLRB agreed.

We agree that substantial evidence indicates that Rhoads engaged in strike misconduct. That evidence, however, indicates that Rhoads misconducted herself both by blocking the passage of employees going to and from work and by striking Lees. We will not condone such conduct. *See Mosher Steel Co. v. N.L.R.B.*, 568 F.2d 436 (5th Cir. 1978). Enforcement of the order insofar as it concerns Rhoads is therefore denied.

Enforcement GRANTED in part and DENIED in part.

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[8] It is worth mentioning that E-Systems filmed much of the strike activity. We have not viewed the films, but they apparently reveal that Rhoads did have string in her hands and that she did throw her arm out toward Lees, they do not prove that Rhoads struck Lees.

[9] The NLRB, however, disagreed with the ALJ's conclusion that the traffic blocking incidents were not an operative cause of Rhoad's dismissal. "Nevertheless," the NLRB maintained, "even assuming without deciding that Rhoads engaged in such conduct, we do not believe that such conduct, whether considered alone or with Rhoads' other conduct described above, was sufficiently serious to deny her the protection of Sec. 8d(a)(3) of the Act." *E-Systems, Inc., v. ECI Division*, 244 NLRB No. 36, at 2, n.1.

North Cambria Fuel Company, Inc., v. NLRB

Paul Baughman, Louis Zilli, Wayne Campbell, Ronald Smith, Roger Snyder, Norman Gorman, and Dale Basinger v. NLRB

645 F.2d 177 (3d Cir.), April 10, 1981; certiorari denied December 14, 1981—247 NLRB 1408

On petition to review Board Order

Before SEITZ, Chief Judge, ROSENN and SLOVITER, Circuit Judges

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SEITZ, Chief Judge: North Cambria Fuel Company (NCF) petitions for review of an order of the National Labor Relations Board (the Board) finding NCF guilty of violating section 8(a)(3) and (1) of the National Labor Relations Act by wrongfully discharging Hans Wuchina, a striking employee. Seven former NCF employees (the Baughman group) petition for review of that portion of the Board's order finding that they were lawfully discharged by NCF because they had engaged in serious strike misconduct. The Board cross-petitions for enforcement of its order.

I.

NCF and United Mine Workers of America Local 1880 (the Union) were parties to the National Bituminous Coal Wage Agreement of 1974. When that agreement expired on December 6, 1977, the Union engaged in an economic strike against NCF. The Union returned to work on March 26, 1978, when a new national agreement was reached with the Bituminous Coal Operators Association. NCF, which is not a member of the Association, refused to accept this agreement and continued negotiating with the Union. When an agreement could not be reached, the Union resumed its economic strike.

The strike was marred by violence and vandalism, and NCF obtained two state-court injunctions prohibiting the Union from maintaining more than four pickets at any NCF worksite and enjoining any Union intereference with the company's operations. On July 10, 1978, the day after a heated union meeting in which the Union's members were told to put on a "show of force," a group of union members, including Wuchina and the Baughman group, gathered near the entrance to NCF's I-22 coal-loading facility. When six coal trucks approached the facility the union members assembled at the entrance in an attempt to prevent the trucks from entering. The strikers shouted obscenities at the drivers, made obscene gestures, and picked up rocks.

Soon after the strikers blocked the entrance to the I-22 facility, the county sheriff arrived and ordered the strikers to disperse because they were violating a state-court injunction. The strikers moved across the highway and stayed there until after the sheriff left with four of the coal trucks. When the remaining two trucks attempted to leave, the lead truck was attacked by a group of strikers throwing rocks. Some of the rocks hit the truck breaking its windshield but not causing any injuries.

Following the incident at the I-22 facility, NCF filed contempt charges in state court. The court found the strikers, including Wuchina and the Baughman group, in contempt of court and ordered four strikers not involved in these appeals to pay for the damages to the truck. NCF also brought criminal charges against the strikers, charging them with riot, criminal trespass, and the propulsion of missiles into an occupied vehicle. The Baughman group entered guilty pleas to the reduced charge of disorderly conduct, and their fines were paid by the Union. Following entry of the pleas, NCF's attorney indicated that the guilty pleas could result in discharge because they were admissions of guilt with regard to the violence at I-22. The company subsequently discharged the Baughman-group employees because of their "criminal activity" at the coal-loading facility. Wuchina pleaded not guilty at his preliminary hearing and was bound over for trial. The day after his hearing Wuchina also was discharged by NCF because of his involvement in the incident at I-22. The charges against Wuchina were later dismissed for failure of the state to prosecute.

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The discharged employees filed complaints against NCF with the Board. After a hearing, the administrative law judge (ALJ) concluded that NCF had violated section 8(a)(3) and (1) of the National Labor Relations Act by discharging the employees because they had been engaged in protected strike activity. The Board agreed that Wuchina's discharge was wrongful, but it overturned the ALJ's finding that the Baughman group had not engaged in serious strike misconduct. The Board found that Wuchina left the I-22 facility when the sheriff ordered the strikers to disperse, but it concluded that the Baughman group had remained and was present during the rock-throwing incident.

II.

A. *NCF Petition*

NCF first argues that the record does not support the Board's finding that Wuchina left the I-22 facility after the sheriff ordered the strikers to disperse. We must, of course, uphold the Board's finding if it is "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e) & (f) (1976); *see Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). NCF directs our attention to evidence indicating that Wuchina not only remained at the I-22 facility but also participated in the rock-throwing incident. Nevertheless, we find that the Board's finding is supported by substantial evidence on the record. For example, Wuchina's testimony that he left the loading facility when the sheriff arrived was corroborated by the testimony of two other strikers, and a third union member testified that he saw Wuchina at a local ice cream stand fifteen minutes after Wuchina testified that he left I–22 and twenty minutes before the other strikers began to arrive. In addition, Wuchina was the only striker who pleaded not guilty to the criminal charges, and NCF allowed Wuchina to return to work after he signed a statement that he had not been involved in the violence at the coal-loading facility. Although the evidence presented at the hearing was conflicting, our review of the record indicates that the evidence supporting the Board's finding is not "overborne by evidence calling for contrary inferences." *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S.Ct. 453, 455, 95 L.Ed. 479 (1951).

Moreover, the ALJ made specific credibility determinations to support her finding that Wuchina left the I–22 facility before the rock-throwing incident. The ALJ emphasized that Wuchina's testimony was persuasive because he had been more candid about the events of July 9 and 10 than the other union witnesses and had made various admissions concerning those events. These findings were adopted by the Board. NCF asks this court to overturn these credibility determinations because they are "based on an inadequate reason, or no reason at all." *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978). This court, however, will not disturb the credibility findings of an ALJ as long as the ALJ considers all relevant factors and sufficiently explains his or her resolutions. *See NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 526 n. 14 (3d Cir. 1977). In this case, the ALJ fully explained her credibility findings, and these explanations show that she considered various factors relevant to credibility, such as demeanor, admissions, and self-interest.

NCF contends that even if Wuchina was not present at the I–22 facility during the rock-throwing incident, his actions before the sheriff's arrival constituted serious strike misconduct justifying termination of his employment. NCF disputes the ALJ's finding that Wuchina's only misconduct was crossing the road with the other strikers and congregating at the entrance to the loading facility in violation of the state-court injunction. Wuchina's testimony that he did not threaten or harass the truck drivers is "not believable" according to NCF. The ALJ, however, apparently credited Wuchina's testimony in this regard, and we hold that substantial record evidence supports this finding.

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NCF argues, however, that even if Wuchina did not use obscenities or attempt to provoke or threaten the truck drivers, his discharge was lawful because he aided and abetted fellow strikers who engaged in such strike misconduct. Union members who actively cooperate with strikers engaged in serious misconduct are equally culpable. *See, e.g., W. J. Ruscoe Co. v. NLRB*, 406 F.2d 725 (6th Cir. 1969); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385 (4th Cir. 1967); *cf. NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 373 (1939) (union members who delivered food and supplies to sitdown strikers occupying plant were aiders and abettors). However, even assuming that Wuchina's participation in the blocking of the facility's entrance is sufficient to show that he actively cooperated with the strikers who provoked and harassed the truck drivers before the sheriff's arrival, his discharge was not lawful unless the actions of those strikers amounted to serious strike misconduct. The ALJ found that these strikers shouted obscenities, used obscene gestures, picked up rocks, and attempted to provoke the truck drivers. NCF maintains that the caselaw demonstrates that these actions constitute serious misconduct because strikers have no right to intimidate nonstriking employees or to interfere with the employer's operations. The Board and the intervenors distinguish the cases relied on by NCF, arguing the they involved "substantially more egregious conduct" than that which occurred prior to the sheriff's arrival.

In *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3d Cir. 1939), *modified on other grounds*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940), this court stated that Congress must have contemplated that the protection of the National Labor Relations Act would extend to employees who commit minor acts of misconduct while exercising their right to strike. This court subsequently has found that the following do not constitute serious strike misconduct: a minor scuffle amounting at most to disorderly conduct, *see NLRB v. Buitoni Food Corp.* 298 F.2d 169 (3d Cir. 1962); abusive, vulgar and profane language, *see McQuaide,* 552 F.2d 519; and ambiguous threats, *see id.* The actions of the strikers before the sheriff's arrival fit within these cases. There was neither any violence nor any damages or injuries. Although the strikers used obscenities and attemped to provoke the truck drivers, these actions are not serious strike misconduct. In addition, interference with the employer's operations was slight and lasted only for a short time, and the strikers stopped blocking the entrance to the facility as soon as the sheriff arrived. The Board is entitled to deference in drawing the line between strike misconduct and protected activity. Therefore we uphold the Board's conclusion that the actions of the strikers before the sheriff's arrival did not constitute serious strike misconduct.

Finally, NCF argues that the Board abused its discretion by ordering it to pay twelve percent interest on back wages owed to Wuchina. NCF contends that this interest rate is improper because it bears no relation to the loss sustained by an employee who has not had the use of his money, does not reflect the cost of money to the average consumer, and exceeds the six percent legal rate of interest in Pennsylvania, which more closely approximates the interest rate paid on bank savings accounts. The Board, however, has broad discretion in fashioning remedies, and this discretion extends to the imposition of an interest rate. *See Local 777, Democratic Union Organizing Committee, Seafarers International Union v. NLRB,* 603 F.2d 862, 891 n. 84 (D.C. Cir. 1978). The interest rate imposed by the Board reflects an employer's cost of borrowing. Therefore, it is rationally related to the Board's objective of discouraging employers from "borrowing" from employees instead of paying backpay awards promptly. Furthermore, the legal rate of interest in Pennsylvania has no bearing on what interest rate is appropriate to effectuate the goals of federal labor legislation. Thus, we hold that the Board did not abuse its discretion by imposing a twelve percent interest rate on the backpay award.

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B. *Baughman Group Petition*

The seven employees in the Baughman group challenge the Board's finding that they engaged in serious strike misconduct justifying termination of their employment. They contend that their actions at the I-22 facility did not constitute serious strike misconduct as a matter of law. The Board's factual findings with respect to the Baughman group, which are not contested, are as follows: They went to the I-22 facility in response to the Union's call for a "show of force"; they participated in the initial blocking of the facility with approximately twenty other union members; one of them admitted picking up a rock and testified that "everybody else picked up a rock"; some of them shouted obscenities at the truck drivers; they did not leave I-22 after the sheriff ordered the strikers to disperse; they were in the group of fifteen strikers who remained across the road from the facility's entrance and attacked the coal truck with rocks after the sheriff left; they were held in contempt of the state-court injunction; and they pleaded guilty to disorderly conduct charges.

Unlike the activities at the I-22 facility before the sheriff's arrival, the rock-throwing attack rises to the level of serious strike misconduct. The strikers present engaged in violence that created a substantial risk of bodily injury and caused property damage. In addition, these strikers pleaded guilty to criminal charges stemming from this incident. We find that the actions of the strikers who remained after the sheriff's arrival would "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *McQuaide,* 552 F.2d at 528.

The Baughman-group employees appear to rest their argument on the fact that the Board did not establish that they, as opposed to the other strikers, actually threw the rocks. However, as noted earlier, union members who actively cooperate with strikers engaged in serious strike misconduct are equally culpable. Active cooperation has been show here. The Baughman group constituted one-half of the strikers remaining after the sheriff ordered the union members to disperse, and they crossed the road with the other strikers as the remaining coal trucks attempted to leave. The Board found that at least twenty rocks thrown by this group of fifteen strikers hit the truck in a very short time. Moreover, the guilty pleas to the criminal charges also support a finding that the Baughman group participated in and supported the strike misconduct. Therefore, the Board did not err in concluding that the employees in the Baughman group has engaged in serious strike misconduct.

The Baughman group also contends that the Board erred in placing upon the General Counsel the burden of establishing that the strikers had not engaged in serious misconduct. In placing this burden upon the General Counsel, the Board cited its decision in *Ohio Power Co.*, 215 NLRB No. 133 (1975). *Ohio Power* provides that if the employer shows that it reasonably held an honest belief that an employee engaged in serious strike misconduct, the General Counsel must show that such misconduct did not occur. The Baughman group argues that this procedural rule is improper because it "deprives employees of statutory rights without an affirmative showing of wrong-doing." The Baughman group apparently contends also that this rule in effect establishes a good faith defense for an employer and requires the General Counsel to rebut the employer's good faith.

The Board, however, did not require the General Counsel to rebut NCF's good faith belief, but only to bear the burden of proving that the strikers had not engaged in serious misconduct. It is settled that the burden of proving a violation of the National Labor Relations Act is on the General Counsel. *See, e.g., Arthur L. Morgan Union, Local 3 v. NLRB*, 463 F.2d 818, 819 n. 3 (D.C.Cir 1972); *NLRB v. St. Louis Cordage Mills*. 424 F.2d 976, 979 (8th Cir. 1970); *cf.* 29 U.S.C. § 160(c) (1976) (Board must dismiss complaint unless it finds upon preponderance of evidence unfair labor practice has been committed). Because the General Counsel must establish the essential elements of an unfair labor practice, it is not incorrect to require that the General Counsel prove that employees have not engaged in serious strike misconduct justifying their discharge. As a result, the procedural rule imposed by the Board in this case does not conflict with the provisions of the National Labor Relations Act or improperly deprive employees of protected rights. *See Dallas General Drivers, Local 745 v. NLRB*, 389 F.2d 553 (D.C. Cir. 1968); *NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495 (5th Cir. 1966).

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III.

The petitions for review of the order of the Board will be denied. The Board's cross-petition for enforcement of its order will be granted.

Pedro's Inc., d/b/a Pedro's Restaurant v. NLRB

652 F.2d 1005 (D.C. Cir.), April 13, 1981—246 NLRB 567

On petition to review Board Order

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Before McGowan, Chief Judge, and Robinson and Edwards, Circuit Judges

Opinion for the court filed by Circuit Judge Harry T. Edwards

Harry T. Edwards, Circuit Judge: Pedro's, Inc. (the "company") here seeks review of a decision and order of the National Labor Relations Board ("NLRB" or the "Board").[1] The Board has filed a cross-application for enforcement of its order. For reasons set forth below, we hold that only certain of the Board's unfair labor practice findings are entitled to enforcement, and remand this case to the Board for further proceedings.

I. BACKGROUND

Pedro's is a restaurant and bar located in Los Gatos, California. On about January 18, 1978, an employee of the restaurant contacted the Hotel and Restaurant Employees and Bartenders Union, Local 19, to discuss the possibility of organizing Pedro's employees. ALJ 3.[2] The union held a number of employee meetings, and several employees signed cards authorizing the union to serve as the exclusive bargaining representive of Pedro's employees. On February 2, 1978, a union representative hand-delivered to the company a letter stating that the union had obtained authorization cards from a majority of Pedro's employees. ALJ 4. On February 17, after company management had responded that they had a good faith doubt that the union represented an uncoerced majority of the employees, the union filed a petition for an election with the NLRB. An election was

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[1] *Pedro's, Inc.*, 246 N.L.R.B. No. 92 (Nov. 23, 1979).

[2] "ALJ" refers to the decision of Administrative Law Judge Earldean V. S. Robbins, adopted by the Board and appended to its decision and order.

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held on April 21, 1978, and the union was defeated by a vote of 56 to 36. ALJ 1.

The union challenged the results of the election, and filed unfair labor practice charges against the company. After a hearing, the Board found that Pedro's had committed several violations of Section 8(a)(1)[3] of the National Labor Relations Act ("NLRA" or the "Act")[4] during the course of the union campaign. ALJ 4–17. In addition, the Board ruled that this unlawful conduct undermined the union's majority and rendered doubtful or impossible the holding of a free and fair second election. ALJ 22-32. As a result, and pursuant to standards announced in *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the Board ordered the company to bargain collectively with the union. Pedro's challenges the unfair labor practice determinations made by the Board, and the issuance of a bargaining order in this case.

II. THE SECTION 8(a)(1) VIOLATIONS

1. *Introduction*

With two important exceptions set forth below, we hold that substantial evidence exists to support the findings of the Board that the company committed several violations of Section 8(a)(1) of the Act during the union campaign.[5] Although each of these findings is vigorously contested by the company, it is firmly established that findings of the Board are entitled to judicial enforcement if supported by substantial evidence. 29 U.S.C. § 160(e) (1976); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 546, 95 L.Ed. 456 (1951).

We are unable to find substantial evidence, however, to support a finding of the Board that the company violated Section 8(a)(1) by implementing a health insurance plan for its employees during the union organizational drive. Proper resolution of this issue requires a detailed review of the facts surrounding the implementation of the plan.

2. *The Facts Relating to the Establishment of the Health Insurance Plan*

The subjects of health insurance coverage for employees of the restaurant first arose in either late 1975 or at some unspecified time in 1976. ALJ 7. Employees were told on this first occasion that the restaurant was not in a suitable financial position to provide insurance. *Id.* However, on April 23, 1977, the subject again arose during an employee meeting, and Peter S. Ramirez, president and co-owner of the company, told employees that the company was in a position to begin to collect bids from insurance companies. ALJ 8. Ramirez stated that he thought coverage could be secured by the end of the year. No date was mentioned, however, as to when such a plan would go into effect. *Id.*

Although the company contends that several insurance companies were contacted unsuccessful after the April 23 meeting, the only documentary evidence to support this contention is a letter dated November 18, 1977, indicating that State Farm Insurance had been requested to submit a bid. ALJ 8. In mid-December 1977, however, Harold Hobson, an experienced insurance broker, was introduced to company management and agreed to solicit additional bids. *Id.* Hobson contacted the Prudential Life Insurance Company. Another broker, Jack Montgomery, also solicited bids from

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three additional underwriters. *Id.* During January, 1978, several meetings were conducted between company officials and representatives of the insurance companies. ALJ 8; A. 99, 263.[6] On February 1, 1978, Prudential submitted a formal, written proposal. ALJ 8. The company compared this proposal with the others subsequently received from other underwriters, and, on March 6, 1978, Pedro's executed an application with Prudential and tendered the initial premium that commenced coverage of the plan. ALJ 10.[7]

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[3] Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of rights protected by the Act.

[4] 29 U.S.C. §§ 151–69 (1976 & Supp. III 1979).

[5] These findings are described at length in the opinion of the Administrative Law Judge. *See* ALJ 4–17. In particular, the Board found that the company had violated the Act by coercively interrogating employees concerning their union activities; threatening an employee with discharge because of his union activities; soliciting grievances from employees in order to discourage them from supporting the union; promulgating a no-solicitation/no-distribution rule in order to discourage employees from engaging in union activities; and promising, announcing and granting benefits in order to induce employees to reject the union.

[6] "A." refers to the Appendix submitted in this case.

In mid-March, Ramirez held a meeting with the employees and informed them that they had been insured for a week. ALJ 7. He introduced Hobson and a representative from Prudential, who in turn explained the new health insurance coverage and gave the employees forms to fill out. No reference to the union was made at this meeting. *Id.*

3. *The Legality of the Grant of Insurance Benefits*

It is firmly established that an employer may not grant benefits to employees during an organizational drive in an attempt to influence the outcome of a pending election. In *NLRB. v. Exchange Parts Co.,* 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964), the Supreme Court held:

> We have no doubt that [Section 8(a)(1)] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.

375 U.S. at 409, 84 S.Ct. at 459. However, a benefit granted in the normal course of the business of an employer, without any motive of inducing employees to vote against the union, does not violate the Act. *NLRB v. Tommy's Spanish Foods, Inc.,* 463 F.2d 116 (9th Cir. 1972); *Jervis Corp., Bolivar Division v. NLRB,* 387 F.2d 107 (6th Cir. 1967).[8] The question presented, therefore, is whether the disputed insurance benefit was granted in the normal course of business by the employer, or outside the normal course of business in an attempt to influence the outcome of the election. In *Free-Flow Packaging Corp. v. NLRB,* 566 F.2d 1124, 1130 (9th Cir. 1978), the court stated that "[t]he question quite simply is whether the employer in good faith sought to comply with the requirements of law."[9]

In the present case, the Board acknowledged that preparations for the implementation of a health insurance plan had begun well in advance of the union organizational drive. The ALJ concluded that the company "had commenced serious attempts to secure health insurance coverage prior to the commencement of the union organizational campaign." ALJ 15. The Board here contends, however, that Pedro's "accelerated" its efforts to locate and implement a plan upon learning of the union activities of its employees.

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In reviewing the record in this case, we are unable to find any evidence that the company accelerated its efforts to implement a health insurance plan because of the union's organizational drive. The company had initially announced the possibility of an insurance plan in April of 1977. At least one insurer was contacted between April and November, 1977. Then, in December 1977, well before the union campaign began, the company secured the services of an experienced insurance broker. From the moment that Hobson entered the picture, substantial progress was made in obtaining bids and securing a plan. In addition, there was nothing unusual about the amount of time that it took Hobson to secure an insurance plan for the company, and the plan was implemented within a time frame that was consistent with industry practice. ALJ 10. In short, the Board has produced no evidence that the health insurance plan was implemented outside the normal course of business, in an attempt to induce employees to vote against the union.[10]

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[7] Hobson testified that, according to his experience with restaurants the size of Pedro's, a minimum of two months is required to execute a formal application for insurance coverage from the time that he is initially contracted to solicit bids. ALJ 10. We note that the insurance plan in this case was implemented approximately two months after Hobson began soliciting bids for the company.

[8] Indeed, it is unlawful for an employer to *withhold* a benefit during a union campaign that is customarily granted to employees. In *May Department Stores Co.,* 174 N.L.R.B. 770 (1969), the Board held that "an employer confronted with a union organizing campaign should decide the question of granting or withholding benefits as he would if a union were not in the picture; if his course of action in granting or withholding benefits is prompted by the Union's presence, he violates the Act." Courts have recognized the "dilemma" facing an employer considering a grant of benefits during a union campaign, for "to hold that in judging employer motive one must hypothesize a case where no union is watchfully present is to ask the employer to behave in an extraordinarily disinterested fashion and to ignore a company problem that management simply cannot be expected to ignore." *Free-Flow Packaging Corp. v. NLRB,* 566 F.2d 1124, 1130 (9th Cir. 1978).

[9] A violation of the Act may also be found where benefits, although granted for business reasons, are announced "right before an election and sprung on the employees in a manner calculated to influence the employees' choice." *NLRB v. Styletek, Division of Pandel-Bradford, Inc.,* 520 F.2d 275, 280 (1st Cir. 1975), *See also J. P. Stevens & Co. v. NLRB,* 461 F.2d 490, 492 (4th Cir. 1972). Thus, both the granting of the benefit and the timing of the grant must occur in the normal course of business.

We are aware that certain courts have imposed a heavy burden on an employer to justify a grant of benefits during a union election campaign.[11] In this case, the company presented evidence that it was the introduction of insurance broker Hobson, and not the union organizational drive, that advanced the implementation of the health insurance plan. The Board has found nothing to rebut this evidence. Thus, to the extent that the company had a burden to justify the implementation of the health insurance plan is a case of this sort,[12] that burden has been met.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 410, 84 S.Ct. 457, 460, 11 L.Ed.2d 435 (1964), the Supreme Court stated that "[o]ther unlawful conduct may often be an indication of the motive behind a grant of benefits while an election is pending, and to that extent it is relevant to the legality of the grant." Thus, if uncertainly exists as to employer motive, an improper motive may be inferred from the presence of unlawful conduct with respect to other events. In the present case, however, the company produced ample evidence that preparations for the implementation of a health insurance plan were begun well in advance of the union campaign, and that a plan was implemented in the normal course of business when negotiations were completed.

The Board has found nothing to rebut this evidence. Therefore, we do not believe that an inference of improper motive may be drawn from the fact that the employer has been found guilty of unfair labor practices relating to incidents that arose *after* the union campaign had commenced and that had nothing whatsoever to do with the insurance plan.

Our ruling here is consistent with the Board's own recent decision in *American Sunroof Corp.*, 248 N.L.R.B. 748 (1980). In *American Sunroof*, the company considered implementing a new pension plan for its employees for over two years. After a union organizational drive began at one plant, the company agreed on a final plan. Although this plan was announced to employees one day before a scheduled election, the Board found no violation of the Act. As stated by the Board:

> In sum, whatever dividend Respondent received from the announcement of the pension plan, it is clear that Respondent granted this benefit for reasons unrelated to the union activity and that it lawfully announced this benefit when, in the normal course of business, the plan was finalized.

248 N.L.R.B. at 749.[13]

Similarly, it is clear on the record before us that Pedro's implemented a health insurance plan for reasons unrelated to the union activity, and that it lawfully announced this benefit when, in the normal course of business, the plan was finalized. The Board simply has failed to present sufficient evidence that the company accelerated its efforts to implement a health insurance plan as a result of the union campaign. As a result, we decline to enforce the finding of the Board that the implementation of the plan violated Section 8(a)(1).[14]

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[10] Nor is there any evidence that the timing of the announcement that health insurance coverage had been secured was intended to influence the employees' choice. Employees were informed of the coverage one week after the plan was implemented, and well over a month before the April 23 election. In *NLRB v. Styletek, Division of Pandel-Bradford, Inc.*, 520 F.2d 275, 281 (1st Cir. 1975), the court noted that "[i]t is obvious that the closer a wage benefit comes to the day of the election, the harder it will be for the union to answer, and the greater the danger that the benefit will be manipulated to sway the election."

[11] For instance, the First Circuit has stated:

> We think when an employer, without having some fairly rudimentary factual explanation for the timing, anounces benefits after the petition for election is filed and two weeks before a representation election, it must take the chance that the Board will ascribe to it improper motives.

NLRB v. Styletek, Division of Pandel-Bradford, Inc., 520 F.2d 275, 282 (1st Cir. 1975).

The burden of proving unlawful employer motivation in granting a benefit is of course on the Board. *Jervis Corp., Bolivar Division v. NLRB*, 387 F.2d 107, 113 n.4 (6th Cir. 1967). The implementation of a benefit before a scheduled election, however, without a showing of business justification, has itself been deemed evidence of improper motive. *J. P. Stevens & Co. v. NLRB*, 461 F.2d 490, 493 (4th Cir. 1972). In *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1129 (9th Cir. 1978), the court held that this rebuttable inference of anti-union motive could not be drawn in cases in which an employer is placed in a "dilemma" as to whether to grant the benefit because a *withholding* of the benefit could be found to violate the Act. *See* note 6, *supra*.

[12] *See* note 11, *supra*.

[13] Although the pension plan in *American Sunroof* was implemented on a companywide basis while the union organizational activity was limited to one plant, we do not believe that the case is distinguishable on that basis. No showing is apparent in *American Sunroof* that the timing of the announcement, *one day* before a scheduled election at one plant, was not chosen to affect the outcome of the election at that plant. *Cf. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 675 (1st Cir. 1979) (Section 8(a)(1) violation found in announcement of corporatewide benefit during union campaign at one plant, since no showing made that timing of the announcement had not been chosen to affect the outcome of that campaign.).

III. THE BARGAINING ORDER

The Board concluded in this case that the Section 8(a)(1) violations committed by company undermined the union's majority and prevented the Board from holding a fair rerun election. ALJ 22–23. As a result, the Board ordered the company to recognize and bargain collectively with the union as the exclusive bargaining representative of the company's employees. Pedro's challenges the issuance of a bargining order in this case.

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 610–16, 89 S.Ct. 1918, 1938–1941, 23 L.Ed.2d 547 (1969), the Supreme Court made it clear that the Board may issue bargaining orders in (1) "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, 395 U.S. at 613, 89 S.Ct. at 1939, and in (2) "less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." *Id.* at 614, 89 S.Ct. at 1940.[15] With respect to this first category of cases, the Court left open the possibility that a bargaining order could issue without need of inquiry into the union's majority status. However, with respect to the second category of cases, the Court held that a showing must be made that the union once held a majority status and that

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> the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.

Id. The Supreme Court cautioned that the election process remains the preferred and most satisfactory method of ascertaining wheter a union has majority support, *id.* at 602–03, 89 S.Ct. at 1934, and emphasized that

> under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.

Id. at 615, 89 S.Ct. at 1940.

Relying on these standards in *Gissel,* courts have refused to enforce bargaining orders issued by the Board where substantial evidence did not exist that unfair labor practices were serious enough, or pervasive enough, to have the tendency to undermine majority strength and impede the election process. *Rapid Manufacturing Co. v. NLRB,* 612 F.2d 144, 150 (3d Cir. 1979); *NLRB v. Pilgrim Foods, Inc.,* 591 F.2d 110, 120 (1st Cir. 1978). In *NLRB v. Ship Shape Maintenance Co.,* 474 F.2d 434 (D.C. Cir. 1972), this court recognized that even though an unfair labor practice may justify setting aside the results of a Board conducted certification election, this

> does not mean that the effects of [an] unfair labor practice were sufficently pervasive and lingering to warrant a determination that a subsequent election could not be held which would be reasonable free from the adverse influence of the Company's unlawful action.

474 F.2d at 442. *See also Peoples Gas System, Inc. v. NLRB,* 629 F.2d 35 (D.C. Cir. 1980).

In the present case, the Board appeared to base the bargaining order largely on its belief that the implementation of the health insurance plan violated Section 8(a)(1). *See* ALJ 31. The Board found that Pedro's actions concerning the health insurance plan "would reasonably tend to encourage a belief on the part of the employees that the health insurance plan was instituted in specific redress of their grievances, thereby exerting a strong and lingering coercive effect on the employees' freedom of choice." *Id.* The Board argues in this court that Pedro's "conduct in soliciting employee grievances, promising that the most commonly expressed problems would be remedied, and granting benefits to employees is of particular significance in assessing the propriety of the Board's bargaining order in the instant case, since these these types of unfair labor practices are an especially effective means of destroying employee support for unionization and are likely to have longlasting effects." Brief for NLRB at 46.

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[14] Similarly, we decline to enforce a finding of the Board that the company violated § 8(a)(1) in informing employees at a January 26 employee meeting of progress made in securing health insurance coverage. As held in *NLRB v. Tommy's Spanish Foods, Inc.,* 463 F.2d 116 (9th Cir. 1972), an employer has the right to notify employees of efforts to improve employment conditions and benefits that were *in progress before a union campaign commenced.*

With these two exceptions, we enforce the § 8(a)(1) violations found by the Board, described in detail by the Administrative Law Judge. *See* ALJ 4–17.

[15] It is in this second category that the present case falls. As the Board concluded, Pedro's conduct "undermined the Union's majority and rendered doubtful or impossible the holding of a free and fair second election." ALJ 31.

We have held that the Board's finding that the implementation of the health insurance plan violated Section 8(a)(1) is not supported by substantial evidence and may not be enforced. As indicated above, the Board appeared to rely heavily on this violation to sustain the issuance of a bargaining order. Thus, absent a finding that the implementation of the health insurance plan violated the Act, a significant question is presented whether the remaining unfair labor practices in this case are serious enough, or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair rerun election.

We believe that it proper, however, to remand this case to the Board for a determination of whether a bargaining order remains appropriate in this case. In *Gissel,* the Supreme Court stated that it is for the Board, and not the courts, to determine the appropriateness of a bargaining

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order, "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." 395 U.S. at 612 n.32, 89 S.Ct. at 1939 n.32.[16] Therefore, we express no opinion here on whether a bargaining order may issue on the facts of this case, and leave that question to the Board to determine in the first instance.[17]

In considering whether a bargaining order may issue, absent a finding that the implementation of the health insurance plan violated the Act, we emphasize that the Board must also consider the conditions in the bargaining unit at the time it renders its decision on remand. *Peoples Gas System, Inc. v. NLRB,* 629 F.2d 35, 48 (D.C. Cir. 1980) ("[T]he Board should formulate its remedy in light of the violation with which it is faced *and* the conditions in the bargaining unit at the time it renders its decision.") (emphasis in original). As stated by this court in *Peoples Gas,* "[w]e think it clear that no responsible decision-making body can formulate a reasonable remedy without taking into account conditions at the time its order is entered." 629 F.2d at 45 n.18.

The order of the Board is enforced in part. The case is remanded to the Board for further proceedings.

SO ORDERED.

E. L. Wiegand Division, Emerson Electric Company v. NLRB

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, (UAW), Local 1020

650 F.2d 463 (3d Cir.), April 13, 1981; rehearing denied June 25, 1981; certiorari denied 455 U.S. 939—246 NLRB 1143

On petitions to review Board order

Before ADAMS and SLOVITER, Circuit Judges, and BROTMAN, District Judge*

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I.

SLOVITER, Circuit Judge: This matter is before us on cross-petitions for review filed by the Union and employer and the NLRB's cross-application for en-

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forcement. It arises from the employer's action in terminating payment of sickness and accident (hereafter "S and A") benefits to disabled employees during a strike by the bargaining unit of which they were members. The National Labor Relations Board found that the employer's action constituted an unfair labor practice and ordered that the employer make such retroactive payments to each employee disabled as of the beginning of the strike for the period until that employee actively participated in strike activity or showed public support for the strike. We find substantial evidence in the record to support the finding of the Board that the employer committed an unfair labor practice in terminating S and A benefits to employees when the strike began.

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[16] *See also NLRB v. Ship Shape Maintenance Co.,* 474 F.2d 434, 442 n.23 (D.C. Cir. 1972) ("[I]t is generally for the Labor Board, and not the reviewing courts, to make the determination of whether the circumstances of a particular case warrant issuance of a remedial bargaining order.")

[17] All other aspects of the Board's remedial order are entitled to enforcement.

*Hon. Stanley S. Brotman, United States District Court Judge for the District of New Jersey, sitting by designation.

We cannot, however, approve the Board's order insofar as it permits payments to be halted to disabled employees on the basis of public support of the strike, and to that extent grant review and modify the Board's order.

II.

On October 31, 1977 the collective bargaining agreement between Local 1020 of the UAW (the Union) and the E. L. Wiegand Division, Emerson Electric Company ("the employer" or Wiegand) expired. As of that date, 23 of the unit's approximately 1100 employees were receiving S and A payments from the employer under a plan established by the 1971–1974 and the 1974–1977 collective bargaining agreements.[1] The plan provided for payments by the employer to disabled hourly employees of sixty percent of the employee's average weekly wages for up to thirty-nine weeks of disability, the length of time of such payments dependent on seniority. "Disability" was defined by reference to a written benefits policy as meaning that the employee is "prevented, solely because of injury or disease from engaging in his regular or customary occupation and is performing no work of any kind for compensation * * *."

Negotiations begun in the fall of 1977 were unsuccessful, and the Union called a strike to commence on November 1. During a negotiation session on the afternoon of October 31, the Union requested that the employer continue to pay premiums for hospitalization, insurance and major medical on behalf of striking Union members, with the understanding that the Union would reimburse the employer for those premiums. That evening, in the final bargaining session, the employer proposed that it pay and be reimbursed for these premiums and for continued S and A payments to employees then on sick leave. The S and A payments had not previously been raised in the negotiations. The Union asserted that employees on sick leave were not participants in a strike and that the employer had a legal obligation to continue making such payments. The employer responded that S and A payments would be halted "if [the Union] went out on strike."

On November 1, 1980 the Union went out on strike and the employer immediately halted all disability payments. The strike was 100% effective. During the strike's four month duration, the circumstances with respect to the 23 disabled employees varied. Several of the disabled employees contacted the employer to inform it that they were still disabled and not participating in the strike. Seven of the disabled employees sent medical certification to the employer that they were recovered and able to return to work. At least one of those employees obtained certification of his ability to return to work and later was seen on the picket line. Other employees who were disabled as of October 31, 1977 but able to work at the conclusion of the strike were identified as on the picket line or otherwise engaged in strike activity.[2] At least one employee was in the hospital before the strike began and remained there for a substantial time after the strike ended.

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After the disabled employees were without S and A payments for six weeks, the Union modified its policy not to pay strike assistance to employees on sick leave. It announced that it would extend strike assistance to them to alleviate the hardship caused by the employer's action in terminating benefits, contingent on reimbursement by the employees from any later Board award against Wiegand. The Union then filed charges with the Board, and the General Counsel of the Board filed the complaint which led to these proceedings.

The strike continued until February 28, 1978. As part of the strike settlement, the parties agreed that "all pending grievances, charges, civil and/or criminal proceedings arising out of or in relation to actions taken or occurring during the strike * * * shall be withdrawn with prejudice or the parties shall cause them to be so withdrawn." When the strikers returned to work, the employer resumed payment of S and A benefits to those employees who were still disabled.

The administrative law judge concluded that the employer committed an unfair labor practice within the meaning of sections 8(a)(1) and (3) of the Act by withholding payment of S and A benefits from disabled employees. The administrative law judge reasoned that these disabled employees were not in a position to choose to withhold labor on the day the strike began; only when they were again able to work did they have the choice and could they become strikers. Each disabled employee was therefore entitled to S and A payments from the date on which the strike began to the date on which he or she was well enough to return to work. The administrative law judge also refused to dismiss the complaint notwithstanding the provision in the strike settlement agreement stipulating that all grievances, charges, and proceedings would be withdrawn. He relied on section 10(a) of the Act and cases interpreting it which held that the parties cannot divest the Board of jurisdiction over unfair labor practices by private agreements.

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[1] The Board and the parties refer to 23 employees receiving Sickness and Accident (S and A) benefits. The ALJ referred to 22 employees. The exact number can be determined at the compliance proceedings.

[2] On the record before us we cannot determine which of such participants in the strike were still medically disabled at the time of their strike activity. The parties in these cross-petitions are agreed that such employees will be identified in the compliance phase of these proceedings.

The Board affirmed the rulings, findings and conclusions of the administrative law judge and adopted his recommendations except with regard to the remedy ordered. The Board stated that, "For all practical purposes, any employee, disabled or sound, who affirmatively demonstrates his support of the strike by picketing or otherwise showing public support for the strike, has enmeshed himself in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits." 246 N.L.R.B. No. 162, slip op. at 4, 103 L.R.R.M. 1073, 1074, [1979-80] N.L.R.B. Dec. (CCH) ¶16,619 at 31,033 (1979). Therefore, the Board determined that payments should end either on the date on which an employee was well enough to work, or when the employee had actively participated in strike activity or shown public support for the strike, whichever was earlier.

The employer petitions for review and contends that the Board erred in refusing to dismiss the complaint, that the Board lacked substantial evidence for its finding of an unfair labor practice, and that it abused its discretion in overruling a prior decision with retroactive effect. The Union petitions for review on the ground that the Board improperly declined to order payments for the periods after employees showed public support for the strike but before they were well enough to work. The Board requests enforcement.

III.

As an initial matter we must consider whether the Board properly denied the employer's motion to dismiss the unfair labor practice charges on the basis of the strike settlement agreement in which the Union agreed to the withdrawal of all charges relating to the strike. Assuing arguendo that the employer correctly construes the agreement, its operation is subject to section 10(a) of the National Labor Relations

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Act which provides that the Board's power to remedy unfair labor practices shall not be affected "by any other means of adjustment * * * that has been or may be established by agreement, law, or otherwise * * *." 29 U.S.C. § 160(a) (1976).

By well established principle, private contracts may not be used to legitimate unfair labor practices nor to divest the Board of jurisdiction over such practices. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967); *J. I. Case Co. v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944). In *J. I. Case Co.*, the Supreme Court affirmed that the Board acts as a public body charged in the public interest with the duty of preventing unfair labor practices, and stated, "[w]herever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." *Id.* at 337, 64 S.Ct. at 580. *In International Union of Electrical, Radio and Machine Workers, Local 613 v. NLRB*, 328 F.2d 723 (3d Cir. 1964), this court rejected the company's argument that a term in its post-strike collective bargaining agreement restricted the Board's power to enter prospective relief only and divested it of power to enter an order of reinstatement with back pay. We held that the power of reinstatement with back pay was exercised in vindication of the public policy encompassed by the Act, and thus "the rights of discriminatorily discharged employees under the statute are not subject to private adjustment. Such an adjustment, if made, cannot bar the Board's exercise of its statutory authority." *Id.* at 727. *See also Lodge 743, International Association of Machinists v. United Aircraft Corp.*, 337 F.2d 5, 8-9 (2d Cir. 1964), *cert. denied*, 380 U.S. 908, 85 S.Ct. 893, 13 L.Ed.2d 797 (1965).

The policy reflected in the precedent and expressed in section 10(a) prevents a party from engaging in unfair labor practices that may coerce a favorable labor agreement and then insulating itself from Board sanctions by exculpatory provisions in that agreement. The Board properly refused to dismiss the complaint and proceeded to the merits, as we also do.

IV.

The first issue on the merits of this appeal is whether substantial evidence supports the Board's conclusion that the employer, Wiegand, committed an unfair labor practice. The Board's conclusion that an unfair labor practice occurred is based on two findings. First, it found that the disability payments were accrued benefits rather than current wages. Second, it found that these benefits were cut off by Wiegand with the intention of coercing and restraining protected union activity with respect to the strike through the imposition of a sanction against certain employees if other employees engaged in strike activity.

The parties agree that these findings, if correct, would support a conclusion that an unfair labor practice was committed. The Supreme Court held in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), that a refusal to pay accrued vacation benefits to those participating in an economic strike was an unfair labor practice, even absent proof of an improper motivation by the employer. The Court found two principles controlling:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives

> since proof of motivation is most accessible to him.

Id. at 34, 87 S.Ct. at 1798 (emphasis in original).

The Supreme Court had held earlier in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963), that the Board might properly infer the existence of discriminatory motivation or improper intent without evidence of illegal subjective intent. Where the employer has engaged in conduct that is "inherently discriminatory or destructive" by its very nature, the employer must be held to intend the consequences which foreseeably and inescapably flow from it. *Id.* at 228, 83 S.Ct. at 1145. The employer may offer evidence of proper motivation, but it must prove a business purpose of overriding significance. *Id.* at 231, 83 S.Ct. at 1147. In *Erie Resistor*, the Court found that a grant of additional seniority (super-seniority) to employees working through a strike could not be justified as necessary to continued operation during the strike.

Although acknowledging these legal principles, the employer argues that the S and A benefits at issue here are wages rather than accrued benefits, and that the record cannot support a conclusion of antiunion motivation. Our standard of review is whether the Board's findings are supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). As the Court has frequently noted, the Board has been delegated the function of balancing the conflicting interests of employer and employees, subject to limited judicial review. *NLRB v. Erie Resistor, Corp., supra*, 373 U.S. at 236, 83 S.Ct. at 1149.

A.

The relevant precedents establish the posts between which this issue falls. On one side, as the employer argues, it is not required to finance a strike against itself by paying wages or other similar expenses. *General Electric Co.*, 80 N.L.R.B. 510 (1948) (wages); *Towne Chevrolet*, 230 N.L.R.B. 479 (1977) (insurance policy premiums); *Ace Tank and Heater Co.*, 167 N.L.R.B. 663 (1967) (medical insurance premiums). On the other side, an employer may not withhold payment of already earned or accrued benefits contingent upon the cessation by employees of a legitimate economic strike. This situation has arisen most frequently in the context of accrued vacation benefits. *See NLRB v. Great Dane Trailers, Inc., supra,* 388 U.S. at 32, 87 S.Ct. at 1796; *Allied Industrial Workers, Local 289 v. NLRB,* 476 F.2d 868, 875–876, 878 (D.C. Cir. 1973); *NLRB v. Jemco, Inc.,* 465 F.2d 1148 (6th Cir. 1972), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 911, 34 L.Ed.2d 690 (1973); *NLRB v. Frick Co.,* 397 F.2d 956 (3d Cir. 1968). *Accord, Indiana & Michigan Electric Co.,* 236 N.L.R.B. 986 (1978) (employer unlawfully withheld accumulated leave pay until employee ceased strike), *enforced without opinion,* 610 F2d 812 (4th Cir. 1979).

In determining whether the S and A benefits in question fall most closely to one side or the other, the Board adopted the findings and conclusions of the ALJ that:

> the benefits being paid the sick people were not compensation for contemporaneous delivery of services at all, but rather payment for past work performed. Their entitlement to that money depended not one wit upon their working at that time. That it was deferred payment for work—albeit conditional upon their being sick and disabled—is true, but for work performed by them in the past, not in the present. Indeed, this is why the man who worked 30 years received more weeks of S and A benefits while sick than the man who had only performed as an employee a year, or two, or three. If the sick man must come out of the hospital and work during a strike to receive a benefit he sweated for in prior years, must the retiree, who is collecting the pension he earned over 35 years, also come back, merely because the working complement is striking at the moment? To ask the question is to answer it.

Accrued benefits, in contrast to wages, are deferred compensation for work already done. They may take the forms of wages due for past work, vacation time, seniority rights and other conditions of employment linked to past service. *E.g., NLRB v. Darling & Co.,* 420 F.2d 63 (7th Cir. 1970), *enforcing* 170 N.L.R.B. 1068 (1968) (severance pay); *Swift Service Stores, Inc.,* 169 N.L.R.B. 359 (1968) (Christmas bonus). Such benefits may be defeasible; for example, vacation time may be forfeited if not taken within a calendar year. The test in deciding if benefits have accrued is whether they are due and payable on the date on which the employer denied them. *Allied Industrial Workers, Local 289 v. NLRB, supra,* 476 F.2d at 876.

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The S and A benefits in this case have the distinguishing characteristic of accrued benefits. As the ALJ and the Board found, the right to and the total amount of benefits are tied to the duration of past services and the wages paid for them. Although they are conditional on the employee suffering and continuing to suffer a disabling illness or injury, they do not depend on any return to work or on any future services to the employer.

Wiegand contends that the continued payment of benefits is conditional also on no strike occurring because the applicable benefit plan defines disability as the condition of being unable to work "solely because of" illness or injury. It argues that here the employees would not have worked during the strike because they were union members and because the strike was fully effective. Since they were not absent from their jobs solely because of physical disability, it claims they are not entitled to benefits.

We agree with the Board that the employer's reading of the disability definition is not tenable. The plan defines disability in terms of the employee being prevented from engaging in his or her "regular and customary occupation" because of illness or injury. This definition turns on the physical capacity to carry on one's occupation. Nor can we accept the employer's suggestion that payment of S and A benefits is dependent upon the availability of work for that particular employee. It has pointed to no language limiting the right to benefits in such a way.

In short, nothing in the record of this case indicates that the benefit plan contemplated that employees who were incapable of performing their usual occupations for the employer would not be deemed disabled for the purposes of receiving benefits. Rather, if an employee is certified as disabled, the only relevant consideration within the period for which benefits are due is whether the employee has again become able to work. Therefore, we find substantial basis supporting the Board's conclusion that the S and A benefits were accrued benefits and not wages, and were due and payable within the period of the strike.

B.

Wiegand contends that the Board had no basis for its conclusion that Wiegand intended to coerce and restrain protected activity by its termination of the S and A benefits. Pointing to evidence of its announced reliance on *Southwestern Electric Power Co.*, 216 N.L.R.B. 522 (1975), Wiegand claims that its action can only be construed as properly undertaken in good faith reliance on the advice of its counsel.

Under *NLRB v. Erie Resistor Corp., supra,* an intent to encroach upon protected rights may be found when discriminatory consequences foreseeably flow from an action; it is unnecessary to show specific illegal intent. Similarly, the test of coercion or interference with protected rights under Section 8(a)(1) is whether the action undertaken by the employer reasonably tends to restrain or interfere with the employee's exercise of those rights. *NLRB v. Clearfield Cheese Co.*, 322 F.2d 89, 94 (3d Cir. 1963). Under *NLRB v. Great Dane Trailers, Inc., supra,* the Board may find the necessary intent even if the employer shows its conduct had a proper motivation, so long as the impact of the discrimination by the employer is "inherently destructive" of section 7 rights. Only when the adverse effect is "comparatively slight" must antiunion motivation be proven as a separate element of the unfair labor practice if the employer raises the issue.

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Where, as here, the employer's action affected a benefit that could amount to as much as 45% of an employee's annual income, one might argue that it is so destructive of important rights that subjective intent could be deemed irrelevant. However, we need not decide the issue of intent on that basis because the Board has specifically found antiunion motivation in this case, finding that "[Wiegand's] announcement of the termination of these benefits was intended to coerce and restrain the protected union activity with respect to the strike, by imposing a sanction against certain unit employees if others in the unit engaged in strike activity." 246 N.L.R.B. No. 162, slip op. at 2, 103 L.R.R.M. at 1073. The Board expressly relied on Wiegand's "declaration that these benefits would not be paid to employees who would otherwise receive them came at a time when a strike at its facility was imminent, but before there was any showing of how widespread the strike would be, and before [Wiegand] was aware that any of the employees who were unable to work ratified or actively supported the strike." *Id.* The Board also relied on the fact that "[Wiegand] terminated these benefits immediately upon the commencement of the strike despite a union representative's clear protest that the individuals who were unable to work were not participants in any strike."[3] *Id.* The context of the employer's decision as conveyed in the final negotiation session adequately supports the Board's conclusion that antiunion motivation was present.

Although Wiegand introduced evidence of its having proceeded on the basis of legal precedent for its actions, this evidence does not invalidate the inference drawn by the Board. Such evidence is self-serving and may be weighed together with all other evidence by the Board. As this court has said in the context of unlawful discharge cases,

> [t]here is clearly no obligation on the Board to accept at face value the reason advanced by the employer. The concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a preponderance of evidence, and the reasonable inferences drawn therefrom, that the discharge was in fact motivated by the employer's opposition to the employee's union activities.

NLRB v. Buitoni Foods Corp., 298 F.2d 169, 174 (3d Cir. 1962). *Accord, NLRB v. G & J Co.*, 346 F.2d 960 (3d Cir. 1965). *See also NLRB v. Garry Manufacturing Co.*, 630 F.2d 934, 945 (3d Cir. 1980) (In spite of a concurrent permissible justification, an action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity); *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978). This is equally applicable where an employer offers a rationale for other discriminatory action. Therefore, even if Wiegand might properly have relied on *Southwestern Electric* to immunize its action, a question we consider hereafter, the Board might still conclude that Wiegand did not in fact do so. We find substantial evidence to support the Board's conclusion that Wiegand intended to coerce and restrain protected activity.

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[3] The record also includes evidence that Wiegand attempted to use its threatened cutting off of disability benefits to secure concessions from the union on the conduct of the strike, and itself brought up the question of these benefits at the last bargaining session without any earlier indication of its position that these were not in fact accrued benefits. Appendix at 91-92, 200-05.

V.

Wiegand vigorously asserts that the Board acted improperly in retroactively changing its rule in *Southwestern Electric Power Co.,* 216 N.L.R.B. 522 (1975). In its decision in this case, the Board expressly overruled *Southwestern Electric* to the extent it was inconsistent with the result in this case. While we believe that under the circumstances of this case, application of

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the NLRB's new approach would not be arbitrary or capricious, we also believe that Wiegand misperceives both the relevance and the effect of the Board's reference to *Southwestern Electric* in the decision here.

In *Southwestern Electric* the Board, acting through a three member panel, held that "on the basis of the facts presented, [the employer] did not violate the Act by treating as strikers the six unit employees on sick leave at the beginning of the strike." *Id.* at 522. The decision, by a 2 to 1 vote, was based on the reasoning that the employer had no way of knowing for certain that the employees on sick leave, all of whom were members of the Union, did not support the strike activities of their colleagues. Since the Board agreed with the ALJ that the employer's belief that the employees in question ratified and supported the strike was reasonable, the complaint against the employer was dismissed. The Board expressly rejected a claim that cancellation of sick leave benefits represented discrimination against union members, saying that there was "no basis" in the case upon which to predicate such a finding. Member Fanning, then Acting Chairman, dissented on the ground that the majority opinion would require that employees on sick leave disavow legal strike action in order to receive their sick pay, which would constitute a clear violation of the section 7 rights of the employees.[4]

In the present case the Board, by a 3 to 1 majority on this issue, took the opportunity to express its agreement with Chairman Fanning's dissenting opinion in *Southwestern Electric* that the employees had a section 7 right to refrain from declaring their position on a strike while they were medically excused. 216 N.L.R.B. at 523. The Board here stated, "an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike." 246 N.L.R.B. No. 162, slip op. at 3, 103 L.R.R.M. at 1073. One member of the Board dissented, expressing his adherence to the analysis in *Southwestern Electric.*

Retroactive application of newly adopted administrative rules or interpretations is not *per se* arbitrary. Instead, "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery Corp.,* 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). *See also NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294–95, 94 S.Ct. 1757, 1771–72, 40 L.Ed.2d 134 (1974). In essence, the courts analyze whether the inequity of retroactive applications is counterbalanced by sufficiently significant statutory interests.[5] *See, e. g., Retail, Wholesale and Department Store Union v. NLRB,* 466 F.2d 380 (D.C.Cir. 1972); *NLRB v. Majestic Weaving co.,* 355 F.2d 854 (2d Cir. 1966).

In this case, even were the Board's order requiring payment of S and A benefits to those employees disabled during the strike to be considered as a retroactive application of a changed interpretation, we would not find its impact to be inequitable. The employer is merely being required to pay an accrued benefit, a form of deferred compensation for service it has already received. The effect therefore does no more than prevent unjust enrichment to an employer by its retention of benefits due to its employees.

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[4] Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) [section 8] of this title."

29 U.S.C. § 157 (1976).

[5] In *Retail, Wholesale and Department Store Union v. NLRB,* 466 F.2d 380, 390 (D.C.Cir. 1972), the court enumerated the following factors to be considered in resolving the problem of retroactive application of a Board holding: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely occupies a void in an unsettled area of law, (3) the extent to which the party against whom the new holding is applied in fact relied on the former rule, (4) the degree of the burden imposed, and (5) the statutory interest in application of this new rule.

Another apparent difference between this case and the decision in *Southwestern Electric* is the nature of the benefit that was denied. In that case, the "sick pay" consisted of "wages being paid to six employees pursuant to a wage continuation policy whereby employees who are sick and unable to work continue to receive, for specified periods and under certain conditions, the wages they would have earned had they been working." 216 N.L.R.B. at 524 (Decision of the ALJ). Therefore, the issue was whether discontinuance of benefits comparable to wages during a strike constituted an unfair labor practice. There was no indication in *Southwestern Electric* that the sick pay was an accrued benefit. In this case, we have already decided that the benefits discontinued fall into the category of accrued benefits. Therefore, the employer had no more right to discontinue such benefits than it would have had to deny strikers their accrued vacation time.

The ALJ recognized the distinction between the case before him and that presented in *Southwestern Electric.* He found this case more analogous to the Board's decision in *Indiana & Michigan Electric Co.,* 236 N.L.R.B. 986 (1978), *enforced without opinion,* 610 F.2d 812 (4th Cir. 1979), where the Board found the employer committed an unfair labor practice by withholding leave pay due employees on the basis of work previously performed. Thus the ALJ here stated that the "employees named in this complaint had already earned their S and A benefits before the strike started."

The fact that the Board has chosen this case as the vehicle for repudiating its prior interpretation in *Southwestern Electric* cannot give the employer any basis for complaint. This case is distinguishable on its facts because of the finding by the Board of intent by the employer to coerce or restrain protected activity, a finding not made in *Southwestern Electric.*[6] The difference is illustrated by the Board's decision in *Pease Co.,* 237 N.L.R.B. 1273 (1978). There the Board found that an employer committed an unfair labor practice when it halted disability benefits notwithstanding the employee's protest of termination of benefits statement that he was not participating in the strike. The Board held that because of these facts, the case was not governed by *Southwestern Electric,* which involved the *reasonable* belief of an employer. In light of the foregoing differences the Board was justified in rejecting Wiegand's defense of good faith reliance on *Southwestern Electric.*

VI.

Having concluded that the Board was warranted in finding that Wiegand had committed an unfair labor practice and in requiring Wiegand to pay S and A benefits to the disabled employees, we must still decide whether there is any basis for the Board's decision that such benefits can be withheld for the periods after the employees actively participated in strike activity or showed public support. We conclude that this limitation cannot be supported.

The Board justified its order that no payment of S and A benefits shall be due for the periods subsequent to any employee's active participation in strike activity or public support for such activity on the ground that such affirmative demonstration of support "enmeshed" an employee "in the ongoing strike activity to such an extent as to terminate his right to continued disability benefits." 246 N.L.R.B. No. 162, slip op. at 4, 103 L.R.R.M. at 1074. It concluded that its limited remedy represented a fair accommodation between employees' rights to disability benefits without disavowing the strike and the employer's right to refuse to finance a strike against itself.

Member Jenkins dissented from the Board's failure to order the full payment of all S and A benefits during their disability period. He stated that only the employee's recovery would terminate the employer's "fully vested obligation to continue [S and A] payments for all employees on disability prior to the strike", *id.* at 7, 103 L.R.R.M. at 1074; that disabled employees are inherently unable voluntarily to withhold services from the employer in support of a labor dispute; and that the employer's prior commission of an unfair labor practice in terminating the benefits may have caused, and therefore excuses, the strike participation of the disabled employees.

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[6] As the Board and the Union argue, the employer here had significantly different information when it announced its decision to terminate S and A benefits than the employer had in *Southwestern Electric.* This employer had received an explicit statement before the strike that employees on sick leave were not strike participants. After the termination, the employer received protests from at least some of the disabled employees who stated they were not on strike, precisely the evidence that the Board noted was absent in *Southwestern Electric.*

Both petitioners attack the remedy ordered by the Board. We have already rejected Wiegand's contention that no S and A payments are proper. The Union, however, asserts that the Board's findings that these benefits were accrued, that disabled employees had non-striker status, and that employees have a section 7 right to refrain from strike action while disabled are inconsistent with the Board's determination that S and A benefits may be cut off by a showing of strike support. It argues that benefits should be continued until employees are no longer eligible or are no longer physically disabled.

Our review of the Board's choice of remedy is necessarily limited by deference to its administrative competence in deciding what means best serve the purposes of the NLRB. Under section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), the Board, upon finding that a person has committed an unfair labor practice, shall require such person to cease and desist from its unfair labor practice and to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act * * *." However, it is patent that the Board's remedy cannot be inconsistent with the reasoning of the decision itself, or with its still applicable principles enunciated in other cases. If it is, then its choice of the remedy may not be enforced. As we have recently said, "[i]t is our duty to insure that the Board adheres to its established criteria unless it clearly decides to modify or alter those standards." *NLRB v. Pincus Bros., Inc.—Maxwell,* 620 F.2d 367, 372 (3d Cir. 1980).

The Board asserts that its remedy serves the well established policy of protecting an employer from financing a strike against itself. *E.g., General Electric Co.,* 80 N.L.R.B. 510 (1948). However, the entire basis of the Board's decision was that the S and A payments were to be considered as accrued benefits. Since an employer may not deny a striking employee accrued benefits, such as vacation pay, because of his or her active participation in a strike, it follows that the employer may not deny the S and A benefits merely because of the disabled employee's approval of or participation in strike activity. The Board's reliance on its decision in *Abilities & Goodwill, Inc.,* 241 N.L.R.B. No. 5, 100 L.R.R.M. 1470, *enforcement denied on other grounds,* 612 F.2d 6 (1st Cir. 1979), is unpersuasive. In that case the Board held that an employer may avoid back pay liability by showing that the employee would not have accepted a reinstatement offer or is otherwise willfully withholding his or her services. Back pay is distinguishable from accrued benefits. Back pay is a statutory remedy that shifts the risk of loss of wages from the employee to the employer if it has committed an unfair labor paractice, generally an unlawful discharge. It cannot be analogized to accrued benefits which are payments for services the employer has already received. Even though such benefits, whether disability payments, vacation pay, or previously earned wages, may provide the living expenses of those who oppose the employer, they do not represent unfair strike financing by an employer, and the Board may not justify its order on that basis.

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Moreover, the Board's decision contravenes the reasoning it applied in *Abilities & Goodwill, Inc., supra,* where it refused to limit the remedy to an employee who, after being illegally discharged, engaged in strike activity. The Board was unwilling to presume the absence of a connection between the employee's conduct and the unfair labor practice. There, the Board stated, "[B]ecause the uncertainty [of the motives of the striker] is caused by the employer's unlawful conduct, we will not indulge in the presumption that the discharge itself played no part in keeping the employees out of work. Rather, it seems to us more equitable to resolve the ambiguity against the wrongdoer * * *." 241 N.L.R.B. No. 5, slip op. at 5, L.R.R.M. at 1471. Here where the employer's termination of the S and A benefits was found to be an unfair labor practice, it follows that such unlawful conduct may have induced strike participation and the employer should not be allowed to benefit from a presumption that its conduct did not induce the participation. *See International Union of Electrical, Radio* *and Machine Workers, Local 613 v. NLRB*, 328 F.2d 723, 726 (3d Cir. 1964) (Where employer commits an unfair labor practice during an economic strike, it may be required to give back pay for the time the strike was prolonged).

Furthermore, the Board's order in this case is inconsistent with its holding, still viable, that an employee who pickets during off-duty time cannot be regarded as a "striker" against whom an employer can act. *See M Restaurants, Inc.*, 223 N.L.R.B. 725 (1976); *Shoppers Drug Mart, Inc.*, 226 N.L.R.B. 901, 910 (1976); *Edir, Inc.*, 159 N.L.R.B. 686 (1966). *See also NLRB v. Circle Bindery, Inc.*, 536 F.2d 447 (1st Cir. 1976) (boycott support); *Coors Container Co.*, 238 N.L.R.B. 1312, 1319 (1978) (display of boycott signs on vehicle); *Sears, Roebuck & Co.*, 168 N.L.R.B. 955, 956–57 (1967) (boycott leafleting after hours). So long as the employee meets the work commitment to the employer, the employer cannot act against the employee for his or her off-time actions, or section 7 rights would be merely empty promises.

Obviously, the employer need not continue to pay S and A benefits once the employee is no longer disabled. Active participation in strike activity may be telling, or even presumptive, evidence of cessation of disability. However, whether such activity in fact reflects the end of the disability period may depend on the nature of the activity and the physical demands of the particular employee's job. Such details can be resolved in the compliance proceeding. On the other hand, use of the mere expression of public support for the strike by a disabled employee, such as one still in the hospital, as the basis for termination of benefits is inherently destructive of the employee's section 7 rights.

Accordingly, the Board's decision to end benefits on the basis of active participation or public support for strike activity cannot stand. It is internally inconsistent with the Board's own rationale in this case. It varies from the Board's policies as set out in previous board decisions, and frustrates effectation of section 7 rights.

VII.

We have found that the Board properly concluded that Wiegand had committed an unfair labor practice and ordered payments of sickness and accident benefits, but improperly limited those payments. Accordingly, we will grant review and enter a decree modifying the order of the Board to authorize payment of sickness and accident benefits for the maximum period of each disabled employee's eligibility or for such employee's period of disability as defined in the plan, whichever is shorter. As so modified, we will enforce the order of the Board pursuant to our power under section 10(f), 29 U.S.C. § 160(f) (1976).

ADAMS, Circuit Judge, concurring: I concur in the judgment of the Court because I believe there is sufficient evidence to support the conclusion of the National Labor Relations Board that the sickness and accident benefits (S&A benefits) were accrued and that Wiegand committed

an unfair labor practice when it terminated these benefits. Under the circumscribed scope of judicial review of Board orders, we may not substitute our judgment for that of the agency; rather, we are constrained to uphold findings supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Although I agree with the reasons expressed by the majority for upholding the Board's findings on the accrued nature of the benefits, I write separately to emphasize a finding that in my view is crucial to the resolution of several issues in this case. Significantly, the Administrative Law Judge and the Board found that the employer intentionally terminated sickness and accident benefits for the purpose of coercing and restraining the employees' protected right to engage in concerted activity.

Substantial facts support this finding of intentionally coercive anti-union animus. As the Board recounted the chronology of events, the employer declared that it would cease paying S&A benefits in direct response to a strike call by the union. The union promptly protested this decision, and informed the employer that the disabled workers were not strike participants. Despite these protestations, Wiegand persisted in cutting off the S&A benefits. The employer acted before it could have acquired any knowledge of how effective the future strike would be or whether the sick employees would ratify the strike. Under these circumstances the ALJ and the Board could have reasonably found that the employer's announcement amounted to a retaliatory threat to sanction certain workers if the other employees went on strike.

The import of the finding of coercive intent is that it serves to distinguish the present situation from that involved in *Southwestern Electric Power Co.*, 216 NLRB 522 (1975), a matter in which the Board found that the employer had not committed an unfair labor practice when it ceased paying sick leave after a strike began. Notably absent from *Southwestern Electric* is any indication that the employer threatened to terminate benefits before the strike commenced, or that the eventual cutoff, which occurred after the strike was called, was an intentionally coercive measure. Indeed, the focus of the inquiry in *Southwestern Electric* was whether the employer acted reasonably in assuming that all workers, well or disabled, actually supported the strike. In concluding that the employer's belief was reasonable, the Board found it significant that no Southwestern employee had registered a protest over the termination of sick leave payments. 216 NLRB at 522. The contrast with the events in the present case is quite significant. Not only did the Board find that Wiegand's threat to cut off benefits was designed to dissuade the union from striking, but the company adamantly adhered to its position despite indications that some disabled workers were not strikers. The union protested to the company that the sick individuals were not strikers, and the record also shows that at least three workers on disability actually telephone the company to complain when their benefits stopped coming. These callers specifically told the company that they were not on strike, but their inquiries were met with the answer that the cut-off was a firm company policy. This affirmative indication in the present situation that the disabled workers were not in the same position as strikers was, as the Board remarked, absent in *Southwestern Electric*. Moreover, there was no finding in *Southwestern*, as there was here, that the sick leave payments were accrued compensation linked to services rendered in the past.

Factual differences between Wiegand's intentionally retaliatory action and the circumstances in *Southwestern Electric* illustrate that, to the extent Wiegand may have based its action on the prior Board precedent, its reliance was not justified. The narrow decision in *Southwestern* cannot fairly be interpreted to give employers carte blanche to issue coercive pre-strike threats to terminate *accrued* benefits. Such a construction would appear to run afoul of the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967). Consequently, the Board's determination to overrule *Southwestern Electric* in the present case has not visited an undue hardship on Wiegand. The employer has not been subjected to fines or other penalties. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295, 94 S.Ct. 1757, 1772, 40 L.Ed.2d 134 (1974). Rather, it merely has been ordered to pay benefits that it was always obligated to pay, because the workers had earned the right to S&A payments before a strike was imminent.

It is firmly settled by the Supreme Court that the Board may overrule its previous decisions in subsequent adjudicatory proceedings, as cumulative experience and wisdom gleaned from legal and industrial evolution warrant rethinking earlier held views. *See e. g., NLRB v. Weingarten, Inc.*, 420 U.S. 251, 264–67, 95 S.Ct. 959, 967–68, 43 L.Ed.2d 171 (1975); *NLRB v. Bell Aerospace Co., supra.* Reliance by one party on past Board decisions does not alter the Board's authority to set aside precedents and apply the new principle to the case at hand. *Bell Aerospace*, 416 U.S. at 295, 94 S.Ct. at 1772. Accordingly, Supreme Court decisions compel the conclusion that, in this case, Wiegand cannot be excused from having committed an unfair labor practice on the basis of possible reliance on a previous Board ruling.

I also write separately to highlight why, in this particular proceeding, we may modify the Board's remedial order despite the extensive deference courts normally accord to such orders.

The Supreme Court has often attested to the breadth of the Board's discretion to devise "remedies to effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S.Ct. 287, 288, 97 L.Ed. 377 (1953). As the Court explained in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964), "[t]he Board's power is a broad discretionary one, subject to limited judicial review. . . . 'In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience.' *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 [73 S.Ct. 287, 288, 97 L.Ed.

377]. The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. Labor Board,* 319 U.S. 533, 540 [63 S.Ct. 1214, 1218, 87 L.Ed. 1568]" (some citations omitted).

This synthesis reveals that although the Board's remedial authority is extensive, it is confined by the very policies that the Board is charged with implementing. Thus, there are two primary constraints on remedial discretion. First, the remedy selected must "undo the effects of violations of the Act," *id.,* rather than perpetuate the unfair labor practice. Second, the Board is not free to adopt a remedy that is at odds with the purposes of and the rights guaranteed by the national labor laws. The Board exceeded both limitations in the present case. Here, the policy that the remedy should have effectuated was the right of employees to support a strike without losing accrued benefits. Yet, the Board's order that the employer could discontinue S&A benefits for active strike supporters in and of itself is inconsistent with the protected right of employees to engage in concerted activity in furtherance of collective bargaining efforts. 29 U.S.C. §§ 157, 158(a)(1) (1976). Moreover, rather than redressing the violation, the Board's remedial order permitted the employer to continue the unfair practice of withdrawing accrued benefits from strike supporters. Thus, the remedy adopted by the Board stands in irreconcilable conflict with its underlying finding that the termination of accrued benefits constituted an unfair labor practice.

Having found that S&A benefits are accrued compensation tied to past service, the Board is not free nevertheless to permit the employer to terminate such benefits for those disabled workers who show support for the strike. The right of employees to support legal strike activity without suffering retaliation or discrimination is at the heart of the protection embodied in 29 U.S.C. §§ 157 and 158. *See NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963). The Supreme Court has squarely held that an employer may not deny accrued benefits to workers who support a strike. *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967).

The remedial order adopted by the Board, however, leads to the precise result prohibited by the Supreme Court in *Great Dane*; it authorizes the withdrawal of accrued benefits to workers who indicate support for the concerted efforts of fellow employees to withhold their services. Such an actions is likely to inhibit strike support, an effect which is fundamentally contradictory to rights protected by 29 U.S.C. § 157. Because the Board's order patently fails to effectuate the policies of the national labor laws, it is not entitled to the respect which appellate courts usually must great to remedial choices. The only remedial order consonant with the finding that the S&A benefits were accrued is one that directs the employer to pay these benefits for the entire time a worker remains disabled.

Although I am concerned that an employer should not be placed in the position of finanicing a strike, the apprehension of the Board that such an order there would be tantamount to requiring Wiegand to finance the strike is not consonant with the finding that the benefits were accured. An employer can be deemed to be financing a strike against itself only when it must pay compensation that bears the characteristics of wages. Wages are *unaccrued* payments for current services rendered. Since striking employees are withholding current services, the employer need not pay them wages. In contrast, Wiegand's duty to pay the *accrued* disability insurance arises in return for efforts expended by employees in the past. Inasmuch as these benefits are not given in return for current services, the employer's continued payment of S&A benefits to disabled workers, during a strike engaged in by nondisabled workers, cannot fairly be viewed as financing the strike.

Accordingly, I agree with the majority that we should enforce the Board's finding of an unfair labor practice because, under the substantial evidence standard of review, the Board's determination that the S&A benefits were accrued is adequately supported in the record. Once the Board found the S&A benefits to be accrued, the unfair labor practice finding was mandated by the Supreme Court's holding in *Great Dane Trailers.* Similarly, modification of the remedial order is consistent with Supreme Court precedents.

NLRB v. Suburban Ford, Inc.

646 F.2d 1244 (8th Cir.), April 15, 1981—248 NLRB 364

On petition to enforce Board Order

Before BRIGHT, STEPHENSON and MCMILLIAN, Circuit Judges

1245

BRIGHT, Circuit Judge: The National Labor Relations Board (NLRB) petitions this court under section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) (1976), for enforcement of its order directing Suburban Ford, Inc. (the Company), to bargain collectively with Local 604 of the Automobile Transport Chauffeurs, Demonstrators & Helpers Union (Local 604), representing the Company's salesmen, and Local 618 of the Automotive, Petroleum and Allied Industries Employees Union (Local 618), representing the Company's clerical workers. The NLRB found that after a majority of the Company's salesmen and clerical workers had signed

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authorization cards designating Local 604 and Local 618 as their collective bargaining representatives, the Company engaged in unfair labor practices that would tend to undermine the Unions' majority strength and impede the election processes. We conclude that substantial evidence on the record as a whole supports the NLRB's findings as to Local 604 but not as to Local 618. Accordingly, we deny enforcement of the Board's order as it pertains to Local 618 and grant enforcement of the order in all other respects.

I. *Background.*

On April 19, 1979, representatives of Local 604 met with five of the nine salesmen employed by Suburban Ford. By the next day, the Union received signed membership cards from six salesmen designating Local 604 as their collective bargaining representative. Shortly thereafter, a majority of the Company's clerical workers signed authorization cards designating Local 618 as their collective bargaining agent. After the Company declined to recognize the Unions on the basis of the signed authorization cards, Local 604 and Local 618 separately petitioned the Board for representation elections among each unit's employees.

On April 28, two days after the Unions' demand for recognition, new-car sales manager James Fitzgerald called salesman Robert Hawkins into the Company-owner's office to express his displeasure that Hawkins had joined a union. In particular, Fitzgerald stated, "Hawk, you of all people, I didn't think you'd do this to me." Fitzgerald also stated that he expected loyalty from his employees and that "he could have blown [Hawkins] out of [the Company] any time he wanted to when [Hawkins] was having bad months." That same day Fitzgerald also called salesman D. W. Van Ronzelen into the office and complained, "Van, you stabbed me in the back. * * * [Y]ou know very well that Mr. Hildebrand and I did not want a union in this store. * * * Have [you] looked up the definition of the word loyalty lately?"

Two days later at the Company's weekly sales meeting, Fitzgerald initiated a number of unprecedented actions. After indicating that the Company had experienced its worst April sales record in history, he ordered the replacement of the salesmen's demonstrators with less desirable vehicles and the transfer of new and used car salesmen between the two departments. Fitzgerald also canceled for "lack of interest" an ongoing bonus contest that offered the salesmen an opportunity to win a trip to Las Vegas or to a Missouri resort. Finally, the Company hired five new salesmen, most of whom had little or no experience in automobile sales, and four new clerical employees, three of whom were at least indirectly related to management officials.

During May, used-car sales manager Jerry Gilliam initiated at least a half-dozen conversations with Company salesmen concerning their support for Local 604. On one occasion, Gilliam approached Van Ronzelen in a tavern and commented, "[I]f you'll forget all this union nonsense, I'll make it very well worth your while." On several occasions, Gilliam made similar comments to Hawkins and during one conversation added, "[I]t won't do any good to bring a union in." In late May, when Hawkins indicated that he had joined Local 604 for the medical, dental, and pension benefits, Gilliam responded, "I can give you that", wrote on a paper napkin that Bob Hawkins would be guaranteed a job for five years if he sold ten or more cars a month, and signed his name.

Finally, on June 6, Gilliam chastized Hawkins for lending a demonstrator to a customer. When Hawkins attempted to explain that he had acted in accordance with Company policy under the circumstances and had received the permission of Company-owner Hildebrand to lend the vehicle, Gilliam refused to listen to these justifications and fired Hawkins. Two days later, Hawkins filed an unfair labor practice charge with the NLRB and delivered a copy of the complaint to Gilliam. Immediately after Gilliam showed the copy to Hildebrand and other management officials, the Company rehired Hawkins.

On the basis of this evidence, the NLRB found that the Company had violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), by accusing salesmen of disloyalty because of their union activity, soliciting grievances from salesmen to discourage union membership, threatening to discharge salesmen who engaged in union activity, promising benefits to salesmen who would abandon their support for Local 604, advising salesmen that unionization would be futile, and hiring new salesmen and clerical employees solely for the purpose of destroying the majority status of both Local 604 and Local 618. The NLRB also found that the Company had violated section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976), by replacing the salesmen's demonstrators with less desirable vehicles, canceling the bonus contest, and discharging Hawkins for participation in union activities. The NLRB then determined that the salesmen and clerical employees constituted appropriate bargaining units, that Local 604 represented a majority of the salesmen and Local 618 held majority status among the clerical employees before the Company committed its violations of sections 8(a)(1) and 8(a)(3), and that the issuance of bargaining orders would better protect the employees' expression of support for the Unions than the use of traditional remedies to ensure fair representation elections.

II. *Discussion.*

A. *Clerical Employees.*

The NLRB's order to bargain with Local 618 primarily rests on the Board's admittedly novel theory that an employer violates section 8(a)(1) by hiring new employees solely for the purpose of destroying a union's majority status in the bargaining unit. The Board premises this theory on the view that "discrimination in hiring is twin to discrimination in firing." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 187, 61 S.Ct. 845, 849, 85 L.Ed. 1271 (1941). Just as an employer may not discharge prounion employees to prevent them from voting in a Board election, neither should the employer be permitted to hire unnecessary antiunion employees for the purpose of diluting the voting strength of those employees already in the bargaining unit who support the union.

The Company answers that the Board cannot establish a violation of section 8(a)(1) upon a mere showing that an employer hired new employees solely for the purpose of destroying a union's majority status. To establish that the employer's addition of employees to the work force might dilute the union's majority status in the bargaining unit, the Board must also show that the new employees would be eligible to vote in the upcoming representation election under the Board's election rules and that these employees would likely vote against the union in a greater proportion than the existing employees in the bargaining unit.

We need not determine the merits of the Board's theory in this case because, in any event, the record does not support the Board's order to bargain with Local 618. To warrant the issuance of a bargaining order, the Board must find that

> the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. [*NLRB v. Gissel Packing Co., Inc.,* 395 U.S. 575, 614–15, 89 S.Ct. 1918, 1940–41, 23 L.Ed.2d 547 (1969).]

The record in this case contains no substantial evidence that the Company's addition of four clerical employees to the bargaining unit after Local 618 had obtained majority status through signed authorization cards so tainted the election process as to justify supplementing traditional remedies with a bargaining order.

The Board argues, however, that it could reasonably find that the Company's unlawful conduct against the salesmen would also affect the fairness of the clerical workers' representation election because the two units worked in close contact with each other. This argument may carry some validity under some circumstances, but in this case the Board's finding lacks substantial evidentiary support in the record. Accordingly, we deny enforcement of the Board's order to bargain with Local 618.[1]

B. *Salesmen.*

The Board's order to bargain with Local 604, however, rests on several violations of section 8(a)(1) and section 8(a)(3) that would warrant the issuance of a bargaining order. For this reason, we grant enforcement of this order and need not determine whether the Company violated section 8(a)(1) by hiring additional salesmen solely for the purpose of destroying Local 604's majority status.

We recognize that for each violation of section 8(a)(1) and section 8(a)(3) charged by the Board, the Company presents an alternative view of the evidence or a legitimate business justification for its actions.[2] On factual issues, however, the Board's findings will be conclusive if supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). This court cannot overturn the Board's choice between two fairly conflicting views of the evidence, even though we might justifiably take a different view were the matter before us *de novo*. *Buffalo Bituminous, Inc. v. NLRB*, 564 F.2d 267, 270 (8th Cir. 1977). Nor can this court pass on the credibility of the witnesses, weigh the evidence, or reject reasonable inferences made by the Board because other inferences might also be reasonably drawn.[3] *Singer v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1970).

Applying these standards to the present case, we conclude that substantial evidence in the record as a whole supports the Board's findings that the Company engaged in unfair labor practices against its salesmen. In particular, the Board might reasonably infer from the coincidence in time between the salesmen's union activities and the Company's conduct that the employer acted with the intent of impeding the salesmen's efforts at unionization. Fitzgerald's conversations with Hawkins and Van Ronzelen occurred within two days after Local 604's request for recognition had been rejected by the Company. At the next weekly sales meeting, Fitzgerald canceled the bonus contest, transferred the salesmen between new and used car sales, and recalled the salesmen's demonstrators. In addition, Gilliam's efforts to dissuade the salesmen from union membership began during this period and continued until he ultimately fired Hawkins. Finally, the Company's reinstatement of Hawkins occurred only after it learned that Hawkins had filed an unfair labor practice charge with the Board. The Board could reasonably infer from the

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[1] Because of our disposition in this matter, we need not consider the Company's other challenges to the Board's order to bargain with Local 618.

[2] As to Fitzgerald's conversations with Hawkins and Van Ronzelen, the Company contends that Fitzgerald's references to disloyalty should be read as disloyalty to him, a long-time friend, not disloyalty to the Company. Similarly, Fitzgerald's statement to Hawkins that he could have fired Hawkins in prior months for low productivity arose in the context of personal loyalty to Fitzgerald rather than as a threat of discharge. As to Gilliam's statements, the Company argues that the employees to whom Gilliam spoke had no reasonable basis to believe that Gilliam, a low-ranking supervisor, spoke or acted on behalf of management in soliciting grievances and promising benefits to those employees who would abandon their support for the Union. As to the Company's hire of new employees, cancellation of the bonus contest, issuance of less desirable demonstrators to the salesmen, and transfer of salesmen between new and and used car sales, the Company attributes its actions to economic necessity rather than antiunion animus. Finally, the Company maintains that Gilliam fired Hawkins without authority and merely out of a personal pique, a decision which the Company immediately rectified upon learning of the discharge.

[3] The Company urges us to review the entire record rather than accept the administrative law judge's findings and credibility resolutions at face value because the administrative law judge allegedly manufactured evidence, disregarded parts of testimony from witnesses he claimed to have credited, credited testimony that was contradicted by other credited witnesses, ignored uncontradicted testimony from witnesses not discredited, quoted his own statements made at the hearing rather than the testimony of witnesses, quoted testimony out of context, repeatedly argued with witnesses during the hearing, and effectively prohibited the Company from making an offer of proof. *See NLRB v. Huntington Hospital, Inc.*, 550 F.2d 921, 924 (4th Cir. 1977) (trial examiner's report and Board's findings will not be accorded presumption of correctness usually attributed to trier of fact if material uncontradicted evidence has been ignored or if evidence has been disregarded or eliminated by casual expedience of discrediting an employer's witnesses); *NLRB v. Miami Coca-Cola Bottling Co.*, 222 F.2d 341, 345 (5th Cir. 1955) (bias of administrative law judge requires court review of credibility resolutions); *Local No. 3, United Packinghouse Workers of America v. NLRB*, 210 F.2d 325, 330 (8th Cir. 1954) (manifest prejudice, bias, and hostility of examiner goes far to weaken or destroy presumption of correctness usually attributed to findings of trier of fact).

Having carefully reviewed the record in light of these allegations, we reject the Company's alllegations as substantially without merit.

timing of these events that the Company interfered with, restrained, or coerced the salesmen in the exercise of their right to self-organization, in violation of section 8(a)(1), and discriminated against the salesmen in the terms and conditions of employment to discourage them from membership in Local 604, in violation of section 8(a)(3).

III. *Conclusion.*

We grant enforcement of the Board's order to bargain with Local 604, but deny enforcement of the order as to Local 618. The Company does not challenge any other remedial provisions of the board's order, and these provisions will be enforced.[4]

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[4] Company counsel has advised us that the Company has recently ceased operations, although nothing to this effect appears in the record. Under settled precedent, however, the Company's closing does not render this case moot. *See NLRB v. Bell Co.*, 561 F.2d 1264, 1266 n.2 (7th Cir. 1977); *NLRB v. Aircraft Engineering Corp.*, 419 F.2d 1303, 1304 (8th Cir. 1970).

Koch Supplies, Inc. v. NLRB

646 F.2d 1257 (8th Cir.), April 17, 1981; rehearing and rehearing en banc denied May 26, 1981—249 NLRB 1144

On petition to set aside Board Order

Before HEANEY, and HENLEY, Circuit Judges, and PECK,[*] SENIOR CIRCUIT JUDGE

1258

PER CURIAM: Koch Supplies, Inc., asks this Court to review and set aside an order of the National Labor Relations Board. The Board found that Koch had violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, by discharging Elke Musy for protected union activities. *Koch Supplies, Inc.*, 249 N.L.R.B. 160, 104 L.R.R.M. 1334 (1980). The Board asks that we enforce its order. We refuse to do so because we do not believe that substantial evidence on the record as a whole supports the Board's findings that Musy was discharged because she engaged in protected union activities.

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The critical issue is whether Musy, a highly competent bilingual secretary, was discharged because of her own *personal* persistent griping, or because she presented employee complaints to management in order to benefit herself and her fellow workers. Section 7 of the National Labor Relations Act grants to employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." 29 U.S.C. § 157 (1976). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158 (1976). Thus, for employees' activities to be protected under the Act, the activities must be concerted. *See N.L.R.B. v. Dawson Cabinet Co.*, 566 F.2d 1079, 1082 (8th Cir. 1977). The concerted activities need not take place in a union setting and it is not necessary that a collective bargaining agreement be in effect. It is sufficient that the employee intends or contemplates, as an end result, group activity which will also benefit some other employees. *Keokuk Gas Serv. Co. v. N.L.R.B.*, 580 F.2d 328, 333-334 (8th Cir. 1978). To state the matter simply, if an employee's actions constitute mere *personal* griping or complaining, then the actions are not entitled to protection. On the other hand, if the employee's efforts are intended to gain more favorable contract terms for himself or herself, then there is some element of collective activity or contemplation thereof, and the employees' efforts are protected. *See N.L.R.B. v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717-718 (5th Cir. 1973); *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683, 684-685 (3rd Cir. 1964).

We are convinced from a careful review of this record that substantial evidence on the record as a whole does not support the Board's finding that Musy intended or contemplated, as an end result of her conversations with management, to benefit employees other than herself in their status as employees.

Musy was upset because she did not receive a promotion. Thereafter, she vigorously protested the company's promise of vacation benefits to a new employee, benefits which she stated were contrary to established company policy. No group action was ever discussed and all of the employees who testified denied any interest in Musy's gripes. There is no evidence in the record from which it can be inferred that such action was contemplated.

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[*] John W. Peck, U.S. Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

The Board justifies its holding, in part, on the theory that because vacations are generally a matter of common interest, Musy's complaints with respect to them are protected. This theory is insufficient justification; something more is required. It must be shown that Musy intended that her activities would relate to group action. *N.L.R.B. v. Buddies Supermarkets, Inc., supra,* 481 F.2d at 718. The requisite showing was not made.

Koch Supplies' petition to review and set aside the order of the Board is granted; the Board's cross-application for enforcement of its order is denied.

Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB

Oregon-Columbia Chapter, the Associated General Contractors of America, Inc. v. NLRB

International Union of Operating Engineers, Local No. 701 v. NLRB

Woelke & Romero Framing, Inc. v. NLRB

NLRB v. Carpenters Local No. 944, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

654 F.2d 1301 (9th Cir.), April 17, 1981; certiorari granted October 5, 1981—239 NLRB 274

On petitions to review and enforce Board Order

1304

CANBY, Circuit Judge: These cases raise important questions concerning the scope of § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), which prohibits "hot cargo" agreements. The primary issue is whether the construction industry proviso to § 8(e) renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work at any construction site to a firm not having a contract with the signatory union. Additional issues are whether unions may picket or strike to induce an employer to enter these agreements and whether the agreements, once entered, may be enforced by picketing or strikes. We conclude that the subcontracting clauses fall within the construction industry proviso and consequently do not violate § 8(e). We also conclude that unions may picket or strike to obtain such agreements, but not to enforce them. The orders of the National Labor Relations Board are accordingly enforced.

I.

Facts.

Two orders of the Board are under review here pursuant to 29 U.S.C. § 160(e) and (f). The first concerns a collective bargaining agreement between Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. (AGC) and Local 701 of the International Union of Operating Engineers (Engineers). AGC is an association of some 200 employers engaged in construction in Oregon and southwest Washington. These employers have delegated their collective bargaining authority to AGC. AGC and Engineers entered into a collective bargaining agreement effective from June 1, 1975, through May 31, 1980, which contained the following clause:

> Article VIII
>
> Subcontractors and Other Employers.
>
> *Section 1.* Employers shall not contract any work covered by this Agreement to be done at the site of the construction, alteration, painting or repair of a building, structure or other work to any person, firm or company who does not have an existing labor agreement with the Union covering such work.

1305

Subsequent clauses [1] provide for a grievance procedure leading to arbitration and further pro-

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[1] Other relevant clauses of the AGC agreement are:

ARTICLE IX
Settlement of Disputes
Grievance Procedure

Section 1. In the settlement of disputes arising out of a violation, misunderstanding or difference in interpretation of this agreement, the following procedure shall be followed:

* * * * *

Continued

vide that should the parties fail to comply with the arbitrator's decision, then "[e]ither party may take such action as they deem necessary to enforce the findings * * *." The effect of the latter provision is to permit either party to employ self-help, such as strikes or lockouts, that would otherwise be prohibited by another article of the agreement.

Upon complaint by Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Engineers and AGC were charged with violating § 8(e) [2] of the National Labor Relations Act, which prohibits agreements between a labor organization and an employer in which the employer agrees to refrain from using the products of another employer or to cease doing business with any other person. The case was submitted to the Board upon stipulated facts and the Board found that, while the agreement fell within the prohibition of § 8(e), it was exempted from the coverage of that provision by the construction industry proviso applicable to agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *." The Board also ruled that the clause authorizing enforcement of the subcontracting provision by self-help was invalid. All parties petitioned for review and the Board sought enforcement of its order.

The second decision of the Board concerns Woelke and Romero Framing, Inc., (Woelke), a framing subcontractor in the construction industry in Southern California. Woelke was a party to a collective bargaining agreement entered on July 5, 1974, with the United Brotnerhood of Carpenters and Joiners of America, AFL–CIO (Carpenters), a group which included Local Number 235 and 944 involved in this litigation. That agreement expired on June 15, 1977. From about June 3, 1977, to August 4, 1977, Carpenters and Woelke engaged in collective bargaining for the purpose of negotiating a successor agreement. They broke off negotiations when they reached an impasse over several issues.[3] One such issue was the union's demand for a clause in the contract that prohibited Woelke from subcontracting work at any construction jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body signatory to this Agreement."[4] In support of Carpenters' demand for this contract provision, Locals 235 and 944 picketed Woelke's construction sites, causing some work stoppages. The two locals were charged with violation of § 8(b)(4)(i) and (ii)(A) of the Act[5] for

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Section 5. Should the parties involved fail to comply with the [arbitrator's] findings within five (5) days after such written notification by either party * * *, then all means of arbitration shall be considered exhausted. Either party may take such action as they deem necessary to enforce the findings * * * and they shall not be considered in violation of any part of this Agreement.

ARTICLE X

Strikes and Lockouts

Section 1. Unless otherwise provided herein, it is mutually agreed that there will be no strikes or lockouts, or cessation of work by either party, for the duration of this Agreement. All disputes arising under this Agreement shall be submitted to the procedures for the settlement of disputes as provided in this Agreement * * *.

[2] Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided.* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contraction or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure, or other work * * *.

[3] Another issue over which the parties reached impasse was Carpenters' demand to include Woelke's foremen in the bargaining unit. The Board found that picketing to enforce this demand violated § 8(b)(1)(B) of the Act. The union has not contested that ruling in this court. We therefore enforce the Board's order concerning this issue.

[4] The proposed clause provides:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

[5] Sections 8(b)(4)(i) and (ii)(A) and (B), 29 U.S.C. § 158(b)(4)(i) and (ii)(A) and (B), provide:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
>> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any good, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

Continued

picketing to require an employer "to enter into any agreement which is prohibited by section 8(e)."

The case was submitted to the Board upon stipulation and the Board found that the proposed subcontracting agreement was not prohibited by § 8(e) because it fell within the construction industry proviso, and that picketing to obtain such a clause therefor did not violate § 8(b)(4). Woelke petitions for review of the Board's order, and the Board seeks enforcement.[6]

Both decisions of the Board were reviewed by a panel of this court. 609 F.2d 1341 (9th Cir. 1979). On the authority of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), the panel held that the subcontractor clauses were prohibited by § 8(e) and did not fall within the protection of the construction industry proviso because there applicability was not limited to jobsites where members of the signatory union were employed at some time during the construction project. Having found the present clauses unenforceable, the panel did not reach the questions whether picketing or striking either to obtain or enforce a lawful subcontractor clause would violate § 8(e). 609 F.2d at 1351. This court subsequently ordered rehearing before a limited en banc panel as provided by Public Law 95–486, 92 Stat. 1629, 1633 and Rule 25 of this court.

II.

Issues.

Four issues are presented for determination in these cases:

(1) Are the subcontracting clauses "secondary" and therefore within the scope of § 8(e)?

(2) If the clauses are within the scope of § 8(e), are they exempted from its proscription by the construction industry proviso?

(3) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) for a union to picket or strike to induce an employer to agree to one?

(4) If the subcontracting clauses are lawful, does it nevertheless violate § 8(b)(4) to enforce them by picketing or strikes?

III.

Applicability of § 8(e).

The subcontractor clauses in the present case clearly require the signatory employer to cease or refrain from using the products of another employer or to cease doing business with another person. The clauses consequently fall within the literal language of § 8(e). In *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed2d 357 (1967), however, the Supreme Court held that § 8(e) is not to be read as expansively as its language seems to indicate. The Court pointed out that the purpose of Congress in enacting § 8(e) was to prohibit voluntary arrangements that reached the same result as coercive secondary boycotts prohibited by § 8(b)(4)(ii)(B) of the Act. The Court therefore held that an agreement between a union and an employer which prohibited certain kinds of subcontracting was permissible so long as the objective was to preserve work traditionally performed at the jobsite by employees of the primary employer. Such a "work preservation" clause was viewed as primary and therefore did not constitute an unfair labor practice.[7] The test

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(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section:

(B) forcing or requiring any person to cease using, selling, handling, tranporting, or otherwise dealing in the products of any other producer, processor, or manufacturer or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. * * *

[6] Along with the present cases, reported at 239 N.L.R.B. 274 (1978) (*Pacific Northwest*) and 239 N.L.R.B 241 (*Woelke*), the Board decided *Los Angeles Building & Construction Trades Council (Donald Schriver, Inc.),* 239 N.L.R.B. 264 (1978), and *Colorado Building & Construction Trades Council,* 239 N.L.R.B.253 (1978). The Board's order upholding broad subcontractor agreements in *Schriver* was enforced by the District of Columbia Circuit in an extensive and instructive opinion by Judge Edwards. *Donald Schriver, Inc. v. NLRB,* 635 F.2d 859 (D.C. Cir. 1980).

[7] "Union standards" clauses, which require that an employer not subcontract with anyone whose wage and benefit scale does not meet union standards, have also been held primary. The purpose of such clauses is deemed to be protection of the pay and benefit scales of the workers of the primary employer. *Truck Drivers Union Local No. 413 v. NLRB* 334 F.2d 539, 548 (D.C. Cir), *cert. denied,* 379 U.S. 916, 85 S.Ct. 264, 13

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whether an agreement was primary and permissible was "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *Id.* 386 U.S. at 645, 87 S.Ct. at 1268–69. An agreement was secondary and prohibited when "the agreements and boycotts were tactically calculated to satisfy union objectives elsewhere." *Id.* at 644, 87 S.Ct. at 1268.

By the *National Woodwork* test, union signatory clauses such as those in issue here are secondary in objective. They do not seek to preserve work for the employees of the contracting employer by limiting the amount of subcontracting. Nor do they seek to protect the wage and benefit standards of those same employees in their present employment by merely limiting subcontracting to third parties who maintain equivalent standards. Instead, these union signatory clauses permit unlimited subcontracting so long as the subcontractors have an agreement with the contracting union. Such clauses are properly viewed as secondary, for they are intended to satisfy union objectives employees and employers outside of the bargaining or work unit. *Griffth Co. v. NLRB,* 545 F.2d 1194 (9th Cir. 1976), *cert. denied,* 434 U.S. 854, 98 S.Ct. 171, 54 L.Ed.2d 124 (1977); *NLRB v. National Maritime Union,* 486 F.2d 907 (2d Cir. 1973), *cert. denied,* 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974).

It is contended by Engineers that the objective of preserving work within the entire multi-employer bargaining unit of AGC is a primary goal and that this fact should take its subcontracting clause outside of the scope of § 8(e). This argument fails for two reasons. First, the clause in question does not limit subcontracting to firms that are members of AGC. Outsiders having an agreement with Engineers are eligible, even though they and their employ-

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ees are wholly foreign to the multi-employer bargaining unit. The clause therefore is not a primary work preservation clause. *NLRB v. National Maritime Union,* 486 F.2d at 914. Second § 8(e) applies in any event to an agreement which attempts to preserve work for an entire multi-employer unit rather than for single employers' employees. This court dealt with the issue in *NLRB v. Joint Council of Teamsters No. 38,* 338 F.2d 23, 28 (9th Cir. 1964):

> Respondents seem to argue that [the clause] falls within the exception to section 8(e) because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. But if this argument were accepted, the exception to section 8(e) would permit precisely what the section itself was intended to prohibit: An agreement by an employer to boycott another unless the latter entered into a union contract.

Accord, NLRB v. National Maritime Union, supra.

The union's further contention that work preservation of the employees of each contractor was one of the objectives underlying the union subcontracting clause, does not compel us to alter our conclusion. Regardless of the union's other objectives, if "*an object* of a clause is to aid union members generally rather than members of the unit, the object is secondary and unlawful." *National Maritime Union,* 196 N.L.R.B. 1100, 1101 (1972), enforced, 486 F.2d 907 (2d Cir. 1973), *cert. denied,* 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974) (emphasis supplied).

It is true that the primary-secondary distinction is particularly difficult to maintain in the construction industry, where contractors and subcontractors assemble their work forces for specific short-term jobs. There is a great deal of flexibility and interchangeability of employees between bargaining units. As a result, a subcontractor clause may well serve the interests of union members in the primary bargaining unit who may later find themselves working for a subcontractor. While we believe that fact to be of great significance for purposes of determining the scope of the construction industry proviso, we do not view it as determinative of the initial applicability of § 8(e) itself. *See NLRB v. National Maritime Union, supra,* 913–14. The primary-secondary distinction between separate employers working the same jobsite in the construction industry has been adhered to in the past, *NLRB v. Denver Building & Construction Trades,* 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), and we do not feel free to disregard it here. Moreover, the consequences of viewing union signatory clauses as

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L.Ed.2d 186 (1964); *NLRB v. National Maritime Union,* 486 F.2d 907, 912 (2d Cir. 1973), *cert denied,* 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974).

primary would be not only to remove them from the scope of § 8(e) but also to remove picketing to enforce such agreements from the prohibition of § 8(b)(4)(ii)(B). For reasons stated in Section VI of this opinion, we believe that permitting coercive enforcement of union signatory clauses would be contrary to the intent of Congress.

We accordingly hold that the union signatory clauses in these cases are secondary and within the scope of § 8(e). Their validity consequently depends upon their eligibility for inclusion within the construction industry proviso to that section.

IV.

Scope of the Construction Industry Proviso to § 8(e).

In order to ascertain the scope of the construction industry proviso, it is necessary to examine its legislative history in the light of the practices existing in the industry at that time and the law then applicable. In so reviewing the origins of the 1959 Landrum-Griffin Act of which § 8(e) and its proviso were a part, we recognize that our initial conclusions as to its meaning are subject to any modifications or corrections that may be compelled by a fair reading of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Indeed, it is the effect of *Connell* that provides the primary ground of controversy in **1309** the present litigation. We believe, however, that the *Connell* decision is best analyzed after a review of the state of the industry and legislative and administrative history of the proviso governing it.

(A) Construction Industry Background.

The primary characteristics which differentiate the construction industry from most others are well stated in the Senate Report on the 1959 amendments:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S.Rep.No. 187, 86th Cong., 1st Sess. 27 (1959), U.S.Code Cong. & Admin. News 1959, pp. 2318, 2344; I *Legislative History of The Labor-Management Reporting and Disclosure Act of 1959* 423 (hereinafter Leg. His.). These peculiarities of the construction industry created special problems for both unions and employers long before 1959. Unions had to overcome difficulties of organizing temporary workers and of maintaining wage and benefit standards in unstable employment conditions. Employers required a ready source of skilled workers available for each new job, and had to be able to forecast labor costs accurately. To satisfy these needs, unions and employers hammered out a number of mutual accommodations. One such arrangement was the closed shop, which was prevalent in the industry by the 1920's.[8] A second was negotiation of area-wide agreements covering all construction work of a certain type, with multiple contracting employers agreeing to the standards set in those agreements.[9] Of necessity, these contracts dealt with wages, hours and working conditions of employees yet to be hired for particular jobs by particular employers.[10] A third device was the agreement to restrict subcontracting in various ways—to firms maintaining union standards, or to firms that were unionized,[11] or to firms that agreed to bind themselves to contracts with the union signatory to the subcontracting clause.[12]

Some of these devices were not necessarily consistent with the organizational scheme of the National Labor Relations Act in its original form. The Act initially caused no disruption in the pattern of collective bargaining in the construction industry, however, because the National Labor Relations Board declined to exercise jurisdiction over the industry.[13] The Taft-Hartley Amendments to the Act, passed in 1947, led to a reversal of the Board's position. Those amendments prohibited striking or picketing to coerce an employer to refraim from dealing in the products of any other emloyer or to cease to do business

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[8] Haber, Industrial Relations in the Building Industry 238–40 (1930). A study by the National Manufacturers Association reported that in 1926, 69% of all construction work was done under closed-shop conditions. *Id.* at 240.

[9] Dunlop, *The Industrial Relations System in Construction, in* The Structure of Collective Bargaining 255, 256–57 (Weber ed. 1961).

[10] S.Rep.No. 187, *supra,* 28; I Leg.Hist. 424. *See generally,* Labor-Management Reform Legislation, Hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare, United States Senate (hereinafter Senate Hearings), 86th Cong., 1st Sess. 136 (testimony of Professor Cox).

[11] A union attempt to limit subcontracting to union firms was held exempt from the antitrust laws as early as 1934. *Levering & Garrigues Co. v. Morrin,* 71 F.2d 284 (2d Cir.), *cert. denied,* 293 U.S. 595, 55 S.Ct. 110, 79 L.Ed. 688 (1934).

[12] Marcus, *Secondary Boycotts,* in Symposium on the Labor-Management Reporting Disclosure Act of 1959, 822, 824 (Slovenko ed. 1961) (hereinafter referred to as LMRDA Symposium).

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with any other person. § 8(b)(4)(A).[14] Subsequent to the amendments, the Board's General Counsel determined that the construction industry would be regulated by the Board.[15]

One effect of applying the amended Act to the construction industry was the invalidation of collective bargaining agreements entered before any employees were hired on the job. *Guy F. Atkinson Co. and J.A. Jones Construction Co.*, 90 N.L.R.B. 143 (1950), *enforcement denied on other grounds*, 195 F.2d 141 (9th Cir. 1952). The amended Act was also applied to prohibit a construction union from picketing a jobsite in order to force the general contractor with whom it had a collective bargaining agreement to cease doing business with a particular subcontractor on the job whose employees were non-union. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951). The picketing was found to violate § 8(b)(4)(A)'s prohibition of coercive secondary boycotts.

These applications of the amended National Labor Relations Act to the construction industry were sufficiently disruptive of existing practices that there was agitation for modification of the Act, particularly in regard to prehire practices and secondary activity. In 1954, President Eisenhower called for amendments to permit prehire agreements and to shorten to 7 days the time by which a nonunion worker could be required to join a union under a union-shop agreement. 100 Cong.Rec. 111, [1954] U.S. Code Cong. & Admin. News 1531, 1532. Again in 1959, when calling for amendments to tighten the prohibition against secondary boycotts, the President added that provisions were needed "to make clear that secondary activity is permitted * * * under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer." S.Doc. 10, 86th Cong., 1st Sess.; 105 Cong.Rec. 1297; I Leg.Hist. 82.

Accommodation to the special conditions of the construction industry was consequently an important consideration that found expression in the 1959 amendments to the Act. Those amendments, however, also embodied another major goal of Congress at the time—that of limiting "hot cargo" agreements.

In June 1958, the supreme Court had decided *Local 1976, United Brotherhood of Carpenters v. NLRB, (Sand Door)*, 357 U.S. 93, 78 S.Ct. 1011, 2 L.ED.2d 1186, *Sand Door* stated that a union did not violate § 8(b)(4)(A) by securing the voluntary participation of an employer in a boycott of another employer's product. Although the Court said it found no occasion to determine the legality of "hot cargo" clauses (by which an employer agreed to boycott nonunion firms) as such, *id.* at 107, 78 S.Ct. at 1020, *Sand Door* was widely interpreted as permitting them. The decision was seen as creating a loophole in the Act, and it contributed heavily to the move toward amending the secondary boycott provision of the Act.

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(B) The Landrum-Griffin Amendments and § 8(e).

The 1959 revisions of the Act accomplished th congressional purposes in various ways. The clearest accommodation to the peculiar conditions o the construction industry was found in § 8(f),[16]

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[13] *Brown and Root, Inc.*, 51 N.L.R.B. 820 (1943); *Johns-Manville Corp.*, 61 N.L.R.B. 1 (1945).

[14] The relevant portions of § 8(b)(4)(A) are now in § 8(b)(4)(ii)(B), quoted in note 4 *supra*.

[15] Denham, *Taft Act's Impact on the Construction Industry, reprinted in* 21 L.R.R.M. 44 (1948) The Board's decision to exercise jurisdiction over the industry following passage of the Taft-Hartley Amendments resulted, in part, from the Amendments' prohibiting the closed shop and "back up crews" (featherbedding), two accepted practices in the construction industry. Despite the General Counsel's action, the Taft-Hartley Act was virtually ignored within the construction industry until the Board decided *United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Industry (Brown-Olds)*, 115 N.L.R.B. 594 (1956), and *Mountain Pacific Chapter of Associated General Contractors Inc. (Mountain-Pacific)*, 119 N.L.R.B. 883 (1958), remanded on other grounds, 270 F.2d 425 (9th Cir. 1959). Apruzzese, *The LMRDA and the Building and Construction Industry*, LMRDA Symposium, note 12, supra, 1019, 1029. Thereafter the General Counsel granted a moratorium to the construction industry to allow it to bring its hiring hall practices into line with the provisions of the Taft-Hartley Act. *See* Fenton, *Union Hiring Halls: NLRB Rules, Penalties*, 42 L.R.R.M. 101, 103 (1958).

[16] Section 8(f), 29 U.S.C. § 158(f), provides:

> It shall not be an unfair labor practice under subsections (a) and (b)
> this section for an employer engaged primarily in the building and co
> struction industry to make an agreement covering employees engag
> (or who, upon their employment, will be engaged) in the building a

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which authorized unions and employers in that industry to enter prehire agreements fixing terms and conditions of employment of workers yet to be hired. This provision amounts to an exception to §§ 8(a)(1), (2) and 8(b)(1)(A), which make it an unfair labor practice for both the employer and the union to enter a collective bargaining agreement before the union, represents a majority of employees in the unit. *International Ladies Garment Workers Union v. NLRB,* 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961); *see NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers,* 434 U.S. 335, 344–45, 98 S.Ct. 651, 657–58, 54 L.Ed.2d 586 (1978). Section 8(f) also shortened to 7 days the period for nonunion workers to join the union under a union-shop agreement.

Conflicting policies were reflected clearly in the passage of § 8(e), which was intended to narrow or close the loophole for "hot cargo" agreements created by the *Sand Door* decision. The Senate bill prohibited such agreements only in the trucking industry,[17] while the House bill outlawed them everywhere.[18] The Conference Committee adopted the House version, but added the provisos creating exceptions for the garment and construction industries.[19] The garment industry exception was unlimited as to time and place,[20] while the construction industry proviso excepted agreements "relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting or repair of a building, structure or other work * * *."

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It is the nature and meaning of the construction industry proviso's restriction to the jobsite that gives rise to the present controversy. The contractors assert that the proviso is intended to authorize subcontracting clauses in collective bargaining agreements only when union workers are present at the jobsite, so that the presence of nonunion workers there might lead to friction. The unions claim that the intent was to authorize subcontracting clauses whether or not union workers were at the jobsite, so long as the clauses refer to work to be performed at the construction site. Although the matter is not free from doubt, we believe that the legislative history favors the latter view.

(C) *Legislative Discussion of the Construction Industry Proviso.*

The legislative history regarding the construction industry proviso is much less exhaustive than that surrounding the garment industry proviso,[21] but there are nevertheless indications of congressional intent in the records. Senator Kennedy, the chairman of the Conference Committee, said of the two provisos, that "[b]oth changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries." 105 Cong.Rec. 17899; II Leg.Hist. 1432. Unlike the garment industry, the construction industry was not exempted from the provisions of § 8(b)(4) that prohibited striking or picketing to coerce a secondary boycott; it was merely exempted from § 8(e)'s prohibition of agreements between a union and an employ-

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construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[17] S. 1555, I Leg.Hist. 582.

[18] H.R. 8342 as amended by H.R. 8400, I Leg.Hist. 683.

[19] H.R.Rep.No. 1147 (Conference Report) 86th Cong., 1st Sess. 38–40, U.S.Code Cong. & Admin. News 1959, p. 2511; I Leg.Hist. 942–44 (1959).

[20] The garment industry proviso to § 8(e), 29 U.S.C. § 158(e), states: *Provided further,* That for the purpose of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry * * *.

[21] There is a substantial explanation in the legislative history of the highly integrated subcontracting arrangements in the garment industry and the problem of "sweatshop" conditions. *See, e. g.,* 105 Cong.Rec. 17381, II Leg.Hist. 1385 (Senators Javits and Goldwater); 105 Cong.Rec. 15538, II Leg.Hist. 1576 (Memorandum of Reps. Thompson and Udall); 105 Cong.Rec. 15848; II Leg.Hist. 1680 (Rep. Teller).

er by which the employer would boycott others. The Conference Committee stated its intent in regard to the proviso as follows:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements * * *. To the extent that such agreements are legal today under section 8(b)(4) * * *, the proviso would prevent such legality from being affected by section 8(e).

H.R.Rep.No. 1147, 86th Cong., 1st Sess. 39, U.S.Code Cong. & Admin. News 1959, p. 2511; I Leg.Hist. 943. Senator Kennedy analyzed the proposed § 8(e) as follows:

> The first proviso under new § 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
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> * * * * *
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> *Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under § 8(e)* * * *.
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> * * * * *
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> It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.

105 Cong.Rec. 17900; II Leg.Hist. at 1433 (emphasis supplied).

As Senator Kennedy made clear, unions continued to be forbidden to picket or strike at a construction site for secondary **1313** objectives, which meant that the holding of *Denver Building Trades, supra,* was left in effect. On the other hand, the Conference Report and Senator Kennedy made it equally clear that unions and employers could enter subcontracting agreements as permitted by law prior to the enactment of the new § 8(e).

It seems more likely than not that the "present law" referred to by the Conference Committee did not restrict the agreements that Senator Kennedy said "appear to be legal" to jobsites where union workers were present. The *Sand Door* decision, *supra,* which supplied much of the inpetus for § 8(e), had legitimized secondary boycotts the objectives of which clearly went beyond the mere avoidance of shoulder-to-shoulder friction between workers. It is true that the construction industry proviso narrowed the geographical scope of the *Sand Door* rule by introducing the jobsite limitation, but we do not interpret the words of the proviso as indicating an intent to narrow the substantive scope of the *Sand Door* rule on the jobsite.

It should be noted that shortly before enactment of the proviso, the District of Columbia Circuit had upheld a subcontractor agreement the terms of which were as broad as those presently in issue. *Operating Engineers Local Union No. 3 v. NLRB,* 266 F.2d 905 (D.C.Cir.), *cert. denied sub nom. St Maurice v. NLRB,* 361 U.S. 834, 80 S.Ct. 86, 4 L.Ed.2d 76 (1959).[22] While that case dealt with an interunion dispute, the terms of the secondary agreement were not restricted to that or any other situation of jobsite conflict. In upholding the agreement, the Court referred to the Board's reasoning "that the preclusion of future work to a prospective subcontractor in the circumstances did not justify the Board in holding that the rights of unidentified employees of such prospective employer were adversely affected." 266 F.2d at 908.

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[22] The *Engineers* decision was submitted to the House committee investigating labor practices as part of the testimony of Paul H. Robbins, Executive Director of the National Society of Professional Engineers. 2 Hearings Before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess. on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474 and Related Bills Regarding Labor-Management Reform Legislation, 803-07 (1959) (hereafter House Hearings).

In addition, Edward M. Carlton, office manager of St. Maurice, Helkamp and Musser, the subcontractor involved in *Engineers,* appeared before the Committee and testified as to the scope of the subcontracting clause:

> The contract also contains a clause which is referred to in the industry as the subcontractor clauses. In effect, that clauses (sic) says that any time an AGC contractor subcontracts work the subcontractor must agree to apply the terms and conditions of the AGC Operating Engineers' agreement to his employees. This, of course, means that the subcontractor's employees must become members of Operating Engineers local 3.
>
> Since about 1955, the AGC and the Operating Engineers *have enlarged the subcontractor clauses so that an AGC contractor will not subcontract any work unless the subcontractor agrees in advance to be bound by the AGC Operating Engineers' agreement.*

5 House Hearings 2366 (Emphasis supplied).

Although the *Engineers* decision was not directly referred to in the Senate Hearings, the problem of union signatory clauses was brought to the committee's attention. Senate Hearings 752 (Testimony of Sen. Curtis).

Moreover, a survey of major labor contracts in existence in 1959 revealed that more than 50 of them contained clauses restricting subcontracting to firms complying with the terms of the prime employer's agreement. Lunden, *Subcontracting Clauses in Major Contracts,* 84 Monthly Labor Review 579 (Part I), 715 (Part II) at 715 (1961). While the survey does not adequately differentiate between union signatory clauses and union standards clauses, it is nevertheless clear that numbers of broad subcontractor agreements were in existence.[23] The survey canvasses various limi-

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tations appearing in subcontracting clauses in the construction industry, but makes no mentions of any restrictions to the jobsite or references to the problem of friction between union and nonunion workers there. *Id.* at 715–16. That there may not have been a consistent pattern of subcontractor agreements of the type in issue here is not crucial. What does emerge from the contemporaneous scene is that some such agreements existed and were legal and that Congress did not appear to intend a change in that condition.

V.

(A) *The Connell Decision.*

It was against this industrial and legislative background that the Supreme Court decided *Connell Construction Co. v. Plumbers & Steamfitters Local Union No 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). *Connell* was an antitrust suit brought by a general contractor against a union that was picketing in order to coerce the contractor to enter an agreement to deal only with subcontractors having a a collective bargaining agreement with the union. The union expressly disclaimed any interest in representing the general contractor's employees. The picketing was successful and the contractor sought to annul the ensuing agreement on the grounds that it violated the antitrust laws.[24] One of the defenses raised by the union was that the agreement could not be a violation of the antitrust laws because it was authorized by the proviso to § 8(e) of the National Labor Relations Act. The Supreme Court rejected that defense and held that broad subcontracting agreements applicable to every jobsite where the general contractor might hire subcontractors were invalid when entered outside of the context of a collective bargaining relationship between the union and the general contractor.

The employers who attach the subcontracting clauses in the present case argue that *Connell's* language necessarily requires a conclusion that subcontracting clauses are permissible only when they serve the purpose of avoiding jobsite friction between union and nonunion workers employed at the same jobsite. So interpreted, *Connell* would invalidate the agreements in issue here at least until the presence of union workers at a particular jobsite triggered their application. We concede at the outset that the *Connell* opinion contains considerable emphasis on problems of shoulder-to-shoulder friction between union and nonunion workers at the jobsite, and additional emphasis on antagonism of the 1959 Congress to "top-down" organizing that is one of the effects of subcontractor agreements. Nevertheless, we believe that this reading of the *Connell* decision misconstrues the Supreme Court's view of § 8(e) and gives too narrow a scope to the construction industry proviso. We think that the prevail-

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[23] Office of the General Counsel, Memorandum 76–57, December 15, 1976, *reprinted in* Labor Relations Yearbook 1976, p. 295. Because Lunden failed adequately to distinguish between union signatory and union standards caluses, the General Counsel found that study "inconclusive." *Id.* at 308. The General Counsel's own study concluded that there was no "pattern" of collective bargaining in the industry, but that the existing clauses constituted only a "mosaic." Union signatory clauses, not restricted to a particular jobsite, were part of that mosaic. *Id.* at 309.

[24] *Connell* was another chapter in the dispute in Dallas between building contractors and trade unions. In *Dallas Building & Construction Trades Council v. NLRB,* 396 F.2d 677 (D.C Cir.1968), a clause similar to the one in *Connel* was at issue. Unlike Connell, however, the general contractor that was picketed had nonunion employees. Although the Trades Council expressly disavowed any interest in organizing the general contractor's workers, both the Board and the District of Columbia Circuit Court of Appeals concluded otherwise. The court held that because there was an organizational objective the picketing was limited to thirty days by § 8(b)(7), a period which the unions had exceeded.

The court's opinion left open the possibility of picketing more than thirty days if the unions could conclusively show no organizational objective. In order to avoid the § 8(b)(7) problem, the union picketed contractors who had no employees of their own. The contractors sought to challenge this practice before the Board, but the General Counsel refused to issue a complaint. *See Connell,* 483 F.2d 1154, 1158 (5th Cir. 1973), and 421 U.S. at 631–32 n. 10, 95 S.Ct. at 1839 n. 10.

When Local 100 began picketing Connell, the contractor did not file a complaint with the Board, but immediately sued the union for violating both federal and state antitrust laws.

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ing thrust of *Connell* is to the contrary and favors a broader view of the exemption. Our conclusion is supported in particular by the *Connell* opinion's emphasis on the absence of a collective bargaining relationship, its references to legislative history, and its characterization of the interests served by the proviso.[25] Our view is reinforced by the adverse practical consequences that would follow from the narrower reading of the proviso. Each of these factors bears elaboration.

The first and most obvious distinction of *Connell* from the present cases is that the agreements in *Connell* arose outside of the context of a collective bargaining relationship. This fact was of course crucial for antitrust purposes, because the national policy of encouraging collective bargaining has served as the basis for a judicially created labor exemption from the antitrust laws.[26] The absence of such an interest was pointedly referred to in *Connell*:

> In this case, Local 100 had an interest in representing Connell's employees. The federal policy favoring collective bargaining therefore, can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

421 U.S. at 626, 95 S.Ct. at 1837.[27] The focus of the *Connell* decision was therefore understandably upon the situation created by subcontracting clauses in the absence of a collective bargaining agreement with the prime contracting employer.

That focus on the part of the Court was not merely the product of the antitrust setting of *Connell*, however. The parties themselves had framed the issued toward the same end. The union contended that all subcontractor agreements were validated by the plain words of § 8(e). The employer responded by urging that "despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship * * *," but not those involving a "stranger" contractor. *Id.* at 627, 95 S.Ct. at 1837.[28] The subject of

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controversy, then, was the validity of subcontractor agreements *outside* of the collective bargaining context, and the *Connell* opinion must to a large degree be read in that light. The Court's conclusion, reached after a discussion of the legislative history and policies behind § 8(e), was clearly limited to the situation before it:

> We therefore hold this agreement, which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, . . . may be the basis of a federal anti-trust suit. . . .

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[25] But for the *Connell* decision, we would have no difficulty in enforcing the Board's order. Prior to *Connell*, this court, other circuits and the Board had upheld broad subcontracting clauses in collective bargaining agreements. *See, e.g., Construction, Production & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Suburban Title Center Inc., v. Rockford Building & Construction Trades Council*, 354 F.2d 1, 2–3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960, 86 S.Ct. 1585, 16 L.Ed.2d 673 (1966); *United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry Local 48*, 190 N.L.R.B. 415, 416–17 (1971).

[26] *See Connell*, 421 U.S. at 622–23, 95 S.Ct. at 1835; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va.L.Rev. 603 (1976). Labor unions also have a statutory exemption from the antitrust laws by virtue of sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113. These statutes declare that labor unions are not combinations in restraint of trade and exempt specific union activities including secondary boycotts from the antitrust laws and from certain kinds of injunctive relief. These statutes do not, however, exempt concerted activity or agreements between unions and non-labor parties. *Connell, supra*, 622–23, 95 S.Ct. at 1835. *See generally*, R. Gorman, Basic Text on Labor Law, 621–31 (1976).

[27] The fact that *Connell* was an antitrust case outside of the context of collective bargaining led to a natural emphasis by the Court on the pursuit of market efficiency through competition. This emphasis reappears in the dissent here, *infra* 654 F.2d 1325–1326, but we find it far less compelling in this labor case in which no antitrust issues have been raised. The thrust of the labor laws, or course, is frequently contrary to that of the antitrust laws. *See* St. Antoine, *supra*, n. 26.

[28] The briefs in *Connell* concentrated entirely on the distinction between the presence and absence of a collective bargaining relationship in determining the validity of subcontracting clauses. The policy of preventing jobsite, friction was raised tangentially in the appendix to Local 100's brief which included a memorandum by the NLRB General Counsel explaining why he would not issue a complaint in a case factually similar to *Connell*. Significantly, that memorandum, dealing with Hagler Construction Co., was distinguished in the *Connell* opinion as being "* * * addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement." 421 U.S. at 632 n. 10, 95 S.Ct. at 1839 n. 10. (Emphasis in original).

Id. at 635, 95 S.Ct. at 1841. The holding of *Connell,* then, does not in the strict sense control the cases before us.

The *Connell* opinion did, however, discuss at length the reach of § 8(e) and its contruction industry proviso, upon which the present cases turn. It therefore becomes necessary to interpret the language of *Connell* and apply it to the situation of the cases at bar where a collective bargaining relationship existed between the unions and the contractors with whom the agreements were sought.[29] A major question is whether the presence or absence of a collective bargaining relationship, obviously significant in the antitrust context of *Connell,* remains pivotal when the issue is purely one of labor law.

We believe that there is a complex of factors affecting labor relations in the construction industry that renders the collective bargaining relationship crucial in the present cases and we find the underlying policies reflected in parts of the *Connell* opinion itself. We also believe that these factors exist at the construction jobsite but are by no means limited to the problem of shoulder-to-shoulder friction between union and nonunion workers there. These two themes—the nature of the collective bargaining relationship in the construction industry and the manner in which these characteristics are exhibited at the jobsite—are interwoven in *Connell* as they are in the present controversy. We will attempt, however, to discuss them separately even though each will necessarily intrude upon the other.

The legislative history already discussed should make it clear that the outstanding peculiarity of the construction industry is that the work force of any given employer—contractor or subcontactor—is highly flexible and grows or diminishes or even disappears depending on the temporary contracting or subcontracting arrangements at any particular jobsite. As Congress recognized in passing § 8(f), collective bargaining cannot even await the presence of workers on the job. Moreover, when there are workers already employed by a general contractor, the interests of those employees are not permanently or inevitably bound to that single employer. The employer has an option on any given project to use some of his own workers, to subcontract to an employer who will use those same workers, or to subcontract to one who will use others represented by the same union, a different union, or no union. Under those conditions the employees and their unions are faced with severe problems not only of maintaining wage levels, but of protecting benefits such as retirement pensions and paid vacations that depend upon continuity of employer contributions.

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When a union representing a contractor's employees seeks to restrict subcontracting to firms having a collective bargaining agreement with the union, the union in fact pursues a number of objectives some of which might fairly be characterized as primary and others as secondary. The welfare of the employees in the primary bargaining unit is clearly likely to be affected by an employer's choice to hire a subcontractor who may himself employ those same employees. On the other hand the union clearly has secondary goals that may include organizing the employees of a subcontractor who have no connection with the primary bargaining unit.

It is quite true that when a union seeks to serve the interests of employees in its bargaining unit not as employees of their existing employer, but as potential employees of some other employer, the arrangement is legally viewed as secondary. *National Woodwork, supra,* at 644–45, 87 S.Ct. at 1268; *National Maritime Union, supra.* We do not quarrel with this well-established rule, nor with the rule that when primary and secondary objectives are combined, an agreement is regarded as secondary for purposes of the National Labor Relations Act. *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 689, 71 S.Ct. 943, 952, 95 L.Ed. 1284 (1951).

We do, however, find sufficient support in the legislative history of the 1959 Amendments to suggest that Congress was sensitive to both the primary and secondary considerations involved in subcontractor arrangements and wished not to interfere with these mixed union objectives when they could be achieved by agreement with the prime employer. Even though a construction union's interest in subcontracting at the jobsite is secondary so as to bring it within § 8(e), it is far more direct and involves the union's members in the primary bargaining unit far more than is the case when unions outside of the construction industry pursue secondary objectives.

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[29] In *Woelke,* the union had entered a three-year collective bargaining agreement with the employer and the dispute arose during negotiations to renew the contract. In *Pacific Northwest,* the union had long had a continuous collective bargaining agreement with the Association of General Contractors. We therefore need not reach and express no opinion on the question whether a "prehire" agreement entered or sought pursuant to § 8(f) of the Act is a sufficient "collective bargaining relationship" to render permissible the entry of subcontracting agreements. We note that prehire agreements were held sufficient to legitimize subcontracting agreements in *Donald Schriver Inc. v. NLRB,* 635 F.2d 859 (D.C.Cir. 1980).

The importance of this fact is that it renders the existence of a collective bargaining relationship highly significant. When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree. In the *Connell* situation, the union is utterly without any objective that could be characterized as primary or direct. Because the union in *Connell* disclaimed any interest in representing the employees of Connell, all of its goals were necessarily secondary and could not be connected to any primary representational interest.

The significance of the restriction of the § 8(e) proviso to work performed at a jobsite may now become more clear. It is at the jobsite that all of the special characteristics of the construction industry are manifested. It is true that *one* of these characteristics is that union workers are traditionally hostile to the presence of nonunion workers on the same job at the same time. But that is clearly not the only or even the major characteristic exhibited. It is at the jobsite where the general contractor can exercise the flexibility to use its own workers or those of a subcontractor, where the flexibility of subcontracting arrangements may lead to multiple employers hiring a few workers for short periods of time,[30] and where working conditions applicable to one

set of workers may very well affect others working on the same project.[31]

We believe that the *Connell* opinion is sensitive both to the interconnection of interests between employees of the various contractors and subcontractors and to the broad manner in which any or all of these factors may be exhibited at the jobsite. In dealing with the legislative history of the construction industry proviso, the opinion in *Connell* points out that the proviso was "explained only by bare reference to 'the pattern of collective bargaining' in the industry." 421 U.S. at 628–29, 95 S.Ct. at 1838. The legislative history discussed above indicates, we believe that the pattern of collective bargaining included broad subcontracting agreements. To the extent that the just-quoted comment in *Connell* dismisses the history regarding the pattern of collective bargaining, it may well be explained by the fact that *Connell* was dealing with a case not considered by Congress, in which there was no collective bargaining relationship.[32]

In any event, the subsequent language of the *Connell* opinion appears quite clearly to encompass the multiple considerations affecting the construction industry at the jobsite. The opinion suggests that the construction industry proviso may have been adopted "as a partial substitute for an attempt to overrule" *Denver Building Trades,* 421 U.S. at

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[30] The 1977 Census of Construction Industries found that there were more than 288,000 "specialty trade contractors" (a category which includes fifteen different subcontracting functions). On the the average, each firm employed six construction workers. U.S. Bureau of Census, Census of Construction Industries (1977), *cited in* Statistical Abstract of the United States (1979) Table 1365, p. 776.

One commentator has aptly summarized the peculiar problems confronted by labor unions attempting to organize construction workers as well as the techniques which they have employed:

> Union insistence on having the contractor use only union men runs counter to the general theory of free determination on which the Wagner Act was based. Elections on the part of the employees are impractical, however, in an industry where the employment may be over before an election can be held, and where the employees on the next job may be a substantially different group. It would be literally impossible to maintain a union if the men had to be organized anew each time they went to a new job. The industrial union can afford the luxury of indifference as to whom the employer hires because the important thing is to organize the employees once they are on the job. The building trade union cannot operate efficiently unless it can require the employer to hire its members in the first place.
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> * * * * *
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> [B]uilding trade unions [therefore] have not organized employees by techniques familiar to manufacturing. Instead, the construction unions have, in effect, organized the employers. An agreement with the employer that he will hire only union members is much the most effective way to standardize working conditions in an industry where jobs are so fluid.

Fleming, *The Building Trades and Title VII of LMRDA,* in LMRDA Symposium, *supra,* note 12, at 1034, 1043.

[31] *See Donald Schriver Inc., supra,* 635 F.2d at 883–884.

[32] In *Connell,* the Fifth Circuit requested that the parties and their amici submit supplemental briefs concerning the pattern of bargaining practices at the time of the 1959 amendments. The union was unable to provide any information which would allow the conclusion that stranger clauses were part of the pattern and that Congress therefore intended to preserve this practice. 483 F.2d at 1182 (dissenting opinion). Such is not the case with regard to particular union clauses. The decision of the District of Columbia Circuit in *Operating Engineers, supra,* as well as the House and Senate Hearings, *supra,* note 24, suggest that Congress was well aware of the existence of these clauses.

629, 1838. *Denver Building Trades* had outlawed the picketing of a contractor at a jobsite in order to force it to cease doing business with a nonunion subcontractor working there. The *Connell* opinion refers to congressional discussion of special problems in the construction industry related both to the § 8(e) proviso and to the attempt to overrule *Denver Building Trades.* That discussion, according to the Court, "focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* 421 U.S. at 629–30, 95 S.Ct. at 1838. The Court's footnote to this statement refers to legislative history that clearly goes beyond the problem of shoulder-to-shoulder conflict between union and nonunion workers at the jobsite. The first excerpt referred to is by Senator Morse whose statement includes the following:

> The secondary boycott ban is based upon the concept to two employers—a primary and a secondary employer. The theory is that a neutral employer should not be **1319** compelled to suffer because of a labor dispute the union has with somebody else, but the theory breaks down when the two employers are "allies." Senator Taft said that the secondary boycott section "is not intended to apply to a case where the third party is, in effect, in cahoots with, or acting as a part of, the primary employer."[33] The National Labor Relations Board and the courts have failed to keep Senator Taft's concept in mind. The Board has considered subsidiaries to be separate employers. Other enterprises, substantially controlled by the same persons, have been considered separate employers, even though one manufactured a product incorporated into the finished article produced by the other.
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> The case of the building and construction industy represented probably the most flagrant injustice, where a general contractor is, in effect, entirely in control of the kind of labor relations taking place on a site which he runs. He lets subcontracts based upon price, responsibility, and the ability to handle labor relations.
>
> He lets those contracts, very well knowing the kind of labor relations which may exist within any of the subcontractor companies. He is not acting in the dark, Mr. President. He is not innocent of any unfair labor policies on the part of a subcontractor.

105 Cong.Rec. 17880–81; II Leg.Hist. at 1425. Even where the sources cited by *Connell* deal with union workers at the jobsite, they reflect a number of interests of the union that affect members of its own bargaining unit as well as the members in secondary employ. The memorandum by representatives Thompson and Udall is illustrative:

> Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obscure their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeles. The illegality of such a boycott would not be affected by the amendment.
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> * * * [A] reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others.

105 Cong.Rec. 15541; II Leg.Hist. 1577. These materials cited by the *Connell* Court suggest a number of reasons why Congress may have wanted to restrict the construction industry's use of subcontracting agreements to work done on a jobsite. These sources do not limit themselves to and, indeed, place very little emphasis on, the problem of shoulder-to-shoulder friction between union and nonunion workers actually present at the jobsite.

The *Connell* opinion quotes *National Woodwork Manufacturers, supra,* to the effect that the construction industry proviso is "designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." 421 U.S. at 630, 95 S.Ct. at 1839, quoting 386 U.S. at 638–39, 87 S.Ct. at 1265. It is clear that the *Connell* opinion views the jobsite consideration of *National Woodwork* as going well beyond the problem of friction among workers,[34] because *Connell* next refers to some courts that have suggested that the proviso serves an "even narrower function"—the alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Id.* 421 U.S. at 630, 95 S.Ct. at 1839, quoting *Drivers Local Union No. 695 v. NLRB*, 361 F.2d 547, 553 (D.C.Cir.1966). The *Connell* opinion does not adopt this "even narrower" reading of the proviso, and indeed finds it unnecessary to treat the matter further because in the *Connell* case the union did not purport to represent any of the interests served by the proviso. 421 U.S. at 631, 95 S.Ct. at 1839.[35]

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[33] Senator Taft's remarks were part of a colloquy with Senator Ives on June 30, 1949, 95 Cong.Record 8709. Senator Taft was referring to the garment industry, but he cited for his proposition a case that involved the construction industry: *Douds v. Metropolitan Federation of Architects, Engineers, Chemists & Technicians, Local 231, (Project Engineering Co.),* 75 F. Supp. 672 (S.D.N.Y. 1948).

We believe that it would do some violence to the language of the *Connell* opinion to adopt the "even narrower" view of the construction industry proviso which the Court in *Connell* did not represent to be its own. Yet this consequence would follow from restricting the applicability of subcontractor agreements to those instances where shoulder-to-shoulder jobsite friction can occur. Instead, we think that it is more in accord with the language of *Connell* to permit those agreements to apply to any jobsite at which an employer with a collective bargaining relationship with the union is a contractor.

We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite. There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing uner § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell.

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[34] Indeed, *National Woodwork* contains a footnote reference succeeding the discussion of the "close community of interests" on the jobsite. 386 U.S. at 639 n. 32, 87 S.Ct. at 1265 n. 32. That footnote refers to *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964), which does deal with shoulder-to-shoulder friction. It also refers, however, to a Yale Law Journal Comment. *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 Yale L.J. 673, 684–89 (1951), which discusses not only job-site friction but also the additional considerations of interchangeability of workers, short time span, flexible contracting arrangements, and numerous other interests that a union representing a primary group of employees may have in the employment arrangements of other employees at the jobsite.

[35] Essentially the same situation was dealt with by this court in *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848 (9th Cir. 1975). *ACCO* does contain language tending to restrict the jobsite proviso to the goals of avoiding shoulder-to-shoulder friction, but we do not read that as essential to its decision. *ACCO* was written before *Connell* and it dealt with what were essentially off-site workers who only occasionally worked on-site. They and their employers were not at all involved in the "community of interest" which are emphasized in *National Woodwork*, *Connell*, and this opinion. The union's objectives in organizing such off-site workers were indirect and wholly secondary; the primary interests of workers in the bargaining unit at the jobsite could not be directly affected by, and were not interchangeable with, the off-site workers.

[36] Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry.

If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell,* where a stranger contractor was powerless to resist unlimited coercion by any means other than signing the demanded subcontractor agreement.

Finally, in summarizing the proviso's effect, the *Connell* Court stated:

> [W]e think its authorization extends only to agreements in the context of collective bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633, 95 S.Ct. at 1840. While it might be susceptible to another reading, we interpret this language to mean that the existence of a collective bargaining relationship *clearly* brings a union signatory subcontracting agreement within the proviso to § 8(e) and that in the absence of a collective bargaining relationship, it is possible that such an agreement may be valid where the union actually has workers on the job that may be threatened with shoulder-to-shoulder friction.[37] We consequently believe that the quoted summary supports our conclusion that *Connell* does not deny the protection of the proviso to the subcontractor agreements in the present cases.

(B) *Practical Consequences.*

Our reading of *Connell* to permit broad subcontracting clauses within a collective bargaining relationship not only accords with the apparent thrust of the legislative history, it is supported by the severe practical limitations attending a contrary conclusion. Limitation of subcontracting agreements to sites where there may be shoulder-to-shoulder conflict between union and nonunion workers presents immense practical problems. If unions are confined to negotia-

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ating these agreements only when they find that there are union employees on the jobsite, then they must inventory and negotiate over an incredible number of jobsites. AGC itself represents some 200 general contractors. The number of jobsites at which they contract is unquestionably a multiple of that figure. Jobsite by jobsite negotiation of subcontracting agreements would seem burdensome to the point of impossibility. It also appears to run counter to Congress's accommodation in § 8(f) to the necessity in the industry of entering long term agreements applying to employees not yet hired for jobs not yet in existence. S.Rep.No. 187, 86th Cong., 1st Sess. 28 (1959); I Leg.Hist. 424.

Even if general subcontracting agreements are permitted to be negotiated wholesale and then are triggered only when union workers appear on the job, the enforcement problems remain severe. The transitory nature of employment at each jobsite, as well as the difficulty of defining the applicable time span during which jobsite conflict is threatened, present substantial problems.[38] If a rule is adopted

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[37] Our reading of the quoted language in *Connell* as presenting disjunctive alternatives rather than conjunctive and cumulative requirements is supported by the District of Columbia Circuit and probably by the Third Circuit. *Donald Schriver, Inc., supra; Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council,* 609 F.2d 1368, 1374-75 (3d Cir. 1979) (en banc). Lower courts and commentators have varied in their approach to the underlying issue. *See Landscape Specialties, Inc. v. Laborers' International Union, Local 806,* 477 F.Supp. 17 (C.D.Cal. 1979); *Long v. Floorcraft Carpet Co.,* 82 Labor cases ¶ 10,044 (D.OR. 1977); St. Antoine, *supra,* 62 Va.L.Rev. at 619; Janofsky & Hay, *Connell—Consistent with Past, Indicative of Future,* Proceedings of N.Y.U. Twenty-Ninth Annual Conference on Labor 3, 21-22 (1976).

Normally, a union without a collective bargaining relationship that seeks a subcontracting clause will be pursing no interest that could impact upon its primary representation of anyone. The rare exception might occur when the union has its own employees working for some other employer on the jobsite and shoulder-to-shoulder friction threatens.

[38] The dissent makes the point that even under our decision, unions must police jobsites to ensure compliance with subcontractor clauses. We believe that it is a more manageable task, however, to police jobsites to

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that the appearance of any union worker on the job triggers subcontracting agreements covering the entire project, it presents an especially strong incentive for anti-union discrimination by employers.

We are presented, then, with a number of practical and theoretical considerations supporting our decision that the present subcontracting agreements, arrived at in the context of collective bargaining relationships, are within the proviso of § 8(e). First, there are overwhelming practical difficulties in confining the subcontractor agreements to jobsites where actual union-nonunion or interunion conflict occurs among workers. Second, the legislative history as well as the actual conditions existing in the construction industry militate in favor of broad subcontractor clauses in collective bargaining agreements. Third, the *Connell* decision, which admittedly has language that might point to either result, may fairly be read to support the validity of subcontracting clauses when there is a collective bargaining relationship, regardless of the presence or absence of union workers at the jobsite.

Given these considerations, we reject a narrow interpretation of the proviso which will substantially change the existing practice in the industry. In addition, we believe that due regard should be given to the view of the National Labor Relations Board supporting these agreements.[39] It is true that the position of the agency has not been an unwavering one,[40] but the Board's articulation of current labor policy is undoubtedly entitled to weight in our decision.

VI.

Additional Issues.

It is contended by AGC that even if the construction industry proviso authorizes

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clauses requiring subcontractors to have agreements with unions in general, it does not permit clauses to require a collective bargaining agreement with a particular union. We note, however, that nothing in the language of the § 8(e) proviso suggests such a limitation, even though "particular-union" clauses were a part of industry practice at the time of its enactment. Two months prior to the creation of the proviso, the District of Columbia Circuit upheld a "particular-union" subcontractor agreement in a decision that was submitted to the House committee considering the 1959 amendments. *Operating Engineers Local Union No. 3 v. NLRB, supra;* 2 House Hearings 803–07. In the light of this history, we do not feel free to find in the proviso a limitation not written there by Congress. We are joined in this conclusion by the District of Columbia Circuit in *Donald Shriver, Inc. v. NLRB, supra,* 635 F.2d at 884–886. We also note that prohibition of "particular-union" subcontractor clauses would defeat at least some of the interests that we earlier found to be served by the construction industry proviso. One such interest is that of a union in protecting the wages and benefits of its members in the primary bargaining unit who may later work for subcontractors. That concern is shared by no other union, and is best served by a "particular-union" clause.

It is next contended, this time by Woelke, that even if a subcontractor agreement is protected by the construction industry proviso, it is an unfair labor practice for a union to picket or strike in order to induce a contractor to enter such an agreement. The legislative history of the 1959 amendments is in conflict on this point.[41] The

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ensure that subcontractors working there have agreements with the policing union than it is to determine whether any union worker has been working on the jobsite at any time, or perhaps at any time when that worker's presence might lead to jobsite friction.

[39] *NLRB v. Yeshiva University,* 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1980). *Compare Beth Israel Hospital v. NLRB,* 437 U.S. 483, 500–01, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978), and *NLRB v. International Association of Bridge, Structural & Ornamental Iron Workers,* 434 U.S. 335, 350–51, 98 S.Ct. 651, 660–61, 54 L.Ed.2d 586 (1978), *with NLRB v. International Longshoremen's Association,* 447 U.S. 490, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980).

[40] *See International Union of Operating Engineers, Locals 542, 542–A and 542–B (York County Bridge, Inc.),* 216 N.L.R.B. 408, 409 (1975), *enforced,* 532 F.2d 902 (3d Cir. 1976), *cert. denied,* 429 U.S. 1072, 97 S.Ct. 808, 50 L.Ed.2d 789 (1977); General Counsel Memorandum, note 25, *supra.*

[41] Representative Barden, the Leader of the House conferees, referred to the proviso as permitting "voluntary agreements." 105 Cong.Rec. 18128; II Leg. Hist. 1715.

Senator Kennedy, the leader of the Senate conferees, appeared to be of the view that economic coercion was permissible, and stated that the proviso was not intended to change the law "with respect to the legality of a strike to obtain such a contract." 105 Cong.Rec. 17900, II Leg. Hist. 1433.

Senator Goldwater, one of the Senate conferees, and the man who may have been most responsible for the Landrum-Griffin Amendments, *see* 105 Cong.Rec. 15516, II Leg.Hist. 1552 (statement of Rep. Madden), said

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actual wording of § 8(b)(4)(ii)(A), however, prohibits coercion of any person "*to enter into any agreement which is prohibited by* [§ 8(e)]." [42] The negative implication of this provision is surely that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful.

After the 1959 amendments, the Board originally took the position that such agreements had to be voluntarily entered, but its position was uniformly rejected by this and other courts of appeals. *Construction Production & Maintenance Laborers Union, Local 383 v. NLRB (Colson & Stevens Construction Co.),* 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB,* 328 F.2d 534, 537 (D.C.Cir. 1964); *Essex County and Vicinity District Council of Carpenters and Millwrights v. NLRB,* 332 F.2d 636 (3d Cir. 1964). The Board subsequently acquiesced in the courts' view. *Northeastern Indiana Building & Construction Council,* 148 N.L.R.B. 854 (1964), *remanded on other grounds,* 352 F.2d 696 (D.C.Cir. 1965). We see no reason to disturb the present law and to read into the Act a limitation that runs counter to the suggestion of its plain words. Nor do we accept the contention that picketing or striking to obtain a subcontractor agreement violates the § 7 rights of employees of subcontractors; they are no more affected by a subcontractor agreement achieved by picketing than by one voluntarily entered.

The final issue concerns the effect of the provision in the AGC contract that permits each party to resort to self-help when the other party does not comply with an arbitration decision made pursuant to the grievance procedure.[43] The Board concluded that these provisions authorized picketing or strikes to enforce the subcontractor agreement, and held that the contract was consequently unlawful. The rule that picketing or strikes may not be used to enforce subcontractor agreements arises from the fact that the 1959 amendments exempted the construction industry from § 8(e)'s prohibition against secondary boycott agreements, but did not exempt it from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history makes clear Congress's intent that subcontractor clauses entered pursuant to § 8(e) were to be enforced judicially rather than by self-help,[44] and this court has followed that view. *NLRB v. International Brotherhood of Electrical Workers,* 405 F.2d 159, 163–64 (9th Cir. 1968), *cert. denied,* 395 U.S. 921, 89 S.Ct. 1772, 23 L.Ed.2d 237 (1969). We have also held that such clauses may be enforced by arbitration. *La Mirada Trucking, Inc. v. Teamsters Local Union 166,* 538 F.2d 286 (9th Cir. 1976).

Engineers argue, without pressing the point strongly, that self-help to enforce an arbitation award that in turn enforces a subcontractor agreement is not unlawful. The picketing or strike, according to the Union, is simply enforcing the arbitration award and not the underlying agreement. We believe that acceptance of this contention would too easily circumvent the clear intent of Congress and would do violence to the plain words of § 8(b)(4)(ii)(B). Nor can we accept the suggestion of the Union that the AGC agreement must be construed to limit the self-help clause to self-help which is determined to be lawful. We must take the agreement to mean what it says. *Operating Engineers, Local No. 701 v. NLRB,* 578 F.2d 841, 842 (9th Cir. 1978); *Donald Schriver, Inc. v. NLRB, supra,* slip op. at 57–58.

VII.

Conclusion.

We find that provisions in a collective bargaining agreement forbidding the signatory employer to subcontract work at a contruction site to firms that do not have a contract with the signatory union are within § 8(e) of the National Labor Relations Act, but are protected by the construction industry proviso to that section. They need not be limited to jobsites presenting the possibility of conflict between union and nonunion workers. We also find that unions may picket or strike to induce employ-

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that the question was left open for the courts to decide. 105 Cong.Rec. 19772, II Leg.Hist. 1858.

[42] (Emphasis supplied). Section 8(b)(4)(ii)(A) appears *supra* note 4.

[43] *See* note 1, *supra.*

[44] The Conference Committee, after stating that it did not intend the proviso to change existing law regarding subcontractor agreements, stated: "Picketing to enforce such contracts would be illegal under the *Sand Door* case *Local 1796, United Brotherhood of Carpenters v. NLRB,* 357 U.S. 93 [78 S.Ct. 1011, 2 L.Ed.2d 1186] (1958)." H.R.Rep. No. 1147, 86th Cong., 1st Sess. 39, U.S.Code Cong & Admin.News 1959, p. 2511; I Leg.Hist. 943. *See also,* 105 Cong.Rec. 17900, II Leg.Hist 1433 (remarks of Sen. Kennedy). Senator Goldwater subsequently explained the proviso as follows: "The union may go into a court and sue [the contractor] if he fails to live up to that agreement. But they cannot strike or picket him to make him live up to it * * *." 105 Cong.Rec. A8359, II Leg.Hist. 1830.

ers to enter such agreements but that, once entered, the agreement may not be enforced by self-help. Clauses authorizing self-help enforcement, directly or through arbitration decisions, are consequently invalid. We accordingly enforce the orders of the Board in their entirely.

Sneed, Circuit Judge (with whom **Choy**, **Anderson** and **Farris**, Circuit Judges, concur) dissenting: As with many legal issues, where one ends up in this case depends upon where one starts. While I have no disagreement with the court's holding that union signatory clauses are secondary and within the scope of section 8(e), I respectfully dissent from its holding that such clauses are invariably within the construction industry pro-

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viso to section 8(e) when a collective bargaining relationship exists between the employer and the union seeking the clause. The majority reaches its conclusion by commencing with the view that the construction industry presents unique problems in labor relations that require the legitimation of union signatory clauses. Although admitting that the legislative history is not compelling, the court finds that legitimation was provided by the construction industry proviso. My starting point, on the other hand, is with *Connell Construction Co. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), and its concern with the "top-down" organizing effect of union signatory clauses. This concern led the panel before which this case was heard originally to hold as follows:

> "We hold that the construction industry proviso extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB,* 609 F.2d 1341, 1347 (9th Cir. 1979).

I would adhere to that holding and to the reasons given by the panel therefor. *Id.* at 1348–50.

The court rejects the panel's result because it is said to represent an "even narrower" view of the construction industry proviso than that adopted by the Supreme Court in *Connell.* 654 F.2d 1320. Alleviation of "the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," 421 U.S. at 630, 95 S.Ct. at 1839, is said not to have been a concern of the Supreme Court in *Connell* because in that case "the union did not purport to represent *any* of the interests served by the proviso." 654 F.2d 1320. Presumably this is because there was no collective bargaining agreement between the employer and union in that case.

As I see it, the crucial language in *Connell* is as follows:

> "We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." 421 U.S. at 635, 95 S.Ct. at 1841.

This language, as the majority acknowledges, is not entirely unambiguous. It is, however, not inconsistent with the panel's holding as set out above; and, more importantly, that holding is more empathetic with *Connell's* concern with the "top-down" organizing effect of union signatory clauses than is that of the majority.

It is true, as the majority states, that any union signatory clause has some "top-down" organizing effect. The difference between the panel's holding and that of the en banc court lies in the scope of this effect. The en banc court permits a clause that forbids subcontracting work covered by the collective bargaining agreement to any firm not having a contract with the signatory union. It matters not whether any of the employees of the signatory employer, who are members of the signatory union, are employed on the jobsite. It matters not that, in the absence of the union signatory clause, the work could have been subcontracted to a firm which, even though adhering to union standards governing wages and working conditions, was more efficient than its competitors.

It must be acknowledged that the panel's holding would not greatly diminish the "top-down" organizing effect of the union

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signatory clause. It would permit the choice of the more efficient firm only when to do so would entail no jobsite friction between members of the signatory union and workers performing work covered by the collective bargaining agreement. Thus, a provision in the agreement precluding subcontracting of all the covered work would prevent choice of the more efficient firm and thus provide a substantial "top-down" organizing effect. A clause prohibiting subcontracting is permissible. *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612, 644–46, 87 S.Ct. 1250, 1268–69, 18 L.Ed.2d 357 (1967); *see also Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); *NLRB v. Johnson,* 368 F.2d 549 (9th Cir. 1966). However, the panel's holding would afford an opportunity by which an employer could accept a union signatory clause without sacrificing all right to choose the more efficient subcontractor. Preservation of this opportunity would be more consistent with the primary concern of *Connell* than is the position of the en banc court. I doubt that the en banc court seriously contends otherwise. It does believe that the preservation of this opportunity would provide a "strong incentive for anti-union discrimination by employers." 654 F.2d 1322. I am dubious. Under either view an anti-union employer will strive to avoid a union signatory clause. That an employer under the panel's view would have a limited opportunity to subcontract to a firm not having an agreement with the signatory union is not likely to make it more anti-union.

I agree with the en banc court that the legislative history of the construction industry proviso is not conclusive. We have previously considered the legislative history of the proviso. *ACCO Construction Equipment, Inc. V. NLRB,* 511 F.2d 848, 851 (9th Cir. 1975). In surveying the legislative history, we concluded that the dominant motive of Congress in adopting the proviso was to permit agreements that aimed at eliminating jobsite friction between union and nonunion workers. *Id.* at 851; *accord, Drivers Local 695 v. NLRB,* 361 F.2d 547, 553 (D.C.Cir.1966); *Essex County District Council of Carpenters v. NLRB,* 332 F.2d 636, 640 (3d Cir. 1964). And the National Labor Relations Board previously believed: "[T]he 8(e) proviso was intended to prevent labor strife among nonunion and union employees at the same jobsite." *International Union of Operating Engineers, Locals 542, 542-A and 542-B,* 216 N.L.R.B. 408, 409 (1975), *enforced,* 532 F.2d 902 (3d Cir. 1976), *cert. denied,* 429 U.S. 1072, 97 S.Ct. 808, 50 L.Ed.2d 789 (1977). I see no reason to depart from our earlier analysis of the purpose of the priviso.

Admittedly, Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases. Others argued that the proviso was intended to permit agreements not to use prefabricated pipe unless union workers did the fabricating. 105 Cong.Rec. 19785–86, 19809 (1959); II Leg.Hist. 1815–16 (extension of remarks of Senator McNamara and Representative Thompson); *contra* 105 Cong.Rec. 20004–05 (1959); II Leg.Hist. 1861 (extension remarks of Representative Kearns). But neither of these purposes were clearly understood as the reason for the proviso. As *Connell* and *ACCO* concluded, the legislative history supports the conclusion that most congressmen thought the proviso was intended to address the problem of jobsite friction. *See, e.g.,* I Leg.Hist. 82 (message from President Eisenhower to Congress); 105 Cong.Rec. 15852, II Leg.Hist. 1684 (statement of Congressman Goodell); 105 Cong.Rec. 17333–34, II Leg.Hist. 1383–84 (proposed instructions for Senate conferees). Also, as I read the excerpt from the memorandum by Representatives Thompson and Udall quoted by the en banc court, 654 F.2d 1319, it too strongly supports the conclusion that the proviso was aimed at the jobsite friction problem. The references to employees working "side by side" on a "single building" so indicate. 105 Cong.Rec. 15541 (1959); II Leg.Hist. 1577.

The en banc court notes that some subcontractor clauses similar to those chal-

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lenged in these cases existed in 1959. Since they conclude that the Congress intended to preserve the law relating to the construction industry as it then existed, the court argues that Congress intended that the proviso would protect broad subcontractor clauses. I believe this reasoning gives far too much weight to the bar reference to the pattern of collective bargaining referred to in the Committee Report. *See Connell, supra,* 421 U.S. at 628–29, 95 S.Ct at 1838. Furthermore, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined in 1959. And the proviso clearly changed the law by explicitly limiting its protection to jobsite work. That limitation at least partially overruled the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB,* 357 U.S. 93, 78 S.Ct. 1011, 2 L.Ed.2 1186 (1958). Thus the most that can be said is that Congress intended to preserve the existing law within the scope of the proviso. That proposition, however, begs rather than answers the question of what the proper scope of the proviso is. That is what this case is about. Our decision, whatever it is, can draw but little comfort from the legislative history.

The majority also argues that practical considerations favor the result they reach. But the practical problems of following the panel's decision would not have been severe. If broad subcontractor clauses are approved, unions must still police construction sites to ensure compliance. No more is required by a rule limiting subcontractor clauses to jobsites at which members of the signatory union are employed. The serious practical problems raised by the majority would arise only if subcontractor clauses were required to be renegotiated on a jobsite by jobsite basis, but that would not be required by the panel's interpretation of the proviso.

Thus, we come to the nub of the matter. Which interpretation of the proviso is more faithful to curbing "top-down" organizing, which, it must be remembered, was Congress's objective in adopting the 1959 Act which included section 8(e). *Connell, supra,* 421 U.S. At 632–33, 95 S.Ct. at 1840. The holding of the panel gets my nod.[1]

FARRIS, Circuit Judge with whom CHOY and J. BLAINE ANDERSON, Circuit Judges, join, dissenting: I join Judge Sneed's dissent in all respects and add some comments regarding the scope of the construction industry proviso.

The collective bargaining agreements here prohibit signatory general contractors from subcontracting any work covered by the agreement at any construction site to nonsignatory contracts. These agreements violate subsection 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), unless they are permitted under the construction industry proviso, which allows "agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * *." *Id.* The precise issue here is whether the proviso legalizes agreements that limit subcontracting at sites where the employer has not employees represented by the union. The majority holds that it does. I disagree.

In *Connell Construction Co. v. Plumbers Local 100,* 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), the Supreme Court concluded that the construction industry proviso did not authorize a construction industry employer and a union not representing its employees to agree to limit the employer's right to subcontract. Finding no congressional purpose in extending the proviso to legalize agreements between employers and "stranger" unions, the Court narrowly construed the proviso to limit its scope "to agreements in the context of collective-bargaining relationships and * * * possibly to common-situs relationships on particular jobsites as well." *Id.* at 633, 95 S.Ct. at 1840.

Here, the three judge panel concluded that the proviso was designed to deal with the special problem of jobsite friction in the construction industry. It read the proviso to allow a collective bargaining agreement to restrict an employer's subcontracting at the jobsite where it employs the union's members. The majority asserts that another purpose—maintenance of contract standards in the industry—requires that the proviso be read to allow restrictions on the use of nonsignatory subcontractors at any jobsite. *See also Donald Shriver, Inc. v. NLRB,* No. 78-2177, slip op. at 43–47 & n.29 (D.C. Cir. Oct. 20, 1980). I agree that a congressional purpose in addition to reduction of jobsite friction may require a broader scope for the proviso, but I do not agree that maintenance of contract standards in the industry is such a purpose. The Court in *Connell* read the proviso to allow restraints in the context of collective bargaining relationships. That does not mean that when a relationship exists *any* restraint can be imposed; rather, the relationship only has a bearing on the legality of the restraint when the relationship and the restraint are related. It is not sufficient that the restraint serves the interest of workers in the industry generally. It must serve the interests of the workers represented by the union in the course of their employment by the employer.

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[1] Because the panel concluded that the broad subcontractor clause in the AGC agreement violated section 8(e), it did not address the lawfulness of the agreement's self-help enforcement provision. 609 F.2d at 1351. I agree with the majority of this en banc court that the self-help enforcement provision must be interpreted to mean what it says and that Congress clearly intended that subcontractor clauses were to be enforced judicially rather than by strikes or picketing. Therefore, I agree that the self-help clause in the AGC contract is invalid.

The only way the all-jobsite restraints here can serve the interests of these workers is by preventing loss of work due to subcontracting. This problem, however, is resolved by a common, *primary* restraint: the union standards clause. Such clauses effectively insulate workers from falling industry standards by removing the incentive to subcontract. At the same time they avoid many of the evils inherent in the restraints here. In my view the construction industry proviso is not concerned with maintenance of contract standards. *See generally* Archibald Cox, Derek Bok & Robert Gorman, *Cases and Materials on Labor Law* 892–95 (8th ed. 1977) (while garment industry proviso was concerned with maintenance of industry standards, construction industry proviso was concerned with jobsite friction). The proviso should not be read to permit restraints which extend to jobsites where no unit employees are present and which are therefore unrelated to reduction of jobsite friction.

NLRB v. Pizza Pizzaz, Inc., d/b/a Jacob Wirth Restaurant

646 F.2d 706 (1st Cir.), April 17, 1981—248 NLRB 191

On petition to enforce Board Order

Before Coffin, Chief Judge, Aldrich and Winter,* Circuit Judges

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Per Curiam: Adopting the findings of the administrative law judge, the National Labor Relations Board held that respondent Pizza Pizzaz, Inc., a Massachusetts corporation doing business as Jacob Wirth Restaurant, violated §§ 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) & (3), by threatening and then discharging two employees as a result of their union activities. The Board petitions for enforcement of its order. Respondent resists enforcement, contending first that the Board improperly exercised jurisdiction in this case, and second that the Board's finding of a violation of §§ 8(a)(1) & (3) is not supported by substantial evidence. We reject both contentions and grant enforcement.

I.

Section 10(a) of the National Labor Relations Act grants jurisdiction to the Board "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. § 160(a). In enacting § 10(a), Congress vested the Board with the widest jurisdiction constitutionally permissible under the commerce clause. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963). It is undisputed that the Board has acted within its statutorily authorized power in this case.

However, in cases involving retail establishments, the Board has imposed upon itself a discretionary jurisdictional standard, requiring that an employer's gross volume of business total at least $500,000 per year. *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88 (1958). Pizza Pizzaz has annual gross sales in excess of only $140,000. However, it is the sole stockholder of **708** Jacob Wirth, another Massachusetts corporation, which has sales in its own right of more than $380,000. The Board determined that it had jurisdiction in this case by finding that the two restaurant corporations were a single employer for jurisdictional purposes. The restaurants attack that finding.

We decline to disturb the Board's determination that Pizza Pizzaz and Jacob Wirth are a single employer. "The Board's conclusion that two corporations constitute a 'single employer' is 'essentially a factual one' and not to be disturbed provided substantial evidence in the record supports the Board's findings." *NLRB v. C. K. Smith & Co., Inc.*, 569 F.2d 162, 164 (1 Cir. 1977), *cert. denied*, 436 U.S. 957, 98 S.Ct. 3070, 57 L.Ed.2d 1122 (1978), quoting *NLRB v. R. L. Sweet Lumber Co.*, 515 F.2d 785, 793 (10 Cir.), *cert. denied*, 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302 (1975). To direct that factual inquiry, we have enumerated four "controlling criteria" for determining whether two or more business entities are a single employer: "interrelation of operations, common management, centralized control of labor relations and common ownership." *Id.*, quoting *Radio Technicians Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965).

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*Of the United States Court of Appeals for the Fourth Circuit, sitting by designation.

Common ownership is undisputed. Pizza Pizzaz is a corporation operating a fast food restaurant and is also the sole stockholder of Jacob Wirth. Interrelation of the restaurants' operations is minimal, although both serve a specially-made product, Jacob Wirth's Dark Beer, and the two corporations file a consolidated tax return.

Although each restaurant has its own manager, Sam Schwartz at Pizza Pizzaz and Robert McManus at Jacob Wirth, control over the two ultimately rests with a single individual, Richard Fallon, who is president of Pizza Pizzaz, vice-president and treasurer of Wirth, and general manager of both establishments. Fallon handles all labor relations matters. In the past he has fired a manager of Jacob Wirth for refusing to obey his orders with respect to the rehiring of an employee. Fallon testified that he consults with both Schwartz and McManus with regard to wages and the hiring and firing of personnel. He has participated in grievance proceedings involving Jacob Wirth employees and, at the time of the alleged violations, was conducting negotiations with the union regarding a collective bargaining agreement for Wirth's employees. Because Pizza Pizzaz employs only Schwartz and three members of his family, Fallon's control over labor relations at that establishment has been limited to consultations with Schwartz regarding wages and hours. In short, although the degree to which respondent's operations fulfill some of the *C. K. Smith* criteria may be debatable, the record provides substantial evidence from which the Board could rationally draw the conclusion that the two restaurants are a single employer.

Moreover, even if the Board erred in this factual conclusion, we should not refuse to enforce the Board's order for want of jurisdiction:

> Where statutory jurisdiction exists . . . the Board has the administrative discretion to disregard its own self-imposed jurisdictional yardstick * * *
>
> When the Board disregards its own self-imposed jurisdictional guidelines in asserting jurisdiction on an ad hoc basis, the courts should not intervene unless compelled to do so by extraordinary circumstances, or unless the Board has abused its discretion.

NLRB v. Erlich's 814, Inc., 577 F.2d 68, 71 (8 Cir. 1978) (citations omitted). *Accord, NLRB v. Okla-Inn*, 488 F.2d 498, 500 (10 Cir. 1973); *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145, 1149 (6 Cir.), *cert. denied*, 414 U.S. 826, 94 S.Ct. 130, 38 L.Ed.2d 59 (1973). We find nothing extraordinary in this case that would justify a refusal to support the Board's exercise of jurisdiction.

II.

The Board found that respondent violated § 8(a)(1) of the Act in threatening Angelo Pappas, Jr. and Mohamed Zahran, both waiters at Jacob Wirth, as a result of

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their union activity. Respondent does not challenge that finding. Respondent does attack the Board's finding that it violated § 8(a)(3) of the Act in firing Pappas and Zahran. We conclude that substantial evidence on the record as a whole supports the Board's conclusion.

We find that the Board initially demonstrated "'significant' improper motivation" for the discharge. *See, e. g., Statler Industries v. NLRB*, 644 F.2d 902 (1st Cir. 1981). Because respondent does not contest the finding of a § 8(a)(1) violation, we accept as undisputed the finding of the administrative law judge that, two days before the discharge, Wirth's manager McManus warned Pappas in the presence of several waiters, "if you think you're going to bust my ass with the union, I got news for you—don't try it." Likewise, we accept the finding that McManus approached Zahran that same day and asked, referring to Pappas and Zahran, "what you two people are trying to do to me?" In that same conversation, as the administrative law judge found, McManus told Zahran to convey to Pappas the warning that, if Pappas persisted in his union activity, McManus would "break his legs." All of these statements, the accuracy of which respondent does not now contest, provide more than ample basis for the Board's finding that McManus knew of the union activity of Zahran and Pappas and acted to stop it when he discharged both men shortly after these conversations.

We also agree with the Board that respondent failed "to prove that it had a good reason, sufficient in itself, to produce the discharge." *See, e. g., id.* Respondent argues that the Board failed to give adequate consideration to the employer's justification for the firings: *i. e.,* that Pappas and Zahran were among the restaurant's most unproductive workers. The administrative law judge discounted this explanation primarily because respondent failed to offer as evidence the cash register records which purportedly would demonstrate the inefficiency of the two employees. Respondent argues that these records were not submitted because Pappas and Zahran admitted their low productivity. However, even if the administrative law judge drew an improper inference from respondent's failure to produce the records, ample evidence remains to support the Board's decision to reject respondent's purported justification. Pappas and Zahran both testified that their low productivity resulted from their assignment to the less desirable tables in the restaurant. Pappas' father, a respected, long-time employee at Jacob Wirth, corroborated this explanation in his testimony.

Respondent asserts that McManus decided to fire Pappas and Zahran because of low productivity several days before making threats to both employees regarding union activity. Respondent's brief places great weight upon the fact that four other employees were fired for inefficiency or misconduct at the same time Pappas and Zahran were discharged. Also, respondent points out, an advertisement seeking new waiters was printed in the *Boston Globe* on the morning of August 5, 1978, the day McManus first warned Pappas about union activity.

The administrative law judge considered this evidence and found it insufficient to account for the discharges. The evidence shows only that plans probably were made prior to August 5 to fire *some employees* for inefficiency. However, respondent's failure to substantiate its claim that Pappas and Zahran fell within that category provided ample grounds for the administrative law judge to reject the employer's proffered justification. Moreover, as the Board argues, it seems extremely unlikely that McManus, having decided to fire Pappas for cause, would publicly threaten him about union activity soon thereafter.

ENFORCEMENT GRANTED.

Warehouse Union, Local 860, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. NLRB

652 F.2d 1022 (D.C. Cir.), April 17, 1981—236 NLRB 844

On petition to review Board Order

Before MCGOWAN, Chief Judge, and ROBINSON, Circuit Judge, and PARKER,* United States District Judge for the District of Columbia

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BARRINGTON D. PARKER, District Judge: The National Labor Relations Board found that the petitioner Warehouse Union, Local 860 (Union or Local 860), violated the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, by failing to provide fair representation to certain workers during contract bargaining negotiations with the employer Emporium.[1] Specifically, the Board found that the Union violated § 8(b)(1)(A) of the Act and committed an unfair labor practice by failing to advise the membership of the clerical unit, which it represented, or prior threat of job loss by the employer if the wage increases demanded during negotiations were granted. Local 860 represented the clerical unit throughout the contract negotiations.

The Warehouse Union petitioned the Court to review and set aside the Board order. The Board has filed a cross-application requesting enforcement of its order. For the reasons set out below we sustain the Board's findings and determination that the Union violated the Act.

BACKGROUND

The factual findings of the administrative law judge (law judge) were adopted by the Board and are briefly summarized. Warehouse Union, Local 860, represented the warehouseman employed by the Emporium, a California retail sales corporation. Local 860 agreed to represent a unit of thirteen clericals which had been transfered to its jurisdicition in 1972. Twelve of these thirteen clericals were women. In the summer of 1976, Local 860 entered into negotiations with Emporium concerning a renewed contract for 1976–1979. Before the negotiations commenced, the clerical employees alerted the Union that they wanted a wage increase equal to that demanded by the warehousemen, namely, a 70-cent increase.

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*Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The Board's opinion and order are reported at 236 N.L.R.B. 844 (1978).

Early in the negotiations, the Union representatives presented the wage demand to the employer. The negotiators for Emporium made it clear that such proposal was unacceptable and asserted flatly that such wages would result in the elimination of the entire clerical unit. Such unequivocal statements were made by the employer's representatives several times during the course of the negotiations. There was testimony that in response to such statements the Union representatives replied that they "didn't want the broads in the first place" but now they were stuck with them. Joint Appendix, (J.A.) at 7. With the knowledge of these statements, the Union representatives persisted in demanding the increase without consulting the clericals whom they represented.

Ultimately the wage increase was granted and the employees voted to accept the new contract. Thereafter, on October 15, Emporium terminated the clerical operation and permanently laid off the employees in that unit.

ANALYSIS

The standard of fair representation required of a unioin was enunciated by the Supreme Court in *Vaca v. Slipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967) and subsequently followed by this circuit, *e.g., Branch 6000, National Association of Letter Carriers v. N.L.R.B.,* 595 F.2d 808, 811 (D.C.Cir.1979); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 310 v. N.L.R.B.* 587 F.2d 1176, 1181 (D.C.Cir.1978). In *Vaca,* an employee discharged for poor health sought the union's help in regaining his job. The union decided not to take the grievance to arbitration because of insufficient medical evidence. The Supreme Court reversed the holding of the Missouri Supreme Court and held that under the applicable federal standard there was no violation since the union's acts were not proven to be arbitary or in bad faith. The court also found that a union had an obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." 386 U.S. at 177, 87 S.Ct. at 910. That standard has been interpreted to encompass a three-prong test by which to measure a union's behavior during its representation of the membership. Actions found to be hostile, discriminatory or arbitrary are likely to constitute a violation of § 8(b)(1)(A). *Ruzicka v. General Motors Corporation,* 523 F.2d 306, 309 (6th Cir. 1975); *Griffin v. International Union of United Automobile Makers,* 469 F.2d 181, 183 (4th Cir. 1974).

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Quoting *Griffin,* the Sixth Circuit in *Ruzicka* accepted the three-prong test at page 309–10:

> A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

In this proceeding the General Counsel attempted to prove that the representatives of Local 860 made an express agreement with Emporium as to the elimination of the clerical unit—an agreement motivated by sex discrimination. The law judge discarded the theory that the parties made an express agreement and that any agreement was based on discrimination against women. The evidence lending support to a finding of sex discrimination was that the Union agents referred to the clericals as "broads." The law judge found this evidence to be fragile and inadequate.

He did find several factors indicating that Mark O'Reilly, a Union representative, had made an implied agreement with Emporium. He did not find, however, the implied agreement to be determinative of the issue of the Union's unfair labor practice. To the contrary, he found "Respondent's [Union's] failure to advise employees of dangers well-known to Respondent that their insistence was creating, which resulted in the loss of jobs, was a violation of section 8(b)(1)(A) * * *." J.A. at 16-17. In its affirmance, the Board noted its decision was based on the law judge's finding "that Respondent failed to represent every employee in the unit fairly, impartially, and in good faith by persisting in demanding a wage increase it knew would result in their termination." J.A. at 22 n.2. It is clear that the Board's determination of a § 8(b)(1)(A) violation was based on the Union's failure to inform the clericals of the threats and not, as petitioner Union now contents, on the theory that there exists an agreement between the Union and Emporium. Substantial evidence in the record supports the Board's determination.

Two of the clerical employees testified at the administrative hearing that the Union never discussed with or presented to their unit the possibility of job layoffs; the law judge recognized and credited their testimony. There was also a stipulation that five other witnesses could corroborate that testimony. J.A. at 13. Finally, the law judge found that no Union agent notified the

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clericals of the representations made by the employer as to the elimination of the clericals' jobs during the negotiations or at any time thereafter.

Local 860 had at least two opportunities to inform and advise the clericals of management's statements during the negotiations. While the negotiations were continuing, O'Riley and Robert Patterson, another Union representative, met with the warehousemen and clericals to explain the Emporium was willing to agree to the demands for an increase in wages for the warehousemen. O'Riley informed the workers that they would continue to push for the wage increase for the clericals, an issue which had not been resolved. At another meeting shortly thereafter, the two discussed the terms of the new agreement and told the clericals they would receive a 70-cent per hour wage increase, but that 35 cents of the increase would be "red circled", meaning that it would not be actually reflected in the contract. The Union representatives neglected to mention the possibility of the layoffs to the clerical employees at either meeting.

When the Union learned the layoffs were to be effected in late August, 1976, O'Riley complained about the timing and asked if the action could be delayed until after Christmas. The employer's negotiator reminded him that the Union had advance warning of Emporium's plan and that they offered no objection. At O'Riley's request, the layoffs were postponed until October. After the layoffs on October 15th, the clerical employees asked O'Riley if the Union knew of the plan. He replied in the negative; he added there was some talk of elimination of the unit by Emporium's representatives but that such threats were made in all negotiations. The findings were not controverted. The Union representatives did attempt to justify their actions by pointing out that such tactics were commonplace and that the Union had no responsibility to inform the clericals of all potential threats. The law judge rejected this defense as did the Board.

In some cases, courts have found that a union's acts need not be intentional or based on hostile motives to constitute a breach of its duty. *E. g., Wyatt v. Interstate & Ocean Transport Co.,* 623 F.2d 888, 891 (4th Cir. 1980); *Robesky v. Quantas Airways,* 573 F.2d 1082, 1090 (9th Cir. 1978). In *N.L.R.B. v. American Postal Workers Union, etc.,* 618 F.2d 1249, 1255 (8th Cir. 1980), the court emphasized:

> if a union representative makes no effort to communicate with the persons directly affected by its actions and takes action without investigation or adequate notice and opportunity to be heard, these acts and omissions may constitute a breach of the duty of fair representation.

There, a union's failure to contact an employee before it revoked its assent to her request for a temporary shift change was found to be arbitrary conduct although the union intended no harm. As the Ninth Circuit stated. "[a]cts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." *Robesky v. Quantas Airways,* 573 F.2d at 1090.

Under the facts and circumstances presented in this proceeding, we find that the Union had a duty to inform its membership of management's position so that they, in turn, could make an informed reassessment of their wage demand. The Union's failure to apprise the clericals of the ultimate danger and risk of job loss created by their wage demand was clearly an arbitrary action and constituted a breach of duty. The Board's finding of a violation of the Act should not be disturbed.

Finally, the petitioner Union's contention that the Board exceeded its remedial authority in ordering the Union to make the clerical employees whole for their loss of wages has little, if any, merit. The Board is vested with broad remedial powers and our review is limited. *International*

Union of Electrical, Radio & Machine Workers AFL-CIO-CLC v. N.L.R.B., 604 F.2d 689, 697 (D.C.Cir.1979). A remedy

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may be overturned "only if the relief ordered 'is a patent attempt to achieve ends other than those which can farily be said to effectuate the policies of the Act.' " *Id., quoting N.L.R.B. v. J.H. Rutter-Rex Manufacturing Co.*, 386 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969). The Board-imposed remedy does not fit within this category. It is not novel that a Union be required to reimburse an employee for backpay when its action resulted in the loss of the employee's job. *See N.L.R.B. v. Laborers International Union of North America*, 226 N.L.R.B. 1315, *enf'd.* 564 F.2d 833 (8th Cir. 1977); *Laborers and Hod Carriers Local No. 341 v. N.L.R.B.*, 223 N.L.R.B. 917, 920 (1976), *enf'd*, 564 F.2d 834, 840 (9th Cir. 1977). An award of backpay is within the authority of the Board and in keeping with the policies of the Act. *N.L.R.B. v. International Association of Bridge, Structual & Ornamental Iron Workers Local 433*, 600 F.2d 770, 777 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980).

We affirm in all respects the decision of the Board and find no legal or compelling reason to modify the relief granted.

It is ordered.

NLRB v. Steven Davis and Michael Provenzano, d/b/a Carlton's Market

642 F.2d 350 (9th Cir.), April 20, 1981—243 NLRB 837

On petition to enforce Board Order

Before FLETCHER and FERGUSON, Circuit Judges, and FITZGERALD,* DISTRICT JUDGE

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FITZGERALD, District Judge: The National Labor Relations Board ruled that Carlton's Market of El Monte, California engaged in unfair labor practices which dissipated a union majority within the bargaining unit and brought about conditions making a fair representation election impossible. As a consequence, the Board issued a bargaining order and now comes to this court for enforcement.[1]

On November 28, 1977, Michael Provenzano and Steven Davis, both experienced in grocery management but inexperienced in labor relations, entered into an agreement with Tajico Corporation to acquire Carlton's Market. The business was in poor financial shape. On the same date, the union[2] completed collection of authorization cards from 13 out of 17 employees at the market.

The new management was opposed to the union. Provenzano and Davis discharged six of their employees because of their pro-union activities. Provenzano also told employees that he would do anything to keep

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the union out.

He threatened to fire union supporters, offered wage increases to those who took his side, threatened not to hire people with pro-union sympathies, mentioned reductions in hours for pro-union employees, and stated that he could obtain the discharge of pro-union employees who left his store to work elsewhere if they should prove troublesome to him.

On March 13, 1978, the union filed a charge of unfair labor practices with the National Labor Relations Board. Provenzano and Davis then consulted a skilled labor attorney who provided them with a "crash course" in employee relations. There have been no new allegations of unfair labor practices at the market since.

An administrative law judge held hearings on the union's complaint in December 1978 and January 1979. The judge refused to admit some evidence indicative of a change of attitude on the part of the management. However, Provenzano and Davis were permitted to show that the number of employees at the market had grown from 17 to 37, of whom 27 had been hired subsequent to any unfair labor practices. At the time of the hearing, only nine members remained of the work force employed at the time the unfair labor practices were committed.

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*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

[1] This court has jurisdiction under 29 U.S.C. § 160(e) (1975) a section of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1975). Hereinafter "the Act."

[2] Retail Clerks Union, Local 1428, United Food and Commercial Workers International Union, AFL-CIO.

The judge found that 15 separate unfair labor practices had occurred in addition to the six prohibited discharges which had been stipulated to. The Board adopted the judge's recommendation and issued an order requiring Carlton's Market to cease and desist its unfair labor practices and to recognize and bargain with the union.

Despite respondent's contentions to the contrary, we find substantial evidence in the record as a whole to establish that in December 1977 the union represented a majority of the employees in the bargaining unit, and that the management thereafter committed serious unfair labor practices against the employees and the union. We hold, as well, that the Board's inquiry into whether a fair election might be held was adequate and that the Board's reasons are sufficiently explicit to justify the bargaining order.

ANALYSIS

In *NLRB v. Gissel Packing Company,*[3] the Supreme Court ruled that a bargaining order could issue in these circumstances if (1) "the Union demonstrates that it represented a majority of the unit employees who signed valid union authorization cards," (2) the employer committed unfair labor practices, and (3) those practices are "bad enough to undermine the free election process."[4]

The Union Majority

The Board correctly determined that the proper size of the bargaining unit was 17, rather than 20 as respondent contends. It found (1) that Donald Conroy was essentially an expert on pricing working for Tajico rather than an employee of the market, (2) that Naushad Kurji was a management trainee with special status more closely aligning him with management than with employees, and (3) that Angus Garrison could be properly excluded as a meat employee in line with current industry practice separating meat and grocery employees. These findings are not arbitrary and capricious as they are supported by substantial evidence.[5]

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Respondent contends that a majority was not achieved within the unit because the purpose of the authorization cards was misrepresented to the signers. In *Gissel* the Court adopted the Board's *Cumberland Shoe* doctrine for dealing with authorization cards when such claims arise.

> [I]f the card itself is unambiguous (*i.e.,* states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election.[6]

In this case, the card was unambiguous. Therefore, the management must establish that the signer was told that the card would be used solely for an election in order to exclude it from the count. Our examination of the evidence now relied upon by the respondent reveals that, at best, it can be viewed as conflicting. The testimony of William Rodriguez, who collected the cards, provides substantial evidence in the light of the entire record that a sufficient number of signature cards were properly signed to obtain a majority.

The Unfair Labor Practices

Four employees were discharged by Carlton's Market within a week of signing their union authorization cards. Later two more employees who had signed cards were terminated. Although all six were subsequently offered reinstatement and back pay, we conclude that discharges for protected union activity strike directly at the Act's stated purpose of "encouraging the practice and procedure of collective bargaining * * * by protecting the exercise by workers of full freedom of association * * *."[7] Such violations are among the most serious infringements of the Act possible. Besides these six, there are seven additional findings of unfair labor practices by Carlton's Market which are undisputed. They include Provenzano's coercive interrogation of employees about union sympathies, a statement to an employee that he was trying to keep the union out, his threat to get another employee discharged from any future job because of union activities, and his statements to still another employee that he did not want any discussion of union organization in the market, or anyone in the store who was for the union. These findings reveal a pattern of sustained and serious violation of section 8(a)(1) of the Act.[8]

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[3] 395 U.S. 575, 614, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969).

[4] The *Gissel* test as paraphrased and explained in *NLRB v. Anchorage Times Publishing Co.,* 637 F.2d 1359 (9th Cir. 1981). As pointed out in *Anchorage Times, Gissel* recognized two situations in which a bargaining order may issue. The first occurs where an employer has committed unfair labor practices during an election campaign which are so "outrageous" and "pervasive" that they destroy any possibility of a fair re-run election. In such circumstances, a bargaining order is almost always warranted. The second situation, at issue here, involves less flagrant violations which nonetheless undermine the possibility of a fair election. It requires a showing that the union once achieved majority status within the unit. *Gissel* also identified a third situation in which a bargaining order is not justified because the employer's practices have had minimal effect on the election process.

[5] *NLRB v. Convair Pomona,* 286 F.2d 691, 696 (9th Cir. 1961).

[6] 395 U.S. at 584, 89 S.Ct. at 1925 (emphasis in original); *compare id.* at 606–08 and n. 27, 89 S.Ct. at 1937 and n. 27.

Finally, six more findings of unfair labor practices rest on the administrative law judge's determinations of credibility. All involve conversations which Provenzano had with individual employees. The employees testified that Provenzano threatened discharges and cuts in hours if the union organized the store, repeatedly interrogated them about their attitudes toward the union, and promised wage increases if they would not support it.

The findings of the Board must be upheld if supported by substantial evidence viewing the record as a whole.[9] "* * * [T]he examiner's findings as to credibility should not be disturbed unless a 'clear preponder-

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ance of all the relevant evidence convinces that they are incorrect.' "[10] Here the administrative law judge made credibility resolutions on the basis of the demeanor and appearance of the witnesses and explicitly presented her analysis and reasoning for crediting some and not crediting others in her findings. Significant testimony in the record supports her findings which we will not disturb.

The Bargaining Order

An employer's commission of an unfair labor practice does not automatically result in an order to bargain. In choosing a remedy, *Gissel* instructs the Board to consider the extensiveness of the unfair labor practices, their past effect on election conditions,[11] the likelihood of their reoccurrence, and the probability that a fair election can be held.[12] The relevant time period for consideration of the possibility of a fair election is when the case is before the Board.[13]

To document is consideration of these factors, the Board must make findings which are sufficiently explicit to support issuance of a bargaining order. The Board must "clearly articulate the reasons behind any order, and particularly why other remedies were found inappropriate."[14] These findings may not be perfunctory.[15] However, when the Board has considered these matters and determined that a bargaining order is necessary, *Gissel* counsels deference to the Board's determination of a remedy.[16]

In her decision, the administrative law judge concluded that the misconduct of Carlton's management was so pervasive that it made a fair election infeasible:

> Finally, I reject Respondent's argument that any effect of the unfair labor practices has been dissipated and a fair election is now possible. The extent of Respondent's unfair labor practices are so pervasive that traditional remedies will not erase the effects thereof. Provenzano and Davis deliberately embarked upon a course of action designed to, and which did, undermine the Union's majority. The leading union adherent was discharged along with 5, probably 6, of the 13 card signers in a unit of only 17. Nine of the current employees were employed at the time of the unfair labor practices. The nature of Respondent's conduct—discharges, threats of dis-

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[7] 29 U.S.C. § 151 (1975); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182, 61 S.Ct. 845, 847 85 L.Ed. 1271 (1941).

[8] *See e.g., NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1150 (9th Cir. 1977); *NLRB v. Vangas, Inc.*, 517 F.2d 747, 748 (9th Cir. 1975); *NLRB v. Tri-State Stores, Inc.*, 477 F.2d 204, 205 (9th Cir. 1972) *cert. denied* 414 U.S. 1130, 94 S.Ct. 868, 38 L.Ed. 2d 754 (1974) (coercive interrogation); and *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 181–82, 61 S.Ct. at 846–47; *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 47 (9th Cir. 1970); *NLRB v. Buddy Schoellkopf Prod.*, 410 F.2d 82, 87–88 (5th Cir. 1969) (threats).

[9] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S.Ct. 456, 464–65, 95 L.Ed. 456 (1951); National Labor Relations Act, 29 U.S.C. § 160(e) (1975).

[10] *NLRB v. Ayer Lar Sanitarium*, 436 F.2d at 49, *quoting NLRB v. Luisi Truck Lines*, 384 F.2d 842, 846 (9th Cir. 1967).

[11] An election was never requested in this case.

[12] 395 U.S. at 614, 89 S.Ct. at 1940; *NLRB v. Four Winds Industries*, 530 F.2d 75, 81 (9th Cir. 1976).

[13] *NLRB v. Pacific Southwest Airlines*, 550 F.2d at 1153.

[14] *Id.* at 1152.

[15] *NLRB v. Western Drug*, 600 F.2d 1324, 1326 (9th Cir. 1979).

[16] 395 U.S. at 612 n.32, 89 S.Ct. at 1939 n.32.

> charges, threat to cause discharge from future employment—is the type of conduct which employees are apt to relate to other employees and which is rather difficult, probably impossible to forget or discount. Nor are employees likely to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment. Thus, such conduct would have a longlasting, if not permanent, effect on the employees' freedom of choice in selecting or rejecting a bargaining representative and it is unlikely, if not impossible, that the Board's traditional remedies would dispel the coercive atmosphere which Respondent has created.

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able inferences.[17] Moreover, *Gissel* teaches that, "* * * a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." [18]

Respondent suggests that the ruling is perfunctory and mechanically applies *Gissel,* without regard to context, in a manner forbidden by *NLRB v. Western Drug.*[19] In that case an administrative law judge determined that the union had failed to achieve a majority within the unit. He made no findings on the question of whether a fair election could be held.[20] The Board reversed the findings of the judge and issued a bargaining order. In reversing the Board, the court in *Western Drug* said:

> We limit our holding to the facts presented. The circumstance changed completely before the unfair practice charges were tried, and there was no unusual delay in trying the charges. All the employees in the unit voluntarily terminated their employment for reasons unrelated to the unfair practices. And the Board's findings do not suggest any alternative ground for concluding that an election would not reflect the present employees' true wishes.[21]

Western Drug is distinguishable from the case now before this court. Here the administrative law judge clearly stated the reasons upon which she rested her conclusion that remedies short of a bargaining order would be ineffectual. The Board adopted her detailed statement of reasons and in conformity with her findings issued the bargaining order. *Western Drug* is simply not on point.

Respondent argues that the proper time to consider whether a fair election can be held is when the issue is before the Board [22] in contending that the administrative law judge improperly rejected evidence of change in management attitude toward the union after March 13, 1978.

The judge correctly refused to allow an employee to be questioned as to whether a fair election would be possible in the near future. *Gissel* points out:

> We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.[23]

Other evidence excluded by the judge included Provenzano's offer to testify as to his present attitude toward unions and to his intentional hiring of employees with prounion sympathies after March, 1978. While this evidence is probative of a change of heart on management's part, the error, if any, was harmless since the record contains evidence of events occurring after March, 1978. Detailed records of employee turnover were received, as was evidence of the settlement resulting in reinstatement and back pay for improperly discharged employees.

Respondent suggests that reinstatement, plus the published notices, must have "inevitably dissipated any fear that past misconduct will recur." The judge, however, drew a different inference:

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[17] *NLRB v. Tri-State Stores,* 477 F.2d at 206, *quoting NLRB v. Ayer Lar Sanitarium,* 436 F.2d at 48–49.

[18] 395 U.S. at 620, 89 S.Ct. at 1943.

[19] 600 F.2d at 1326.

[20] *Id.* at 1326 n.4.

[21] *Id.* at 1326–27 (footnotes omitted).

[22] *NLRB v. Coca-Cola Bottling Co. of San Mateo,* F.2d 140, 141 (9th Cir. 1972).

[23] 395 U.S. at 608, 89 S.Ct. at 1937 (footnote omitted).

> Nor are employees likely to miss the point that back pay and offers of reinstatement made some 9 to 11 months after the discharge do not necessarily
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> compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment.

The change in the behavior of the Carlton management after it consulted labor counsel was apparent to the administrative law judge; the excluded evidence would have added little. The judge determined that such altered behavior when one faces charges before the National Labor Relations Board is not surprising and probably not a reliable guide to the future. She was justified in concluding that the impact of the management's past unfair labor practices had not been dissipated, and their extent was so pervasive that traditional remedies were inadequate.

We find, therefore, that there is substantial evidence in the record to support the factual findings, errors on evidentiary matters, if any, are harmless, and the holdings are sufficiently explicit to support the issuing of a bargaining order. The Board's order is hereby ENFORCED.

Tobey Fine Papers of Kansas City, Division of Distribix, Inc. v. NLRB

Graham Paper Company, Division of Jim Walter Paper, Inc. v. NLRB

Butler Paper Company, Division of Great Northern Nekoosa Corporation v. NLRB

659 F.2d 841 (8th Cir.), April 20, 1981—245 NLRB 1398

On petitions to review Board Order

Before LAY, Chief Judge, and BRIGHT and MCMILLIAN, Circuit Judges

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LAY, Chief Judge: Tobey Fine Papers of Kansas City, Graham Paper Company and Butler Paper Company separately petition this court for review of an order of the National Labor Relations Board finding that the petitioners violated section 8(a)(1) and (5) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1), (5). The Board held that petitioners were guilty of unfair labor practices by refusing to honor collective bargaining agreements negotiated by the Paper Industry of Kansas City, a multiemployer bargaining association to which each company belonged.[1] The Board found petitioners had made an untimely and ineffective with-

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drawal from the multiemployer collective bargaining negotiations because their withdrawals occurred, after negotiations had begun and were not justified by "unusual circumstances." Petitioners urge that each of their withdrawals were motivated by an impasse in negotiations which constituted, as a matter of law, "unusual circumstances" justifying unilateral withdrawal. Alternatively, petitioners urge that the bargaining unit was fragmented by the withdrawal, with Union consent, of two members of the association and the Union's execution of separate agreements [2] with the two companies. In each case, the Board cross-petitions for enforcement of its order.

We enforce the Board's order in each case on a limited ground; we find substantial evidence on the record as a whole sustaining the Board's finding that the actual reason for each company's withdrawal was not based upon impasse or fragmentation, but on the fact that the employees of the individual companies expressed a doubt as to the Union's representation of a majority of each company's employees. It is well settled that this constitutes an impermissible reason for a company to withdraw from multiemployer bargaining. *See NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966).

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[1] The factual background of the dispute is set forth in the Board's three opinions. *Tobey Fine Papers of Kansas City*, 245 N.L.R.B. No. 181 (1979); *Graham Paper Co.*, 245 N.L.R.B. No. 180 (1979); and *Butler Paper Co.* 245 N.L.R.B. No. 182 (1979).

[2] Separate agreements are final contracts between the union and employers which are completely independent of any agreement that may be reached later between the union and association. Interim agreements are temporary contracts which govern the employee-employer relationship between the time a previous contract expires and the time a new contract is negotiated by the union and the association. By the terms, the interim agreement adopts the language of and is superseded by any subsequent contract between the union and association.

Petitioners urge that their motivation for withdrawing from the bargaining unit was that contract negotiations had reached an impasse and the Union had executed separate agreements with Bermingham & Prosser and Nationwide Papers, the largest employer of the group. The Union and association met three times to negotiate a new contract before June 1, 1978, the date the existing contract expired. No agreement was reached and the Union struck all association employers on June 6. On June 8, Bermingham & Prosser withdrew from the association with Union consent and reached a separate agreement with the Union on June 26, 1978. On July 25, one week after the only negotiation session held since the strike began, Nationwide Papers withdrew, with Union consent, from the association and signed an agreement on July 31, 1978. After the withdrawal of Bermingham & Prosser and Nationwide Papers the number of employees in the bargaining unit declined from 130 to 75 members. On August 11, Tobey and Graham notified the Union and the association that they were withdrawing from the association. On August 14, Butler also informed the Union it had withdrawn from the association. The Union refused to consent to these withdrawals. Subsequently, the original wage package tendered to the Union by the association was resubmitted to the 75 employees remaining after the withdrawal of Bermingham & Prosser and Nationwide Papers. On August 25, the wage package was approved by a vote of 19 to 12 and a contract between the association and the Union was subsequently signed. Tobey, Graham and Butler have refused to recognize or bargain with the Union or to execute or abide by the agreeement.

Petitioners urge that it is the overwhelming law of the circuits that an employer may withdraw from a multiemployer group once an impasse has been reached, citing *NLRB v. Independent Association of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978); *NLRB v. Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975); *NLRB v. Association Shower Door Co.*, 512 F.2d 230 (9th Cir. 1975); and *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974). Petitioners also rely upon the dicta in *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1172 (8th Cir. 1972), that an impasse was an "unusual circumstance" justifying unilateral withdrawals.[3] This rule has had recent reappraisal by the Board and least three courts of appeals. For reasons discussed, we need not pass on the impasse issue. However, because of the importance of the issue, we think it helpful to point out the reasons we feel it best to resolve the issue at a later date.

The Ninth Circuit recently reaffirmed its earlier position taken in *Associated Shower Door* and commented that "Courts of Appeals have consistently recognized an impasse in negotiations as justification for a unilateral withdrawal from a multiemployer unit." *H&D, Inc. v. NLRB*, 633 F.2d 139, 142 (9th Cir. 1980), *quoting Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 907 (9th Cir. 1979). The Ninth Circuit, however, did not discuss *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 630 F.2d 25 (1st Cir. 1980), *cert. granted*, ——— U.S. ———, 101 S.Ct. 1512, 67 L.Ed.2d 813 (1981), which questioned the right of an employer to withdraw simply on the basis of an impasse reached in negotiations. The First Circuit in *Bonanno* thoroughly analyzed the policy background involved in the controversy and adopted the Board's position that without evidence of fragmentation or of an intent by the Union to destroy the bargaining unit, an impasse in negotiations, standing alone, is not a sufficient basis for an employer's unilateral withdrawals. *Id.* at 35. In *Bonanno*, unlike the present case, no separate agreements were consensually reached after impasse between the Union and withdrawing employers.

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[3] The First Circuit in *NLRB v. Charles D. Bonanno Linen Service, Inc.*, 630 F.2d 25, 30 & n.7 (1st Cir. 1980), *cert. granted*, ——— U.S. ———, 101 S.Ct. 1512, 67 L.Ed.2d 813 (1981), notes that *Fairmont Foods* relied on the Board's prior decisions in *Ice Cream Council, Inc.*, 145 N.L.R.B. No. 71 (1964), and *Morand Bros. Beverage Co.*, 91 N.L.R.B. No. 58 (1950), *enf. in part* 190 F.2d 576 (7th Cir. 1951). The First Circuit correctly points out that *Ice Cream Council* approved withdrawal only upon union consent. *Id.* It further distinguishes *Morand Bros.*, which provided employers "unlimited freedom" to withdraw "at any time * * * at their will or fancy," as abandoned by the Board in *Retail Associates, Inc.*, 120 N.L.R.B. No. 66A (1958). *Id.* In any event, the Board made its position clear in *Hi-Way Billboards, Inc.*, 206 N.L.R.B. No. 1 (1973), *enf. denied*, 500 F.2d 181 (5th Cir. 1974), that it no longer recognizes the right of any employer to withdraw from a multiemployer group solely on the basis of an impasse in the negotiations. Since the dicta in *Fairmont Foods* relied primarily on what this court perceived to be the Board's policy and in view of the change of this policy, *Fairmont* can no longer be considered controlling in this circuit.

As recently as January 30, 1981, the Fifth Circuit has reevaluated its position taken earlier in *Hi-Way Billboards. NLRB v. Marine Machine Works, Inc.*, 635 F.2d 522 (5th Cir. 1981). In *Hi-Way Billboards*, the Fifth Circuit declined to adopt the Board's reasoning that impasse alone could not constitute an "unusual circumstance" justifying unilateral withdrawal. The court perceived that it was unfair to employers for the Board to allow the union to negotiate separate agreements with the individual employer members of the association, and in effect withdraw from the multiemployer bargaining at least with respect to those employers, and not to allow the remaining employers a similar right of unilateral withdrawal.[4] 500 F.2d NLRB at 183–84. In *Marine Machine Works*, the Fifth Circuit observed the Board had recently addressed the unfairness perceived in *Hi-Way Billboards* in two ways. First, "the only separate agreements that the Board will permit [a union and employer to enter into] are temporary or interim agreements pending the outcome of negotiations in the multiemployer unit." 635 F.2d at 525. Second, "the execution of a final separate agreement by a union and an individual employer of the multiemployer unit is violative of section 8(b)(3), 29 U.S.C. § 158(b)(3) (1976), by the Union and of section 8(a)(5) by the employer, unless all parties—the union, the employer, and the employer association—consent to the agreement" *Id.* (citing *Callier's Custom Kitchens*, 243 N.L.R.B. No. 143, *enf'd on other grounds*, 630 F.2d 595 (8th Cir. 1980); *Charles D. Bonanno Linen Service, Inc.*, 243 N.L.R.B. No. 140, *enf'd*, 630 F.2d 25 (1st Cir. 1980); *Teamsters Union Local No. 378 (Olympia Automobile Dealers Ass'n)*, 243 N.L.R.B. No. 138, *enf. pending*, No. 79-7683 (9th Cir. argued Nov. 5, 1980)).

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Under these circumstances, the Fifth Circuit now holds:

> The Board's rules balance an individual party's legitimate interest in striking its own separate bargain against the parties' and the public's legitimate interest in achieving the benefits afforded by continued multiemployer bargaining including avoiding the industrial strife likely to result from frustration of the bargaining process. In reaching this balance, the Board is treating both unions and employers equally and fairly. The Board permits each to use all available economic weapons in aid of reaching an overall settlement. On the other hand, the Board prohibits each from taking action that is destructive of the multiemployer unit: unions may not seek to negotiate separate permanent agreements with employers, and employers may not withdraw from the unit and seek separate permanent negotiations with the union. This result is well within the Board's broad discretion to resolve the inevitable questions arising in the multiemployer bargaining context.

635 F.2d at 525–26.

One of the decisions relied upon by the Fifth Circuit is the Board's opinion in *Teamsters Union Local No. 378 (Olympia Automobile Dealers Ass'n)* 243, N.L.R.B. No. 138, *enf. pending*, No. 79-7683 (9th Cir. argued Nov. 5, 1980). In *Olympia Automobile Dealers*, the Board, for the first time, held that an employer may not withdraw from a multiemployer unit without the permission of the association.

Assuming that the Fifth Circuit's understanding of the Board's position is correct, that is, separate *permanent* agreements may no longer be entered into, and the *Olympia Automobile Dealers* decision is enforced,[5] it would appear that few controversies concerning unilateral withdrawal from multiemployer bargaining by employers will hereafter arise.[6]

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[4] As the court stated:

> [T]he Board permitted a union to negotiate separate final agreements with individual employer members of the multiemployer unit. We felt that this was tantamount to allowing the union to withdraw from the multiemployer unit, at least with respect to those individual employers. For the Board to then deny to the other employers a similar right of unilateral withdrawal did not accord with the Board's espoused commitment to applying to both employers and unions the same rules concerning the right to withdraw. *See generally, Evening News Association*, 154 N.L.R.B. 1494, 1495–97 (1965), *enforced sub nom. Detroit Newspaper Publishers Association v. NLRB*, 372 F.2d 569, 570–71 (6th Cir. 1967).

Marine Machine Works, 635 F.2d 525.

[5] *Olympia Automobile Dealers* specifically allows negotiation of interim agreements without association consent.

[6] One difficulty remains. We find the Board's position still somewhat equivocal as to the impropriety of the union to enter into separate *permanent* contracts with withdrawn employers. Apparently the Board represented to the Fifth Circuit, in *Marine Machine Works*, that it would not allow unions to enter into permanent contracts. The court relied upon

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Although both the Board and petitioner urge the issue is before us and although strong policy considerations seemingly support the Fifth Circuit's recent analysis, nevertheless, we find the issues not easily resolved.[7] We are concerned with the fact that the Board has evidently taken different positions before this court in *Tobey,* where the Board apparently approved negotiation of separate contracts between the Union and two employers that had withdrawn, and before the Fifth Circuit in *Marine Machine Works,* where the Board represented that *only* temporary, interim contracts would be approved by the Board. We note as well that certiorari is now granted in *Bonanno.*

Under these circumstances, rather than speculate over the Board's future policy or as to the Supreme Court's analysis of *Bonanno,* we elect to decide this case on the Board's narrow, alternative holding.

For over 20 years each of the petitioners belonged to the Paper Industry of Kansas City during which time the association had entered into successive collective bargaining agreements with Teamsters Local No. 955, the most recent of which was to expire on June 1, 1978. After negotiations of a new contract failed to bring about agreement, the members authorized an economic strike which the union members commenced on June 6, 1978, against all of the association members. Six of the eight employees employed by Tobey as well as six of eight employees of Graham struck their employers. Eight of Butler's employees also joined the strike.

After Nationwide Papers withdrew from the association, with Union approval, on July 25 and reached a separate agreement with the Union on July 31, Tobey, Graham, and Butler received statements from a majority of their respective employees stating they no longer wished to be represented by the Union. Both Tobey and Graham received these statements from their employees on August 11, the same day they each filed representation petitions with the Board's regional office in Kansas City and notified the Union and association, by telegram, that they were withdrawing from the association. Each stated their reason for withdrawing was because their employees no longer wished to be represented by the Union. On July 31, Butler received a statement signed by its eight employees stating that they wished to resign from the Union and wanted "the opportunity to vote the union out." Butler filed a representation petition on August 9

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this representation along with the Board's decisions in *Callier* and *Bonanno* in deciding to change the position it had taken in *Hi-Way Billboards.* However, in *Tobey Fine Papers,* decided shortly after *Callier* and *Bonanno,* the Board said that separate permanent contracts are not per se unacceptable to the Board. The Board observed:

> In our recent Bonanno decision, we reexamined the impact of a bargaining impasse upon multiemployer negotiations in light of its potential as an affirmative device to aid in achieving agreement and we reemphasized that parties have great leeway during impasse, absent proof of unlawful motivation, to exert concurrent economic pressure upon each other. We also concluded that the negotiation of individual "interim" agreements during impasse may prevent, rather than cause, significant multiemployer unit fragmentation. Respondent herein in essence contends that the Union's negotiation of final, separate agreements establishes its unlawful motivation and per se created new withdrawal rights in Respondent, and in Butler and Graham. In our view, it does not follow ipso facto that execution of individual separate final contracts with former Association members either proves an intention to destroy, or necessarily causes the fragmentation of, a multiemployer unit. Rather, the facts of each case must be assessed in order to ascertain the impact of the parties' conduct upon the continued viability of multiemployer bargaining.

245 N.L.R.B. No. 181 (1979).

[7] Although we recognize the expertise of the Board in these matters and the deference accorded its decisions, the Board's interpretation of labor policy is not unreviewable. The Supreme Court in *NLRB v. Insurance Agents Int'l Union,* 361 U.S. 477, 499, 80 S.Ct. 419, 432, 4 L.Ed.2d 454 (1960) said,

> We recognize without hesitation the primary function and responsibility of the Board to resolve the conflicting interests that Congress has recognized in its labor legislation. Clearly, where the "ultimate problem is the balancing of the conflicting legitimate interests" it must be remembered that "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." * * * But recognition of the appropriate sphere of the administrative power here obviously cannot exclude all judicial review of the Board's actions * * *. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer, but they must be sure the question has been asked.

In the multiemployer bargaining context the Supreme Court said,

> Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. Labor Board,* [380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965)] * * *. Congress has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent.

NLRB v. Brown, 380 U.S. 278, 292, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965).

and on August 14 Butler notified the Union of its withdrawal stating its reasons for withdrawal were "changed circumstances and a management decision made at our headquarters."

Under our decisions, the Board is directed to base the validity of an employer's withdrawal from multiemployer bargaining on the actual motivation for the company's withdrawal. *NLRB v. Custom Wood Specialities, Inc.*, 622 F.2d 381, 385 (8th Cir. 1980). There is no dispute that an employer's withdrawal predicated on loss of the union's majority status among its employees does not justify withdrawal. *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966). A union's majority status must be tested by the multiemployer unit and not on an individual employer basis. The Board found "that the concurrent withdrawals [of Tobey, Graham and Butler] and filings of representation petitions were, in each case, expressly tied to an expression of doubt as to the Union's majority support among the respective employees." The Board relied on this finding to support its conclusion that Tobey's, Graham's and Butler's withdrawals from the association were untimely.

Petitioners argue that we can ignore the stated reasons for their withdrawals and view the overall circumstances which indicate the real reasons for their actions. They urge their withdrawals were motivated by the impasse in negotiations and the subsequent fragmentation caused by the withdrawal of Bermingham & Prosser and Nationwide Papers and their negotiation of separate agreements with the Union. Even if we assume that petitioners are not indulging in hindsight reasoning, and it is indeed difficult for us to do so, we nonetheless cannot ignore the factual findings made by the Board based on the petitioners' telegrams sent on August 9 to the association. We cannot substitute our judgment for the Board's where substantial evidence on the record as a whole supports the Board's findings. We find that substantial evidence on the record as a whole sustains the findings of the Board as to the actual motivation of Tobey and Graham for withdrawing and, therefore, reject their contentions.

Butler urges that it stands in different shoes than Tobey and Graham. It states that it did not rely on the changed attitude of its employees in deciding to withdraw from the association. The Board found otherwise. The Board reasoned that negotiations had been at an impasse for more than two months, and Bermingham & Prosser had withdrawn a month before and these were not "changed circumstances." The Board concluded that the "changed circumstances were the July 31 letter from the former union steward saying all of Butler's employees no longer wished to be represented by the Union and Butler's filing of a petition for a representation election on August 9. The Board fortified its conclusion by the fact that Butler withdrew from the association on the same day the representation petition was filed.

Here again, we must give credence to reasonable inferences drawn by the Board and must support the Board's findings if they are supported by substantial evidence on the record as a whole. We conclude that the record as a whole supports the Board's finding that Butler's withdrawal was motivated by a doubt as to the Union's majority status among its employees.

There is another even more cogent reason on this appeal why we feel compelled to enforce the Board's finding against Butler. Butler agreed to have its case before the Board presented on a stipulated record. Unlike Tobey and Graham it did not file a brief with the Board nor did it seek to have the Board reconsider its findings. Its claim that the record does not support the Board's finding as to the reason for withdrawal is raised here for the first time. It is difficult for us to understand that Butler makes a good faith contention when it did not attempt to resist the brief of the General Counsel made before the Board as to the actual motivation for But-

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ler's withdrawal. Butler's reasoning is not only after-the-thought, it simply cannot be properly considered at this time. *See* 29 U.S.C. § 160(e); *International Ladies' Garment Workers' Union v. Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3, 95 S.Ct. 972, 975 n.3, 43 L.Ed.2d 189 (1975); *Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 202–03 (D.C.Cir. 1969).

We thus find the actual motivation for the withdrawal of Tobey, Graham and Butler was based upon their employees' desire to withdraw from the Union. This does not justify unilateral withdrawal. Under the circumstances, the Board's order finding that each of the petitioners violated sections 8(a) (5) and (1) is enforced.

New England Lumber Division of Diamond International Corporation v. NLRB

646 F.2d 1 (1st Cir.), April 21, 1981; rehearing and rehearing en banc denied May 18, 1981—252 NLRB 95

On petition to review Board Order

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BREYER, Circuit Judge: This case came before the court upon the petition of the New England Lumber Division of Diamond International Corporation ("Diamond") for review of an order of the National Labor Relations Board and the Board's cross-application for enforcement. The order requires Diamond to bargain collectively with the United Paper Workers international Union and its Local No. 80, AFL-CIO (the "Union"). Diamond based its refusal to bargain upon its claim that the Union was not validly chosen to represent its employees because the Union had an improper observer present at the representation election. We reject Diamond's claim and enforce the Board's order.

The dispute in the case concerns an observer designated by the Union at a representation election held in accordance with

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an agreement or stipulation between the Union and the company. The election was held on October 25, 1979, at the stud mill operated by Diamond's New England Lumber Division. From the morning of the election, Diamond has consistently urged that the designation of the Union's president Phillip Veilleux, an employee of Diamond's Penobscot Division, to act as the Union observer at the election, violated the specific provisions of the "Stipulation for Certification Upon Consent Election". It adds that a rerun of the election (which the Union won) must be ordered. In response to petitioner's objections, the Regional Director of the NLRB conducted an administrative investigation, and recommended that the objections be overruled. The Board adopted the Regional Director's Report.

Diamond's argument is based on paragraph 4 of the printed form stipulation,[1] prepared by the NLRB, entitled "United States of America, National Labor Relations Board, Stipulation for Certification Upon Consent Election". It states:

> "4. OBSERVERS.—Each party hereto will be allowed to station an equal number of authorized observers, *selected from among the non-supervisory employees of the Employer,* at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally." (Emphasis added.)

Diamond argues that Veilleux is not a non-supervisory employee of the "employer" within the meaning of the stipulation because Veilleux is a nonsupervisory employee of the *Penobscot Division* of Diamond, not its *New England Lumber Division.* Diamond argues that the Penobscot Division and the New England Lumber Division are autonomous entities operating within a large multinational corporation, and that it is the Lumber Division, not Diamond as a whole, which is the "employer" within the terms of stipulation.

The facts related to the stipulation's meaning are as follows: First, the stipulation does not explicitly state whether the New England Lumber Division or the larger company is the "employer" within the terms of paragraph 4. However, the words "Diamond International Corporation, New England Lumber Division" were typed above the printed word "(Employer)" at the place on the form which calls for a signature.

Second, paragraph 8 of the form stipulation calls for the parties, presumably the employer, to "insert commerce facts" establishing that the employer is engaged in commerce within the meaning of Sections 2(6) and (7) of the National Labor Relations Act; and, the typewritten words inserted appeared to name Diamond International Corporation as the corporation. The remainder of the typed response in paragraph 8, however, limited the facts establishing effect on commerce to facts concerning the New England Lumber Division, not Diamond as a whole.[2]

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[1] Form NLRB-652 (8-77).

[2] 2. The paragraph 8 response reads:

"Diamond International Corporation is a Delaware corporation with offices in Passadumkeag, Maine where it engages in the manufacture of framing materials. It annually purchases materials valued in excess of $50,000 directly from points outside of Maine and annually ships materials valued in excess of $50,000 directly to points outside of Maine from its Passadumkeag location.

Third, a letter from the NLRB to Diamond's New England Lumber Division and the Union enclosed the completed stipulation for signature. It stated in part:

> "Enclosed in accordance with our telephone discussions is the Stipulation for Certification upon Consent Election . . . Each party may designate an election observer. These observers must be nonsupervisory employees."

The letter is not specific about whether nonsupervisory employees of any division of Diamond or only of its New England Lumber Division were intended to be qualified observers. But the letter is captioned "RE: DIAMOND INTERNATIONAL CORP, NEW ENGLAND LUMBER DIV."

It is clear that the Board has discretion to interpret ambiguity in a Stipulation

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for Certification Upon Consent Election. *NLRB v. Detective Intelligence Service, Inc.*, 448 F.2d 1022, 1025 (9th Cir. 1971). In that case, the Ninth Circuit stated, "where a Stipulation is ambiguous, the Board has authority to interpret the agreement according to what its finds to have been the intent of the parties." *Id.* Whether the stipulation is sufficiently ambiguous here to warrant the Board's interpretation is uncertain, given the instances in the relevant papers where the "employer" is referred to as Diamond International Corporation, New England Lumber Division. But, we need not decide that question, for even if use of Veilleux as an observer was inconsistent with the terms of the stipulation, the NLRB's decision to accept the election results is still valid.

The NLRB has broad discretion in the conduct of representation elections. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct 324, 327, 91 L.Ed. 322 (1946); *NLRB v. Morgan Health Care Center*, 618 F.2d 127, 128 (1st Cir. 1980). The Board's determination can be set aside only for an abuse of discretion in determining that the election was fairly conducted. *See NLRB v. Mattison Machine Works*, 364 U.S. 123, 124, 81 S.Ct. 434, 435, 5 L.Ed.2d 455 (1961). In this instance, the relevant legal standard is whether any breach in the stipulation was sufficiently prejudicial or sufficiently material to warrant setting the election aside. Did a breach of the stipulation significantly impair the fairness of the election process? *Summa Corp. v. NLRB*, 625 F.2d 393, 295 (9th Cir. 1980); *Grant's Home Furnishings, Inc.*, 229 N.L.R.B. 1305 (1977).

The Board has found that any breach of the stipulation was immaterial: even if Veilleux is not an "employee" under the stipulation, his presence as an observer did not warrant setting aside the election. We cannot say that the Board abused its discretion in arriving at this conclusion. The Board's determination rests upon the view that the stipulation—in limiting observers to "nonsupervisory employees of the employer"—is aimed primarily at preventing intimidation that might take place should the *employer* choose to have *supervisory* employees present. It is not aimed at stopping observers who are union officials.[3] Such an interpretation of the language is a reasonable one; nothing in the record indicates any conflict between that interpretation and the parties' intent. And the Board's view of the matter should be given weight in light of the fact that the Board itself wrote the stipulation; the parties adopted language that appeared in the Board's printed form. On this interpretation of the clause, the presence of a nonsupervisory Diamond employee from outside the New England Lumber Division as an observer, would, at worst, constitute a nonmaterial breach of the stipulation.

Diamond also argues that, if management is prohibited from sending supervisory employees to observe, so should the Union be prohibited from sending union officials to observe. There are obvious differences, however, between permitting a local union official to be present in the polling place during voting and permitting individuals closely identified with management to be there. The Board could reasonably conclude that the presence of supervisors in the polling place during voting, even in the role of observers, might create an atmosphere of fear or intimidation where the similar presence of a local union official would not. *See NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969). The Board has consistently held, with court approval, that the designation of a union official as observer does not warrant overturning an election unless there is evidence that the official engaged in improper conduct while acting in that capacity. *See Shoreline Enterprises v. NLRB,* 262 F.2d

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[3] Indeed, how could this standard language do so, for many employers will have union officials among their nonsupervisory employees? Of course, Diamond might argue that here it was aware that the language would protect it against observers who were union members. But the record does not suggest that if accepted the form language with such a purpose of effect in mind. And, had Diamond focused upon this effect in advance and sought it, why did it allow the definition of "employer" to remain somewhat ambiguous?

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933, 942 (5th Cir. 1959); *NLRB v. E–Z Davies Chevrolet,* 395 F.2d 191, 193 (9th Cir. 1968); *Soerens Motor Company,* 106 N.L.R.B. 1388, 1389–90 (1953); *Dallas City Packing Co.,* 110 N.L.R.B. 8 (1954).[4] Thus, we find the Board's decision here reasonable, its application for enforcement is granted and Diamond's petition is denied.

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[4] Petitioner's reliance upon *Summa Corp. v. NLRB, supra,* is misplaced. There, an unequal number of observers was permitted in material breach of the election stipulation, over the company's objection, creating the "significant risk" of an impression of union predominance and of partiality on the part of the Board. There was so such inequality here.

David D. Sutherland, d/b/a Maaco Auto Painting and Body Work v. NLRB

646 F.2d 1273 (8th Cir.), April 21, 1981

On petition to review Board Order

Before Heaney, Stephenson and McMillian, Circuit Judges

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Per Curiam: David D. Sutherland, d/b/a Maaco Auto Painting and Body Work, petitions this Court to review and set aside an order of the National Labor Relations Board. The Board found that Maaco had violated section 8(a)(1) of the National Labor Relations Act by discharging Donald Rubino for engaging in protected concerted activity. The Board ordered Maaco to cease and desist, and also ordered Rubino's reinstatement with back pay. *David D. Sutherland, d/b/a Maaco Auto Painting and Body Work,* 249 N.L.R.B No. 184, 104 LRRM 1323 (1980). The Board requests that we enforce its order. The two questions raised on appeal are (1) whether the Board properly asserted jurisdiction over the dispute, and (2) whether substantial evidence supports the Board's finding of a section 8(a)(1) violation.

After careful review of the entire record, we hold that the Board properly exercised jurisdiction of this matter under its non-retail standard. *Siemons Mailing Service,* 43 LRRM 1056, 1058 (1958). The company's records show that it grossed over $50,000 from non-retail services provided to automobile dealerships and truck companies, themselves subject to the Board's jurisdiction; and that it purchased over $50,000 worth of goods from points outstate. The fact that Sutherland had purchased the company and had managed it for less than a year does not affect the Board's jurisdiction. *Cf. Aroostook Fed'n of Farmers, Inc.,* 36 LRRM 1611, 1611 (1955); *Reliable Roofing Co.,* 103 LRRM 1006, 1007 (1979).

We are also convinced, after reviewing the entire record, that substantial evidence supports the Board's finding that the company violated section 8(a)(1) by discharging Rubino for engaging in protected concerted activity. The National Labor Relations Act guarantees employees the right to engage in concerted activity that is intended for the employees' mutual aid and protection. It is clear that when employees join together and seek, through their actions, better terms, tenure or working conditions, that activity is protected under section 7 of the Act. *Crenlo, Division of G. F. Business Equip., Inc. v. N.L.R.B.,* 529 F.2d 201, 204 (8th Cir. 1975); *Koch Supplies, Inc. v. N.L.R.B.,* 646 F.2d 1257 at 1259 (8th cir., 1981). Moreover, it is well settled that when an employee is discharged for engaging in protected union activity, that discharge is in violation of section 8(a)(1) of the Act. *Koch Supplies, Inc. v. N.L.R.B., supra,* at 1259.

The record clearly demonstrates that Rubino and another employee met with Sutherland and told him that the other employees, as well as themselves, were dissatisfied with their wages and the fact that all the employees were not equally paid for equal work. Moreover, they were upset about the company's decision to shelve its employee bonus system.[1] Finally, they told Sutherland that some of the employees were unhappy about the working conditions in the shop. The evidence clearly shows that Rubino and his coworker approached Sutherland in an effort to bring about changes beneficial to themselves and the other employees. These are classic forms of concerted activity. *See N.L.R.B. v. Sencore, Inc.,* 558 F.2d 433, 434 (8th Cir. 1977).

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[1] We note that the record does not support the company's contention that Rubino was seeking unlawful bonuses for himself and the other employees.

This is not a case involving the mere personal griping of a single employee who has no intention to benefit other coworkers. *Koch Supplies, Inc. v. N.L.R.B., supra.* Here, Rubino was clearly engaged in pro-

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tected concerted activity, and he was discharged for it. His discharge was in violation of section 8(a)(1) of the Act.[2]

The order of the Board is enforced.

NLRB v. Rexair, Inc.

646 F.2d 249 (6th Cir.), April 23, 1981—243 NLRB 876

On petition to enforce Board Order

Before Keith, Merritt and Martin, Circuit Judges

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The National Labor Relations Board is applying to the court under § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), to enforce its order setting aside the results of a disputed election in which the United Furniture Workers Union lost its bid to represent the employees at Rexair's Cadillac, Michigan plant; requiring Rexair to cease and desist from engaging in certain activities violating §§ 8(a)(1) and

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8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3); and ordering Rexair to recognize and bargain with the Union upon request. The challenged activities occurred after the Union obtained authorization cards from a large majority of the plant's employees in early December 1977 and requested recognition by Rexair. The latter refused, and the two parties entered into a Stipulation for Certification Upon Consent Election. The election was held on February 14, 1978. The Union lost, and it filed objections to the election, charging that Raxair had engaged in numerous unfair labor practices during the campaign. After a hearing, the administrative law judge found that almost every one of the challenged activities constituted an unfair labor practice, and he held that Rexair's unlawful conduct "impeded the election process, undermined the Union, and destroyed its majority status" (App. 23). He held that issuance of a cease and desist order and holding a new election would be an unsatisfactory remedy, and he therefore ordered that the Union be recognized without a rerun election and that Rexair bargain with it upon request. The Board upheld the ALJ's decision, stating simply, "The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the [ALJ] and to adopt his recommended Order [with small modifications not relevant here]" (App. 29) (footnote omitted).

The standard employed by courts reviewing a Board determination of factual issues is whether its findings are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). Upon review of the record we hold that the ALJ's finding that Rexair engaged in unfair labor practices during the unionization drive is supported by substantial evidence. Although some of Rexair's challenges reveal that there may be some debate about individual findings of the ALJ, we do not believe that Rexair has sustained the burden of demonstrating that the ALJ erred in concluding that the company had engaged in unfair labor practices necessitating the vacating of the election results.

More difficult, however, is the issue of the remedy imposed. In *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the Supreme Court held that although holding a new election is the preferred remedy, a bargaining order may issue without a new election in either of two situations: when employer violations have been "flagrant" or "egregious"; or when a union obtained a majority status at some point prior to the election, and the employer's conduct, though not outrageous, "nonetheless still [has] the tendency to undermine majority strength and impede the election process." 395 U.S. at 613-15, 89 S.Ct. at 1939-1941. The ALJ found that the present case fell into the second category, and he stated,

> I am of the opinion that the possibility of erasing the effects of the Company's unfair labor practices and insuring a fair election by the use of the traditional remedy of a cease-and-desist order is

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[2] We agree with the Board that the fact that Rubino may have been classified as a probationary employee should not affect the ruling of this Court.

> slight, and that in this case the employees sentiment expressed through the authorization cards obtained by the Union would, on balance, be better protected by a bargaining order * * *.

(App. 23).

We disagree. We recognize that "the determination of a remedy is peculiarly within the province of the Board." *Automated Business Systems v. NLRB,* 497 F.2d 262, 272 (6th Cir. 1974); *see Gissel, supra,* at 612 n.32, 89 S.Ct. at 1939 n.32 ("In fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.") Nonetheless, this court has exercised less deference to the Board and scrutinized its decision more closely when it has imposed the very strong remedy of issuing a bargaining order without holding a new election. *See, e.g., Donn Products, Inc. v. NLRB,* 613 F.2d 162 (6th Cir.), *cert. denied,* 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980); *NLRB v. East Side Shopper, Inc.,* 498 F.2d 1334 (6th Cir. 1974); *Automated Business Systems v. NLRB,* 497 F.2d 262

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(6th Cir. 1974); *Pulley v. NLRB,* 395 F.2d 870 (6th Cir. 1968). Bargaining orders have not been enforced when "[t]he Board made no findings or detailed analysis as to the residual impact * * *, or the likelihood of recurrence, of any of the unfair labor practices, " or when they are "based on conclusory statements unsupported by sufficient facts," *Donn Products, supra,* at 166, or when the Board's reasoning consisted simply of " 'a litany, reciting conclusions by rote without factual explication,' " *East Side Shopper, supra,* at 1336, *quoting NLRB v. American Cable Systems, Inc.,* 427 F.2d 446, 449 (5th Cir. 1970).

The Board has failed to support its conclusion that a bargaining order is the only satisfactory remedy in the present case. The ALJ simply recites his findings of the Company's improper activities and then states that a cease-and-desist order could not cure these wrongs. There is no analysis of the residual impact or possible recurrence of these violations, nor explanation why a cease-and-desist order would fail to prevent possible recurrence. Nor is there any " 'analysis of the causal connection between the unfair labor practices and the conclusion that the election process was undermined' " to the point that a bargaining order must issue. *Automated Business Systems, supra,* at 275, *quoting New Alaska Development Corp. v. NLRB,* 441 F.2d 491, 494 (7th Cir. 1971). Given the lack of reasoning to support the Board's conclusion, we decline to enforce the bargaining order. Instead, we believe that the purposes of the Act will be better served by the holding of a new election.

Accordingly, the Board's finding that Rexair engaged in unfair labor practices in violation of 29 U.S.C. §§ 158(a)(1) and 158(a)(3) is affirmed, as is its cease-and-desist order (with the one exception noted below) and the order to restore the working conditions enjoyed by Earl Fox prior to February 6, 1978. The conclusion that Rexair violated 29 U.S.C. § 158(a)(5) by refusing to bargain with the Union is reversed, and enforcement of the order requiring Rexair to reognize and bargain with the Union upon request (including that part of the cease and desist order requiring the Company to cease its refusal to bargain) is denied. References to bargaining will be deleted from the notice to employees that the Board ordered posted.

NLRB v. Lyon & Ryan Ford, Inc.

647 F.2d 745 (7th Cir.), April 24, 1981; certiorari denied October 13, 1981—246 NLRB 1

On petition to enforce Board Order

Before Wood and Cudahy, Circuit Judges, and Marovitz, Senior District Judge*

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Cudahy, Circuit Judge: The National Labor Relations Board has petitioned this court pursuant to Section 10(e) of the National Labor Relations Act for enforcement of an order issued against respondent, Lyon & Ryan Ford, Inc., (the "Company") for violations of Sections 8(a)(5), 8(a)(3) and 8(a)(1) of the Act. *See* 29 U.S.C. § 160(e), § 158(a) (1979). In its order, the Board adopted the findings and recommendations of an Administrative Law Judge[1] and concluded that respondent had recognized Automobile Mechanics Local 701, International

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*The Honorable Abraham L. Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

[1] The Board's order is reported as *Lyon & Ryan Ford, Inc.* 246 NLRB No. 2 (1979).

Association of Machinists and Aerospace Workers, AFL–CIO (the "Union") as the employees' bargaining representative. According to the Board, the Company later withdrew this recognition by demanding a "federal election" and refused to bargain with the Union in violation of Section 8(a)(5) of the Act. The Board further found that the employees' strike in response to the Company's withdrawal of recognition was an unfair labor practice strike, and that the Company's action in discharging six employees because of their involvement in that strike violated Sections 8(a)(3), and 8(a)(1). Finally, the Board determined that a Company executive's conversations with two employees' concerning their feelings about the Union constituted impermissible interrogation and also violated the provisions of Section 8(a)(1). The order which the Board seeks to enforce requires the Company to bargain with the Union on request, to reinstate the six discharged employees with backpay and to cease and desist from engaging in further violations of the National Labor Relations Act. For the reasons set forth below, we conclude that the Board's findings are supported by substantial evidence on the record as a whole, and therefore, we grant enforcement of the Board's order.

I.

THE FACTS

Lyon & Ryan Ford, Inc. is a new and used car dealership located in Antioch, Illinois, which employs workers in various capacities to prepare and service the cars it sells. On August 17, 1978, a representative of the Union met with certain Company employees to discuss the benefits of unionization. Several days later at a second meeting ten Company employees signed union authorization cards and applications for union membership.[2]

These cards were presented to Company President Larry Ryan by Union business representatives Donald Carlson and Ed Vaughn at an impromptu meeting on August 24, 1979. Carlson and Vaughn went to Ryan's office with a copy of a letter, allegedly in the mail, which advised the Company that a majority of its "mechanics, bodymen, painters, semi-skilled and apprentices" had designated the Union as their collective bargaining agent. The letter demanded formal recognition of the Union and commencement of negotiations for a collective bargaining agreement.

During the ensuing discussion with Ryan, Carlson clarified the composition of the proposed bargaining unit. Carlson stated that the Union traditionally represented only those employees "who turn wrenches, not anybody else." In the Ryan dealership, "the parts men, the chasers, the parts chasers, the car washers and the hikers" would be excluded, leaving approximately twelve to fourteen employees in the unit represented by the Union. Ryan personally examined each of the eleven signed union authorization cards and membership applications. He also inspected a copy of the recently expired master contract for the Chicago area and a voting information sheet which contained the changes to be included in the new, but then unpublished, master contract. Carlson briefly explained the general terms of the contract and answered Ryan's specific questions on the cost of welfare and pension provisions and the Union's insurance coverage. Before concluding the meeting, Carlson reviewed the proposed wage scale with Ryan and pointed out that the Union and the Company were not far apart on this issue. Carlson asked for another meeting and Ryan agreed.

The second meeting between representatives of the Union and the Company occurred four days later on August 28, 1978 Carlson, Vaughn, Larry Ryan and his son, Patrick, who served as general manager for the dealership, were in attendance. The discussion, once again, centered on the terms of the master contract. Larry Ryan stated that the Company's present vacation policy was better than the Union's contractural provision on the subject, but Carlson replied that he would take the good with the bad and go with a straight "701 Contract."

The focus of the meeting then shifted to the job classification of specific employees.

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[2] A total of eleven authorization cards were signed by Company employees. There was evidence presented, however, that employee Mark Mantsch, whose signed card was dated August 22, 1978, did not attend the Union meeting. As a result, the Administrative Law Judge decided not to count his card for the purpose of determining the Union's majority status.

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All but two of the employees were classified as mechanics, semi-skilled or apprentices. The two exceptions were Gary Wilke, whom Larry Ryan categorized as a detailer, and Mark Mantsch, a wash boy, who had been doing mechanical work under the supervision of another employee. Carlson subsequently sorted through the authorization cards and placed the cards of five employees in a pile identified as journeyman. The cards of four other employees were placed in a separate pile labeled semi-skilled and apprentices. A third pile was created for the cards of Wilke and Mantsch. Carlson commented that there was a "problem" with respect to the manner in which these individuals would be classified within the unit or whether they would be included in the unit at all. The parties then discussed the balance required between mechanics, semi-skilled and apprentices, and Carlson gave examples of the situation at other dealers. Carlson requested a third meeting to resolve the Wilke-Mantsch classification question and was then given permission to go into the shop and talk to some of the employees.[3]

Later that day, Patrick Ryan approached employee Anthony Hynous at his work station and asked about the "circumstances with the Union." Hynous replied that the employees felt the Union could obtain better benefits for them. Ryan asked if more money would do, and Hynous indicated that the employees would have to evaluate that. Ryan left with the comment that "he guessed he had some talking to do."

Similarly, on August 29, the younger Ryan called employee Michael Stern into his office and asked him what he thought about the Union. Stern answered that it sounded good, and that the Union was something the employees really wanted. Ryan then asked if money would make a difference, and Stern responded that he really didn't know.

When Carlson and Vaughn arrived for the third scheduled meeting with the Company on September 1, 1978, Larry Ryan called for a "federal election." Carlson responded that he was very disappointed with the decision since everything had been going along fine with the exception of two employees. He announced that the union didn't have the time or the need for an election and if a contract was not signed by September 12th, "there would be a work stoppage." Carlson and Vaughn then informed two unit employees that the Company wanted an election and that the employees should be prepared to strike if a contract had not been signed by September 12th.

Eleven Company employees walked off the job on September 12, 1978, and began picketing the dealership. Six of those employees received a copy of the following form letter from the Company at various times during the month of October.

> This letter is to inform you that effective ———————, we have hired an individual who will replace you on our work force. Accordingly, it will not be our intention to recall you to work at the conclusion of our labor dispute inasmuch as the new employee will be taking your place.

246 NLRB at 4.[4] The strike was still in effect on April 11, 1979, when an Administrative Law Judge conducted a hearing in this case.

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From these facts, the ALJ concluded that the Union represented a majority of the employees in an appropriate unit and had satisfactorily demonstrated the status to Company President Larry Ryan, who recognized the Union as bargaining representative for unit employees on August 24, 1978. The ALJ further found that the Company had engaged in discussions and negotiations with

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[3] At the administrative hearing, Larry Ryan denied that he ever gave Carlson and Vaughn permission to talk to the employees on work time. But the ALJ credited the Union representatives' testimony over that of Ryan and explained:

> I was not impressed with the demeanor of Mr. Ryan or of his son Patrick Ryan who testified regarding the second and third visits Carlson and Vaughn made to Ryan's office. I found Carlson and Vaughn to be more open and cooperative on cross and their testimony appeared more logical under the circumstances. Also there were noticeable conflicts between Larry and Patrick Ryan, the most notable involving the authorization and application cards. . . . Therefore, I have discredited the testimony of Larry and Patrick Ryan to the extent it conflicts with the testimony of Carlson and Vaughn.

246 NLRB at 34.

[4] The dates of the letters and the effective dates of replacement are as follows:

Ronald Blood—October 4, 1978—effective October 4, 1978
Patrick J. Cullinan—October 30, 1978—effective October 30, 1978
Anthony Hynous—October 30, 1978—effective October 30, 1978
Michael Stern—October 30, 1978—effective October 30, 1978
Edward Wagner—October 3, 1978—effective September 18, 1978
Lawrence Weigman—October 3, 1978—effective October 2, 1978

the Union over terms of the proposed contract on that date and on other occasions but subsequently violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition and refusing to bargain. In addition, the ALJ found that the strike which began on September 12, 1978, resulted directly from the Company's withdrawal of recognition and was thus an unfair labor practice strike. By discriminatorily discharging six employees for their involvement in that strike, the Company violated Sections 8(a)(3) and 8(a)(1) of the Act. The ALJ also concluded that a separate 8(a)(1) violation occurred when a company executive interrogated two employees about their Union activity.[5]

On October 5, 1979, the Board issued an order adopting the findings and recommendations of the Administrative Law Judge. The order instructed Lyon & Ryan Ford, Inc., to bargain with the Union on request and to reinstate the six discharged employees with backpay from the date of their discharge letters, even if this required the release of replacement employees. The Company was also ordered to cease and desist from engaging in further violations and to post appropriate notices. The Board subsequently petitioned this Court for enforcement of the order.

II.

The scope of judicial review accorded to an NLRB order upon petition for enforcement is appropriately narrow. The National Labor Relations Act specifically directs that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." 29 U.S.C. § 160(e). Our inquiry is thus limited to determining whether the record in its entirety provides a proper basis for the Board's decision. Although all evidence which fairly detracts from the weight of the Board's decision must be considered, it is not our function to substitute our judgment for that of the Board when its judgment is supported by substantial evidence on the record as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567 (7th Cir. 1980); *Altemose Constr. Co. v. NLRB*, 514 F.2d 8 (3d Cir. 1975).

A. The Section 8(a)(5) Violation

The National Labor Relations Act authorizes two methods for the establishment of a binding bargaining relationship between an employer and a labor union. 29 U.S.C. § 159(a). Generally, NLRB certification of a union's success in an election is the more prevalent practice, but it is not the only route by which a union may acquire the status of bargaining representative. *NLRB v. Newspapers, Inc.*, 515 F.2d 334 (5th Cir. 1975). An employer's voluntary recognition of a majority union remains "a favored element of national labor policy." *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978). An employer who has not committed unfair labor practices and has not recognized a union has the right to require an election regardless of the union's showing of majority status. But once the employer recognizes the union, no matter how informally, he loses the right to require an election. *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979);

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NLRB v. Gogin, 575 F.2d 596 (7th Cir. 1978). The essence of voluntary recognition is the "commitment of the employer to bargain upon some demonstrable showing of majority [status] * * *. Once the commitment [is] made, [the employer cannot] unilaterally withdraw its recognition and to do so [is] a violation of the Act." *Jeer-Dan Corp.*, 237 NLRB 302, 303 (1978), *enforced*, 601 F.2d 575 (3d Cir. 1979). *Accord. Brown & Connolly*, 583 F.2d at 1374; *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976), *cert. denied*, 430 U.S. 914, 97 S.Ct. 1325, 51 L.Ed.2d 592 (1977); *Toltec Metals Inc. v. NLRB*, 490 F.2d 1122 (3d Cir. 1974).

In the present case the record substantially supports the Board's conclusion that the Company recognized the Union as majority rerresentative of its mechanics, semi-skilled, apprentices, bodymen and painters when Larry Ryan checked the employees' union authorization cards and membership applications on August 24, 1978.[6] At this initial

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[5] This Section 8(a)(1) violation is not contested on appeal.

[6] The Company questions the finding that Ryan examined the cards at the August 24th meeting by pointing to an alleged conflict in the testimony of the two Union representatives. According to the Company, "one [of the representatives] stated that the cards were offered to Mr. Ryan in response to his questions concerning the composition of the unit they claimed to represent, * * * and the other implied that Mr. Ryan's question was more in the nature of a demand for proof of majority status."

Continued

meeting with Union representatives, Ryan also examined a copy of the proposed contract and discussed various contractual provisions. He voiced no objection to the Union as a properly designated bargaining representative, and negotiations continued at a second meeting serveral days later, in which the parties compared Union contractual provisions with current company policy and considered the job classification of employees within the proposed bargaining unit. After scheduling a third meeting to settle differences over the inclusion of two employees in the bargaining unit, Larry Ryan gave the Union representatives permission to speak to employees during working hours. This course of conduct is consistent with, and indicative of, the commitment necessary to create a bargaining relationship and warranted a finding by the Board that the Company had recognized the Union as the employees' bargaining agent.

The Company argues, however, that Ryan never recognized the Union, firts because the parties failed to agree on an appropriate bargaining unit, and second, because the Union did not represent a majority of the required employees.[7] It is undisputed that identification of an appropriate bargaining unit is a prerequisite to the determination of a union's majority status. *NLRB v. SAC Constr. Co.*, 603 F.2d 1155 (5th Cir. 1979). In the instant case, both the ALJ and the Board concluded that the parties were in agreement as to the definition of the unit. Neither party disputes the fact that the Union demanded recognition as the bargaining agent only for the dealership's "mechanics, bodymen, painters, semiskilled and apprentices." In response to specific questions from Larry Ryan, Union representatives stated that they represented only "people who turn wrenches, not anybody else." The "parts people, the chasers, the parts chasers, the car washers and the hikers" were expressly excluded. Ryan made no objection to the scope of the unit at any time during these discussions.

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The issue of job classification was discussed in greater detail at the second meeting between the parties. Union representatives explained that in a "new" shop, the employees classified themselves by describing the job they were hired to fill. Final classification, however, remained a subject a negotiation. When Ryan and Union representatives examined the job description on each employee's authorization card, agreement was reached on the classification of nine mechanics, semi-skilled and apprentices, but Ryan objected to the inclusion of Gary Wilke, a detailer, and Mark Mantsch, a wash boy, in the unit. The Company now contends that the Union's attempt to include these individuals in the bargaining unit "created confusion about the overall scope of the unit sought and made it apparent that, in the context of the realities of Respondent's employee situation, the Union's definition of the unit was ambiguous." Respondent's Br. at 24. Since a union request to bargain on behalf of an ambiguously defined unit may be fatally defective, the Company claims that Ryan never recognized the Union.

The Company's argument is unpersuasive The fact that the parties failed to agree on the inclusion within the unit of two employees does not necessarily prove that the parties failed to agree substantially on the definition or scope of the unit. In *National Can Corp. v. NLRB*, 374 F.2d 796 (7th Cir. 1967), this court explained, "once having defined the unit it claims to represent and having made a bargaining demand on that basis, the Union has thereby established the frame of reference for measuring the validity of its demand." *Id.* at 801. Here, the Union clearly defined the unit it sought to represent as "mechanics, bodymen, painters, semi-skilled and apprentices" and made a bargain-

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Respondent's Br. at 17. In view of the Company's statement that "Both Union representatives testified that Mr. Ryan looked at each card handed to him [at the first meeting]", we find no meaningful conflict in this testimony which would cast doubt upon the Board's finding that Ryan examined the cards on August 24th. *See* Respondent's Br. at 5.

[7] The Company also attempts to justify its withdrawal of recognition on the basis of the Supreme Court's decision in *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974), which held that an employer had the right to refuse to recognize the union and to request an election on the basis of a proffered card majority. In *Linden*, however, the Court carefully noted that the employer and the union "had never voluntarily agreed upon any mutually acceptable and legally permissible means other than a Board conducted election for resolving the issue of union majority status." *Id.* at 310 n. 10, 95 S.Ct. at 434. Since the Court expressly reserved the question whether a union which possessed a card majority was required to submit to an election "if the employer breache[d] his agreement to permit majority status to be determined by means other than a Board election," the *Linden* decision is not controlling here. One an employer has voluntarily recognized a union, he loses his right to require an election. *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979); *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976); *Toltec Metals, Inc. v. NLRB*, F.2d 1122 (3d Cir. 1974).

ing demand on the basis of authorization cards from a majority of employees in those categories.

While it is true that the Board usually groups all employees in an automotive service department into a single bargaining unit, (*see, e.g., Graneto-Datsun*, 203 NLRB 550 (1973)), a smaller unit is acceptable if it has been agreed to by the parties and is not repugnant to the National Labor Relations Act. *Otis Hospital, Inc.*, 219 NLRB 164 (1975); *Harvey Russell*, 145 NLRB 1486 (1964). The Union in this case was a party to over three hundred similar agreements with Chicago area auto dealerships and all but two of these agreements covered the same scope of bargaining unit as defined here. The existence of these comparable units tends to negate any claim that the failure to include all automotive service personnel in the particular bargaining unit in the instant case creates any fatal frailties in the definition of the unit.

Moreover, there was substantial evidence in this case to support the Board's conclusion that the parties agreed to the smaller bargaining unit. The Company not only failed to make any objection to the scope of the unit, but also negotiated with the Union over membership within that unit. The Board has long sought to encourage parties to agree voluntarily to the coverage of an appropriate bargaining unit. *NLRB v. Chelsea Clock Co.*, 411 F.2d 189 (1st Cir. 1969). The salutary purpose of such agreements would be frustrated if, once concluded, the parties were free to repudiate them at will. In the absence of extraordinary circumstances or a clear denial of employees' rights, neither of which are present in the instant case, we cannot sanction the subsequent repudiation of a Union's right to bargain on behalf of a smaller, yet otherwise appropriate, bargaining unit which has received the Company's implicit approval.

The Company also claims that the Board erred in concluding that Larry Ryan recognized the Union on August 24th because the Union failed to properly demonstrate its majority status. According to the Company, Ryan never examined the employees' authorization cards at the initial meeting with Union representatives. This argument relies primarily on the testimony of witness Michael Stern, a former Lyon & Ryan employee. At the hearing before the ALJ, Stern testified that he attended a Union organizational meeting on the evening of *August 28th* (well after August 22nd) with ten or eleven of the dealership's employees, and all of the employees present then signed union authorization cards. Stern explained further that one of the employees whose signed card had been included in the evidence before the ALJ was not present at the card-signing meeting on *August 28th*. The ALJ credited that portion of Stern's testimony which related to the absent employee and refused to count the employee's card when determining the Union's majority status. Stern's testimony was discredited, however, insofar as it indicated that the cards were not signed on August 22nd, the date indicated on the cards. The Company suggests that the ALJ arbitrarily selected those portions of Stern's testimony which supported the ALJ's conclusion and ignored the rest.

This court accords great weight to the credibility determinations of an administrative law judge, which are based on the first hand observations of a witness' demeanor. *NLRB v. Blue Hills Cemetery, Inc.*, 567 F.2d 529 (1st Cir. 1977). In reviewing the ALJ's findings, however, this court should consider "the consistency and inherent probability of the testimony." *Universal Camera Corp.*, 340 U.S. at 496, 71 S.Ct. at 468. We conclude that the discredited portions of Stern's testimony are directly contrary to the testimony of other witnesses and inherently improbable. The ALJ based his finding that the authorization cards were signed prior to the August 24th meeting on three factors: 1) the testimony of Union representatives Donald Carlson and Ed Vaughn; 2) the testimony of Company employee Anthony Hynous, which corroborated the Union representatives' testimony as to the dates of the organizational meetings; and 3) the dates entered on the cards themselves. It is not this court's function to second guess the ALJ or to retry the case on appeal when substantial evidence supports the administrative determination. After reviewing the record, we conclude that the factors outlined by the ALJ satisfy the substantial evidence test and adequately resolve any doubts raised by contrary testimony or inferences.

The course of conduct pursued by the Company following the Union's demand for recognition on August 24th supports the Board's finding that a bargaining relationship had been established. After voluntarily recognizing the Union, the Company was obligated to bargain for a reasonable period so that the relationship could be given a fair chance to succeed. *Franks Bros. v. NLRB*, 321 U.S. 702, 706, 64 S.Ct. 817, 819, 88 L.Ed. 1020 (1944). We believe that three meetings in seven days does not exhaust the requirement for bargaining over a reasonable period. Hence, we accept the Board's finding that the Company's request for a federal election on September 1, 1978, constituted a withdrawal of recognition and a refusl to bargain in violation of Section 8(a)(5) and enforce that portion of the Board's order.

B. The Section 8(a)(3) Violation

After the Company's unlawful withdrawal of recognition and refusal to bargain on September 1st, Union representatives informed Ryan that the employees would strike if they did not have a signed contract by September 12th. When no contract was forthcoming, eleven Company employees stuck and picketed the dealership. Less than a month later, several of the strikers received letters from the Company stating that a replacement employee had been hired and the Company had "no intention" of recalling the striking employee to work at the end of the labor dispute.

After examining the ALJ's report, the Board concluded that the strike was "caused and prolonged" by the Company's withdrawal of recognition and refusal to bargain. A strike which is caused in whole or in part by an employer's unfair labor practice is an unfair labor practice strike. *NLRB v. My Store, Inc.*, 345 F.2d 494 (7th Cir.), *cert. denied*, 382 U.S. (927, 86 S.Ct. 315, 15 L.Ed.2d 340 (1965); *NLRB v. Waukesha Lime & Stone Co.*, 343 F.2d 504 (7th Cir. 1965). Unlike employees who strike for economic reasons, unfair labor practice strikers "do not lose their [employee] status and are entitled to reinstatement with backpay, even if replacements for them have been made." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). The Board therefore concluded that the letters which stated that the Company had no intention of recalling the strikers constituted notices of discharge and violated Section 8(a)(3) and (1) of the Act.

In these enforcement proceedings the Company contends that the Board erred by ignoring evidence of the Union's express purpose in calling the strike. Relying on the testimony of a Union representative which indicated that the employees' picket signs read, "On Strike for Recognition," the Company argues that the Board failed to accord proper weight to the Union's own characterization of the strike. The Company contends that in *Drug Package, Inc. v. NLRB*, 570 F.2d 1340 (8th Cir. 1978), *on remand*, 241 NLRB No. 44 (1979), *petition den. sub nom. Willenbrink v. NLRB*, 612 F.2d 1088 (8th Cir. 1980), the court considered both the availability and use of picket signs bearing slogans indicating that union recognition had not taken place and rejected the Board's determination that a strike should be characterized as arising out of an unfair labor practice.

We are, however, unpersuaded by the Company's argument. A strike may be an unfair labor practice strike even though it contains some recognitional objectives. *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975); *NLRB v. Juniata Packing Co.*, 464 F.2d 153, 155 (3d Cir. 1972). Contrary to the Company's assertion, the *Drug Package* court did not reject the finding of an unfair labor practice strike because of the Union's picket sign slogans. Instead, the court, having reversed the Board's 8(a)(5) finding concluded that, "without that crucial element [an 8(a)(5) violation], the strike cannot be deemed an unfair labor practice strike." *Drug Package*, 570 F.2d at 1348. In the instant case, on the other hand, we have accepted the Board's determination of a Section 8(a)(5) violation. After a thorough review of the record, we also conclude that substantial evidence supports the Board's finding that the strike, although perhaps seeking some recognitional objectives, was primarily caused by the Company's unlawful withdrawal of recognition and refusal to bargain.

Finally, the Company objects to the Board's conclusion that the dealership permanently discharged and refused to reinstate six striking employees in violation of Section 8(a)(3) and (1). The Company claims that the Board failed to articulate any basis for this finding. It is the Company's position that the letter sent to the employees represented notice of replacement to economic strikers rather than notice of discharge to unfair labor practice strikers.

Having concluded that the employees were participating in a bona fide unfair labor practice strike, we need only determine whether substantial evidence supports the Board's conclusion that the letters constituted notice of discharge. The pertinent portions of the letter stated, "we have hired an individual who will replace you on our work force. Accordingly, it will not be our intention to recall you to work at the conclusion of our labor dispute inasmuch as the new employee will be taking your place." While the letter carefully avoids using the words, "discharged," "fired," or "terminated," we think the Company's purpose is clear. By indicating that the employee would not be recalled, the Company emphasized that a request for reinstatement would be futile. Under the facts of the instant case, there is no meaningful distinction between discharging an employee and permanently replacing him. Thus, the record fully supports the Board's determination that the Company discharged six un-

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fair labor practice strikers in violation of Section 8(a)(3) and (1).

III.

Section 10(c) of the National Labor Relations Act directs the Board to develop remedies which will carry out the policies of the Act. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S.Ct. 287, 288, 97 L.Ed. 377 (1953). Since the relation of remedy to policy in the field of unfair labor practices is a matter within the Board's particular experience and administrative competence, the courts accord wide discretion to the Board in this area. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941). "Unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Board's determination will be affirmed. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed 1568 (1943).

In the present case, the Board, relying on its decision in *Abilities & Goodwill, Inc.*, 241 NLRB No. 5 (1979), ordered the Company to reinstate the six unlawfully discharged employees with backpay from the date of discharge. The Company responds that this remedy, the imposition of which overrules more than thirty years of Board precedent with respect to strikers, improperly places an unreasonable burden on the employer and should be set aside. Because we think the Board could reasonably conclude that its former policy, which had the effect of sanctioning disparate treatment as between discriminatorily discharged working employees and discriminatorily discharged striking employees, is inequitable and inadequate, we affirm the Board's backpay order.

The discretion accorded the Board in devising appropriate remedies for labor violations has been most evident with respect to backpay awards. Rather than relying on rigid formulas, the Board has tried to use a more flexible approach "to attain just results in diverse, complicated situations." *Phelps*, 313 U.S. at 198, 61 S.Ct. at 854. In each case, the "just result" represents "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Id.* at 194, 61 S.Ct. at 852.

In the case of an unlawfully discharged working employee, a "just result" requires reinstatement and backpay from the date of discharge. No request for reinstatement was necessary because the Board reasoned that such a plea would fall on deaf ears. Generally, an employer would not voluntarily grant a request to rehire an individual whom he had just fired. In addition, the Board believed that the employer, who unlawfully discharged the employee in the first place, bore the onus of undoing the damage by offering the employee immediate reinstatement and reimbursement for all losses suffered from the date of the discriminatory action.

A different rule controlled, however, when the Board considered the case of an unlawfully discharged striking employee. In the absence of an unconditional offer by the employee to return to work, a "just result" included reinstatement but no backpay. For many years, this rule was applied as "established Board precedent" although it enjoyed less than unanimous Board approval.[8]

In *Abilities & Goodwill*, the Board (with members Pennello and Murphy dissenting) announced a change in the policy governing backpay awards.

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[8] *See, e.g., Bartlett-Collins Co.*, 230 NLRB 144 (1977); *Michael Muldoon Elder, d/b/a Vorpal Galleries*, 227 NLRB 446 (1976); *Valley Oil Co., Inc.*, 210 NLRB 370 (1974); *Roosevelt Roofing and Sheet Metal Works, Inc.*, 204 NLRB 671 (1973); *Astro Electronics, Inc.*, 188 NLRB 572 (1971); *Universal Services, Inc.*, 184 NLRB 381 (1970); *Sea-Way Distributing, Inc.*, 143 NLRB 460 (1963); *Elm Tree Baking Co.*, 139 NLRB 4 (1962); *Sea View Industries, Inc.*, 127 NLRB 1402 (1960); *Wheatland Electric Cooperative, Inc.*, 102 NLRB 1119 (1953); *National Gas Co.*, 99 NLRB 273 (1952); *Happ Brothers, Inc.*, 90 NLRB 1513 (1950); *Kallaher and Mee, Inc.*, 87 NLRB 410 (1949); *Massey Gin and Machine Works, Inc.*, 78 NLRB 189 (1948).

The Board declared "a discharged striker is a discharged employee and entitled to be treated as such, for there is nothing peculiar to a strike which justifies dissimilar treatment. The nature of

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the employer's unlawful conduct is not changed by the fact that the employee happens to be a striker at the time of discharge. "*Goodwill* at 3. As a result, the Board concluded that an unlawfully discharged striker is no longer required to request reinstatement to trigger an employer's backpay obligation.

The Company argues, however, that the *Abilities & Goodwill* remedy is inappropriate because the employer who discharges a striking employee cannot aptly be termed a "wrongdoer." After all, the Company contends, the employees would not have been "permanently replaced" if they had not engaged in the strike. This argument highlights the ambiguity inherent in the discharge of a striker. As this court recently explained:

> On the one hand, the employee may voluntarily be refraining from work, as evidenced by the fact that he was initially on strike. [I]n this case, a back pay award would more than make him whole for his unlawful discharge and thus would not be consistent with the remedial purposes of the Act. *See Republic Steel Corp. v. NLRB,* 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 * * * (1940). On the other hand, the employee may not have returned to work because of the unlawful discharge, thinking it futile to even ask to be reinstated.

NLRB v. Mars Sales & Equipment Co., 626 F.2d 567, 574 (7th Cir. 1980). Rather than requiring the discharged employee to engage in the presumably futile act of requesting reinstatement, we believe that the ambiguity may be resolved against the employer who committed the unfair labor practice. The employer is thus liable for backpay unless he can affirmatively establish that the unlawful discharge did not prevent the employee from returning to work.[9]

This result is not as onerous as it may appear. As in the case of any discharged employee, the employer must make an offer of reinstatement. If the striking employee thereafter refuses to return to work, the employer's position is vindicated and his backpay obligation is tolled. When the employee willfully withholds his services, the employer is thus not responsible for his corresponding loss of earnings. Even where an employer fails to offer reinstatement, he is entitled to reduce his backpay liability by presenting evidence that the employee would have refused the reinstatement offer had it been made.

Moreover, the policy we enforce here is not so much an abrupt departure from Board precedent as it is the natural evolution of the Board's efforts over the years to achieve a "just result." Several years prior to *Abilities & Goodwill,* the Board created a futility exception to the reinstatement rule for discharged strikers. Under this exception to the reinstatement rule for discharged strikers. Under this exception, if evidence indicated that a request for reinstatement would be futile, the striker was entitled to reinstatement with backpay even if no request had been made. *See, e.g., Sigma Service Corp.,* 230 NLRB 316 (1977); *Valley Oil Co., Inc.,* 210 NLRB 370 (1974). It was neither unreasonable nor unforeseeable that the Board should elect to extend this exception by creating a presumption of apparent finality of discharge in strike situations. It would appear to be a rare case where a reinstatement request by a striking employee who had just been fired would *not* be futile. Since the backpay award for unlawfully discharged working employees is based on an identical presumption of futility, the reasons for distinguishing logically between the two situations tend to disappear. Particularly in the instant case, where the employer unlawfully discharged

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employees for participating in a strike caused by the employer's unlawful withdrawal of recognition and refusal to bargain, we see no reason to deny these employees reinstatement with backpay from the date of discharge. We emphasize, however, that essentially our conclusion only supports the Board's exercise of discretion and that some other result, if arrived at by the Board pursuant to the Act, might also in the appropriate circumstances be quite defensible.

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[9] We implicitly accepted this remedy in *NLRB v. Mars Sales & Equipment Co.,* 626 F.2d 567 (7th Cir. 1980). In that case, the Board found that the Company violated Sections 8(a)(1) and (3) by discharging two employees, Metzger and Neaville, who were participating in an economic strike. Since permanent replacements had not been hired for these individuals at the time they were discharged, the Board ordered the Company to offer reinstatement to both employees with backpay from the date of their unlawful discharge. We enforced the Board's order as to employee Neaville because it was "consistent with the remedial policies of the Act." *Id.* at 574. We declined to enforce the Board's order as to employee Metzger, however, because Metzger had resigned from the Company during the strike.

Finally, the Company argues that the Board's retroactive application of the remedy announced in *Abilities & Goodwill* was improper because the strikers were discharged *before* the new backpay policy had been announced. We decline to adopt an unnecessary limitation on a policy which not only rectifies an apparent disparity in the treatment of discharged employees but which was also not an unforeshadowed departure by the Board from its prior line of decisions.

Generally, a decision which changes existing law or policy is given retroactive effect unless retroactive application would cause "manifest injustice." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The Supreme Court has devised a three part test to identify situations in which a civil, nonconstitutional precedent should be applied on a prospective basis only:

1) Does the decision "establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, * * * or by deciding an issue of first impressin whose resolution was not clearly foreshadowed?"
2) Considering "the prior history of the rule in question, its purpose and effect," does retroactive application "further or retard" the operation of the rule?
3) Does retroactive application create "injustice or hardship" for one of the parties?

Chevron Oil Co. v. Huson, 404 U.S. 106–07, 92 S.Ct. at 355 (1971). Since there is a presumption favoring retroactivity, all three *Chevron* factors must support prospective application in order to limit the retroactive effect of the decision. *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1289 (7th Cir.), *cert. granted*, —— U.S. ——, 101 S.Ct. 395, 66 L.Ed.2d 242 (1980); *Schaefer v. First Nat'l Bank*, 509 F.2d 1287, 1294 (7th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S.Ct. 1682, 48 L.Ed.2d 186 (1976).

In the instant case, the matter seems settled for us because the new rule was not an unforeshadowed departure from the Board's previously existing practice, and the Board has sufficiently demonstrated a basis for its view that retroactive application will further rather than retard the operation of the rule. In addition, retroactive application will not create substantial injustice or undue hardship for either party. The Board finds no valid reason for distinguishing between the status of an unlawfully discharged striker and of an unlawfully discharged working employee. Contrary to the Company's claim, the rule enforced here does not provide a windfall to striking employees but merely places the burden of undoing the wrong on the wrongdoer, where it seems properly to belong.

For the foregoing reasons, we grant enforcement of the Board's order.

NLRB v. Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc.

646 F.2d 1173 (6th Cir.), May 1, 1981; rehearing denied November 21, 1981—241 NLRB 869

On petition to enforce Board Order

Before EDWARDS, Chief Judge, BROWN, Circuit Judge, and BATTISTI,[*] District Judge

EDWARDS, Chief Judge: The National Labor Relations Board petitions for enforcement of it order entered April 13, 1979, reported at 241 NLRB No. 136.

Pepsi-Cola Distributing Company of Knoxville, Tennessee, Inc. purchased a distributorship previously owned and operated by Hartman Beverage Company. For a considerable number of years, Hartman had paid its route salesmen a year-end bonus calculated at one cent per case sold by individual route salesmen during the previous year. The bonus was paid annually approaching the Christmas season and had been so paid before the union, Teamsters Local Union No. 519, negotiated a one year contract, effective November 27, 1975. At the time of these negotiations, no mention was made of the year-end bonus for route salesmen but Hartman paid the bonus in late 1975. The following year, Hartman and the union executed another contract and the bonus was discussed but no reference to it was put in the labor management contract.

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[*] Honorable Frank J. Battisti, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

During the year 1976, respondent Pepsi-Cola Distributing Company purchased Hartman's business without actual knowledge of the Hartman practice of paying a one cent a case bonus to its salesmen. While the new ownership became effective February 1, 1977, and the management told the route salesmen that there would be no change in pay structure, the record indicates that the new management did not become aware of the bonus until some time in May. Respondent did not duscuss the matter with the union or with its route salesmen until some of them began asking about the bonus, at which time General Manager Moore reviewed Hartman's payroll records and found that Hartman had paid its route salesmen the full rate due under the contract and that the one cent per case bonus was paid in addition to

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wages under the contract. At that point, Moore informed the route salesmen that the would not pay the year-end bonus.

On complaint filed by the General Counsel alleging that the company had violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally withholding the 1977 bonus, the Administrative Law Judge who heard this case initially found that the Christmas bonus "was essentially part of [the route salesmen's] employment as distinguished from being in nature a gift or gratuity" and that the employer was under a duty to negotiate with the union prior to effecting any change therewith, citing *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3rd Cir. 1968), unless the union had previously waived its bargaining rights. On his analysis, the ALJ concluded that the waiver clause in the contract previously signed by Hartman with the union served to relieve the successor Pepsi-Cola Distributing Company of any obligation to continue the bonus or to negotiate with the union in relation to discontinuing it in advance of doing so even though the ALJ acknowledged "that employees hired after respondent's takeover were told that their pay and conditions would remain the same." In this respect, the ALJ relied upon *Bancroft-Whitney Co., Inc.*, 214 NLRB 57 (1974).

On review by the NLRB, a three-number panel thereof held that the *Bancroft-Whitney* decision was not determinative in relation to this case. Its reasoning concerning *Bancroft-Whitney* bears quotation here:

> * * * the Board found that the union had clearly waived any right to bargain about the payment of an annual wage dividend during the contract's duration. In that case, bargaining was extensive and the contract contained a clear and specific provision that "all wages and other benefits to be received are contained in this agreement."
>
> The law is settled that the right to be consulted concerning unilateral changes in terms of employment is a right given by statute and not one obtained by contract and that, it order to establish a waiver of a statutory right, there must be a showing of a clear relinquishment of the right. Whether there has been a clear relinquishment of the right is to be decided on the facts and circumstances surrounding the making of the contract.[4] Having considered all the circumstances herein, we concluded that there has been no showing that the Union relinquished its statutory right to bargain over the year-end bonus.
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> [4] *McDonnell Douglas Corporation*, 224 NLRB 881, 887 (1976).

The Board thereupon ordered respondent to cease and desist from "unilaterally without notification of or consultation with the union discontinuing its past practice of conferring upon its route salesmen a year-end bonus" and required the respondent to pay the 1977 year-end bonus and to bargain collectively in relation to any change of practice concerning it.

While this case is not beyond dispute, we conclude that the union had a statutory right to be consulted about changes in relation to the bonus paying practices before it was discontinued and that the Board's order is consistent with Section 8(d) of the Act which requires the parties to "confer in good faith with respect to wages, hours and other terms and conditions of employment." In the unanimous decision in *NLRB v. Katz*, *supra*, the opinion for the court said as follows:

> The duty "to bargain collectively" enjoined by § 8(a)(5) is defined by § 8(d) as the duty to "meet * * * and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has re-

fused even to negotiate *in fact*—"to meet * * * and confer"—about any of the mandatory subjects.[10] A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the

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union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similary a violation of § 8(a)(5), for its is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.[11]

> In *Medo* the court held that the employer interfered with his employees' right to bargain collectively through a chosen representative, in violation of § 8(1), 49 Stat. 452 (now § 8(a)(1)), when it treated directly with employees and granted them a wage increase in return for their promise to repudiate the union they had designated as their representative. It further held that the employer violated the statutory duty to bargain when he refused to negotiate with the union after the employees had carried out their promise.
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> *May* held that the employer violated § 8(1) when, after having unequivocally refused to bargain with a certified union on the ground that the unit was inappropriate, it announced that it had applied to the War Labor Board for permission to grant a wage increase to all its employees except those whose wages had been fixed by "closed shop agreements."
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> *Crompton-Highland Mills* sustained the Board's conclusion that the employer's unilateral grant of a wage increase substantially greater than any it has offered to the union during negotiations which had ended in impasse clearly manifested bad faith and violated the employer's duty to bargain.

369 U.S. at 742–743, 82 S.Ct. at 1111–1112.

The dissent in this case relies upon *NLRB v. Southern Materials Co.*, 447 F.2d 15 (4th Cir. 1971). There on somewhat similar facts, enforcement of a Board order to pay Christmas bonuses was denied. In that case, however, the bonuses were small and consistent with being Christmas gifts, as opposed to part of regular compensation.

In our instant case, Pepsi-Cola has assured employees that their compensation would be the same as it has been under the Hartman administration. Additionally, it appear clear to use that the year-end payments were not mere bonuses, but were a regularly calculated part of the route salesmen's compensation, based upon a formula of one cent per case. Thus, what we deal with here, as opposed to *Southern Materials*, in a unilateral management change of one of the fundamental issues of collective bargaining; namely, wages.

On this record, where a successor employer has promised to continue previously established compensation, a general waiver clause, which does not refer specifically to waiver of a portion of the promised compensation, should not be regarded as a clear and unmistakable waiver of the union's right to collective bargaining.

The petition of the Board to enforce its order is hereby granted.

BAILEY BROWN, Circuit Judge, dissenting: I respectfully dissent.

The precise issue before the Board was whether Pepsi-Cola, as a successor employer that adopted the existing collective bargaining contract effective November 1976-November 1977, committed an unfair labor practice under Section 8(a)(5) by its failure to bargain with respect to the payment of the 1977 Christmas bonus. I recognize that the Union's statutory right to bargain cannot be held to have been waived unless such result is required by the provisions of the collective bargaining contract and the surrounding circumstances. The ALJ determined that the right to bargain was waived by the clear terms of the contract and that the surrounding circumstances did not support a different result. The Board determined that the contract was not clear as to waiver of the right to bargain, and that moreover, the surrounding circumnstances did not support a waiver by the Union. In my view, under the collective bargaining contract the parties waived the right to bargain by language that could not have been clearer had it been written by Abraham Lincoln and etched in stone. Moreover, there was nothing in the surrounding circumstances that supported a different result.

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I would agree, as the ALJ determined, that this bonus, though not mentioned in the contract, was not a gratuity and had become part of Hartman's (the predecessor employer's) wage structure. It might well be that, if the Union had taken this bonus issue to arbitration, it should have prevailed. It could have possibly prevailed either on the theory that the bonus claim had not been waived by the contract or on the theory that, even if so waived, Pepsi-Cola in effect "waived the waiver" when it obtained some information from Hartman about the bonus in May of 1977 and did not then take the matter upon with the Union. (In May, Pepsi-Cola did receive information from Hartman about the bonus, but it was incorrect; the information was that the route salesmen were paid one cent per case less than the contract rate and that this amount was accumulated and paid as a "bonus" at the end of the year.) But, as I have indicated, the question before the Board was not whether the Union had effectively waived the right to the bonus but rather whether the Union has waived the right to bargain with respect to the bonus. It was not for the Board to determine whether Pepsi-Cola was bound to pay the bonus where, as here, there was an arbitration provision in the contract to resolve such disputes. See *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 87 S.Ct. 559, 17 L.Ed.2d 486 (1967), at 426–428, 87 S.Ct. at 562–564.

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[10] See, *e.g.*, *Labor Board v. Allison & Co.*, 165 F.2d 766 (6 Cir. 1948).

[11] Compare *Medo Corp. v. Labor Board*, 321 U.S. 678, 64 S.Ct. 830, 88 L.Ed. 1007; *May Department Stores v. Labor Board*, 326 U.S. 376, 66 S.Ct. 203, 90 L.Ed. 145; *Labor Board v. Crompton Highland Mills*, 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320.

First, I will deal with the terms of the collective bargaining contract and then with the surrounding circumstances.

The operative provision of this contract provided as follows:

> Section 2. The Employer and the Union agree that all matters desired by either party have been presented, discussed and incorporated herein or rejected. *Accordingly, it is agreed that for the life of this Agreement each party voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter, whether or not referred to in this Agreement.* (Emphasis supplied.)

In *N.L.R.B. v. Southern Materials Co.*, 447 F.2d 15 (4th Cir. 1971), the Fourth Circuit found the following clause to be a "clear and unmistakable" waiver of the union's right to negotiate about Christmas bonuses. The clause in *Southern Materials* stated (at 17):

> The Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter referred to or covered in this Agreement or with respect to any subject matter not specifically referred to or covered in this Agreement. 447 F.2d at 17.

There is no difference of consequence between the waiver clause presented here and the waiver clause before the court in *Southern Materials.*

As stated, there is nothing in the surrounding circumstances that could be interpreted as a waiver of this waiver provision. It is without dispute that Pepsi-Cola had no knowledge of this practice of Hartman of paying a Christmas bonus when Pepsi-Cola bought this business and adopted this collective bargaining contract, which did not mention bonus, in February of 1977. Pepsi-Cola did, in adopting this contract, verbally assure that compensation of employees would continue as under Hartman, but it obviously meant the compensation set out in the contract would be paid. Pepsi-Cola did receive some incorrect information about the bonus from Hartman, as before stated, in May of 1977 and did not consult with the Union about it. But the only effect this could have possibly had on the rights of these parties would be to create a waiver of its contract right not to pay the bonus. It could not effect a waiver of Pepsi-Cola's contract right not to bargain with respect to the bonus.

Even if the Board were correct in determining that Pepsi-Cola was guilty of an unfair labor practice in failing to bargain with respect to the bonus, it is doubtful that it had the authority to in effect, adjudicate the obligation of Pepsi-Cola to pay the bonus (see *C & C Plywood Corp., supra,* 385 U.S. at 428, 87 S.Ct. at 564) rather than to order Pepsi-Cola to bargain. In any case, the Board exercised some overkill when, in spite of Pepsi-Cola's strong position, it ordered Pepsi-Cola to pay the 1977 bonus rather than to bargain with respect to it and when, in spite of the fact that the parties had settled the bonus issue as to future years, it ordered Pepsi-Cola to bargain as to future years.

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For these reasons, I respectfully dissent and would deny enforcement.

NLRB v. Clerks and Checkers Local No. 1583, International Longshoremen's Association, AFL–CIO

644 F.2d 408 (5th Cir.), May 4, 1981—243 NLRB 8

On petition to enforce Board Order

Before GODBOLD, Chief Judge, HATCHETT, Circuit Judge and MARKEY, Chief Judge*

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GODBOLD, Chief Judge: The union local, affiliated with the International Longshoremen's Association, represents stevedoring clerks and checkers in the Jacksonville, Florida area. This local was a party to collective bargaining agreements with the Jacksonville Maritime Association, Inc. The agreements incorporated by reference trust provisions of collective bargaining agreements between the Association and ILA Local No. 1408, which represents longshoremen in the Jacksonville area. The provisions required the signatory association employers to make welfare, vacation, and pension contributions to the ILA Welfare, Vacation and Pension Fund for the benefit of eligible union members. The

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Fund is a joint trust fund administered by a board of six trustees, three appointed by the ILA and three by the Association.

In an unfair labor practice case brought against the union local, the Board found that the union had violated §§ 8(b)(1)(A) and (2) of the Act by refusing to refer employee Beckham for employment through its exclusive referral service and that the referral system illegally conditioned referral priority upon union membership. The Board ordered the union and its representatives to make Beckham whole for any loss of pay suffered by reason of the discriminatory refusal to refer him.

The Board's General Counsel, the union and Beckham reached an agreement on the amount of back pay owed Beckham and the amount of contributions to be paid to the Fund to prevent his suffering loss of contractual fringe benefits. The General Counsel, the union, and the Fund and its trustees then entered into a stipulation regarding compliance with the Board's order. The union and the Fund stipulated that: they had no objection to the Board's order, which they conceded was valid in all respects; the union and General Counsel had agreed on the amount of contributions that the union was willing to pay; the only compliance issue that has arisen was that the Fund refused to accept the retroactive contributions on Beckham's behalf. It was stipulated that the Board's Regional Director would bring a supplemental proceeding in which the Fund was guaranteed the right to intervene and that in the event judicial proceedings were necessary to enforce the Board's determination of compliance the only issue before the court would be that of the Fund's refusal to accept the contributions.

The Regional Director issued a back pay specification setting out the fringe contributions to be paid and alleging that but for the union's unlawful discrimination employer members of the Association would have forwarded the contributions for Beckham during the relevant period and the Fund would have been required under the collective bargaining agreements to accept them. The Fund filed its answer setting forth several defenses.[1]

The case was transferred to the Board, and the General Counsel moved for summary judgment. The Fund objected to summary judgment on the ground that no provisions had been made for payment of interest, insurance premiums, and costs and additional administrative expenses that might arise and that the Fund should be made whole for these items.

The Board granted summary judgment. It found that for purposes of accepting fringe benefits contributions the Fund was an agent of the union and the signatory contributing employers, and as such was required to accept the contributions. The Board found merit to the Fund's financial objections and ordered the union to compensate the Fund for administrative costs and other expenses and loss of interest occasioned as a result of the Fund's acceptance of the retroactive contribution.

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*Honorable Howard T. Markey, of the United States Court of Customs and Patent Appeals, sitting by designation.

[1] The Fund was denied due process because it was not a party to the Board's original order; a compliance order against the fund would jeopardize the status of the Fund under Internal Revenue and Department of Labor laws and regulations; the Fund lacked authority to accept the contributions because acceptance would violate the Labor Management Relations Act; acceptance of the funds would be a prohibited transaction under ERISA; a retroactive participation in the Fund would deprive participants of the right to interest and income that would have been earned had the contributions been made when required; the Fund would incur additional administrative expenses and costs in providing retroactive benefits to Beckham; a compliance order would establish a bad precedent; the Fund can deny retroactive coverage in order to achieve economic stability and maintain maximum earning potential.

The Board has moved for an enforcement order. The Fund contends that the Board had no jurisdiction or authority to order the Fund to accept the contributions. The Board's predicate for bringing the Fund in as a party and for entering an order against it is that for the limited purpose of accepting contributions the Fund is an agent of both union and employer. We agree. *See Local 138, International Union*

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of Operating Engineers v. NLRB 321 F.2d 130, 137 (2d Cir 1963); *Local 38, Sheet Metal Workers International Association,* 194 NLRB No. 17, 1972 NLRB Dec. ¶ 23, 634; *Local 80, Sheet Metal Workers International Association,* 161 NLRB No. 7, 1967 NLRB Dec. ¶ 20, 806. *But see NLRB v. United Brotherhood of Carpenters,* 531 F.2d 424, 426–27 (9th Cir. 1976).

When implementing back pay awards the Board is granted broad discretion in formulating remedies to make employees whole and to effectuate the policies of the Act, *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); *NLRB v. Pilot Freight Carriers, Inc.,* 604 F.2d 375 (5th Cir 1979). For the limited purpose of accepting contributions, the Fund is a mere receptacle into which the union must pay contributions in order to carry out the Board's back pay order and make the employee-beneficiaries whole for the union's unfair labor practice.

This limited agency of the Fund to receive contributions does not conflict with common law principles relating to fiduciaries or with ERISA provisions requiring that trustees of such a fund not be subject to the control of any other person or organization. It does not extend to discretionary decisions of the trustees involving investment of trust funds or determination of eligibility requirements for benefits,[2] *see Agro v. Joint Plumbing Industry Bd.,* 623 F.2d 207 (2d Cir. 1980); *Pierce v. NECA–IBEW Welfare Trust Fund,* 620 F.2d 589 (6th Cir. 1980); *Gordon v. ILWU–PMA Benefit Funds,* 616 F.2d 433 (9th Cir. 1980). Moreover, because the union and not the Fund must pay the costs associated with processing the contributions, compliance with the Board order and acceptance of the contributions fall squarely within the fiduciary duty imposed on the Fund's trustees by both ERISA and the common law: to administer the trust solely in the interest of its beneficiaries, 29 U.S.C. § 1104(a)(1); Restatement (Second) of Trusts § 170. It is hornbook law that trustees have a duty to take possession of trust property as soon as reasonably possible. G. C. Bogert & G. T. Bogert, *Law of Trusts,* § 97 (5th ed. 1973).

The Fund also urges that it was deprived of due process in the initial determination by the Board of the fact of the employer's obligation to make contributions and the amount of the contributions. It is difficult to understand how the Fund had any interest in this part of the proceeding, and, moreover, it has agreed that it does not controvert these aspects of the Board's actions. The Fund became a party in interest only in the remedy proceedings, and it was brought in as a party and participated. The Fund now contends that it was entitled to be a party in the ascertainment of the *amount* of contributions because it does not maintain a separate account for each employee, as the Board either assumed or found, but rather that all funds received are comingled and income is earned on the total pool of funds at variable and varying rates, and differing levels of benefits are paid and credited to the different beneficiaries from time to time paid from this common account. Thus the Fund contends that the raw calculation of the amount to be paid in cannot be correct. The Fund couples with this an argument that the Board's order that the union shall be responsible for costs and expenses is not a sufficient protection to it.

In oral argument the Fund asserts that retroactive payment of contributions into its single general account will necessitate recalculating thousands of benefits heretofore paid and that this undertaking is in a practical sense an impossible task and enormously expensive. The short answer to this due process argument is that it was not raised by the

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Fund as an issue when it appeared as a party before the Board. Even if due process was an issue the contention now made that it will be necessary to go back and recalculate all benefits that have been paid since the contribution for Beckham should have been made, and that this task is an impossible one and the costs thereof astronomical, are arguments not made in this case until the case was on appeal and even then not clearly presented until oral agrument.

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[2] We need not decide whether the Fund's limited agency extends to decisions by the trustees to refuse to accept contributions ordered by the Board where the Fund's administrative and processing costs in receiving and handling the contributions will exceed those normally incurred in handling contributions generally and the Board has not ordered the union to pay these costs to the extent they are extraordinary. In this case the Board ordered the union to pay any excess costs.

The Board's order is ENFORCED.

Complete Auto Transit, Inc. v. Reis, et al.

451 U.S. 401, May 4, 1981—614 F.2d 1110

On certiorari to 6th Cir.

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J. Albert Woll, Laurence Gold, and *George Kaufmann* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

JUSTICE BRENNAN delivered the opinion of the Court.

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Court held that § 301 (a) of the Labor Management Relations Act. 1947, 61 Stat. 156, 29 U.S.C. § 185(a) does not authorize a damages action against individual union officers and members with their union is liable for violating a no-strike clause in a collective-bargaining agreement. We expressly reserved the question whether an employer might maintain a suit for damages against "individual defendants acting not in behalf of the union but in their personal and nonunion capacity" where their "unauthorized individual action" violated the no-strke provision of the collective-bargaining agreement. 370 U.S. at 249 n. 7. We granted certiorari to decide this important question of federal labor law, 449 U.S. 898 (1980).

I.

Petitioners are three companies engaged in the transportation by truck of motor vehicles. All three are parties to a collective-bargaining agreement with the Teamsters Union the covers operations at their respective facilities in Flint,

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Mich. Respondents are employees of petitioners and members of Teamsters Local Union No. 332. The collective-bargaining agreement contains a no-strike clause,[1] and subjects all disputes to a binding grievance and arbitration procedure.

On June 8, 1976, respondents commenced a wildcat strike, because they believed that "the union was not properly representing them in * * * negotiations for amendments to the collective-bargaining agreement." 614 F.2d 1110, 1111 (CA6 1980). Soon thereafter, petitioners brought this § 301 (a) action in the United States District Court for the Eastern District of Michigan, seeking injunctive relief and "damages against the [employees], in their individual capacity, for all losses arising out of the unlawful work stoppage and for attorneys fees." App. 21. Petitioners alleged that the strike was neither authorized nor approved by the union and, therefore, sought no damages from the union. See 614 F.2d. at 1115; App. 18, 20–21. After a hearing the District Court found that "the issue which had caused the work stoppage was not arbitrable" because it was "an internal dispute between factions in the Local." App. to Pet. for Cert. 15a-16a. and accordingly denied preliminary injunctive relief, citing *Boys Markets, Inc., v. Retail Clerks,* 398 U.S. 235 (1970).[2]

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Following additional hearings and settlement of the "internal dispute." the District Court concluded that "the work stoppage continued only because of a dispute between the Local and [petitioners] over amnesty for the strikers [and that] this issue was arbitrable." App. to Pet. for Cert. 16a. The court therefore, issued a preliminary injunction, enjoining continuation of the strike. Respondents obeyed the order and returned to work on June 21, 1976.

Nine months later, respondents moved to dissolve the preliminary injunction and to dismiss the complaint for damages. Relying on this Court's intervening decision in *Buffalo Forge Co. v. Steelwork-*

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[1] The no-strike clause provides that "[t]he Unions and the Employees agree that their shall be no strike, tie-up of equipment slowdowns or walkouts on the part of the employees, nor shall the Employer use any method of lockout or legal proceeding without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." See Exhibit A to Complaint of Complete Auto Transit, Inc., 24–25.

[2] In *Boys Markets, Inc.,* v. *Retail Clerks,* 398 U.S., at 253–254, this Court held that the Norris-LaGuardia Act's prohibition against enjoining strikes does not apply where the "collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure," where the grievance is subject to arbitration, and where the usual requirements for obtaining equitable relief have been satisfied.

ers, 428 U.S. 397 (1976),[3] the District Court dissolved the injunction on the ground that the work stoppage was not precipitated by an arbitrable issue. App. to Pet. for Cert. 18a. The court also dismissed petitioners' claim for damages, holding that "an employer may not sue his employees for monetary relief for breach of the collective bargaining agreement * * * whether or not the union may also be liable." *Id.*, at 16a.

The United States Court of Appeals for the Sixth Circuit reversed the District Court's dissolution of the injunction, holding that an injunction may be granted even where the issue which precipitated the strike was nonarbitrable provided an arbitrable issue, other than the simple legality of the strike itself, caused the continuation of the strike with

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the purpose of "compel[ling] the employer to concede on the arbitrable issue." 614 F.2d, at 1114. Petitioners do not seek review of this part of the Court of Appeals' ruling.[4]

The Court of Appeals affirmed the District Court's dismissal of petitioners' claim for damages from the individual union members. Relying principally on the legislative history of § 301, the Court of Appeals concluded that Congress had not intended through § 301 to "create a cause of action for damages against individual union members for breach of a no-strike agreement." 614 F.2d, at 1116. We agree.

II

Since *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), it has been settled that § 301(a)[5] does more than confer jurisdiction on federal courts to decide lawsuits alleging violations of collective-bargaining agreements. Section 301(a) also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers v. Lincoln Mills*, 353 U.S., at

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451. *Lincoln Mills* defined the mode of analysis for fashioning this body of federal law as follows:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Id.*, at 457.

Of course, "*Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements." ***Howard Johnson Co. v. Hotel & Restaurant Employees***, 417 U.S. 249, 255 (1974). Rather, it is clear that in fashioning federal law under § 301(a) substantial deference should be paid to revealed congressional intention. See *Atkinson v. Sinclair Refining Co.*, 370 U.S., at 248–249.

In *Atkinson*, the court relied on the intent of Congress in passing § 301(b) to hold that individual union members may not be sued for damages where the union has breached the no-strike provision of its collective-bargaining agreement. Section 301(b) states in pertinent part that "[a]ny money judgment against a labor organization * * * shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." Thus, in *Atkinson,* we noted that "in discharging the duty Congess imposed on us to formulate the federal law to govern § 301(a) suits, we are strongly guided by and do not give a niggardly reading to § 301(b)." *Ibid.* Accordingly, we consulted and relied on the legislative history of § 301(b) which made it "clear that th[e] third clause [of § 301(b)] was a deeply felt congressonal reaction against the *Danbury Hatters* case * * * and an expression of legislative determination that the aftermath * * * of that decision was not to be permitted to recur." *Id.,* at 248.[6] Similarly, in deciding the question presented, in this case, we "discharg[e] the duty Congress imposed on us to formulate the federal law to govern § 301(a) suits," *id.,* at 248–249, by looking to the "penumbra" of § 301(b), 353 U.S., at 457, as informed by its legislative history. See *Howard Johnson Co. v. Hotel & Restaurant Employees, supra,* at 255.

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[3] In *Buffalo Forge Co. v. Steelworkers*, 428 U.S., at 407 (emphasis in original), this Court held that the Federal District Court properly refused to enjoin a sympathy strike because "the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." The Court further held that, even though the "dispute whether the sympathy strike violated the Union's no-strike undertaking * * * was arbitrable," injunctive relief was not warranted, since to hold otherwise "would cut deeply into the policy of the Norris-LaGuardia Act and make the courts potential participants in a wide range of arbitrable disputes." *Id.*, at 410.

[4] We express no view on whether the Court of Appeals' ruling was correct.

[5] Section 301, as set forth in 29 U.S.C. § 185, states in pertinent part:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

Section 301(b) by its terms prohibits a money judgment entered against a union from being enforced against individual union members. See *Atkinson v. Sinclair Refining Co., supra.* It is a mistake to suppose that Congress thereby suggested by negative implication that employees *should* be held liable where their union is not liable for the strike. See *Sinclair Oil Corp. v. Oil, Chemical & Atomic Workers,* 452 F.2d 49, 52 (CA7 1971). Although lengthy and complex, the legislative history of § 301 clearly reveals Congress' intent to shield individual employees from liability for damages arising from their breach of the no-strike clause of a collective-bargaining agreement, whether or not the union participated in or authorized the illegality. Indeed, Congress intended this result even though it might leave the employer unable to recover for his losses. See *Atkinson v. Sinclair Refining Co., supra,* at 248.

The legislative history of § 301 begins with a review of congressional efforts in the year prior to adoption of the Labor Management Relations Act. Section 10 of the Case bill H.R. 4908. 79th Cong., 2d Sess. (1946), passed by both Houses of Congress, but vetoed by the President in 1946, was "the direct antecedent of § 301." *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 509 (1962). Since § 10 "contained provisions substantially the same * * * as the provisions of § 301," *ibid.,* its legislative history is highly relevant in ascertaining congressional intent with respect to § 301, see *id.,* at 511–512.

The purpose of § 10 was "to establish a mutual responsibility when the collective-bargaining process has resulted in a contract." 92 Cong. Rec. 838 (1946) (remarks of Rep. Case). As introduced in the House, § 10 provided for collective-bargaining agreements to be enforceable "against each of the parties thereto."[7] The Senate adopted a bill which encompassed the purposes of § 10 the House version and which, in addition, explicitly permitted an employer to discharge an employee who participated in a strike which was not authorized by the

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[6] In the *Danbury Hatters* case, "an antitrust treble damage action was brought against a large number of union members, including union officers and agents, to recover from them the employer's losses in a nationwide, union-directed boycott of his hats. The union was not named as a party, nor was judgment entered against it. A large money judgment was entered, instead, against the individual defendants for participating in the plan 'emanating from headquarters' * * *, by knowingly authorizing and delegating authority to the union officers to do the acts involved. In the debates, Senator Ball, one of the Act's sponsors, declared that § 301, 'by providing that the union may sue and be sued as a legal entity, for a violation of contract, and the liability for damages will lie against union assets only, will prevent a repetition of the *Danbury Hatters* case, in which many members lost their homes.'" *Atkinson v. Sinclair Refining Co.,* 370 U.S., at 248. See *Savings Bank of Danbury v. Loewe,* 242 U.S. 357 (1917); *Lawlor v. Loewe,* 235 U.S. 522 (1915); *Loewe v. Lawlor,* 208 U.S. 274 (1908).

[7] Section 10 of the Case bill provided:

"All collective-bargaining contracts shall be mutually and equally binding and enforceable either at law or in equity against each of the parties thereto, any other law to the contrary notwithstanding. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then in addition to any other remedy or remedies existing either in law or equity, a suit for damages for such breach or for injunctive relief in equity may be maintained by the other party or parties in any United States district court having jurisdiction of the parties. If the defendant against whom action is sought to be commenced and maintained is a labor organization, such action may be filed in the United States district court of any district wherein any officer of such labor organization resides or may be found." H.R. 5262, 79th Cong., 2d Sess. (1946).

Representative Case explained that the "parties" against whom a "suit for damages" would lie were limited to the employer and to "the recognized bargaining agent rather than an individual." 92 Cong. Rec. 765 (1946).

union.[8] Senator Taft, principal proponent of the provision, explained:

> "If the union violates its collective bargaining-agreement, it is responsible, but no individual member is responsible, and he can in no way be deprived of his rights. But if the union tries to keep its contract and, in violation of its undertaking, some of its members proceed to strike, then the employer may fire those members and they do not have the protection of the Wagner Act." 92 Cong. Rec. 5705–5706 (1946).

Thus the Senator stopped short of proposing that individual

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employees be held liable in damages for engaging in unauthorized strikes.

The House's subsequent consideration of the Senate's version reflected its clear understanding of the Senate's limitation on employers' remedies. Representative Case explained the Senate amendment on the floor of the House:

> "Individual members of a union are not made liable for any money judgment, I might point out, but only the union as an entity. If employees strike in violation of their agreement, the *only* individual penalty that can be employed is the forfeiture of their right to employment under that contract which is cured when the employer re-employs them." *Id.*, at 5930–5931 (emphasis added).[9]

The House then passed the Senate version. In doing so, the House, like the Senate, clearly intended to protect employees from the sanction of a suit for damages for a strike in breach of the collective-bargaining agreement, whether or not the union participated in or authorized the strike. It is true that the President vetoed this bill and that his veto was sustained. Nevertheless, the substantial similarity between the pertinent language of the Case bill as passed by Congress and of § 301 as it reads today makes the legislative history of the Case bill vitally significant to a full understanding of the policy behind § 301(b).

Six months after the veto, Congress began work on the legislation which became § 301.[10] The bill ultimately passed

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by the House created a federal cause of action for breach of a collective-bargaining agreement.[11] The

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[8] Senate Amendent No. 3 to H.R. 4908, passed by the Senate, stated in pertinent part:

"(a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this act may be brought in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employee whom it represents in the courts of the United States: *Provided*, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

* * * * *

"(d) Any employee who participates in a strike or other stoppage of work in violation of an existing collective-bargaining agreement, if such strike or stoppage is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights for such employee, shall lose his status as an employee of the employer party to such agreement for the purposes of section 8, 9, and 10 of the National Labor Relations Act: *Provided*, That such loss of status for such employee shall cease if and when he is reemployed by such employer." 92 Cong. Rec. 5705 (1946).

[9] Representative Halleck echoed Representative Case:

"Mr. Speaker, there is substituted for that [the provision] which has to do with the responsibility of the individual who goes out on a wildcat strike in violation of a contract and in violation of the wishes of his organization. All we say is that if he breaches his contract as an individual in that manner, his employer does not have to take him back unless he wants to. What is the matter with that[?]" *Id.*, at 5932.

[10] In the House, Representative Case introduced a bill containing a provision establishing federal-court jurisdiction over actions for breaches of collective-bargaining agreements. Subsections (a) and (b) were virtually identical to their counterparts in the bill passed in the previous session of Congress. As Representative Case explained the bill before the House Committee on Education and Labor, "there is no provision for suing individual workers, as such, or rendering any judgment against them." Hearings before the House Committee on Education and Labor on Amendments to the National Labor Relations Act, 80th Cong., 1st Sess., 125 (1947). Instead, wildcat strikers would be subject to discharge. *Ibid.*

Representative Case's testimony before the House Committee is also instructive:

"Mr. LANDIS. I agree that you can deny the members the rights of the Wagner Act, but say there is one coal mine—we had an instance in Indiana where one coal mine went out on a wildcat strike, and the United Mine Workers organization did not like it, and they tried to get the men to go back to work, and they would not go back to work and still refused to go back to work for several days.

"Who would you sue in that case?

"Mr. CASE. Of course, I would think the United Mine Workers, as an organization, would have a pretty good defense to any suit for damages against them, if they ordered the men back to work.

"It would seem to me, if you had a local that went out on strike, and they were parties to a contract, the local would be liable for damages." *Id.*, at 126.

[11] Section 302(a) stated:

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Committee Report explained that "actions and proceedings involving violations of contracts between employers and labor organizations may be brought by either party." H.R. Rep. No. 245, 80th Cong., 1st Sess. 45–46 (1947). Section 302(b) also contained express language precluding enforcement against in-

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dividuals of judgments entered against unions.[12] In addition, the bill included an amendment to § 7 of the National Labor Relations Act providing that "violations of collective bargaining-agreements" would not be protected under the Act. H.R. 3020, 80th Cong., 1st Sess. (1947), § 7(a), thereby allowing employers to discharge wildcat strikers.[13] The House bill also included a provision, however, which *allowed* an employer to recover damages from individual employees. Section 12 created a damages action against *any person* engaging in an unlawful concerted activity. The bill defined "unlawful concerted activities" to include, *inter alia*, jurisdictional strikes, sympathy strikes, and certain picketing activities.

Significantly, however, the Senate *rejected* the House's imposition in § 12 of damages liability against individuals for unlawful concerted activity, and a Conference Committee adopted the Senate version.[14] The Senate counterpart to § 12 of the House bill was § 303. Senator Taft offered a floor amendment to § 303 which would have established a damages action against *individuals* who engage in certain types of unlawful concerted activity such as secondary boycotts and jurisdictional strikes, 93 Cong. Rec. 4900 (1947). In a critical exchange during the debate on the proposed amendment, Senator Taft altered the language to limit damages actions to claims against *unions*, in order to conform with § 301(b) and bar imposition of individual damages liability against employees:

> "Mr. MORSE: [T]he proposal of the Senator from Ohio would open wide the doors of the Federal courts to damage suits against any person who engaged in a strike or attempted to persuade other employees to engage in a strike for one of the prohibited objectives.
>
> "The proposal would very definitely take us back at least 40 years and we would again have the spectacle of mass suits against employees, similar to the infamous Danbury Hatters case. Senators will recall that in that case some 150 members of the union were sued by their employer and the Supreme Court of the United States sustained a judgment against them in the neighborhood of a quarter million dollars * * *.
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> "It also should be pointed out that the substitute proposal is inconsistent with the present provision in the bill allowing a union to be sued for breach of contract. Section 301 of the bill permits suits against labor orga-
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> nizations only, whereas the substitute proposal allows damage suits against 'any person.' Also, section 301 limits recovery of the assets of the union. The substitute allows the attachment of employees' bank accounts and all their property.
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> * * * * *
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> "Mr. TAFT: On request by . . . Senator [Ives] from New York and others who raised the point, I am amending the proposal, by striking out the word 'person,' in the second line, and inserting in

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"(a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause." H.R. 3020, 80th Cong., 1st Sess. (as passed by the House) (1947).

[12] Section 302(b) stated:

"(b) Any labor organization whose activities affect commerce shall be bound by the acts of its agents, and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforeceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." H.R. 3020, *supra*.

[13] The Committee Report stated that "[t]he committee has revised this section by writing into it in express terms that employees who strike or engage in similar activities in violation of collective-bargaining agreements * * * forfeit the protection of the Labor Act." H.R. Rep. No. 245, 80th Cong., 1st Sess., 27 (1947).

[14] The Senate Committee on Labor and Public Welfare had earlier reported a bill creating a federal cause of action for breach of a collective-bargaining agreement. It stated in pertinent part:

"Sec. 301(a) Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act may sue or be sued in its common name in the courts of the United States: Provided, That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." H.R. 3020, *supra*.

> lieu thereof 'labor organization,' so the action will be open only against labor organizations promoting this type of strike." *Id.*, at 4839–4841.[15]

The Senate passed this version of the bill, foreclosing individual damages liability in *both* § 301 and § 303 lawsuits.

At conference, the Conference Committee squarely rejected § 12 of the House bill in favor of § 303 of the Senate bill, thereby refusing to create a damages action against individual employees for the condcut prohibited in that section. In addition, the Committee deleted the provision in the House bill which had removed protection under § 7 of the National Labor Relations Act for concerted activity in breach of a collective-bargaining agreement for the stated reason that the provision was unnecessary in light of recent decisions of the National Labor Relations Board. Those provisions had held that "strikes in violation of collective bargaining contracts were not concerted activities protected by the act and [the NLRB had] refused to reinstate employees discharged for engaging in such activities." H.R. Conf. Rep. No. 510, 80th **415** Cong., 1st Sess., 39 (1947). The Committee, therefore, opted for a discharge remedy for violations of § 303 by individuals, rather than for the damages remedy that had been proposed by the House. At the same time, it preferred discharge as the employer's remedy under § 301 where employees violate the no-strike provision of their collective-bargaining agreement.[16]

Thus, while § 301(b) explicitly addresses only union-authorized violations of a collective-bargaining agreement the "penumbra" of § 301(b). *Textile Workers v. Lincoln Mills*, 353 U.S., at 457, as informed by its legislative history, establishes that Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by their union to strike.[17] The legislative debates and the process of legislative amendment demonstrate that Congress deliberately chose to allow a damages remedy for breach of the **416** no-strike provision of a collective-bargaining agreement only against *unions*, not *individuals*, and, as to unions, only when they participated in or authorized the strike. See *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 216 (1979). Congress itself balanced the competing advantages and disadvantages inherent in the possible remedies to combat wildcat strikes, and "we are strongly guided by" its choice.[18] *Atkin-*

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[15] During the floor debate, proponents of the Committee bill emphasized the limited nature of the damages remedy in the proposed legislation. For example, Senator Ball stated: "[W]e give to employers the right to sue a *union* in interstate commerce, in a Federal court, for violation of contract. It does not *go beyond that.*" 93 Cong. Rec. 5014 (1947) (emphasis added).

[16] "Many of the matters covered in section 12 of the House bill are also covered in the conference agreement in different form, as has been pointed out above in the discussion of section 7 and section 8(b)(1) of the conference agreement. Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge any employee for any such reason is protected in specific terms in section 10(c). Furthermore, under section 10(k) of the conference agreement, the Board is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily pending the decision of the Board on the merits." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 59 (1947).

[17] Petitioners' reliance on the statement of *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976) (emphasis added), that "Section 301 contemplates suits by and *against individual employees*" is misplaced. We decide a much narrower question not before the Court in *Hines*: that § 301 does not contemplate recovery of *damages* from individual employees as a result of a breach of the no-strike provision of a collective-bargaining agreement. Whether *Hines* contemplated injunctive suits against individuals was not decided by the Court in *Hines* and we have no occasion to decide that issue now. See n. 18, *infra*.

[18] Petitioners argue that a damages remedy against individual employees is *indispensable* to preserve the integrity of the collective-bargaining agreement and thereby to further the national labor policy of promoting industrial peace. This proposition is questionable on its own terms, overlooks an array of potential remedies that are available to the employer apart from a damages remedy against individuals, and in any event was rejected by Congress.

It is by no means certain that an individual damages remedy will meaningfully increase deterrence of wildcat strikes above that resulting from use of other available remedies. It is just as likely that damages actions against individuals would exacerbate industrial strife: "an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." *Boys Markets, Inc.*, v. *Retail Clerks*, 398 U.S., at 248 (footnote omitted); *see Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 381, n. 14 (1974).

The significant array of other remedies available to employers to achieve adherence to collective-bargaining agreements casts further doubt on petitioners' proposition. First, an employer may seek damages against the union where responsibility may be traced to the union for the contract breach. See 29 U.S.C. § 185 (b); *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, 216–218 (1979); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S., at 247–249. Second, an employer may discharge, or otherwise discipline, an employee who unlawfully walks off the job. See *id.*, at 246; *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80 (1953); *Lakeshore Motor Freight Co.* v. *International Brotherhood of Teamsters*, 483 F. Supp.

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son v. Sinclair Refining Co., 370 U.S., at 249. See *Howard Johnson Co. v. Hotel & Restaurant Employees,* 417 U.S., at 255. Accordingly, we hold that § 301(a) does not sanction damages actions against individual employees for violating the no-strike provision of the collective-bargaining agreement, whether or not their union participated in or authorized the strike.

Affirmed.

JUSTICE POWELL, concurring in part and concurring in the judgment.

The Court's opinion makes clear that Congress, in enacting the Taft-Hartley amendments to the National Labor Relations Act, did not intend to hold individuals liable in damages for wildcat strikes. I therefore join the Court's judgment and most of its opinion. I do not, however, share the Court's view that there remains to management a "significant array of other remedies," *ante,* at 416, n. 18, with which to deter or obtain compensation for illegal strikes. In fact, the "remedies" said to be available are largely chimerical.

I

Collective-bargaining agreements typically contain a promise by the union not to strike during the agreement's term. Unions agree to these no-strike clauses in exchange for the employer's promise to arbitrate disputes arising in contract

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administration. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 449, 455 (1957). Each promise is the "*quid pro quo*" for the other, *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960), because the employer yields traditional managerial autonomy in exchange for industrial peace.

Despite the mutual benefits of the no-strike/grievance-arbitration pact, strikes in breach of contract occur with disturbing frequency. In some cases, these strikes are encouraged or even instigated by union leaders.[1] Often, however, they are true "wildcats"—strikes that arise spontaneously to protest grievances against the company and occasionally, against the union leadership itself. Responsible unions disapprove of such strikes but some officials, especially those at the local level, may acquiesce in them because of the fervor of intransigent members.

Whatever the cause, strikes in breach of contract frequently injure all concerned: the employer,[2] employees, and the public. Strikes and lockouts by their nature squander human working capacity, the full use of which is essential to the enjoyment of the Nation's productive potential. To be sure, the national labor policy recognizes that, in some circumstances, the use of weapons of strike and lockout is con-

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sistent with and protected by law. Labor, management, and the public nevertheless share a "common goal of uninterrupted production." *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). The essential tenet of our labor policy is that "a system of industrial self-government" based on consensual (albeit vigorously negotiated) labor contracts, see *Steelworkers v. American Mfg. Co., supra,* at 570 (BRENNAN, J., concurring), is preferable to "strikes, lockouts, or other self-help." *Boys Markets, Inc.* v. *Retail Clerks,* 398 U.S. 235, 249 (1970).

1150, 1154, n. 2 (WD Pa. 1980) (wildcat strikers discharged, and those allowed to return were rehired as new employees). Third, the union itself may discipline its members. See *Carbon Fuel Co.* v. *Mine Workers, supra,* at 220; *Sinclair Oil Corp.* v. *Oil, Chemical & Atomic Workers,* 452 F. 2d 49, 54 (CA7 1971); see 92 Cong. Rec. 5706 (1946) (Sen. Capehart) (debate on Case bill). Finally, an employer may seek injunctive relief against unions for breach of a no-strike provision in a collective-bargaining agreement where the underlying dispute giving rise to the breach is subject to binding arbitration. See *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S., at 407; *Gateway Coal Co.* v. *Mine Workers, supra,* at 380–387; *Boys Markets, Inc.* v. *Retail Clerks, supra.* Whether a *Boys Markets-Buffalo Forge* injunction could have issued against individual union members engaged in the wildcat strike at issue here is not before us. It may be that an injunction would not issue against a participating or authorizing union in circumstances otherwise the same: in the instant case the District Judge found that the strike commenced over a nonarbitrable labor dispute, and that ruling was not disturbed by the Court of Appeals.

[1] Strike encouragement sometimes is explicit but more often is cryptic. A union may employ subtle signals to convey the message to strike. One court noted that unions sometimes employ "a nod or a wink or a code * * * in place of the word 'strike.'" *United States v. UMW,* 77 F. Supp. 563, 566 (DC 1948), aff'd, 85 U.S. App. D.C. 149, 177 F.2d 29, cert. denied, 338 U.S. 871 (1949).

[2] Production disruptions have obvious short-term adverse consequences. And one commentator has pointed out that the long-term consequences of these strikes may be even more severe. A strike rends the "closely integrated supply and distribution systems" that the company has developed. M. Jay Whitman, Wildcat Strikes: The Unions Narrowing Path to Rectitude?, 50 Ind. L.J. 472, 473 (1975). Such systems "presume predictability. A business with a reputation for labor problems, let alone wildcats, simply cannot provide its customers with that predictability," *ibid.,* leading once-regular customers to seek other sources of supply.

When the Taft-Hartley amendments were enacted in 1947, the Nation had experienced a wave of labor unrest.[3] Congress found that "the balance of power in collective-bargaining" had been destroyed because employers, who had promised to arbitrate disputes in exchange for no-strike promises, often failed to obtain the industrial peace for which they bargained. S. Rep. 14.[4]

II

It is increasingly clear that the 1947 Taft-Hartley amendments did not provide employers with an effective remedy for wildcat strikes. The Court today holds, properly I think, that Congress intended to foreclose a damages remedy against individual wildcat strikers. The Court states, however, that

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there remains a number of legal weapons with which to deter or terminate illegal strikes, or to obtain compensation when they occur. *Ante,* at 416–417. n. 18. In support of its view, the Court contends that the employer may (i) obtain an injunction, (ii) discharge the strikers, (iii) request the union to use its internal disciplinary powers, or (iv) sue the union entity for damages. *Ibid.* In reality, more often than not, each of these remedies is illusory.

Injunctions in labor disputes are generally prohibited by the Norris-LaGuardia Act.[5] In *Boys Markets, Inc.* v. *Retail Clerks, supra,* the Court recognized a limited exception to the anti-injunction provisions of that Act. *Boys Markets* permits injunctions to terminate strikes pending arbitration if the grievance underlying the strike is arbitrable. However, *Boys Markets* offers only "narrow" relief, 398 U.S. at 253 because injunctions cannot be obtained in strikes of other kinds. *E.g., Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976) (injunctions not available in sympathy strikes). Moreover, even when an injunction is available, workers on strike often are disinclined to obey it.[6] Courts may be reluctant to impose contempt penalties on individual workers; if ordered, such penalties are difficult to enforce.

Nor is discharge a realistic remedy in most cases. Because a strike in breach of contract is unprotected conduct under the National Labor Relations Act, see *NLRB* v. *Sands Mfg. Co.,* 306 U.S. 332 (1939), workers who strike illegally may be terminated. It therefore has been argued that discharge

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effectively deters strikes and punishes wrongdoers because discharge is "the industrial equivalent of capital punishment." M. Jay Whitman, Wildcat Strikes: The Union's Narrowing Path to Rectitude?. 50 Ind. L.J. 472, 481 (1975). There are at least three reasons why this remedy in practice often is not effective. First, in a large wildcat strike, wholesale discharges are not practical because an employer cannot terminate all or most of his labor force without crippling production. See *Boys Markets supra,* at 248–249, n. 17.[7] Second, certain kinds of *selective* discharges arguably are illegal. The National Labor Relations Board takes the position that an employer may not discipline a union officer more severely than other strike participants, even where the union officer failed to fulfill a contractual undertaking to help terminate strikes.[8] In any event, discharging only selected

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[3] The Senate Report accompanying the Taft-Hartley amendments observed that the Nation in 1945 experienced "the loss of approximately 38,000,000 man-days of labor through strikes. This total was trebled in 1946 when there were 116,000,000 man-days lost * * * ." S. Rep. No. 105, 80th Cong., 1st Sess., 2 (1947) (hereinafter S. Rep.).

[4] The Senate Report stated that if workers "can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of such an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." *Id.,* at 16.

[5] Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, provides, in pertinent part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute * * * ."

[6] Compare *Old Ben Coal Corp.* v. *Local 1487,* UMW, 457 F. 2d 162 (CA7 1972), with *Old Ben Coal Corp.* v. *Local 1487,* UMW, 500 F. 2d 950, 952 (CA7 1974). *See Gould,* On Labor Injunctions Pending Arbitration: Recasting *Buffalo Forge,* 30 Stan. L. Rev. 533, and n. 47 (1978).

[7] Discharging the entire work force would "caus[e] mountainous personnel problems. Consider the sheer logistics of hiring, training and acclimating an entirely new work force with suitable skills. Even if a new labor force could be recruited, the time and expenses of this process, from recruitment to full production, could very well sound the death knell of the business." Fishman & Brown, Union Responsibility for Wildcat Strikes, 21 Wayne L. Rev. 1017, 1021 (1975).

[8] *E.g., Miller Brewing Co.,* 254 N.L.R.B. 266 (1981); *South Central Bell Telephone Co.,* 254 N.L.R.B. 315 (1981); *Precision Casting Co.,* 233 N.L.R.B. 183 (1977). The Board's position is so clear that employers may be deterred from conducting selective discharges. This Court has not ad-

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strikers is unlikely to influence the rank and file to return to work. Such discharges actually may aggravate worker discontent and thereby prolong the strike. *Cedar Coal Co.* v. *United Mine Workers*, 560 F. 2d 1153, 1157 (CA4 1977), *cert.* denied, 434 U.S. 1047 (1978); see 86 Harv. L. Rev. 447, 454.

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n. 33 (1972). At a minimum, strikers may insist that their discharged colleagues be reinstated as a condition to returning to work. Fishman & Brown, Union Responsibility for Wildcat Strikes, 21 Wayne L. Rev. 1017, 1022 (1975). Third, arbitrators not infrequently refuse to sustain discharges of strikers. See Handsaker & Handsaker, Remedies and Penalties for Wildcat Strikes: How Arbitrators and Federal Courts Have Ruled, 22 Cath. U. L. Rev. 279, 284 (1973).

The union itself normally will not discipline its striking members. Most unions have the legal authority to take such action, see Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1065 (1951), but the power seldom is used. In a wildcat strike, worker recalcitrance sometimes is directed at the incumbent union leadership as much as at company management. In these circumstances, the union's attempt to discipline is unlikely to be effective and may be counterproductive. Moreover, under this Court's decision in *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212 (1979), a parent union normally is not obligated to take affirmative steps to prevent or terminate a wildcat strike. Absent such an obligation, there is little incentive for the union to intervene, even where intervention would be useful.

Finally, a suit for damages against the union entity rarely is feasible.[9] Last Term, in *Carbon Fuel, supra,* we largely foreclosed this possibility when we held that lia-

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bility normally may not be imposed on a parent union [10] absent proof that it authorized or ratified the strike.[11] It is a foolish union that would invite a damages suit by explicitly endorsing a strike in this manner. See n. 1, *supra.*

III

The Court plainly is unrealistic, therefore, when it suggests that employers have at their disposal a battery of alternative remedies for illegal strikes. *Ante,* at 416–417, n. 18. The result of the absence of remedies is a lawless vacuum. Despite a no-strike clause, a plant may be closed with adverse consequences that often are far-reaching. The strike injures the employer, other companies and their employees, and consumers in general. Frequently, the strike is harmful even to the majority of strikers, who feel obligated to honor the picket line of minority wildcatters.

It is, of course, the province of Congress to set the Nation's labor policy. I do not suggest that authorizing a damages remedy against individual wildcat strikers would be desirable. I do believe, however, that the absence of an effective

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remedy leaves such strikes undeterred and the public interest unprotected. The National Labor Relations Act, as amended in 1947, was intended to further broader national interests than those of

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dressed the question, but some Courts of Appeals have not warmly received the Board's reasoning. See *Gould, Inc.* v. *NLRB*, 612 F. 2d 728 (CA3) (denying enforcement to 237 N.L.R.B. 881 (1978), cert. denied *sub nom. Moran* v. *Gould Corp.*, 449 U.S. 890 (1980); *Indiana & Mich. Electric Co.* v. *NLRB*, 599 F. 2d 227 (CA7 1979) (denying enforcement to 237 N.L.R.B. 226 (1978)); see also *NLRB* v. *Armour-Dial, Inc.*, 638 F. 2d 51, 54–56 (CA8 1981).

[9] Sophisticated employers for tactical reasons may elect to forgo tenable poststrike suits for damages. As the Court points out such suits may "exacerbate industrial strife," *ante,* at 416, n. 18, and thereby delay the dissipation of the acrimony engendered by the strike. Employers also may elect not to sue for damages because they do not want to subject themselves to the disclosure attendant to litigation. A damages suit "necessarily involves detailed discussion of an employer's most intimate financial secrets. By making a damage claim, the employer puts its . . . finances * * * at issue in the litigation. The discovery rules of the *Federal Rules of Civil Procedure* give the union and its accountants the right to explore every corner of the employer's books. If the union conducts its case properly, it will know everything from per-unit profit to the finer details of [corporate] management." M. Jay Whitman, *supra* n. 2, at 474 (footnote omitted).

Finally, part of the price of setting the stike often is a promise that the company will waive its claim for damages. *Ransdell v. International Assn. of Machinists*, 97 LRRM 2738. (ED Wis. 1978); Gould, On Labor Injunctions, Unions, and the Judges: The *Boys Market* Case, 1970 S. Ct. Rev. 215, 231.

[10] *Carbon Fuel* did not consider the quantum of proof necessary to establish damages liability against a local union. Because of the local's proximity to workers, an inference of agency—and hence, liability—arguably may arise even without explicit proof of strike authorization or ratification. See § 301(e) of the Act, 29 U.S.C. § 185(e). The possibility that the local will be liable may be of little practical benefit, however, because the local often is judgment-proof.

[11] *Carbon Fuel* recognized, of course, that an explicit contractual undertaking by the parent to intervene to terminate wildcats could be the basis for damages liability. See 444 U.S., at 218–222.

either labor or management. It was conceived not only as a charter for labor rights but also as a framework of law to promote orderly labor relations. Wildcat strikes are at war with these objectives.

Chief Justice Burger, with whom Justice Rehnquist joins, dissenting.

The Court today holds that individual employees who, without the approval of their union, breach a covenant not to strike in the collective-bargaining agreement between their union and their employers may not be held liable for resulting damages to the employers. At stake is the fundamental principle that individuals are accountable when they breach a voluntarily executed contract.

The underlying facts in this case are not in dispute. The respondents are members of Local 332 of the International Brotherhood of Teamsters, which acts as their exclusive bargaining agent with petitioners, their employers. The union and the petitioners have entered into a collective-bargaining agreement that provides in part:

> "The Unions and Employers agree that there shall be no strike, tie-up of equipment, slowdowns or walkouts on the part of the employee * * * without first using all possible means of settlement, as provided in this Agreement, of any controversy which might arise." App. 14–15.

Despite this covenant, the respondents embarked on what is commonly called a "wildcat" strike; it is admitted that the local union "did not aid, assist or authorize the work stoppage or a tie-up of any equipment." *Id.*, at 25.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), makes collective-bargaining agreements enforceable in federal courts against both unions and employers. See H.R. Rep. No. 245, 80th Cong., 1st Sess., 46 (1947); S. Rep. No. 105, 80th Cong., 1st Sess., 15–16 (1947). Of course the union, acting on behalf of its members, may sue the employeer for any breaches of the agreement, and the employer may sue the union for its breaches. This is no more than a corollary to the enforceability of the contract under § 301(a). Moreover, the Court has had no problem in the past in holding the parties responsible for a breach accountable for their conduct. An employee may sue the employer directly for breach of the agreement even though the employee is not technically a party to the agreement, *Smith* v. *Evening News Assn.*, 371 U.S. 195 (1962), but the employer may not sue an individual worker for union-sponsored breach, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962) (applying Labor Management Relations Act § 301(b), 29 U.S.C. § 185(b)). Nor may the employer sue the union for members' breaches that the union has not condoned, *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S.C. 212 (1979).[1] This case presents the final unresolved situation: May individual union members be held accountable in a suit by the employer for a plain violation of the agreement committed without the approval of the union?

On the basis of literally centuries of the common law of contracts, one would have thought that the traditional notions of accountability for one's voluntary actions would govern. Instead, the Court holds that individual workers, acting without union approval, are a special, privileged class who may with impunity violate an agreement voluntarily reached in arm's-length bargaining. This result finds no support in the statute, it significantly undermines the usefulness and reliability of the collective-bargaining process, and it will not advance the goals the Court claims for it.

In reaching this unusual conclusion, the Court mistakenly relies on the last sentence in § 301(b) of the Labor Management Relations Act, which states:

> "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b).

On its face, this clause does no more than insulate union *members* from personal liability for *union* breaches of the contract; Congress intended this provision to give union members a protection analogous to that afforded stockholders in corporations against personal liability for corporate acts. S. Rep. No. 105, 80th Cong., 1st Sess., 16 (1947) ("members of the union would secure all the advantages of limited liability without incorporation"). It is acknowledged that Congress added this provision to the Act to prevent a recurrence of the Danbury Hatters situation, see *Lawlor* v. *Loewe,* 235 U.S. 522 (1915); *Loewe* v. *Lawlor,* 208 U.S. 274 (1908), where the participants in a strike were held personally liable for the union's actions on the theory that the union, as an unicorporated association, could not be sued. *Ante,* at 406–407, and n. 6; *Atkinson* v. *Sinclair Refining Co., supra,* at 248; 93 Cong. Rec. 5014 (1947) (remarks of Sen. Ball). But the language of § 301(b) says nothing about holding union members harmless when they, without the approval of their union, individually breach the contract.

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[1] Thus, the union is not an "insurer" of members' compliance with the collective-bargaining agreement, or vice versa. Had this been the case, I might have been willing to join in the Court's position, for the union would remain liable for failing to see that its members abided by the agreement.

The special exemption in § 310(b) affords individual union members protection against individual liability for collective action; this simultaneously encourages group action through the union—which is what unions are all about—and prevents potentially large damage awards against individual workers. But when Congress changed the law regarding *individual* liability for *union* conduct, it did not even hint at changing the common-law rule of contract law of *individual* liability for *individual* conduct, which does not more than articulate the basic idea of individual accountability essential to an organized society.[2] When an individual, either personally or, as here, through an agent, voluntarily enters into a binding agreement, that individual is liable in damages for breach. A provision whose language governs—and whose history indicates it was designed to govern—only situations of individual liability for collective action should not be construed to wipe out core principles of personal accountability for individual actions.

Curiously, the Court, *ante,* at 416, n. 18, and the respondents suggests that this anomaly will promote more harmonious relations between employers and striking workers by preventing a long and drawn-out fight in the courts. This argument is wholly specious, and it is contradicted by the views Congress expressed when it adopted § 301. Congress fully recognized that agreements, if breachable with impunity, "do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace." S. Rep. No. 105. 80th Cong., 1st Sess., 16 (1947). If workers can "have their cake and eat it too" by holding the employer liable for its breaches but receiving immunity for their own, employers will be less likely to enter into mutually satisfactory collective-bargaining agreements in the first place.

"Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." *Ibid.* Indeed, the Court's logic would insulate unions from suit as well: an action against the union for a strike it had sponsored but that since has ended similarly tends to "reopen old wounds." Moreover, I have difficulty seriously entertaining an argument that the *employer* is responsible for jeopardizing industrial harmony by seeking damages for injuries it has sustained when it was the unlawfully striking employees themselves who broke the peace in the first place. One must resist the temptation to recall the youth who, having deliberately murdered both parents, pleads for the court's mercy as an orphan.

The respondents believe—and the Court accepts, *ante,* at 416, n. 18—that the threat of discharge by the employer or discipline by the union is sufficient to ensure that collective-bargaining agreements generally will be followed by the union and its members.[3] These measures, however, are no answer; they may be too little[4] and they surely

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[2] The Court cites various comments by Members of Congress regarding immunity for union members when they act with union approval. Those remarks do not address the issue before us—individual liability for individual conduct undertaken *without* union involvement. The nearest the Court comes to finding support on that question is a remark by Senator Taft, made during debate on a predecessor bill subsequently vetoed by the President, that employers may fire "wildcat" strikers. *Ante,* at 409. Even Senator Taft's statement does not directly touch on individual liability for individual action, and, ironically, the Court's use of it follows on the heels of the Court's own admonition to avoid "suggest[ions] by negative implication." *Ante,* at 407.

[3] The Court also mentions the employer's suit against the union itself when the union is responsible. Obviously, that remedy is wholly irrelevant to this case. See *supra,* at 425.

[4] JUSTICE POWELL, in his separate opinion, thoroughly analyzes the inadequacy of these measures. The union's impotence is demonstrated by its failure to control its members in the first place. In addition, union offi-

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come too late, after the employer has suffered substantial losses to its business due to a strike that, under the contract, never should have occurred. In theory, the employer might mitigate damages by hiring substitute workers, but this assumes qualified work-

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ers could be found who would be willing to cross even a "wildcat" picket line.

Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from "The King can do no wrong." This principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice. Today the Court penalizes the employer for the "wildcat" breaches of the employees and rewards those errant employees.

It seems to me that, by now the American labor movement has matured sufficiently so that neither unions nor their members need this kind of artificial, excessively paternalistic protection for admittedly illegal acts—a protection contrary to fundamental, centuries-old concepts of individual accountability. The stability of unions and the harmony of industrial relations will be enhanced, not impaired, by applying to union members the same standards of accountability that govern all other individuals in society.[5]

The Court ought not to make two classes of contract breakers under collective-bargaining agreements, one liable and one immune. I submit that if union members understand that where they breach a contract without the approval of their union, individual liability will follow, we will very likely see fewer unauthorized strikes, for union authority will be enhanced and greater industrial harmony will likely result.

Motor Inn of Perrysburg, Inc. d/b/a Holiday Inn of Perrysburg, Ohio v. NLRB

647 F.2d 692 (6th Cir.), May 4, 1981—243 NLRB 280

On petition to review Board Order

Before ENGEL and BOYCE F. MARTIN, JR., Circuit Judges and MANOS, District Judge*

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This labor dispute is before the court upon cross-petitions for review and enforcement of the order of the National Labor

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Relations Board[1] directing the petitioner Motor Inn of Perrysburg, d/b/a Holiday Inn of Perrysburg, Ohio, (Motor Inn) to bargain collectively with the Hotel and Restaurant Employees and Bartenders Union, Local 868, AFL–CIO, and to refrain from certain practices which the Board found to have been in violation of the National Labor Relations Act, § 8(a)(2), (3) and (5), 29 U.S.C. § 158(a)(2), (3) and (5) (1976).

Although the union had lost in two certification elections held in December, 1974 and September, 1975, the Board ordered the company to recognize and to bargain with the union on the authority of *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547, *reh. denied*, 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123 (1969). The Board found that the conduct of the company in imposing more onerous working conditions on certain of its employees had amounted to a constructive discharge of those employees because of their union activities or to discourage union support. Therefore, according to the Board, a third certification election could not be fairly conducted and the bargaining order was issued.

While other conduct of the employer also was claimed to be violative of the Act, counsel for the Board and for Motor Inn agreed that the propriety

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cers in some instances may reject discipline in the hope of appeasing "wildcat" members and bringing them back under union control. As JUSTICE BRENNAN, writing for the Court in *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 183 (1967), aptly noted:

> "Where the union is weak, * * * the union faced with further depletion of its ranks may have no real choice except to condone the member's disobedience."

[5] Cf. *United States* v. *Park*, 421 U.S. 658 (1975), in which the chief executive officer of a supermarket chain was held criminally liable for permitting food to be left in insanitary conditions after notice of those conditions.

*Hon. John M. Manos, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

[1] The Board's decision and order is reported at 243 NLRB No. 55 (1979).

of the bargaining order had to be determined upon whether there was substantial evidence in the record as a whole to support the Board's finding that the employees were constructively discharged by the imposition of the so-called "Captain System" and "Revised Captain System." These systems changed the working conditions and method of compensation of the waiters and waitresses employed in the restaurant by Motor Inn during the time in question.

It should be noted at the outset that petitioner's motion to file the affidavit of Chip C. Dennison is denied. After an examination of the record as a whole, as it stood before the Board, however, the court concludes that substantial evidence does not support the Board's finding that the captain systems were instituted to induce the union adherents to voluntarily terminate their employment, and thus defeat the upcoming campaign to certify the union. In making this conclusion, the court is reminded of the words of Justice Frankfurter in *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951), where he said: "The substantiality of evidence must take into account whatever in the record failury detracts from its weight." In this respect, there was no collective bargaining agreement in effect at the time, yet the Board in its order sought to impose conditions of employment as if one had been. Although the new systems were perhaps unpopular with at least some employees, they were imposed equally upon all employees, not only those who were in sympathy with the union. This lack of discriminatory treatment of or impact upon union adherents obviously detracted from the evidence which might show Motor Inn's antiunion animus.

In addition, the record shows that the Revised Captain System continued in operation until at least early 1977, when the hearing before the Administrative Law Judge was held. If the purpose of the system was to constructively discharge employees who were sympathetic to the union, as the Administrative Law Judge and the Board found, there would be no reason for continuing the system beyond April 1, 1976, when those employees terminated their employment. To the contrary, the record contains sufficient evidence of Motor Inn's economic motivation for implementation of the captain systems to convince the court that Motor Inn's claim in this regard was not merely pretextual. Exhibit 49 shows that the system was profitable. While the total number of dinners served during 1976 declined from prior years, the price of the average check increased due in large part to the increase in sales of desserts and appetizers. This evidence shows that the captain systems had the intended effect: to increase the sale of food. For these rea-

sons, enforcement of the Board's orders in respect to implementation and retention of the captain systems is denied. Also, enforcement of the Board's order requiring Motor to offer reemployment to the employees it found to have been constructively discharged is denied.

Since substantial evidence does not support the Board's finding that the employees were constructively discharged by the imposition of the captain systems, enforcement of the bargaining order also is denied. Furthermore, the long delay between the filing of the complaint and the action of the Board in ordering the *Gissell* remedy made its imposition in this case an abuse of discretion within the meaning of *Clark's Gamble Corp. v. NLRB,* 422 F.2d 845 (6th Cir.), *cert. denied,* 400 U.S. 868, 981 S.Ct. 100, 27 L.Ed.2d 108 (1970).

Certain other findings of the Board also appear, upon our consideration, to lack supporting substantial evidence in the record. Specifically, the Board concluded that Motor Inn violated section 8(a)(1) by threatening to terminate its restaurant operation rather than bargain with the union. A review of the evidence, however, discloses that any such threat was made only to former employees. The evidence does not suggest that this threat was communicated to the former employees with the intention that it be recommunicated to then current employees. This conduct is clearly not a violation of the Act.

Next, the Board found that Motor Inn promulgated an overly broad no-solicitation and non-distribution rule. This action, according to the Board, violated section 8(a)(1). The Administrative Law Judge's decision itself, however, found that this rule was never enforced. Nor does the evidence even suggest that the employees were chilled in the exercise of their solicitation and distribution rights. On the contrary, the evidence shows that the employees excercised these rights freely, openly, and frequently. Under these facts the court concludes that the mere enactment of the overly broad rules was not a violation of the Act. For this reason, enforcement of the Board's cease and desist order prohibiting Motor Inn from promulgating, maintaining, giving effect to or enforcing these overly broad rules is denied.

Finally, the Board found that Motor Inn's photographic surveillance of employees engaged in picketing on behalf of the union violated section 8(a)(1). There is evidence in the record suggesting that the surveillance was undertaken to support an attempt to obtain an injunction against unlawful employee picketing. The Administrative Law Judge also found that this surveillance was mainly directed against two employees whose later terminations were upheld. This evidence severely detracts from the weight of the little evidence substantiating the Board's decision on this issue. Therefore, the Board's finding in this regard will not be upheld on this appeal and enforcement of the Board's cease and desist order prohibiting Motor Inn from engaging in the surveillance of employees engaged in lawful picketing on behalf of the union is denied.

Two violations found by the Board were substantially conceded by Motor Inn. The first violation was the employer's threat to discharge employees who signed union registration cards. The second involved interrogation of employees regarding union activities and sympathies. There is substantial evidence on the record, as well as the concession by Motor Inn, to uphold these findings on appeal. Therefore, those parts of the Board's order requiring Motor Inn to cease and desist from interrogating employees concerning their membership, sentiment toward, and activities on behalf of the union and from threatening employees with discharge because of their support for the union is enforced.

Accordingly,

IT IS ORDERED that the Board's order is enforced in part and enforcement is denied in part.

Coating Products, Inc. v. NLRB

648 F.2d 108 (2d Cir.), May 4 1981—251 NLRB 1271

On petition to review Board Order

Before Feinberg, Chief Judge, Van Graafeiland, Circuit Judge, and Maletz, Judge, United States Court of International Trade*

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Feinberg, Chief Judge: Coating Products, Inc., a Connecticut corporation, petitions for review of an order of the National Labor Relations Board, which requires that petitioner (a) cease and desist from enumerated violations of section 8(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a); (b) reinstate one employee and make him and another employee whole for losses attributable to petitioner's illegal conduct; and (c) recognize and bargain with a designated union local (the union) as the representative of petitioner's production and maintenance employees. The Board cross-applies for enforcement of its order. For the reasons stated below, we deny the petition for review and grant the application for enforcement.

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Affirming the findings and conclusions of an administrative law judge (the ALJ), the Board found that petitioner had violated section 8(a)(1) of the Act by, inter alia, coercive questioning of employees, statements giving the impression of illegal surveillance of union activity, threats of lost benefits and layoffs, and the presentation and implementation of a "company plan" of pay raises and other benefits. The Board also found that the promotion of an "employee committee" by petitioner's management constituted a violation of section 8(a)(2) of the Act and that the constructive discharge of a union activist violated section 8(a)(3). Finally, the Board found that petitioner violated section 8(a)(5) by refusing to bargain with the union after it obtained signed authorization cards from a majority of employees in the unit.

Petitioner argues that in a number of respects these findings are not supported by substantial evidence in the record, and that the ALJ was biased against it. We conclude, however, that the violations found by the Board do rest on substantial evidence, and that the ALJ's conduct does not justify denial of enforcement of the order.

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*Honorable Herbert N. Maletz, Judge of the United States Court of International Trade, sitting by designation.

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The only issue requiring discussion is the propriety of the Board's issuance of a bargaining order under the circumstances of this case. In *NLRB* v. *Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980), this court undertook a thorough canvass of the problems involved in the issuance of such orders. Among other things, that decision identified a number of "hallmark" violations of the federal labor laws that are "regularly regarded * * * as highly coercive" and that "support the issuance of a bargaining order unless some significant mitigating circumstance exists." Id. at 212. The Board found that at least two such violations occurred here: the reassignment and constructive discharge of the union activist and the grant of substantial pay and fringe benefits under the "company program" at a time when the union drive was under way. These findings alone "justif[y] a finding without extensive explication that [the employer's conduct] is likely to have a lasting inhibitive effect on a substantial percentage of the work force." Id. at 213. Under *Jamaica Towing*, therefore, the Board's issuance of the bargaining order on the basis of the union authorization cards signed by a majority of the employees, was not an abuse of its "wide, though not unfettered, discretion" in remedying an employer's unfair labor practices. See *NLRB* v. *Hendel Manufacturing Co.*, 483 F.2d 350, 353 (2d Cir. 1973; cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32, 614–15, 89 S.Ct. 1918, 1939 n.32, 1940–41, 23 L.Ed.2d 547 (1969).

We note, nevertheless, that the bargaining order would rest on more secure ground if the Board had taken more care to explain why traditional remedies, such as a cease and desist order, would not have been sufficient in this case to dispel the effects of the employer's past misconduct. Instead, the Board offered little more than a conclusory justification for the order.[1] We believe it important for the Board to give some indication of the reasoning behind its recourse to the extraordinary remedy of a bargaining order, with all its attendant risks. Failure to do so may tend to make routine a remedy that should remain exceptional. We think this should be avoided, and take this occasion to register our concern.

In this particular instance, however, we conclude that the Board's action was proper, and accordingly grant the application for enforcement of its order.

NLRB v. St. Anne's Hospital

648 F.2d 67 (1st Cir.), May 5, 1981—245 NLRB 1009

On petition to enforce Board Order

Before BOWNES and BREYER, Circuit Judges, and WYZANSKI,* SENIOR DISTRICT JUDGE

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BOWNES, Circuit Judge: This case is before us by application of the National Labor Relations Board pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), for enforcement of its order issued against St. Anne's Hospital (the Hospital) on September 28, 1979, and reported at 224 N.L.R.B. 130. The issue is whether there is substantial evidence to support the Board's finding that the hospital violated § 8(a)(1) of the Act by interfering with the rights of employees to engage in protected, concerted activity and by retaliating against three employees by discharging two of them and disciplining and changing the job assignment of the third.

The Facts

The record shows that most of the testimony adduced during the four-day hearing was uncontradicted. The case concerns the operating room staff at the hospital which, at the pertinent times, consisted of approximately seventeen full-time and part-time employees, including registered nurses, licensed practical nurses and operating room technicians. An outline of how the staff functioned is necessary to understand the issues. There are two types of nurses in the operating room during a surgical procedure, scrub nurses and circulating nurses. Scrub nurses are either registered nurses or operating room technicians. Circulating nurses are mostly registered nurses. Scrub nurses are part of the operating team; they pass instruments and other needed material to the surgeon and may directly assist him by holding clamps and sponging the patient

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[1] We are aware that the ALJ offered an extended explanation of his conclusion that a bargaining order was warranted in this case. The Board, however, made clear that it did not adopt the ALJ's principal rationale, precluding any inference that the Board intended to adopt the bulk of the ALJ's reasoning as its own.

*Of the District of Massachusetts, sitting by designation.

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if this is not done by another doctor. The number of scrubs assigned to a given operation depends on its complexity and length. Scrubs must, or course, be completely sterile. Scrubbing is a highly technical and skilled job that requires an intimate knowledge of the instruments and supplies that will be used in a particular operation. For this reason, scrubs, regardless of whether they are registered nurses, receive specialized training.

Circulating nurses, on the other hand, do not participate directly in the operation. They prepare patients for surgery, make sure that all laboratory reports are on hand, assist the anesthesiologist, and take the patient to the recovery room after the operation is over. Circulating nurses also are on hand during the operation to see to it that the scrubs are performing properly. Unlike the scrubs, however, they are not sterile and function outside the sterile field of the operation.

Until the differences between the operating room staff and the hospital surfaced, it had not been the practice to use circulating nurses as scrubs and several of the circulating nurses had not assisted in major surgery as scrubs for a number of years.

The regular work week for the operating room staff was forty hours with time and one-half for overtime. The staff personnel are regularly scheduled for on-call duty which require that they be within telephone reach of the hospital. Until March of 1978, circulating nurses were on call one night a week and scrubs were on call two to three nights a week. In January of 1978, the operating room staff received $1.00 per hour for on-call duty.

The disagreement leading to this case started on January 25, 1978, when some of the operating room nurses were receiving $3.00 per hour for on-call duty. This was confirmed the next day by the operating room supervisor, Hilda Paruch. A series of meetings then ensued during which a group representing most of the operating room personnel was formed. A number of letters were sent to the hospital administration, one of which threatened a strike if the short-term goals of the group were not met. There was no strike, but the group and hospital administration, despite a number of joint meetings could not agree on an overall on-call policy, although agreement was reached on compensation. The group retained private counsel.

On February 23 the group elected Madeline Souza as spokesperson and Joy Cawley as secretary-treasury; both were registered nurses and worked as circulating nurses. Other members of the group included registered nurses Helen Loos, Rose Mary Almeida, and Leslie Rocha, all of whom worked as circulating nurses, and operating room technician, Patricia Danis. The group discussed a rumor that the hospital was planning to resolve the on-call policy dispute by no longer distinguishing between scrub and circulating nurses. Several nurses expressed the feeling that they were not qualified to scrub for major surgery without additional training.

On the same day, the first of the alleged unfair labor practices occurred. According to the testimony of Cawley, the operating room supervisor Paruch went into a supply room where Cawley and Loos were talking during their afternoon break and told them they were not to have any more meetings of that sort on hospital time. Paruch denied this; the administrative law judge (A.L.J.) specifically credited Cawley's testimony.

Souza told Paruch on February 24 that the group had retained counsel. Paruch responded by saying that such action was almost like a threat. A few days later she assembled the operating room personnel, and told them that, although she had been sympathetic to them at first, she was now on the side of the administration because they had hired a lawyer. At about the same time, Paruch told her niece, Leslie Rocha, not to be seen coming to work with Souza as she had been doing.

On February 27 the group met with the director of hospital personnel, Robert Seeley, and the assistant director of nursing services, Theresa Nientimp. They were

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told that the on-call policy from then on would be to schedule circulating nurses, as well as scrubs, for call duty as scrub nurses. Almeida, Rocha, and Cawley stated that they were not qualified to work as scrubs without further training. Nientimp told them that if they did not feel qualified to assist at an operation, they should not do it.

The group was upset by the new on-call policy. They met on February 28 and a letter was drafted and delivered to the hospital administrator telling him the on-call policy was unacceptable and asking for a meeting with their spokesperson within a week. Another letter was sent on March 1 stating that members of the operating room staff "have expressed a grave concern for the welfare of the patients regarding that aspects of the Call Policy which would require Nurses inexperienced in the art of Scrubbing to assume the responsibilities of Scrub Personnel." The letter requested a delay in instituting the new policy until a reasonable training period be given those inexperienced in scrubbing; a four-month period was recommended.

The operating room staff was assembled by the Director of Nursing Services, Margaret Goslin, and her assistant, Nientimp, on March 3. The new on-call operating room policy was read; Goslin said she would speak to the nurses on an individual basis, but would not meet with them as a group. The new policy of assigning circulating nurses to scrub was discussed with Goslin and Nientimp a few days later. Goslin said that if a nurse did not feel qualified to accept a scrub assignment, she should inform her supervisor and other arrangements would be made.

Souza testified that early in March, Paruch told Souza and Loos, when they were eating lunch in a hospital kitchen, that they were not to have any meetings on hospital property. When Souza protested that it was their lunch time, Paruch said it made no difference. Paruch denied ever telling any of the nurses that they couldn't talk on hospital property. The A.L.J. specifically credited the testimony of Souza.

The last meeting between the operating room group and the hospital administration took place on March 15. Personnel Director Seeley read the hospital's grievance policy and a statement relative to employee conduct. Seeley then stated that some of them had poor attitudes, and he had received complaints about this, and that he wanted them to know that the hospital could suspend or fire employees who were uncooperative.

For a number of years prior to 1978, Souza or Almeida had taken over as operating room supervisor for Paruch when she was not there. For handling this additional responsibility, which entailed assigning nurses to operations, rescheduling of operations and calling in additional staff, they received additional pay of twenty-five cents per hour. In late February of 1978, Paruch arranged for a leave of absence in March because her mother was terminally ill. Almeida agreed to act as supervisor during the time Paruch would be away. Paruch subsequently informed Almeida, after attending a meeting with members of the administration, that "they" did not want her to take charge because of her "involvement." Paruch was away from March 11 to March 18; neither Almeida nor Souza were made acting supervisor of the operating room, nor were they ever again given this responsibility.

On March 17 Rocha was given a warning by Nientimp for behaving in an "unprofessional and unacceptable manner relative to the needs of the Operating Room." The facts culminating in this warning were as follows: Rocha was sitting in the operating room lounge at about 7:30 A.M. with other nurses when Dr. Shulman was informed by telephone that Dr. Shea's case was at the operating room door. Dr. Shulman told the nurses in the lounge that the patient was waiting. Rocha, who had not been assigned to the case, called Nientimp and told her that the operating room was not fully staffed, that there was no one in charge and some nurses had not yet reported for duty. Rocha then went to the operating room to receive the patient. Dr. Shea asked who was going to circulate and said,

seemingly in jest, that he would circulate himself. This upset Dr. Shulman, who said that he would circulate while giving anesthesia. Rocha then said she would be the circulating nurse and remarked, "I am doing this out of a sense of duty." After the operation, which was completely routinely, Dr. Shea said to Dr. Shulman, "Thanks a lot." Dr. Shulman took this as sarcasm. He then saw Nientimp and told her that "things aren't going too well in the OR, and gave his version of what happened. Dr. Shulman did not request or suggest that Rocha be disciplined. Nientimp did not inquire of Dr. Shea or Rocha as to what had happened before issuing the warning. This was the only warning Rocha had received in her ten years of service at the hospital.

On the same day, March 17, Almeida received a suspension. She was scheduled to work from 8:00 A.M. to 4:30 P.M. and to be on call the rest of the day. There was a bad snow storm early that day and Almeida called to say that she could not get in because of road conditions. Under hospital policy, she was therefore, excused both from working her scheduled shift and from call duty that night. Nientimp called Almeida about 11:00 A.M. explained that she was short of call nurses and asked whether she would take call duty for the evening. Almeida asked if she would be paid time and a half if she were called to work; Nientimp said no, and Almeida then said no. After discussing the situation with her husband, Almedia called Nientimp back and suggested that she would report to work between 12:00 and 1:00 P.M. if Nientimp would sign her in for a full day, thus qualifying her for time and one-half if called to work while on call. Nientimp said she could not approve such an arrangement. Within a short time, Nientimp called Almeida again and told her that she was suspended and, if she had any questions, to see Seeley, the personnel director. Almeida met with Seeley that afternoon who told her the reasons for her suspension were extortion, bribery, bad attitude, and lack of cooperation with the hospital. The suspension was for ten days, March 17 to March 27.

Madeline Souza, the spokesperson for the operating staff group, was discharged on March 27. The reason given in her termination letter was:

> On Friday, March 24, 1978, while acting as a scrub nurse on an emergency assignment and in the presence of a patient, you walked out of the operating room refusing to follow through with your assignment.

The letter also described her attitute as "[u]sually cooperative, bitter and agitative for past 2 months." Souza had worked at the hospital for sixteen years. Her latest job evaluation, made on September 3, 1977, gave her the highest rating for job knowledge, job responsibility, quality and quantity of work performance, initiative and interest, and rate of progress versus education and training. Her supervisors stated that she was very reliable and competent.

As the facts show, this was not a simple case of refusing to carry out an assignment. Souza was told on March 24, while working her regular 7:30 A.M. to 3:00 P.M. shift, that she would be needed to circulate at operations which were scheduled for 3:00 to 4:00 P.M. The operation scheduled for 3:00 o'clock was an exploratory laparotomy, a major surgical procedure. The start of the operation was delayed; at 3:20 P.M. Paruch told Souza that Souza and Jeanniene Labreche would be the scrub nurses and that she, herself, would be the circulating nurse. Labreche was an operating room technician, not a registered nurse, and always worked as a scrub. Souza had not acted as a scrub for two years and had never done so for major surgery. Over 90% of Souza's working time was spent in the recovery room. The sudden change of assignment upset Souza, especially because she knew that the patient had been through two other recent operations and was not in good physical condition. Because no other doctor was listed for the operation, Souza assumed that Labreche would assist the surgeon and she would be first scrub. Despite her misgivings about her ability to perform properly, Souza prepared to go ahead. She asked Labreche to go over the special instruments with her; this was done while they waited for the patient to be brought to the operating room. At about 3:45 P.M. Paruch returned to the operating room and Souza said, "I am sorry Hilda, I can't do it." Paruch told her to circulate instead of scrubbing. Souza, overcome by stress and upset at having to refuse an assignment, began to cry. She left the operating room to get control of herself, which took about ten minutes. The operation had not begun when she returned, and she acted as circulating nurse throughout the operation, which was completed without incident. On the following Monday, March 27, Souza was discharged.

On March 25 Rocha learned on her arrival at the hospital that she had been assigned to scrub for an aortic aneurysm operation. The only others listed on the schedule were the surgeon and an operating room technician. Rocha immediately went to the charge nurse and told her that she did not feel qualified to assist or be first scrub at this type of operation. She was told to take it up with Paruch, who had not yet arrived. When Paruch got there, Rocha repeated what she had told the charge nurse. Paruch told her to return to the operating room and scrub. After Rocha reiterated that she did not feel qualified, Paruch said, "If I tell you to assist, you will assist and if I tell you to first scrub, you will first scrub." Rocha replied, "I am not refusing to scrub but I just do not feel qualified to assist or to first scrub." Paruch then ordered Rocha to follow her into the nurse's locker room where she said, "[Y]ou get into that room and scrub." Rocha left the locker room and sat down in the corridor to calm herself. Paruch then ordered her to go to the nursing service office. At the office Rocha told Nientimp about her inability to assist or act as first scrub at the operation. Nientimp responded by saying that Rocha was only assuming that she would be first scrub or assisting. Rocha then said that she would act as second scrub or "back table" for the operation. Nientimp replied to this by telling Rocha that, because she already had a warning, this was serious and would result in at least a suspension. She also said that she was going to discuss it with Paruch. Rocha was instructed to go to the personnel office. Nientimp and Paruch then discussed the matter with Seeley. After a two-hour wait in Seeley's office, Rocha was handed a termination notice which contained the following:

> On Tuesday, March 28, 1978, when assigned as a scrub nurse on an assignment in the Operating Room, and in the presence of your supervisor and other nurses, you refused to follow through with your assignment.

The termination notice had essentially the same description of attitude as did Souza's, "[u]sually cooperative, most recently bitter and agitative." Rocha's latest job evaluation report, made on September 1, 1977, on a scale of 1 to 5 (5 being the highest), rated her 4 for job knowledge, job responsibility, quality and quantity of work performance, initiative and interest, cooperation with others, attitude towards hospital and department, and rate of progress versus education and training. Her supervisor's comment was, "Will do whatever she can to meet the needs of the OR schedule." Rocha had worked at the hospital for more than ten years.

Patricia Danis went back to work at the hospital as an operating room technician in January of 1978 after an absence of almost four years. She joined the operating room group and attended meetings with hospital officials. Paruch warned Danis at the end of January that, as a new employee, she ought to be "low-key" at the meetings. On April 3 Paruch called her to her desk and showed her an evaluation form that had the word probation at the top. Danis asked Paruch the significance of this and was told that every new employee at the hospital was on probation for three months. Paruch then went on to say that at the end of the three months she could end the probation, extend it, or recommend dismissal. Paruch then pointed to the attitude section of the evaluation form, said she had spoken to Danis about this before and that those in the operating room were a team and could not stick to groups.

In March Almeida told Paruch that she wanted to work through her eighth month of pregnancy, but did not want to be on call during that month. This was in accord with past hospital practice. Paruch said she would check on it; she later informed Almeida that, despite the past practice, she would have to remain on the call roster if she wanted to work the eighth month. Almeida appealed to Nientimp who said, "with the new women's lib and equal rights," if she wanted to work, she would have to be on call. Almeida felt that on call duty during her eighth month would be too tiring, so she took maternity leave one month earlier than planned.

When Almeida returned from maternity leave in September, she requested assignment to the operating room where she had worked for ten years and had been charge nurse for five. This request was denied by Nientimp who said that the operating room hours were filled. Almeida was assigned duties as a staff nurse. There was uncontradicted testimony that during the preceding six years every full-time operating room nurse had been allowed to return to the operating room after maternity leave.

The Board's Decision and Order

Except in one respect,[1] the Board affirmed the rulings, findings and conclusions of the A.L.J. It found that the hospital had violated § 8(a)(1) of the Act in the following particulars: by discharging Madeline Souza and Leslie Rocha; by issuing a warning to Rocha; by threatening Patricia Danis with extension of her probationary period or dismissal if she continued her association with the operating staff group; by suspending Rose Mary Almeida; by refusing to allow Almeida to work her eighth month of pregnancy without also being on call; by not assigning Almeida to the operating room when she returned from maternity leave; by warning Rocha not to be seen coming to work with Souza; and by prohibiting Souza, Loos and Cawley from talking together on the hospital premises during nonworking hours.

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[1] The A.L.J. found as a fact that the hospital had refused to assign Souza or Almeida to act as charge nurse of the operating room in Paruch's absence because they participated in protected, concerted activities. He ruled, however, as a matter of law that the appointment of temporary supervisors is outside the protection of the Act and, therefore, there was no violation. The Board reversed and found an 8(a)(1) violation.

The hospital has not raised this issue on appeal and we, therefore, do not reach it.

The Board agreed with the A.L.J. that the hospital took these actions because the nurses involved had engaged in protected, concerted activity.

Our review of the record convinces us that the evidence of the § 8(a)(1) violations was not only substantial; in most respects, it was overwhelming. The two nurses who were discharged were very active in the group protesting the hospital's call policy. Their records at the hospital over a period of sixteen years (Souza) and ten years (Rocha) were exemplary. The hospital stresses the seriousness of a nurse walking out of an operation, but ignores the fact that in both instances, the nurses acted out of concern for the patients. This is in contrast to *Hubbard Regional Hospital v. NLRB*, 579 F.2d 1251, 1253 (1st Cir. 1978), relied on by the hospital; the nurses in *Hubbard* made sport of the patient as they took him to the operating room. Moreover, the operating room group had been told explicitly by Nientimp and Goslin that if a circulating nurse did not feel competent to scrub, she did not have to and other arrangements would be made.

The treatment of Almeida was also clearly retaliatory. Although she may have been trying to take advantage of the snowstorm to get time and one-half if she was called to work, she was not asking to get paid for hours that she did not work. She made a straightforward request, which was denied. The ridiculous accusation of bribery and extortion by the hospital personnel director was a reflection of his hostility against any member of the group. The refusal of the hospital, contrary to its past policy, to allow Almeida to return to work

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in the operating room after her maternity leave can only be interpreted as retaliatory. Again, we have a nurse with a spotless ten-year record whose only fault was that she was an active member of the operating room group.

The facts as to prohibiting talking at work and the veiled threats to the probationary operating room technician are not as stark, but easily meet the substantial evidence requirements.

We find no merit in the hospital's contention that the Board did not meet the test set forth in *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979). The only serious question here is not whether the hospital had "good" reasons for the discharges, but whether the hospital deliberately put Souza and Rocha in a position where their lack of special training and their concern for the patient's welfare forced them to do what they did.

The order of the Board shall be enforced. Costs are awarded to the Board.

Peavey Company v. NLRB

NLRB v. Peavey Company

648 F.2d 460 (7th Cir.), May 6, 1981—249 NLRB 853

On petition to review Board Order

Before SWYGERT, SPRECHER and BAUER, Circuit Judges

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BAUER, Circuit Judge: Petitioner, Peavey Company, seeks review of an order of the National Labor Relations Board ("NLRB"). The NLRB cross-petitions for enforcement. We grant enforcement in part and deny it in part.

I

The Board found that Peavey violated section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), when it discharged Mellinda Snider. The Administrative Law Judge ("ALJ") found that Snider's discharge "was motivated at least in substantial part by her protected activities." While affirming the ALJ's conclusions of law, the Board labeled Peavey's reasons for the discharge a "pretext." The Board then found that "Snider was discharged solely because of her concerted and union activities." Peavey claims that legitimate business reasons justified Snider's discharge.

Since its decision in this case, the National Labor Relations Board issued its *Wright Line* decision, 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980). *Wright Line* set forth definitive rules for resolving cases in which a "dual motive" discharge is alleged. The Board expressly rejected the "in part" test relied upon by the ALJ here. Instead, it applied the Supreme Court's test in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), to dual motive discharge cases. Under the new test, the General Counsel must first make a *prima facie* showing that the employee's protected conduct was a motivating factor in the employer's decision to discharge the employee. Once this is established, the burden shifts to the employer to demonstrate that he would have discharged the employee even in the absence of the protected conduct. *Wright Line,* 105 L.R.R.M. at 1175. The Board ruled that the *Mt. Healthy* test aimed to determine the causal relationship between the employee's protected activities and the employer's action. Once found, a causal relationship justifies liability under section 8(a)(3), without any quantitative label such as "in part" or "dominant motive." *Id.*

This is the first "dual motive" case to reach us for decision since *Wright Line.*[1] At least one other circuit has adopted the *Mt. Healthy* approach. *See Statler Industries, Inc. v. N.L.R.B.,* 644 F.2d 902 (1st Cir. 1981); *N.L.R.B. v. Eastern Smelting & Refining Corp.,* 598 F.2d 666 (1st Cir. 1979). We have reviewed the decisions and have decided to follow the *Mt. Healthy/Wright Line* test in "dual motive" cases in this circuit.

Our review of the record as a whole convinces us that Peavey Company met its burden under the *Wright Line* decision. The evidence showed that, although a good typist, Snider was a sloppy worker and had a history of disputes with her supervisors. Peavey disciplined her in writing and advised her of possible discharge unless her work record and attitude improved. A few days before her discharge, she refused to insert notices of new pay scales into paycheck envelopes she was told to prepare. Snider's discharge was ultimately prompted by her refusal to retype some poorly-typed letters.

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The Board backed away from the ALJ's determination that Snider's discharge was motivated "in part" by her union activity. In labeling Peavey's reasons as "pretextual," however, the Board relied on the same rationale as did the ALJ. It agreed that Peavey had "tolerated Snider's poor job performance for over eighteen months" until she began concerted activities. The Board also relied on Peavey's demonstrated "animus" towards the union and the timing of Snider's discharge.

Peavey's reasons here cannot be labeled pretextual. As *Wright Line* held, a pretext can be found to exist when "the purported rule or circumstances advanced by the employer did not exist, or was not, in fact, relied upon [sic]." 105 L.R.R.M. at 1170. Here, however, it is undisputed that Snider had been disciplined, for cause, prior to her contact with the union. Snider testified, in fact, that she went to the union as a result of her discipline. Her prior discipline also undermines the Board's claim that Peavey had tolerated Snider's poor preformance without complaint for eighteen months. Unlike in *St. Luke's Memorial Hospital, Inc. v. N.L.R.B.,* 623 F.2d 1173, 1179 (7th Cir. 1980), there were independent acts of misconduct at the time of Snider's discharge which justified Peavey's action. Moreover, an employer's silence does not extinguish its right to discipline an employee whose conduct continues to worsen. *See N.L.R.B. v. Wilson Freight Co.,* 604 F.2d 712, 723 (1st Cir. 1979), *cert. denied,* 445 U.S. 962, 100 S.Ct. 1277, 64 L.Ed.2d 238 (1980).

Once Peavey's reasons for discharge are stripped of the label "pretext," it is apparent that Peavey met its burden under the *Wright Line* decision. Even though Snider engaged in some protected activity, Peavey showed that she would have been discharged even in the absence of the protected conduct. *See Pelton Casteel, Inc. v. N.L.R.B.,* 627 F.2d 23, 30 (7th Cir. 1980). The substantial evidence on the record as a whole does not support the Board's finding of an 8(a)(3) violation. We therefore deny enforcement of that portion of the Board's order calling for reinstatement of and back pay for Snider.

II

The Board also found five violations of section 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1). The Board found that Peavey violated the Act when (1) its General Manager told Snider that she was a confidential employee and thus not entitled to participate in union activities; (2) Supervisor Sandy Noe followed employees and eavesdropped on their conversations; (3) it announced, after the union began organizing, that employees could see their personnel files; (4) its General Manager told an employee that persons who joined the union would be considered disloyal, thus decreasing their promotional chances; (5) its General Manager promised the employees at a meeting that "he was going to see that things" got better.

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[1] A recent decision, *Sullair P.T.V., Inc. v. N.L.R.B.,* 641 F.2d 500, 504 (7th Cir. 1981), cited but did not rely on *Mt. Healthy* and *Wright Line,* because there was no evidence of any illegal motive for the discharge.

After a review of the record as a whole, we conclude that substantal evidence supports the Board's finding of section 8(a)(1) violations. Peavey's contentions to the contrary are without merit. Accordingly, we enforce the rest of the Board's order.

Enforced in Part, Enforcement Denied in Part.

Soule Glass and Glazing Co. v. NLRB

652 F.2d 1055 (1st Cir.), May 7, 1981—246 NLRB 792

On petition to review and set aside Board Order

Before CAMPBELL, Circuit Judge, WYZANSKI, Senior District Judge,* and KEETON, District Judge*

1069

KEETON, District Judge: In this appeal, Soule Glass and Glazing Company and three related Soule firms [1] ("the company") petition this court to review and set aside an order of the National Labor Relations Board ("the Board") finding the Company guilty of a number of unfair labor practices. The Board cross-applies for enforcement of its order. The case presents, in the words of petitioners' brief, "a virtual compendium" of the labor law issues implicated by an employer's operation during a strike.

I.

A summary of the history of the company and the labor dispute at issue provides the necessary context for our review of the Board's decision.

Soule Glass and Glazing Co. is one of several corporations owned by the Soule family, all of which are engaged in various facets of the glass and related businesses in the state of Maine. The present corporate structure evolved, under the direction of Charles Soule, from the original Soule Glass and Paint Company ("SGP"). Following several acquisitions and a reorganization in 1975, the parent company was renamed Soule Glass Industries ("SGI"), and the business was organized into two operating divisions, King & Dexter (hardware, glass cutting and fabrication, and metal fabrication) and SOAGCO (auto glass), and a wholly owned subsidiary, Soule Glass and Glazing ("SGG").[2] Charles Soule became president of SGI, Edward Churchill became president of SGG, and Andrew Soule, Charles Soule's cousin, was named SGG's treasurer. SGG took over the business of installing glass and framing on new construction projects ("contract work") as well as the replacement of broken glass in existing buildings ("replacement work").[3] SGG operated from various facilities in Portland, Lewiston, Waterville, and Bangor.

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Petitioners' relationship with Glaziers Local 1516, International Brotherhood of Painters and Allied Trades, AFL-CIO ("the union") has been long, if not harmonious. SGP's Portland employees have been represented by the Union since 1945. In 1969, following a strike, SGP entered into a three-year collective bargaining agreement for a unit of "all glaziers, apprentice glaziers, inside glass workers, metal fabricators, and truckdrivers, excluding all office clerical employees, salesmen, professional employees, guards and supervisors" at SGP's various locations. Following another strike in 1973, petitioners and the Union negotiated three separate three-year contracts for three separate units: SGP (succeeded by SGG), King & Dexter, and SOAGCO. Each of these contracts was to expire March 31, 1976. However, the employees of King & Dexter and SOAGCO voted to oust the Union, resulting in the decertification of the union in these units on March 24, 1976.

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*Of the District Court of Massachusetts, sitting by designation.

[1] The Board's decision describes the employer as "Soule Glass and Glazing Co.; Soule Glass Industries; Soule Replacement Co. and/or Presque Isle Glass d/b/a Soule Glass and Glazing." The functions and relationship of the various Soule companies are discussed *infra*.

[2] Charles Soule in 1975 also formed another wholly-owned SGI-subsidiary, Presque Isle Glass, to perform glass work in the city of Presque Isle.

[3] The contract glass installation and glass replacement work performed by SGG employees is referred to as "outside" work; glass cutting and fabrication and metal fabrication constitutes "inside" work. "Outside glaziers" were generally higher paid than "inside glass workers."

On February 21, 1976, the union began bargaining with SGG for a contract to replace their 1973 agreement, covering bargaining unit employees engaged in outside glazing on new construction and replacement jobs. In all, 17 bargaining sessions were held. By the fifth session, on April 9, the parties had reached at least tentative agreement on all issues except wages and the duration of the contract, with the union demanding a $1.10 per hour raise in the minimum glaziers' pay rate for a one-year contract, and the company offering a two-year contract with increases at six month intervals of 15 cents, 10 cents, 15 cents, and 10 cents per hour. The Union rejected this offer, and on the morning of April 12, 1976, the bargaining unit employees of SGG went on strike. That afternoon, Charles Soule approved a flat 25 cents-per-hour pay raise, retroactive to April 1, for all the (non-striking, non-unit) employees of the King & Dexter and SOAGCO divisions of SGI.

For about the first month of the strike, SGG operated on an ad hoc basis, with supervisors and borrowed SGI personnel working long hours to fulfill the company's contractual glass installation obligations. Replacement work was initially neglected, and the company subcontracted certain work. Starting in mid-May, 1976, SGG began to hire permanent replacement employees to do outside glazing work formerly done by the striking bargaining unit employees.

On May 6, 1976, at the first post-strike bargaining session, the company announced its intention to close SGG's Lewiston and Waterville shops for economic reasons, and to have the employees on each of the affected crews report directly to jobs from their homes. Because of the closings, the Company proposed to divide the state into two wage zones instead of the three previously agreed to.[4] The Union rejected the two-zone proposal. At the May 6 meeting and thereafter, there was considerable discussion as to the effects of the Lewiston and Waterville closings on the employees at those locations.

At negotiating sessions on May 7, 1976, the union made a wage proposal for a three year contract with 26 cent increases very 6 months the first year, 29 cents every six months the second year, and one 54 cent increase in the third year. The company rejected this proposal, and offered a two year contract with six months increments of 20 cents, 15 cents, 21 cents, and 15 cents, which the union rejected. Thereafter, the company never increased this offer. Subsequently, at sessions on June 18, August 27, and October 18, the union reduced its wage demands to 90 cents for a one year contract, then to 80 cents for a one year contract, and finally 80 cents per year for a two year contract, respectively. The company rejected each of these offers, and no further progress was made toward resolving the wage issue.

In addition to the wage increase and the Lewiston-Waterville closing, several incidents during the strike and concomitant negotiations gave rise to unfair labor practice charges against the company. Early in the strike, pursuant to a "marketing concept" he had envolved for the Soule Companies,[5] Charles Soule formed Soule Glass Replacement Company ("SGR"), a wholly-owned subsidiary of SGI combining the former King & Dexter and SOAGCO divisons. "Replacement centers" were set up as early as April 1976, and the transfer of a majority of the replacement work formerly done by SGG employees took place in May and June. Whether this transfer of bargining unit work was implemented as a permanent change (and if so, at what point it became so) or was instead a temporary response to the exigencies of the strike is disputed. The existence of SGR and the company's "proposal" to transfer permanently the majority of SGG's replacement work was first disclosed to the union in an "agenda" distributed by the company's attorney at the August 6 bargaining session. The agenda proposed changes in a number of noneconomic areas on which agreement had previously been reached, including work jurisdiction, elimination of the apprenticeship plan, company discretion as to new employees' wages (above contractual minimum), modification of the grievance and arbitration clauses, and addition of a non-retaliation clause. The union made no immediate response to the specifics of the agenda.

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[4] As reflected in previous contracts, SGG glaziers at the company's four locations historically had three different wage scales; with the highest wages in Portland, the lowest in Bangor, and an intermediate wage at Lewiston-Waterville. Glaziers were paid on the basis of which shop they came from rather than where the particular job on which they were working was located. In negotiations prior to the strike, the parties had agreed to divide the state into three "wage zones," whereby glaziers would be paid on the basis of which zone they were working in, not where they came from.

[5] Charles Soule's objective was to effect a division of labor whereby SGI became a wholesaler of glass, metal framing and related products, SGG did exclusively contract work on new construction projects, and the newly-formed SGR combined all auto glass installation and broken window replacement work.

On June 25, 1976, SGG president Edward Churchill and manager Edward Tribou were involved in two incidents involving confrontations with picketing strikers. Following lunch at a Bangor restaurant, Churchill and Tribou drove to SGG's Bangor facility, where a striker's vehicle was allegedly parked on company property. Following some discussion with strikers Carleton French and Harold Douglas, Tribou seized a picket sign that was leaning against a truck windshield and threw it into the street. Churchill then attempted to persuade the two strikers to return to work, allegedly offering raises of first ten cents and then one dollar, and inviting both to discuss the matter later over drinks. After both pickets refused, Tribou directed insults at the two and he and Churchill departed. Churchill and Tribou then drove to SGG's nearby Hampden facility, where Tribou again seized the strikers' picket signs and threw them on the ground. Churchill allegedly grabbed picket Nick Botzko, a robust 60 year old man, around the neck and held Botzko's head down as if preparing to punch him. Striker Michael Nadeau at that point jumped from a concealed position behind an air compressor and Churchill released Botzko. Tribou made various abusive and threatening remarks to Nadeau, and departed with Churchill. These incidents were reported to the union membership at a meeting held shortly thereafter.

During the November 22, 1976 bargaining session, the union's attorney (Cohen) requested that the company provide certain wage and hour information to permit the union to evaluate the company's wage position. The company's attorney (Levenson) told the union to put its request in writing. On November 23 Cohen wrote Levenson requesting wage and hour data for all nonstriking employees of SGI, SGR, and SGG. At the December 9 bargaining session, Levenson gave the union a written reply, stating that the company was furnishing the wage rates (without names) and aggregate weekly overtime hours of all SGG employees, but declining to furnish any information regarding the nonunion SGI and SGR employees. December 9, 1976 was the final bargaining session.[6]

On March 8, 1977, attorney Cohen wrote to attorney Levenson on behalf of the strikers, unconditionally applying for the immediate reinstatement of 22 named individuals, and proposing to resume negotiations. Levenson responded on March 10 with a letter stating that the request "must be studied carefully before making a definitive reply," that Andrew Soule would like to interview individually each of the strikers applying for reinstatement, and suggesting possible dates for a bargaining session. On March 11, Cohen wrote Levenson emphasizing that the request was for reinstatement of the named strikers "as a group" to their former or equivalent jobs and asserting that as unfair labor practice strikers they were entitled to reinstatement as of right and that conditioning reinstatement on individual interviews was unlawful. Cohen agreed to meet on March 28, 1977 for further negotiations. Levenson by letter of March 21 notified the union that striker David Bates, whose name was among the 22 reinstatement applicants, was being terminated for strike misconduct and would not be reinstated.

On March 25, 1977, Levenson again wrote Cohen, this time informing him that the scheduled meeting would be "without purpose," in that, because of the company's "doubts that Local 1516 continues to represent the bargaining unit at Soule Glass and Glazing Company," the company was withdrawing its recognition of the union as bargaining representative. The company stated it would, "upon proper application," reinstate strikers when openings occurred.

On June 27, 1977, the Board's Regional Director issued a consolidated complaint, consolidating five sets of unfair labor practice charges brought by the union against the company during the negotiations and strike.[7] Specifically, the complaint, as later

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[6] On March 18, 1977, pursuant to a settlement agreement approved by the Board's Regional Office, the company supplied the union with wage information on SGG's employees before the strike, and the names and hours worked by week of each striker replacement and other company employees who had performed some glass replacement work during the strike.

[7] As noted in the complaint, the cases arising from three of the union's charges were settled and the settlement agreements were approved by the Regional Director. However, on June 14, 1977, the Regional Direc-

Continued

amended, charged the company with violating § 8(a)(1) of the act by increasing wages of nonstrikers, assaulting a picketing striker, and offering wage inducements to picketing strikers; violating § 8(a)(1) and (5) by unilaterally combining wage zones, refusing to supply relevant requested information, withdrawing recognition of the union, and unilaterally permanently reassigning bargaining unit work to nonunit employees; and violating section 8(a)(3) and (1) by re-

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fusing to reinstate the strikers. The complaint makes no mention of the Lewiston-Waterville shop closings, and does not charge bad faith bargaining as an independent violation.

The case was heard before an Administrative Law Judge ("ALJ") at a ten day hearing in November and December, 1977. On July 9, 1979, the ALJ issued his decision and remedial order finding the company guilty of a number of unfair labor practices. On December 5, 1979, a three member panel of the Board summarily affirmed, in a brief order without opinion, and with one minor modification, the AFJ's findings, conclusions, and order.

II.

Standard of Review

Section 10(e) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(e), provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." As interpreted by the Supreme Court in *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), " '[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' " *Id.* at 477, 71 S.Ct. at 459. In searching "the whole record" for substantial evidence, a reviewing court "must take into account whatever in the record fairly detracts" from the Board's fact finding as well as evidence that supports it. *Id.* at 487–88, 71 S.Ct. at 464-465. The court may not substitute its judgment for that of the Board when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo,*" and must defer to the Board's inferences in the Board's areas of specialized experience and expertise. *Id.* at 488, 71 S.Ct. at 465. However, it is appropriate to set aside the Board's decision when the court "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Id.* at 488, 71 S.Ct. at 465. As to mixed questions of law and fact, such as the inferences drawn by the board from the evidence (*e.g.,* motive) or the application of a statutory standard to particular factfindings (*e.g.,* bargaining in good faith), the court must sustain the board's conclusions if reasonable. *See, e.g., Famet, Inc. v. NLRB,* 490 F.2d 293, 295 (9th cir. 1973); *NLRB v. Marcus Trucking Co.,* 286 F.2d 583, 592 (2d Cir. 1961).

In light of these criteria we review the Board's findings of fact and conclusions of law.

III.

Procedural Due Process

Petitioners challenge several of the Board's unfair labor practice findings against them as violative of due process, in that these violations were not charged in the General Counsel's amended complaint. In particular petitioners attack on due process grounds the "course of conduct" violation, held to violate § 8(a)(5) and (1); the additional finding of a § 8(a)(5) violation with respect to the wage increase when only § 8(a)(1) was charged; and the § 8(a)(5) and (1) violations found regarding "reneging" on the three wage zone agreement and the Lewiston-Waterville closing. Although we deal with each of these claims individually in later sections of this opinion, it is useful to set forth initially the analytic framework common to all such claims.

Due process requires that persons charged with unlawful conduct be given prior notice of the charges and an opportunity to be heard in defense before the government can take enforcement action. For federal agency adjudications, the Administrative Procedure Act, 5 U.S.C. § 554(b)(3), provides that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted." The NLRB's

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tor revoked his approval, set aside the the settlement agreements, and reopened the cases, following the regional office's investigation of subsequent charges filed by the union.

own rule, 29 C.F.R. § 102.15, requires that "[t]he complaint shall contain * * * a clear and concise **1074** description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of the respondent's agents or other representatives by whom committed." The General Counsel's complaint, which may be liberally amended, is designed to notify the adverse party of claims to be adjudicated so he may prepare his case, and sets the standard of relevance at the hearing before the ALJ. *Douds v. International Longshoremen's Ass'n.* 241 F 2d 278, 283 (2d Cir. 1957).

Due process prohibits the enforcement of a finding by the Board of a violation "neither charged in the complaint nor litigated at the hearing." *NLRB v. H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962); *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 162 (8th Cir. 1968). Stated in the strongest terms, "[f]ailure to clearly define the issues and advise an employer chared with a violation * * * of the specific complaint he must meet and provide a full hearing upon the issue presented is * * * to deny procedural due process of law." *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967). The adversary process employed in NLRB adjudication is premised on having a neutral, impartial trier of fact, with the General Counsel serving as prosecutor. The ALJ may not, in effect, become a litigant by "prosecuting" uncharged violations. Although the ALJ may, in his discretion, "call attention to an uncharged violation or decide an uncharged violation *which has been fully litigated by the parties*, * * * he should [not] undertake to decide an issue which he alone has injected into the hearing, especially where, as here, the parties were never advised to litigate the issue." *NLRB v. Tamper, Inc.*, 522 F.2d 781, 789–90 (4th Cir. 1975) (emphasis in original) (denying enforcement because ALJ's action "so inherently prejudicial").

However, courts have recognized "the Board's power to decide an issue that has been fairly and fully tried by the parties, despite the fact that the issue was not specifically pleaded," *Drug Package, Inc. v. NLRB*, 570 F.2d 1340, 1345 (8th Cir. 1978); and have gone so far as to state that the Board "has an obligation to decide material issues" which were fully litigated although not specifically pleaded. *American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 547, 556 (8th Cir. 1968), *cert. denied*, 398 U.S. 960, 90 S.Ct. 2162, 26 L.Ed.2d 546 (1970). *See NLRB v. Puerto Rico Rayon Mills Inc.*, 293 F.2d 941, 947 (1st Cir. 1961) (issue obvious, fully litigated, no prejudice shown). Inconsequential or technical variances between the phraseology or characterization of the violation charged and the violation found are not a valid defense where it is clear the respondent "understood the issue and was afforded full opportunity to justify [its actions]," *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350, 58 S.Ct. 904, 913, 82 L.Ed. 1381 (1938); REA Trucking Co. v. NLRB, 439 F.2d 1065, 1066 (9th Cir. 1971).

Thus, the test is one of fairness under the circumstances of each case—whether the employer knew what conduct was in issue and had a fair opportunity to present his defense. For example, if the identical employer conduct gave rise to two violations, the legal elements of which overlap substantially, and only one was charged, under some circumstances it may be fair to say that both were "fully litigated." However, in *Drug Package*, 570 F.2d at 1345, the court held that an issue was "not fairly litigated" because

> [a]lthough the underlying facts were litigated, the Company at the time of the hearing, was aware only of the possibility that the Board would find an 8(a)(1) violation * * *. Had the Company been given notice of the possibility of an 8(a)(5) violation and the resulting additional penalties, it might have litigated the matter differently.

In this regard, the Court of Appeals for the Tenth Circuit recently noted:

> Many labor dispute cases involve multiple charges based on a variety of occurrences. This case was complex and confusing—there were not only a number of charges but a change of ownership, * * *. Simply because violations could have been **1075** alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities.

NLRB v. *Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 274 (10th Cir. 1980). This observation is particularly pertinent to the instant case, in which eight instances of employer conduct were charged as violating some or all of three provisions of the statute, and where the hearing consumed ten trial days.

In light of these standards, we find it necessary to reverse several of the unfair labor practice charges found by the ALJ. *See* Parts V(B), VI(A), and IX(A), *infra.*

IV.

Single Employer

The Board held that SGI and its subsidiaries, SGG and SGR, constituted a "single employer" for the purposes of the Act. There is apparently no dispute as to the criteria upon which the single employer issue is to be determined.

"[T]he Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise * * *. The controlling criteria, * * * are [1] interrelation of operations, [2] common management, [3] centralized control of labor relations and [4] common ownership." *Radio & Television Broadcast Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965) (per curiam). This court has noted that the Board's "single employer" conclusion "is 'essentially a factual one' and not to be disturbed provided substantial evidence in the record supports the Board's findings." *NLRB* v. *C.K. Smith & Co.*, 569 F.2d 162, 164 (1st Cir. 1977) (noting that "the sale of essentially similar products via similar distribution methods is also probative of integration"), *cert. denied,* 436 U.S. 957, 98 S.Ct. 3070, 57 L.Ed.2d 1122 (1978). The "single employer" finding depends on "all the circumstances of the case," and none of the above factors is controlling. *NLRB* v. *Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied,* 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979).[8]

Perhaps the most important of the above criteria, in the Board's eyes, is the degree of centralized control over labor relations policies, although this alone is not determinative. *Local 627, Operating Engineers v. NLRB,* 518 F.2d 1040, 1046 (D.C. Cir. 1975), *aff'd in part and vacated in part,* 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976). In *Local 627,* the Court of Appeals reversed the Board's finding of separate employers, relying on the facts that the two companies were wholly owned operating subsidiaries of the same parent, in related businesses, with an "interchange of key personnel" and some "instances of interchange of employees," and "a substantial qualitative degree of interrelation of operations and common management—one that we are satisfied would not be found in the arm's length relationship existing among unintegrated companies." *Id.* at 1047. The Supreme Court affirmed the single employer holding. 425 U.S. at 802–03, 96 S. Ct. at 1843–1844. *See Royal Typewriter Co. v. NLRB,* 533 F.2d 1030, 1043 (8th Cir. 1976) ("A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries * * *."); *Sakrete of Northern California, Inc. v. NLRB,* 332 F.2d 902, 907 (9th Cir. 1964) ("If there is overall control of critical matters at the policy level, the fact that there are variances in local management decisions will not defeat applica-

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tion of the 'single employer' principle"), *cert. denied,* 379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965).

The ALJ found, in support of his conclusion that the Soule companies were a single employer, (1) that the 1976 corporate structure had evolved from a common ancestor, Soule Glass and Paint; (2) that the corporations had an "interlocking relationship," by virtue of "the interrelation of operations and common flow of management personnel from one corporation to another"; (3) that "the ownership and financial control of the various Soule enterprises rests solidly in the hands of the Soule family, and that the majority stockholder of the SGI [which owns all of the stock of SGG and SGR] is Charles Soule"; (4) that "on limited occasions there was employee interchange" and "interchange of equipment, particularly trucks"; (5) that in certain instances SGG shared premises with another Soule enterprise; and finally (6) as to "the critical factor of centralized control of labor relations," that "Charles Soule is the person who has and exercises the power to make the major decisions, including labor relations decisions, for the entire Soule complex, including SGG."

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[8] It is important to distinguish between the concepts of single employer and single bargaining unit. Under § 9(a) of the Act, a bargaining unit means a group of jobs constituting an election constituency; it is comprised of jobs and job classifications, not people, and the Board ascertains what is an "appropriate" bargaining unit under a "community of interest" standard. R. Gorman, Labor Law 66–69 (1976). A bargaining unit may, for example, constitute some subgroup of jobs in a particular plant. "The fact that two companies have been designated a single employer for purposes of the act is not determinative as to whether both * * * constitute a single bargaining unit." *Don Burgess Construction,* 596 F.2d at 386.

Each of these findings is supported by substantial evidence in the record. In each instance the ALJ based his finding on specific testimony, which he reasonably credited. Since the Board's findings satisfy each of the criteria set forth in *Broadcast Union, supra,* we affirm the ALJ's holding that SGG, SGR, and SGI may be considered a single employer.

The ALJ did not make clear his view of the significance of this holding to the other issues in the case. We note, however, that the single employer finding enhances the relevance, to the labor dispute between SGG and the union, of certain corporate actions whose primary impact occurred beyond the corporate boundaries of SGG (*e.g.*, the wage increase and the creation of SGR), and may provide the basis for corporationwide relief.

V.

The Wage Increase

The ALJ found, on the basis of Charles Soule's testimony and the timing and amount of the wage increase, that the granting of 25 cent-per-hour pay increases to non-striking SGI employees on the first day of the strike violated § 8(a)(1) and (5) of the Act. Charles Soule stated that

> April 12 arrived, and I became very aware of the fact that because * * * certain picket lines were in front of our locations, that maybe it was time to act upon granting a wage increase. So I gathered the information and consulted with my payroll clerk * * * [and] decided that a flat ten dollar, or 25 cent raise per hour was appropriate at that particular time.

Charles Soule also testified that annual pay increases for these employees historically had been granted around April 1, that an across-the-board 25 cent-per-hour raise was on the average just under a five percent increase, consistent with the company's wage policy, and that he was aware of the general status of the negotiations between the SCG and the union on the wage issue.

From these facts the ALJ concluded: Under these circumstances there can be little doubt that Respondent's intention was to emphasize to the strikers at the outset of the strike that it did not pay to support their Union. *Alba-Waldensian, Inc.*, 167 NLRB 695, 696; *Chanticleer, Inc.*, 161 NLRB 241, 252. I find that the Respondent violated Sections 8(a)(1) and (5) of the Act on April 12 by granting this unilateral wage increase for nonstriking employees, greater than what was offered to employees in the bargaining unit.

A. *The § 8(a)(1) Violation*

Under § 8(a) of the Act, 29 U.S.C. § 158(a), it is an unfair labor practice for an employer "(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title [basically to organize, join unions, bargain collectively, and strike]," and "(5) to refuse to bargain collectively with the representatives of his employees * * *."

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The elements of a section 8(a)(1) violation are to be determined by reference to an objective test. It is *not* necessary to show that particular employees actually felt coerced, etc., or that the employer intended to produce the impermissible effect. *E. g.*, *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204, 207–08 (8th Cir. 1977) (reasonable tendency, not actual effect); *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970) (employer motive not an element); *cf., Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1114–15 (7th Cir. 1973). Rather, "it is sufficient if the General Counsel can show that the employer's actions would tend to coerce a reasonable employee." R. Gorman, Labor law 132 (1976). In addition, § 8(a)(1) requires a weighing of employer and employee interests. Employer conduct that otherwise tends to interfere, restrain or coerce employees "may be held lawful if it advances a substantial and legitimate company interest in plant safety, efficiency or discipline," or is "in accordance with plant custom or business necessity." *Id.* at 133. "[I]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated." *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 269, 85 S.Ct. 994, 999, 13 L.Ed.2d 827 (1965).

It is settled that the grant or withholding of wage increases and other benefits, either discriminatorily or across-the-board to all employees, may violate § 8(a)(1). *E. g., NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409–10, 84 S.Ct. 457, 459–460, 11 L.Ed.2d 435 (1964) (grant of additional benefits to all employees before representation election for purpose of discouraging unionization). *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233–36, 83 S.Ct. 1139, 1148–1150, 10 L.Ed.2d 308 (1963) (post-strike award of super-seniority to striker replacements and nonstrikers); *NLRB v. Rubatex Corp.*, 601 F.2d 147, 149–50 (4th Cir.) (post-strike bonus to union and nonunion strikers), *cert. denied*, 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979); Aero-Motive Manufacturing Co., 195 NLRB 790 (1972), *enf'd*, 475 F.2d 27 (6th Cir. 1973) (post-strike bonus to non-striking union employees). The timing of such wage increases is a relevant factor in determining whether an employer's action violates § 8(a)(1). *See Russell-Newman Manufacturing Co. v. NLRB*, 407 F.2d 247, 251–52 (5th Cir. 1969) (wage increase at nonunion plant just after union won elelction at company's other plant violated § 8(a)(1)); *NLRB* v. *Fitzgerald Mills Corp.*, 313 F.2d 260, 268 (2d Cir.), *cert. denied*, 375 U.S. 834, 84 S.Ct. 47, 11 L.Ed.2d 64 (1963) (unilateral wage increase to all (unionized) employees, announced contemporaneously with strike decision, violated § 8(a)(1) and (5)); *NLRB v. Otis Hospital*, 545 F.2d 252, 256 (1st Cir. 1976) (withholding promised wage increase from all employees during union organizing compaign violated § 8(a)(1)). The relevant inquiry is whether the wage increase impermissibly discriminated against the union by "demonstrat[ing] for the future the special rewards which lie in store for employees who choose to refrain from protected strike activity," *Aero-Motive, supra*, 195 NLRB at 792, and "[bringing] home in concrete fashion to those employees who were aware of it that it did not pay to become associated with the union," *Chanticleer, Inc.* 161 NLRB 241, 252 (1966).[9]

On the other hand, an employer may lawfully treat differently union and nonunion employees or employees in different bargaining units, where a legitimate business justification is shown for such action, and absent evidence of bad faith or antiunion motive. In *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971), during the course of negotiations with the union the company granted nonunion employees wage increases and improved benefits and denied the same to union employees. The court denied enforcement of the Board's findings of § 8(a)(1) and (3) violations, stating, "* * * in a context of good-faith bargaining, and absent other proof of unlawful motive, an employer is privileged to withhold from organized employees wage increases granted to unorganized employees or condition their grant upon final contract settlement." *Id.* at 1074. Similarly, in *Omaha Typographical Union v. NLRB*, 545 F.2d 1138 (8th Cir. 1976), the court upheld the Board's dismissal of an 8(a)(1) charge regarding the employer's grant of selective bonuses to those who had worked long hours during a strike by the union. The court reasoned that "[d]isparate treatment of workers of *different units* provides no inference of discrimination * * *. [T]he bonuses were paid for a legitimate business purpose [*i.e.*, rewarding the extraordinary effort necessary to continue operations] which did not interfere with the exercise * * * of the employees' § 7 rights to engage in strikes." *Id.* at 1144 (emphasis added).

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Although the issue is a close one, we hold that the Board's conclusion that the wage increase violated § 8(a)(1) is supported by substantial evidence. The timing of the increase (granted on the first day of the strike), its amount (an immediate, retroactive 25 cents-per-hour as compared to the six-month increments of 15 cents, 10 cents, 15 cents and 10 cents offered the union), and the evidence of causation (Charles Soule's testimony that the pickets prompted the wage increase) all support the conclusion that the employer's action would tend to interfere with and undermine a reasonable employee's exercise of the right to strike, and that this effect was at least clearly foreseeable, if not in fact intended.

To be sure, there are a number of countervailing factors which might have produced a reasonable conclusion to the contrary. Among these are the fact that the increase was granted only to non-bargaining unit employees of a different corporation[10] who had recently voted to decertify the union, the proffered business justification regarding the consistency of the timing of the increase with past practice, and the fact that the increase was not announced to the union (which could cut both ways). Also, we are troubled by the conclusory manner in which the ALJ asserts his certainty as to the employer's antiunion intention, and his reliance on a patently distinguishable case.[11] Notwithstanding these concerns, our review is a limited one, and we may not substitute our judgment for that of the Board. There is substantial evidence in the record supporting the ALJ's findings, and, giving due deference to the Board's experience and expertise in such matters, we conclude that the ALJ's inferences as to causation, the probable effect of the wage increase upon the striking employees, and the employer's motivation are reasonable. Therefore, we affirm the ALJ's holding that the wage increase violated § 8(a)(1).

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[9] In this respect there is considerable overlap between § 8(a)(1) and § 8(a)(3), which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," 29 U.S.C. § 158(a)(3), except that § 8(a)(3) typically requires a showing of antiunion motivation. *See* R. Gorman, *supra*, at 137–38. No § 8(a)(3) violation was charged regarding the wage increase.

B. *The § 8(a)(5) Violation*

To the extent that the additional § 8(a)(5) finding has independent force, however, we reverse on due process grounds the ALJ's holding that the wage increase also violated § 8(a)(5). No § 8(a)(5) violation was charged in the amended complaint with respect to the wage increase. The ALJ, acknowledging this fact, stated as justification that

> the facts upon which this additional finding of a Section 8(a)(5) violation is based are the same and were fully litigated. It is well established that an employer may violate Section 8(a)(5) of the Act during negotiations by the conduct of its supervisors and agents away from the bargaining table. *Chatham Manufacturing Company*, 172 NLRB 1948, 1978.

Accepting the validity of the latter proposition, we are unable to sustain the § 8(a)(5) finding. Because no explanation is given of how or why the wage increase additionally violated § 8(a)(5), we are unable to determine that this issue was in fact "fully litigated," notwithstanding the ALJ's conclusory assertion that it was. There is nothing in the record suggesting that the employer had notice at the hearing that its good faith in dealing with the union on and before April 12, 1976 was at issue. To the contrary, there are affirmative indications that the company's counsel believed and acted on the justifiable assumption that it was not. *See* part IX *infra.* Due process forbids the ALJ from gratuitously injecting new issues into the case and deciding them *sua sponte. NLRB v. Tamper, Inc., supra,* 522 F.2d at 789–90. Moreover, on substantive grounds, it is not immediately apparent, in light of *Chevron, supra,* how granting a wage increase to non-unit non-union employees—with respect to whom there was no duty to bargain with the union—can of itself constitute a refusal to bargain in good faith, absent some other evidence of bad faith not present here.

C. *Conversion of the Strike*

It is apparently undisputed, and the ALJ found, that "the strike was called because the wage issue was not settled and therefore was an economic strike at the outset." However, the ALJ found that the strike was "converted" to an unfair labor practice strike on its first day, April 12, 1976, by the company's unfair labor practice of granting the wage increase.[12] The ALJ notes that the wage in-

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[10] The significance of the fact that SGI and SGG were distinct corporate entities is vitiated by our conclusion, in part II, *supra*, that the two were properly found to be a "single employer" for the purposes of the Act. Also, the evidence shows that the replacements for striking SGG bargaining unit members, when hired, also received wages 25 cents-per-hour higher than union members had previously received for the same job classification.

[11] As is discussed in greater detail in part IX *infra, Alba-Waldensian, Inc.*, 167 NLRB 695 (1967), was a case in which the employer's grant of additional wages and benefits to employees in its unorganized plants while denying the same to the union was just one of many elements supporting a finding of overall course of bad faith bargaining. The wage increase was merely cited as additional evidence of bad faith and was not treated as an independent violation. In this context the Board concluded that the company "utilized the pay raise to demonstrate to the [unionized] employees . . . the impotence of the [union]." *Id.* at 696–97. *Alba-Waldensian* presents a pattern of employer behavior far more egregious in degree and kind than is disclosed by the record here. Here we find no evidence, independent of the fact that the wage increase was granted, to support the inference that the company's intention was to disparage and undermine support for the union, or that this action was part of an overall scheme of bad faith bargaining (*see* part IX *infra*).

Nevertheless, given that intent or motive is not an element of a § 8(a)(1) violation, cases like *Rubatex* and *Aero-Motive, supra*, do at least by analogy provide support for the Board's ultimate § 8(a)(1) conclusion.

[12] The exact basis of the ALJ's finding of conversion is somewhat clouded. The relevant passage from the ALJ's decision reads as follows:

> *Beginning with the April 12 wage increase the respondent engaged in a course of conduct* designed to disparage the Union in the eyes of its members, erode its strength, undermine its bargaining position, and ulti-

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crease was promptly reported to the union pickets by the nonstrikers, and was shortly thereafter discussed at a union membership meeting.

A strike begun in support of economic objectives becomes an unfair labor practice strike when the employer commits an intervening unfair labor practice which is found to make the strike last longer than it otherwise would have. *E. g., NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978); R. Gorman, *supra*, at 339. It must be found not only that the employer committed an unfair labor practice after the commencement of the strike, but that as a result the strike was "expanded to include a protest over [the] unfair labor practice[ ]," *NLRB v. Top Manufacturing Co.*, 594 F.2d 223, 225 (9th Cir. 1979), and that settlement of the strike was thereby delayed and the strike prolonged. *Moore Business Forms, supra*, at 840. The central, and most problematic, element is causation—the effect of the employer's unlawful conduct on the union and its strike. Was the unfair labor practice a proximate cause of the lengthening of the strike? The burden of proof is on the General Counsel to demonstrate prolongation, and the Board's determination of conversion is reviewed under the usual substantial evidence standard. R. Gorman, *supra*, at 340. However, it need not be shown that the employer's unfair practice was "the sole or even the major cause or aggravating factor of the strike," but only that it was "*a contributing factor.*" *Moore Business Forms, supra*, at 840 (emphasis added). The new issue injected into the bargaining process by the employer's violation "need not be the sole cause for failure to agree." *Rogers Manufacturing Co. v. NLRB*, 486 F.2d 644, 649 (6th Cir. 1973), *cert. denied*, 416 U.S. 937, 94 S.Ct. 1937, 40 L.Ed.2d 288 (1974).

Both objective and subjective factors may be probative of conversion. Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice. Did they continue to view the strike as economic or did their focus shift to protesting the employer's unlawful conduct? *See NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 242 (9th Cir. 1978); *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691, 703 (7th Cir. 1976). However, in examining the union's characterization of the purpose of the strike, the Board and court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context. *See Colonial Haven, supra*, at 705; *Winter Garden Citrus Products Corp. v. NLRB*, 238 F.2d 128, 130 (5th Cir. 1956).

On the record before us, we are unable to sustain the Board's finding that the strike was converted by the April 12, 1976 wage increase. Although we have held that the wage increase was an unfair labor practice, our review does not disclose substantial evidence that this violation prolonged the strike. The ALJ's finding of conversion is both ambiguous and conclusory, *see* note 12 *supra*, and contains no finding as to causation or any discussion at all of evidence as to the *effect* of learning of the wage increase upon the strikers.

The only direct evidence bearing on the issue is the uncorroborated [13] testimony of union business agent Walter Dolbow, whom the ALJ credited generally, that the wage increase was discussed "at length" at the union membership meeting held about a week after April 12 and that the membership "agreed that they would not go back *at the wage package that the company had presented.* They felt that if they could give the non-striking employees this kind of an increase, we should have been at least offered the same thing" (emphasis added). Dolbow also testified that the membership was "all steamed up" at the meeting over the fact that management and SGI employees "were doing our

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> mately destroy its majority. This course of action was highlighted by specific incidents of bad faith which have been discussed in detail [above] * * *. Consequently, I find that the strike was converted to an unfair labor practice strike on April 12 by Respondent's unlawful conduct, and was *thereafter prolonged* by the Respondent's unfair labor practices both at and away from the bargaining table.

(Emphasis added.) It is thus unclear whether the ALJ found that the wage increase alone converted the strike or instead that it was the first of a sequence of events the combined force of which converted the strike as of the time of the first event, April 12. If the ALJ's finding is interpreted in the latter way, it is like a finding that the camel's back broke when the first straw was loaded. *See* note 14 *infra*.

[13] The General Counsel offered no other testimony as to the events at the union's post-strike meeting and the members' reaction to the wage increase.

work." Thus, it appears that the wage increase was only one of the things about which the members were upset in the first week of the strike. Fully crediting Dolbow's testimony and taking it at face value establishes that (1) the union would not accept the company's wage proposal (the unacceptability of which was the undisputed cause of the strike) and would remain on strike until the company increased its offer by some unspecified amount, and (2) that the 25 cent increase to the nonstrikers effectively set a "floor" be-

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low which the union, it can be inferred, would not settle. *Cf. NLRB v. Brazos Electric Power Coop.*, 615 F.2d 1100, 1101 (5th Cir. 1980). The first proposition merely reaffirms the economic nature of the strike. The most that could be inferred from the second, standing alone, is that the wage increase *may* have "aggravated [the company's] differences with the Union" on the crucial wage issue, *Kohler Co.*, 128 NLRB 1062, 1083–84 (1960), and thereby caused the union to hold out for a higher offer or to persist with higher demands than it otherwise would have. In context and without some further corroboration in the record, however, the latter inference is an unduly tenuous and speculative basis on which to hinge the Board's determination of the fundamental nature of the strike and the harsh remedial consequences that flow from such a determination.

Given the scant and equivocal evidence of the union's contemporaneous reaction to the wage increase, it is appropriate to look to subsequent events and the overall context of the strike for indications as to whether the wage increase in fact prolonged the strike.[14] The record of the bargaining sessions after April 12 belies the claim that the 25 cent-per-hour wage increase prolonged the strike. The union's final pre-strike wage demand was an immediate $1.10-per-hour increase for a one year contract, a demand company attorney Levenson testified the union was "very serious about," because the SGG glazies "felt themselves low men on the totem pole, in comparison with the whole country's glaziers." Thus, it appears that the union's relatively high wage demand, as compared to previous increases,[15] was not mere window dressing, but was a sincere position based on the strikers' preception that they were substantially underpaid.

That the union's predominant, if not sole, concern after April 12 remained improving substantially its members' wages, rather than protesting or redressing the company's favorable treatment of the nonstrikers, is indicated by Walter Dolbow's testimony regarding the first post-strike bargaining session on May 6, 1976. Dolbow stated that "[w]e were determined to increase our wages * * *. We wanted a decent increase"; and that "Jim [Holcroft, the Union's chief negotiator] stated that the main problem was money and our members were adamant to the point that we were not going to stay at the low point that we had been put by the company." Other union negotiators subsequently reiterated that wages were the critical issue, and for some time refused to discuss other issues. However, there is no indication in the record that the wage increase to nonstrikers was a major source of dispute or topic of discussion at any bargaining session, that it was used as a point of reference by the Union's negotiators for their demands, or that the wage increase was ever even discussed at the bargaining table. Indeed, it was not until July 27, 1976 that the union filed an unfair labor practice charge which included the wage increase.[16] Moreover, Dolbow tes-

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[14] The ALJ may have meant to apply a theory that later events contributed retroactively to converting the strike as of April 12. However, that theory cannot be sustained. As a factfinding it would be plainly erroneous. *See* note 12 *supra*. Nor can it be sustained as a legal proposition—that a conversion effectuated by later events should be treated in law as retroactively effective as of the date of the first event. Evidence of later events may be relevant to other issues, but it does not prove conversion at an earlier date. Conversion of a strike is a legal concept focused on the effect on strikers, which in turn leads them to prolong their strike. *See.* p. 1080, *supra*. Thus, only when the essential effect has been accomplished does the conversion occur.

[15] Under the previous (1973) contract, between 10/3/73 and 10/1/75 SGG employees received raises at six-month intervals of 20 cents, 10 cents, 10 cents, 10 cents, and 10 cents. At the time of the 1976 negotiations, the minimum SGG journeyman glazier's rates were: $5.40/hour (Portland), $5.20/hour (Lewiston-Waterville), and $5.15/hour (Bangor).

[16] In the interim, on June 8 the union filed an unfair labor practice charge alleging the company's refusal to bargain in good faith, unilateral closing of the Lewiston-Waterville shops, and transfer of unit work to SGR; and on July 6 the union filed a charge regarding the alleged assault by supervisors Churchhill and Tribou. The July 27 charge additionally charged that the company had "unilaterally consolidated" unit glass replacement work and unilaterally placed into effect new [wage?] zones, and that the strike was "caused or prolonged by the above-named unfair labor practices."

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tified that in February, 1977 (after 10 months of striking and 4 sets of unfair labor practice charges) he appeared on television news and told the reporter "something to the effect that the men on that job (being picketed) were working for substandard wages and that *we were on strike or more money.*"

Although the union eventually modified and reduced its wage demands, with the exception of its short-lived proposal on May 7 (for a three year contract with annual increments of 26¢ and 26¢, 29¢ and 29¢, and 54¢), the union persisted in demanding a wage increase of the order of magnitude originally demanded and a one-year contract. After reducing its wage demands to 90 cents/one-year June 18 and to 80 cents/one-year on August 27, the union's final proposal, made on October 18, was 80 cents-per-year over a two-year contract. The company consistently insisted on a two-year contract, and increased its 15¢/10¢/15¢/10¢ prestrike offer only once, on May 7, to 20¢/15¢/21¢/15¢.

Thus, it is fair to say that the parties never got close to agreement on the wage issue, and that the two sides' proposals were not even in the same ballpark. The union's final annual raise demand was 2.3 times the company's final annual offer, and that is only when the six month increments are aggregated. There is no indication whatsoever that the union would have settled for anything like the one-shot 25 cent increase granted to the nonstrikers. Nor is there any evidence that but for the April 12 wage increase the union would have lowered its demands or that the strike otherwise would have been settled sooner. Rather, the record taken as a whole supports the conclusion that what caused and prolonged this protracted strike was the company's lawful adherence to a relatively low wage offer and the union's lawful adherence to a relatively high wage demand. As discussed below, § 8(d) of the Act, 29 U.S.C. § 158(d), explicitly states that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Adamant insistence on a bargaining position * * * is not in itself a refusal to bargain in good faith." *Chevron Oil Co. v. NLRB, supra,* 442 F.2d at 1072.

For these reasons we hold that the wage increase did not convert the union's economic strike to an infair labor practice strike on April 12, 1976. Whether subsequent unlawful conduct by the company might have converted the strike at a later date will be considered below.

VI.

Unilateral Action: Reneging, Plant Closings, and Replacement Work Transfer

The ALJ found that the company violated § 8(a)(5) and (1) of the Act by:

> [1] reneging on its agreement with the Union concerning the three wage zone clause, [2] by unilaterally closing its Lewiston-Waterville operations without fully revealing and discussing all the effects of the closure on the employees, and [3] by unilaterally and permanently assigning bargaining unit work to [SGR] without advance notice and bargaining with the Union prior to the time this change was placed in effect.

The ALJ found that each of these actions was "related" and was part of Charles Soule's overall plan to restructure the Soule companies' operations. We consider each of these findings sequentially.

A. *"Reneging" on Bargaining Commitments*

In appropriate circumstances, a party's "reneging on commitments already made in ongoing negotiations" may be held to violate § 8(a)(5). R. Gorman, *supra,* at 408. As Professor Gorman explains,

> If, for example, a tentative agreement is reached on a number of bargaining items, a refusal to honor that agreement at a later date *without good reason* may be
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> viewed as an indicator of bad faith. Thus, if the employer * * * repudiates understandings already arrived at, abruptly changes its positions without any announced reason, or interposes new demands not raised earlier, this conduct will destory not only amicability at the bargaining table but also the premises on which bargaining had progressed, and will protract the negotiations and delay settlement.

Id. (emphasis added). *See, e. g., San Antonio Machine & Supply Corp. v. NLRB,* 363 F.2d 633, 641 (5th Cir. 1966) (significant "reversal of position" on seniority clause "indicative of a lack of good faith").

However, "by showing that the earlier negotiations had not clearly resulted in agreement, or that an earler understanding was intended to be conditioned on the resolution of other disputed issues, or that there were other good reasons to modify one's bargaining position" a party may negate a finding of bad faith bargaining. R. Gorman, *supra,* at 409. *See Food Service Co.,* 202 NLRB 790, 803 (1973). *Cf. NLRB v. Randle-Eastern Ambulance Service, Inc.,* 584 F.2d 720, 726 (5th Cir. 1978) (context of shifting balance of bargaining strength justified company's withdrawal of previously agreed-to proposals; Board's § 8(a)(5) finding reversed); *NLRB v. Tomco Communications, Inc.,* 567 F.2d 871, 883 (9th Cir. 1978) (distinguishing "offers" from concessions; "Absent abuse not present here, it is perfectly legitimate for a party to retract a proposal before the other side has accepted it.").

Both on due process grounds and because it is not supported by substantial evidence, we reverse the ALJ's finding that the company's alleged "reneging" violated § 8(a)(5). First of all, there was no such charge in the amended complaint.[17] The reason for this omission becomes clear upon a careful examination of certain exhibits in the record. In a charge filed on June 8, 1976, the union alleged that the company had engaged in an unlawful "course of conduct, including but not limited to its announcement of a change of position with respect to items previously agreed on." The Regional Director refused to issue a complaint on this charge. By letter of February 23, 1977, in affirming the Regional Director's refusal to issue a complaint on this charge, the Board's General Counsel stated, "absent bad faith, *which we do not find here,* an Employer, following a strike, may lawfully repudiate previously-made bargaining concessions" (emphasis added). Secondly, there was testimony by negotiators for both the company and the union, not discredited, contradicted, or even mentioned by the ALJ, that the parties were negotiating subject to a mutual initial understanding that all agreements on noneconomic issues were tentative until a final agreement had been reached on all issues. Finally, a withdrawal of a previous agreement is indicative of bad faith bargaining only where such action is arbitrary and not supported by a reasonable justification. Here, the company's change of position with respect to the number of wage zones was based on its plan, also announced at the May 6 negotiating session, to close SGG's Lewiston and Waterville warehouses for economic reasons, leaving only two bases of operations (Portland and Bangor) for SGG. Thus, it cannot be said that the company modified its position "without good reason." [18]

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B. *Unilateral Action Generally*

In general, an employer's "unilateral action" with respect to mandatory subjects of collective bargaining under a collective bargaining agreement is considered an unlawful refusal to bargain. "[A]n employer's unilateral change in conditions of employment under negotiation is * * * a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz,* 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962) (unilateral changes regarding automatic wage increases, sick leave benefits, and merit pay increases during contract negotiations). Perhaps the leading case on unilateral action is *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), which held that a company's "contracting out" of all plant maintenance work previously done by bargaining unit employees, without bargaining, violated § 8(a)(5), where unit employees were replaced by those of an independent contractor doing the same work. The Court reasoned that since the Company's decision "did not alter [its] basic operation, * * * to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business," 379 U.S. at 213, 85 S.Ct. at 404; and that national labor policy required "that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly." *Id.* at 214, 85 S.Ct. at 405.

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[17] The only potentially relevant allegation in the complaint, paragraph 19(a), involves "unilaterally combining certain work zones." However, this cannot fairly be read to give notice of a charge of reneging on an agreement concerning the number of wage zones.

[18] Nor do we find that attorney Levenson's distribution at the August 6 meeting of an "agenda" of topices for discussion, which were either new or proposed modifications on subjects of previous tentative agreement, of itself violated § 8(a)(5) and (1) of the Act. Although the ALJ made no explicit finding on this subject, he implies that this action also was somehow indicative of bad faith. For the above reasons, and in recognition of the significant changes in circumstances occurring over four months of a strike, we cannot sustain this finding.

In *NLRB v. W.R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir. 1978), the court stated:

> It is well-settled that an employer violates its duty to bargain collectively when it institutes changes in employment conditions without first consulting the union * * *. [However,] [t]he employer's power to alter working conditions in his plant is *not* contingent upon union agreement with his proposed change. The company has only to notify the union before effecting the change so as to give the union a meaningful chance to offer counter-proposals and counter-agruments.

(emphasis added; citations omitted) In *Grace*, which involved the company's decision to discontinue a product for economic reasons, with layoffs and elimination of a shift, the court held: "The failure to notify or refusal to bargain with the union over the effects of management decisions to limit production or otherwise alter operations violates Section 8(a)(5) and (1) of the Act." *Id.* at 283.

Good faith bargaining requires timely notice and a meaningful opportunity to bargain regarding the employer's proposed changes in working conditions, since " '[n]o genuine bargaining * * * can be conducted where [the] decision has already been made and implemented.' " *International Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C.Cir.1972). Thus, "[n]otice of a *fait accompli,*" regarding a matter as to which the employer is obligated to bargain to impasse, violates § 8(a)(5). *Id.; see Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182, 1189 (8th Cir. 1978).

As is clear from the above discussion, in some contexts an employer's "unilateral" action ordinarily will *not* violate § 8(a)(5). These situations include unilateral actions where: (1) they relate to matters outside the manadatory bargaining subjects, such as the wages of non-unit, non-union employees, *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 171–78, 92 S.Ct. 383, 393–397, 30 L.Ed.2d 341 (1971) (collective baragaining obligation under § 8(d) extends only to "terms and conditions of employment" of employees in appropriate bargaining unit); (2) the employer has bargained in good faith to impasse on the issue, *e. g., NLRB v. U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963); (3) the changes merely preserve the "dynamic status quo," consistently with past policies and practices, *see* R. Gorman, *supra*, at 450–54; (4) the union has made a "clear and unmistakable waiver" of its right to bargain on the issue, *e. g., Metromedia, supra*, 586 F.2d at 1189; R. Gorman, *supra*, at 466–69; and (5) the actions concern certain major business decisions involving fundamental changes in the scope, nature, or mode of operation of the business, or the commitment of investment capital, *see Machinists and Aerospace Workers v. Northeast Airline, Inc.*, 473 F.2d 549, 557 (1st Cir.), *cert. denied*, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed2d 85 (1972) (no duty to bargain regarding merger); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268–69, 85 S.Ct. 994, 998–999, 13 L.Ed2d 827 (1965) (closing entire business not unfair labor practice; "some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1)"). *See generally* R. Gorman, *supra*, at 443–45. The applicability of these exceptions is discussed below.

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C. *The Warehouse Closing*

As quoted above, the ALJ found that the company violated § 8(a)(5) and (1) "by unilaterally closing its Lewiston-Waterville operations without fully revealing and discussing all the effects of this closure on the employees." The ALJ found, in support of this conclusion, that by the May 6, 1976 bargaining session, "[t]he Respondent had already decided to close its Lewiston-Waterville facility and work the crews from their homes," and that at the May 6 session the company "presented the Union with a *fait accompli,* Lewiston-Waterville was closing, and the crews were going to work out of their homes." With regard to bargaining on the subject, the ALJ found that

> [a]though it then "discussed" with the Union some of the effects of the closing * * * on the employees, there was no meaningful bargaining since Respondent had unilaterally decided upon the effects as well. Furthermore, Respondent did not discuss all of those effects, which included its planned (SGR) operations. Thus, the Respondent unilaterally changed important working conditions of its bargaining unit employees at Lewis-

ton-Waterville without advance notice and bargaining about all of the important effects of this decision on its employees.

A subcategory of the law of "unilateral actions" involves the special problem of plant closings. As summarized by Professor Gorman.

> [R]egardless of whether the employer is obligated to bargain about such major *decisions* as going out of business, closing down one of several plants, or subcontracting work currently done by its employees, it must bargain about the *effects* or *impact* of those decisions, such as severance pay or transfer to other company jobs or locations.

R. Gorman, *supra,* at 499 (emphasis added). Thus, there is an important distinction between the duty to bargain about a particular business *decision* affecting unit employees and the duty to bargain about the decision's *effects* on the unit employees; a distinction which at times is difficult to draw. In the case, however, it is only bargaining with respect to the decision's *effects,* not the underlying decision,[19] that is at issue.

In a number of cases involving business changes such as the termination of a particular product line or the closing of one of several plants, courts have held that the employer is required to give the union notice and the opportunity to bargain with respect to the effects of the decision on unit employees before implementing the change. *E. g., NLRB v. W.R Grace & Co., supra,* 571 F.2d 279 (product discontinuation with layoffs and shift changes); *International Union, UAW v. NLRB,* 470 F.2d 422 (D.C.Cir.1972) (sale of factory-owned truck dealership with terminations of all employees; no violation where company official discussed and attempted to mitigate effects with union on and after date of transfer); *Ladies Garment Workers v. NLRB, supra,* 463 F.2d 907 (plant relocation; under circumstances notice and bargaining regarding both decision and effects required); *NLRB v. Acme Industrial Products, Inc.,* 439 F.2d 40 (6th Cir. 1971) (relocation of part of manufacturing operations from old to new plant for economic reasons; no violations where "employer stands ready to negotiate with the Union in respect to any and all (effects) of its move"); *Weltronic Co. v. NLRB,* 419 F.2d 1120 (6th Cir. 1969) (transfer of electronic assembly work from union to nonunion plant, with no layoffs), *cert. denied,* 398 U.S. 938, 90 S.Ct 1841, 26 L.Ed.2d 270 (1970). Nevertheless, as this court observed in *Northeast Airlines, supra* "[t]o allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place." 473 F2d at 558.

A threshold issue is whether petitioners had sufficient notice that the plant closing was in issue, and whether this issue was "fully litigated" so as to comport with due process. As noted above, there is no mention of the Lewiston-Waterville plant closing as an § 8(a)(5) violation in the amended complaint.[20] However, in this instance we hold that the plant closing issue was fully and fairly litigated. Several witnesses were questioned by both counsel as to the reasons for, and timing, *announcement implementation, permanency,* and bargaining table discussion of the Lewiston-Waterville closing. There is no merit to the company's argument that due process was not afforded with respect to this issue.

The above-quoted passages from the ALJ's opinion, p. 1085 *supra,* make clear that the § 8(a)(5) violation found was a matter of degree rather than a *per se* refusal to bargain. There is no finding that the company completely failed or refused to discuss the effects of the closing decision upon the affected employees. Indeed there appears to be no dispute that the subject of the treatment of the employees was discussed by both sides of some length at the May 6 and 7 sessions (including discussions of combining seniority lists, superseniority, and travel pay), and that no agreement was ever reached on the subject.[21] What the ALJ found was

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[19] The Board did not hold that the company violated the Act by failing to bargain with respect to its decision to close the SGG Lewiston and Waterville warehouses. It is undisputed that this business decision was based on economic considerations of unprofitability and the need to reduce overhead, and that unit jobs were not to eliminated. There is nothing in the record to suggest antiunion motivation. Apparently the unlawful *fait accompli* found by the Board was therefore not the announcement of the final decision to close Lewiston-Waterville (which we may assume, without deciding, that the company had the right to do), but rather the fact that before the announcement the company "had unilaterally decided upon the effects as well," precluding any meaningful bargaining as to the treatment of the affected unit employees.

[20] The only potentially relevant allegations are:

"unilaterally combining certain work zones," ¶ 19(a), and unilaterally reassigning bargaining unit work to nonunit employees, ¶ 19(d). Although arguably related, these allegations cannot fairly be said to give notice of a refusal-to-bargain issue regarding a plant closing.

[21] Of particular note is the credited testimony of union negotiator Walter Dolbow concerning the May 6 meeting of the parties:

Continued

that the company announced the closing "without fully revealing and discussing *all* the effects of this closure on the employees," and that although the company " 'discussed' with the Union *some* of the effects" after the announcement, "there was no *meaningful* bargaining" since the company had already "unilaterally decided upon the effects as well" (emphasis added). Among the "effects" omitted from discussion by the company was "its planned [SGR] operations."[22]

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Thus, the sense of the Board's finding seems to be that the company merely went through the motions of bargaining regarding the effects of the Lewiston-Waterville closing while in fact having made up its corporate mind what it would do with the affected employees—in essence a finding of "surface bargaining." It is not the company's refusal to bargain regarding effects, but rather its state of mind while ostensibly doing so—subjective bad faith—that apparently was found to be an unfair labor practice.

Our careful examination of the record discloses no support for the ALJ's inference of bad faith bargaining with respect to the Lewiston-Waterville plant closings. The company manifestly offered to discuss the effects of this operational chance on unit employees, offered three proposals on the subject, and bargaining in fact did occur. The fact that no agreement was ever reached is indicative, in this context, not of the company's refusal to bargain in good faith on the issue, but of bona fide bargaining to impasse. The union was given "a meaningful change to offer counter-proposals and counter-arguments" to the company's "effects" proposals. *NLRB* v. *W. R. Grace & Co., supra,* supra, 571 F.2d at 282. That is all the Act requires. We find no evidence that the company merely "engag[ed] the union in sham discussion," *Ladies Garment Workers, supra,* 463 F.2d at 917.

An argument of somewhat more substance is that the company implemented the plant closing decision before it had bargained to impasse with the union on the effects issue—that when announced the closing decision, its implementation, and its effects on employees were already accomplished. The testimony of the various company witnesses establishes that the closing *decision* was made and became final in early May, prior to May 6; was announced to Kenwood Kimball, the SGG Lewiston branch manager, during the first week in May by SGG president Edward Churchill; and that the actual closing took place between May 12 and May 15. In the interim the lengthy May 6 and May 7 bargaining sessions were held, with no agreement as to the treatment of the Lewiston and Waterville crews. Thereafter, the union adhered to the position that the company could not close the warehouses, and at the next session on May 25 took the position that everything was settled except wages. Although the ALJ discredited testimony that union negotiator Holcroft stated at the close of negotiations on May 7 that the parties were at an impasse, one could reasonably conclude that an impasse had been reached at least as to the closing/effects issue.

In any event, irrespective of the precise dates of impasse and implementation of the *closings,* it is clear that the company could not have implemented its proposed *effects* of the closings—i. e., having the men report to jobs directly from their homes—until June 1976 or later, because at the time of all these events SGG had no active employees. All were on strike, and no replacements were hired for the Lewiston-Waterville operation until late

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> DOLBOW: The company announced that they had closed the plants in Lewiston and Waterville and that they now wanted to go to two (wage) zones and they informed us that then *we would have to negotiate what to do with the employees.*

[22] The ALJ elaborated on the relationship he saw between the plant closing and the advent of SGR thus: "Respondent had already decided [as of May 6] to close the Lewiston-Waterville facility and work the screws from their homes, in order to set the stage for the day when [SGR] would become fully operational and would be in a position to take over SGG's replacement work.

> ATTY. LEVENSON: Was there any discussion about any of the employees right then and there?
>
> DOLBOW: Right then and there, yes, sir, there was.

(Emphasis added.) Attorney Levenson later testified to the same effect:

> At the May 6th meeting, I indicated that the Company wanted to close the Lewiston and the Waterville warehouses. *And then I wanted to discuss, and asked to discuss the effects of that closing. I had these three proposals* * * *

(Emphasis added.)

We cannot sustain the ALJ's conclusory assertion of the relationship between the plant closing and the creation of SGR. The two have no necessary logical or functional relationship, and each was justified by the company, in undisputed testimony, as serving distinct business purposes. Since we find no substantial evidence in the record of any such relationship (except perhaps a rough temporal coincidence and an allegation by the union that SGR commenced operations at SGG's former Lewiston location), we conclude that SGR was not an undisclosed *effect* of the Lewiston-Waterville closing. Whether nondisclosure and failure to bargain regarding SGR was in independent violation we consider *infra.*

May.[23] Hence, it is somewhat illusory to talk of the effects of the plant closing upon members of the bargaining unit, who while on strike were not concretely affected at all. Under these circumstances, where the company did offer to bargain in good faith about the effects of the operational change upon bargaining unit employees before any changes were actually implemented, we hold that no violation of § 8(a)(5) or (1) occurred.

D. *Diversion of Bargaining Unit Work*

The ALJ found that the company also violated § 8(a)(5) and (1) "by unilaterally and permanently assigning bargaining unit [glass] replacement work to [SGR] * * *." In support of this conclusion the ALJ found that

> the corporate reorganization and its effect on the bargaining unit remained concealed until completed and sprung upon the Union's negotiators also as a *fait accompli* at the August 6 bargaining session. It was then the Union learned for the first time * * * that these changes were in force and that all of SGG's bargaining unit replacement work had been permanently lost to the nonunion [SGR].

It is clear that "[t]he preservation or diversion of unit work" constitutes a "term [or] condition of employment" subject to mandatory bargaining under § 8(d) of the Act. *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). The employer must bargain with respect to the *decision* to remove work from bargaining unit employees, not merely its effects on the employees. The leading case is ***Fibreboard Paper Products Corp. v. NLRB***, 379 U.S. 203, 209, 85 S.Ct. 398, 402, 13 L.Ed.2d 233 (1964), which held that the employer is required to bargain about "contracting out" work previously performed by members of the bargaining unit. As discussed above, the ***Fibreboard Court*** reasoned that where the operational change would merely reassign work done by existing employees to others (an independent contractor) who would "do the same work under similar conditions of employment," it would not unduly impair management prerogative to require bargaining, and that national labor relations policy required that the union be given an opportunity to negotiate a mutually acceptable alternative. *Id.* at 213–14, 85 S.Ct. at 404–405. In *American Cyanamid Co. v. NLRB*, 592 F.2d 356 (7th Cir. 1979), the court applied *Fibreboard* to hold that the employer's decision, during a strike, permanently to contract out maintenance and service work, terminating half of the bargaining unit employees, violated § 8(a) (5) and (1) and converted the strike. The court distinguished permanent contracting out, where bargaining is required, from *temporary* contracting out "to enable the employer to continue operating in an emergency situation thrust upon it by a strike," where it has been held that bargaining was not required. *Id.* at 360. *See Puerto Rico Telephone Co. v. NLRB*, 359 F.2d 983, 987 (1st Cir. 1966) (need not bargain about subcontracting "to meet some temporary or transient need, * * * unless the subcontracting adversely affects the unit's present employees").

The record makes clear that some significant portion (but not all) of the "outside" glass replacement work formerly done exclusively by SGG employees was assigned to the newly-created, nonunion SGR "replacement centers" at some point during the strike, as part of Charles Soule's corporate reorganization plan, and that at some point this transfer became "permanent." Charles Soule testified that he began to set up "replacement centers" consolidating the former King & Dexter and SOAGCO divisions of SGI in late April, 1976; that "technically * * * from an accounting standpoint" SGR did not begin to exist "until June of '76"; and that SGR signs first appeared in July or August. Walter Dolbow testified that he first became aware of SGR in mid-May, 1976 when "the signs first started being noticed by the strikers."[24] Kenwood Kimball, SGG's Lewiston manager, testified that in mid-May the SGG supervisors stopped doing emergency replacement work, which was

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[23] The first Lewiston replacement, Daniel Moreau, began work on May 24, 1976. The other three Lewiston replacements started in mid-June or later.

[24] We note that in its first set of unfair labor practices charged, filed on June 8, 1976, the union charged, *inter alia*, that "the company continues to do business at its Lewiston location under the changed name of Soule Glass Replacement"; and that the union's June 27 charge included the allegation that the company had "unilaterally consolidated glass replacement work formerly performed by bargaining unit employees."

taken over by SGR, that SGG started doing exclusively contract work at this time, and that the reason for the transfer was that due to the strike SGG had no men to do the replacement work. Several witnesses testified that once permanent replacements were hired, SGG resumed doing some outside replacement work, but less than before the strike. Charles Soule testified, somewhat equivocally, that the decision to transfer SGG glass replacement work to SGR is and was a permanent decision, and was made in June or July of 1976. The existence of SGR and the company's intention to transfer permanently to SGR SGG's replacement work was first disclosed to the union at the August 6 bargaining session, when attorney Levenson presented an "agenda" including these and other "proposals." The union reacted with what the ALJ characterized as a "stunned" silence.

The issue is whether the company had made a *permanent* transfer of some portion of SGG's outside glass replacement work to SGR before August, 6, with the result that Levenson's purported " proposals" were really the announcement of a *fait accompli.* The company argues, *inter alia,* that the change was not made permanent until some unspecified later date, and that until that time the changes were a temporary response to the exigencies of the strike. The ALJ found otherwise. On this issue the ALJ is on much firmer ground. Substantial evidence supports his inference that the company had already made and implemented its decision by August 6.

One indication that the shift of replacement work effectively became permanent prior to August 6 is that only a portion of the replacement work was shifted back to SGG when the hiring of striker replacements during June and July eased SGG's strike-caused labor shortage. Also, apart from the metaphysical question of when a change becomes "permanent," there is no evidence that Charles Soule ever intended that his reorganization plan and concomitant new division of labor be instituted on a trial basis, or merely as a temporary response to the strike. Neither the fact that SGG (striker replacement) employees resumed or continued doing *some* replacement work nor the fact that there was no ultimate decline in the SGG workforce vitiates the conclusion that substantial work was diverted from the bargaining unit.

The ALJ's findings, amply supported by the record, thus compel the conclusion that the company failed to give the union notice of its intended action with respect to SGR "sufficiently in advance of actual implementation * * * to allow reasonable scope for bargaining," *Ladies Garment Workers v. NLRB, supra,* 463 F.2d at 919. Such unilateral action, without prior bargaining to impasse, violates § 8(a)(5). The company's argument that the union waived bargaining on this issue, either by its silence on August 6 or by virtue of the contractual management rights clause, is without merit. We therefore affirm the ALJ's finding that the diversion of bargaining unit work to SGR, without prior disclosure or bargaining, violated § 8(a)(5) and (1) of the Act.

In light of the ALJ's finding that the strike was "prolonged by the [company's] unfair labor practices both at and away from the bargaining table" subsequent to April 12, it becomes necessary to consider whether the record supports the inference that the company's failure to bargain regarding the transfer of replacement work to SGR converted the strike. We find no evidence that the company's actions with respect to SGR aggravated, changed the focus of, or in any way prolonged the strike. To the extent that the ALJ found to the contrary, such a finding was necessarily based on impermissible speculation and surmise. The only pertinent testimony as to the union's reaction is Walter Dolbow's exaggerated statement that, based on the SGR "proposal" in the August 6 agenda, "they've taken about 90 percent of the work that we did and gave it away. And if we had bought this proposal, we would have been out of work." By contrast, SGG officers Edward Churchill and Andrew Soule testified that before the strike replacement work constituted only ten percent of SGG's workload, and Andrew Soule estimated that it would be about four percent in 1977, a decline attributable in part to the strike, corporate priorities, and a declining overall trend in glazing sales. All that the record shows is that the SGR "proposal" was unacceptable to the union, that the union made little or no immediate response to Levenson's August 6 presentation, and that in the union's eyes wages continued to be the critical issue at subsequent negotiations. Evidence of prolongation and causation is wholly lacking. Thus, we hold that the record does not support the

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inference that the company's SGR unfair labor practice converted the strike.

VII.

Supervisor Strike Misconduct

The Board found that the actions of SGG president Edward Churchill and SGG Hampden branch manager Edward Tribou on June 25, 1976 violated § 8(a)(1) of the Act. The ALJ found that the supervisors' unlawful conduct included Tribou's throwing picket signs into the street at SGG's Bangor and Hampden facilities, Tribou's and Churchill's solicitation of strikers Carleton French and Harold Douglas, to return to work with promises of increased wages, Churchill's assault on striker Nick Botzko at the Hampden site, and Tribou's threats and attempts to incite a fight at both locations. The ALJ noted that prior to these incidents Churchill and Tribou had "had drinks and lunch at a nearby restaurant." He also found that Nadeau responded to Tribou's threats and taunts that the strikers "were getting to them and that the company officials had been working 7 days a week, 12 to 14 hours a day." In so finding, the ALJ credited the testimony of pickets French, Douglas, and Nadeau, and discredited the accounts of the incidents of Churchill and Tribou, except to the extent that the latter corroborated the strikers' testimony. The ALJ further found that French, Douglas, and Nadeau "reported the respective incidents which they observed in detail to the assembled union membership at the monthly membership meeting a day or two later."

It is clear that a supervisor's physical violence or threats of assault against employees engaged in protected conduct, attributable to the supervisor's employer under agency principles, violates § 8(a)(1). *NLRB v. Fry Foods, Inc.*, 241 NLRB No. 42 (1979), *enf'd*, 609 F.2d 267 (6th Cir. 1979) (per curiam) (threats of violence to union supporters, assault by automobile); *NLRB v. Gibbs Corp.*, 297 F.2d 649 (5th Cir. 1962) (beating of union organizers); *NLRB v. H. R. McBride*, 274 F.2d 124 (10th Cir. 1960) (nonunion company president's violence against union pickets held to coerce nonunion employees); *Heights Thrift-Way, Inc.*, 155 NLRB 52 (1965) (nonunion company president's threats and violence against peaceful union pickets); R. Gorman, *supra*, at 326. Similarly, soliciting striking employees individually and offering financial inducements to return to work has been held to violate § 8(a)(1). *E.g., NLRB v. Easton Packing Co.*, 416 F.2d 256, 258 (3d Cir. 1969); *NLRB v. Neiderman*, 334 F.2d 601, 603 (2d Cir. 1964). Such overtly antiunion conduct, likely to intimidate or under mine employees' free exercise of their § 7 rights, is typically held to be a *per se* violation of § 8(a)(1). Under the objective test, the "ineffectiveness of the supervisors' activities * * * will not vitiate a Section 8(a)(1) finding if the conduct itself, viewed in context, may reasonably induce fear of reprisal or anticipation of reward." *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1115 (7th Cir. 1973).

Under basic § 8(a)(1) objective test principles, however, it is possible that under limited circumstances such objectionable employer conduct might be found to be *de minimis*. As discussed *supra*, the appropriate inquiry is whether, under the circumstances, reasonable union pickets would feel "interfere[d] with, restrain[ed] or coerce[d]" in the exercise of their statutorily protected rights by the incident in question. *Cf. Associated Grocers of New England Inc. v. NLRB*, 562 F.2d 1333, 1335–36 (1st Cir. 1977) (dismissing certain *striker* picket line misconduct as "slight," within allowable "leeway for impulsive behavior," noting objective test is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act"); *Peerless, supra*, 484 F.2d at 1115, 1120 (record shows employees "resolute and unintimidated," supervisor threats and solicitations ineffective, "marginal indiscretions," but § 8(a)(1) finding affirmed as having "reasonale basis in law")

Although the objective impact of Churchill's and Tribou's misconduct is questionable, we affirm the Board's finding of § 8(a)(1) violations as "having a reasonable basis in law." *Peerless, supra*. We find no basis for disturbing the ALJ's reasoned credibility determinations, and the record supports his findings as to the factual details of the two incidents. Strike violence and attempts to subvert or circumvent the bargaining process cannot be condoned. We conclude, however, that viewed in context these were clearly isolated violations of the Act and must be treated as such for remedial purposes. The supervisors' misconduct consisted of two incidents occurring on one Friday afternoon of a long strike. There is no evidence whatsoever that the supervisors' actions were part of any larger scheme by the company to intimidate the strikers or had any relationship to the company's conduct at the bargaining table.[25] More likely, the supervisors' irrational (and inexcusable) behavior resulted from a combination of too much drink,[26] overwork, and frustration caused by the protracted strike and its effect on the business. Not only were the assault and solicitation predictably ineffective in intimidating or enticing the strikers, but they were apparently counterproductive, strengthening the strikers' resolve by showing they were finally "getting to" the company. *Cf. Peerless, supra,* 484 F.2d at 1120. Walter Dolbow testified that the report of the incidents at the union meeting "sort of pulled everybody together at that time. We had almost started to fall apart at that time and the actions of the company did more to unite us than I could have ever done with a big speech." Dolbow said the members "were pretty angry" and reaffirmed that "we would continue to strike to the end."

Since the ALJ found that the strike was converted to an unfair lablr practice strike on April 12, he made no explicit finding as to whether the supervisor misconduct itself would have converted the strike.[27] We hold that the record would not support such a finding. The only relevant testimony is that the Dolbow, just quoted. Apart from our doubts whether Dolbow's conclusory characterizations of the union's collective reaction would if taken at face value support the inference that these incidents prolonged the strike, we agree with petitioners that the incidents' effect on the union was "the exact opposite of what the conversion theory is supposed to prove." As discussed above, pp. 1079-1080 *supra,* the rationale of conversion doctrine is that the strike is "expanded to include a protest over [the] unfair labor practice," *NLRB v. Top Manufacturing Co., supra,* 594 F.2d at 225, and that the strikers remain on strike longer than they otherwise would have *"in protest* against employer conduct which is found * * * to be in violation of the Labor Act." R. Gorman, *supra,* at 339 (emphasis added). Here, by contrast, marginal violation of the Act *encouraged* the strikers to maintain the strike (although there is no basis for concluding that they otherwise would not have) because the supervisors' irrational behavior convinced them that, in Dolbow's words, "we're getting to them when they have to resort to this stuff with our pickets." In other words, the supervisors' impotent acts of frustration gave the strikers new hope that their strike was succeeding. Section 8(a)(1) declares to be an unfair labor practice employer conduct which "interfere[s] with, restrain[s], or coerce[s] employees" in the exercise of their § 7 rights, not conduct which encourages, strengthens, or aids protected conduct. Therefore, the supervisor strike misconduct violations at most support the issuance of a cease-and-desist order.

VIII.

Refusal to provide Requested Information

The ALJ held that petitioners violated § 8(a)(5) and (1) of the Act "by failing and refusing to promptly furnish the Union with adequate relevant information concerning wages necessary to the performance of the Union's functions as collective-bargaining agent during negotiations." The ALJ found that the information requested by the union at the November 22, 1976 bargaining session was requested "in order to justify the Company's wage position," was relevant to the negotiations on "the crucial unresolved issue * * * [of] wages," that the relevance of the requested data was increased by reports that nonstriking employees and replacements had received raises, and that in this context the company's reason for declining to furnish more detailed information—fears for the safety of the replacements in light of alleged union strike misconduct—was inadequate. Finally, the ALJ found that the company's furnishing of additional information, pursuant to settlement agreement, on March 18, 1977, as "too late to be meaningful or legally significant." The ALJ did not distinguish in his findings between the information requested regarding bargaining unit (SGG) employees and non-unit (SGI and SGR) employees.

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[25] The following passage from *Peerless, supra,* aptly characterizes the situation here: "It is difficult to comprehend how the study and sophisticated American working man would be brought to the point of abandoning his pro-union voting intentions by incidents like these * * *. What clearly emerges is a picture of employees with enough hardiness and confidence in their Union and their rights as not to be cowed by these marginal indiscretions." 484 F.2d at 1120.

[26] There is substantial evidence to support the conclusion that Churchill and Tribou were under the influence of alcohol, if not fully intoxicated, at the time of the incidents. both testified that they had been several drinks with lunch at the Pilot's Grill, Bangor. Nadeau and Douglas testified that the supervisors had apparently been drinking, and that one or both had "swizzle sticks" in their pockets, but that Churchill and Tribou were not "drunk.

[27] The ALJ did find that the strike "was *thereafter prolonged* by the Respondent's unfair labor practices both at and *away from* the bargining table (emphasis added). Since the supervisor misconduct was the only subsequent unfair labor practice, besides the diversion of work to SGR, *supra,* occurring away from the bargaining table, it could be reasonably inferred that the ALJ found that the supervisor misconduct prolonged (and thereby would independently have converted) the strike.

A. *The Legal Standards*

The general rule is that an employer must supply, on request, "relevant information" "in the employer's possession" "needed by a labor union for the proper performance of its duties as the employees' bargaining representative," *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L.Ed.2d 333 (1979); i.e., "to enable the [union] to understand and intelligently discuss the issues raised in bargaining * * *." *San Diego Newspaper Guild v. NLRB,* 548 F.2d 863, 866 (9th Cir. 1977). *See* R. Gorman, *supra,* at 409. Absent special circumstances, *see Western Massachusetts Electric Co. v. NLRB,* 589 F.2d 42, 47 (1st Cir. 1978), "relevance" is determinative of the duty to disclose.[28] Relevance is to be determined by a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437, 87 S.Ct. 565, 568, 17 L.Ed.2d 495 (1967). As the Supreme Court noted in the leading case of *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 153–54, 76 S.Ct. 753, 756–757, 100 L.Ed. 1027 (1956), "[e]ach case must turn on its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met."

Where the requested information concerns wages and related information for employees in the bargaining unit, the information is presumptively relevant to bargainable issues." *NLRB v. Rockwell Standard Corp.,* 410 F.2d 953, 957 (6th Cir. 1969). Unless the employer comes forward with an effective rebuttal as to lack of relevance or "provide[s] adequate reasons why he cannot, in good faith, supply the information," *NLRB v. Borden, Inc.,* 600 F.2d 313, 317 (1st Cir. 1979), the union need make no showing of relevance. *Curtiss Wright Corp. v. NLRB,* 347 F.2d 61, 69 (3d Cir. 1965). *See Boston Herald-Traveler Corp. v. NLRB,* 223 F.2d 38, 63 (1st Cir. 1955) (disclosure required "without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement"). Futhermore, the company is obligated to make a "reasonably diligent effort" to obtain such relevant information, and absent some valid justification must provide all of the relevant data requested. *Borden, supra,* at 318.

"[W]here the request is for information concerning employees *outside* the bargaining unit, the Union must show that the requested information is relevant to bargainable issues." *Rockwell-Standard, supra,* 410 F.2d at 957 (emphasis added). Information in the latter category also includes profits, production figures, wage surveys of competitors and other information that "is not ordinarily pertinent to [the Union's] performance as a bargaining representative, but is a alleged to have become so because of peculiar circumstances." *San Diego Newspaper Guild,* 548 F.2d at 867.[29] To meet its burden regarding such information, the Union must show more than "an abstract, potential relevance" or "mere suspicion or surmise." *Id.* at 868. It must show, "by reference to the circumstances of the case * * * more precisely the relevance of the data it desires." *Curtiss-Wright, supra,* 347 F.2d at 69.[30]

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[28] In *Puerto Rico Telephone Co. v. NLRB.* 359 F.2d 983, 986 (1st Cir 1966), we held that "an employer violates Section 8(a)(5) and (1) of the Act by refusing during the term of a collective bargaining agreement, to furnish information requested by the union if such information is *relevant to* a grievance, or to the administration or policing of the agreement." (emphasis in original), and, quoting *Curtiss Wright Corp. v. NLRB,* 347 F.2d 61, 69 (3rd Cir. 1965), we declared that an employer's refusal to honor such a request is a "per se violation of the Act." In *Puerto Rico Telephone,* however, we did not focus on any claim or privilege. We do not consider that decision inconsistent with the position we take here, that under certain circumstances the duty to disclose relevant information may be qualified. *Cf. Emeryville Research Center v. NLRB,* 441 F.2d 880, 886–87 (9th Cir 1971)—(per se language in *Puerto Rico Telephone* and other cases "gratuitous" dicts; holdings "considerably narrower").

[29] Cases requiring disclosure of nonunit employee data include *NLRB v. Brazos Electric Power Coop.,* 615 F.2d 1100, 1101 (5th Cir. 1980) (non-unit employee wage data, where company had maintained "a degree of wage parity between non-unit and unit employees of similar working skills," to prepare for upcoming negotiations); *Western Mass. Electric Co. v. NLRB,* 573 F.2d 101, 107–08 (1st Cir. 1978) (first case) (costs of subcontracting work capable of being done by unit members, where employer claimed use of union employees uneconomical); *NLRB v. Rockwell-Standard Corp.,* 410 F.2d 953, 957 (6th Cir. 1969) (names, job classifications and descriptions for nonunit employees assigned to new facility, where erosion of bargaining unit through work transfer was at issue); *NLRB v. Goodyear Aerospace Corp.,* 388 F.2d 673, 674 (6th Cir. 1968) (per curiam) (job titles, descriptions, wages, benefits, etc. for nonunit R & D employees, where company assignment of employees in dispute; Board summarily affirmed); *Curtiss-Wright Corp. v. NLRB,* 347 F.2d 61, 69 (3d Cir. 1965) (job titles, classifications, descriptions, duties, and pay scales for nonunit "confidential and administrative" employees where shrinkage of unit and misclassification of employees were at issue).

However, where the employer, during bargaining, puts in issue information not presumptively relevant, the employer must produce data to substantiate its claims. As the Court stated in *Truitt Manufacturing, supra,* "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims * * * If such an argument [inability to afford wage increases] is important enough to present, in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152–53, 76 S.Ct. at 755–756. In *Teleprompter Corp. v. NLRB,* 570 F.2d 4, 9 (1st Cir. 1977), this court held, "[w]hen the employer itself puts profitability in contention—as by asserting an inability to pay an increase in wages—information to substantiate the employer's position has to be disclosed." We further stated that "[t]he employer may not limit the relevant information disclosed to just those fragments which satisfy its own view of the issue," and rejected a mootness argument against enforcement of the Board's order. *Id.* at 11. *See Western Massachusetts Electric Co. v. NLRB,* 573 F.2d 101, 106–07 (1st Cir. 1978) (where company cited economics as reason for using subcontractor rather than unit employees, company put subcontractor costs in contention and must substantiate its cost assertions).

Under certain narrow circumstances, an employer may be excused from providing requested information presumed or shown to be relevant. When the employer has a good faith claim of undue burden, legitimate business need for confidentiality or justifiable fear of violence or harassment of employees, disclosure generally will not be required. *Western Massachusetts Electric Co.,* 589 F.2d at 47. R. Gorman, *supra,* at 415–18. In such cases, the court will weigh the competing interests of the employer and the union in the requested information, and the type and extent of disclosure required will depend on "the circumstances of the particular case." *Detroit Edison, supra,* 440 U.S. at 314–15, 99 S.Ct. at 1130–1131 (refusing to require unconditional disclosure to union of employee psychological aptitude test where employer had reasonable confidentiality concern). For example, a union is not entitled to even clearly relevent information "in the precise form demanded," where this would entail undue burden. *Emeryville Research Center v. NLRB,* 441 F.2d 880, 887 (9th Cir. 1971).

In *Emeryville,* the union requested salary grade curves, individual salaries, and merit ratings for 430 unit professional employees to enable the union "to bargain intelligently." The court held that

> [W]here, as here, the Company raises *bona fide* objections [*i.e.,* burdensomeness and confidentiality of competitors' salary data] to the form in which information is requested and offers to provide information sufficient to meet the Union's needs in a mutually satisfactory form, the Union must do more than rely on general avowals of relevance in order to establish its right to the information. It must state the uses to which the information is to be put so that the company is afforded an opportunity to provide it on mutually satisfactory terms * * *. Once the Union has done so, a Company refusal to provide information adequate to meet the Union's needs within a reasonable time would support an unfair labor practice charge * * *.

441 F.2d at 885. The court held that "resort to the Board is premature" where the company has offered to accommodate the union's needs and the union refused to cooperate in the above manner. *Id.* at 886; see *Shell Oil Co. v. NLRB,* 457 F.2d 615, 619–20 (9th Cir. 1972) (citing *Emeryville, supra*). In addition, "[t]he employer may also defend against disclosure by demonstrating that there is a clear and present danger that the union will use the information to incite violence or harassment of employees." R. Gorman, *supra,* at 416. The leading case regarding this defense is *Shell Oil Co. v.*

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[30] Cases upholding the employer's refusal to disclose nonunit information include *NLRB v. Temple-Eastex, Incl,* 579 F.2d. 932, 936–37 (5th Cir. 1978) (nonunit employee identity, job classification, wage, and benefit data; now showing of relevance to union grievance or otherwise, plus lack of timely notice of theory of relevance); *Western Mass. Electric, supra,* 573 F.2d at 108–10 (second case) (costs of subcontracting work not of concern to the union, where *Western Electric, Inc.,* 559 F.2d 1131, 1134 (8th Cir. 1977) (names, grades, wages, ratings, seniority status of nonunit employees who might be transferred to unit; no showing of need or relevance to bargainable issues); *San Diego Newspaper Guild v. NLRB,* 548 F.2d 863, 868 (9th Cir. 1977) (identity and compensation of contractor's employees being trained as contigency striker replacements, where union failed to show probable contract violations or other relevance).

NLRB, supra, in which following a violence-marred strike the union requested the names and addresses of all unit employees (40% of whom were not union members). The company expressed fears of misuse of the list for harassment of employees, proposed alternatives to the requested mode of disclosure, and offered to work toward a "mutually agreeable" compromise, while the union could give no assurance that the list would be kept confidential. The *Shell* court, finding a "likelihood of a clear and present danger" to the employees involved, sustained the company's refusal to disclose under the circumstances: "Presentation of *bona fide* concerns by the Company, coupled with reasonable proposals designed to satisfy the needs of the Union and to achieve a mutually satisfactory resolution of the Union request, is simply not a refusal to bargain." 457 F.2d at 620.[31] Another leading case is *Sign & Pictorial Union v. NLRB,* 419 F.2d 726 (D.C.Cir.1969), where during a strike the union requested payroll records to verify allegations that strikebreakers were getting higher wages and bonuses than had union members. The company declined to turn over the records, in the context of harassment, threats and assaults to strikebreakers, "without some assurance that the information was necessary and * * * would not be used " 'to further facilitate harassment of replacements.' " *Id.* at 730. The court upheld the Board's finding of no violation by the company. *But see NLRB v. Pearl Bookbinding Co.,* 517 F.2d 1108, 1113 (1st Cir. 1975), (where, after strike, union requested current employees' names, addresses and classifications, and company had *no* good faith fear of harassment or violence, disclosure required).[32]

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In general, then, the "clear and present danger" defense is likely to be sustained where the company articulates a reasonable good faith fear of harm to striker replacements, offers to explore alternative forms of disclosure acceptable to both parties, and the union refuses to consider any such alternatives. However, in any information request case where the company's objections are frivolous, made for the purpose of delay, or part of an overall context of bad faith bargaining, the Board and courts are properly unsympathetic. *See Pearl Bookbinding, supra,* 517 F.2d at 1113–14; *Emeryville, supra,* 441 F.2d at 886; *NLRB v. Fitzgerald Mills Corp.,* 313 F.2d 260, 264–65 (2d Cir.), *cert. denied,* 375 U.S. 834, 84 S.Ct. 47, 11 L.Ed.2d 64 (1963).

B. *The Request and the Company's Response*

By letter of November 23, 1976, attorney Cohen described the information requested at the previous day's bargaining session as follows. For "all auto glass workers, inside glass workers, helpers and glaziers" of SGI, SGG, SGR, and Presque Isle Glass d/b/a Soule Glass and Glazing:

> (1) the employee's name, (2) classification, job description, title or the like, (3) his or her hourly wage and average number of hours worked weekly as of February 21, 1976 and April 22, 1976, (4) any change in hourly wage or average number of hours worked weekly at any time since April 12, 1976 specifying the date(s) of such change(s), the amount(s) of change(s) in hourly wage and/or average hours worked weekly, and (5) any changes since April 12, 1976 in any and all benefits specifying all particulars of and relating to such changes.

As to the reason for the request and the relevance of the requested information, the letter stated:

> The purpose of this information request and the need for such information is to permit the Union to bargain intelligently with the Company as to wages and benefits and, with respect to same, to understand, evaluate and discuss with the Company at * * * further negotiations its wage and benefit position as explained by you at yesterday's negotiating session.

Attorney Levenson delivered the company's written response at the bargaining session on December 9. Levenson's letter first recounted that the information requested was "prompted" by his statement that SGG

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[31] The court in *Shell,* noting that "the Company has behaved in a reasonable and conciliatory manner throughout, while the Union has been demanding, arrogant and intransigent," said it would be "most anomalous" to hold that the company rather than the union had refused to bargain 457 F.2d at 618.

[32] In *Pearl Bookbinding,* this court also rejected the company's argument that its eventual release of the requested data made the information disclosure issue moot, since the company did not concede the illegality of its past conduct and "present compliance [does not] deprive this court of the power to decide the disputed issues." 517 F.2d at 1114.

during the strike had been able to hire better men for less money and that, from a strictly economic point of view * * *, it did not make sense to pay more than our last offer when, in fact, we had found that it was possible to acquire a better labor force for even less than the current rate * * * in regard to spirit and productivity if not necessarily glazing expertise.

As noted above, the company on December 9 furnished two lists: a weekly listing of the aggregate overtime hours worked by nonsupervisory SGG employees and the number of men working each week, without any names; and another list, without names, of the then-current wage rates of SGG employees, numbered one through thirty-four. In addition, Levenson's December 9 letter stated that during the strike the company had not classified any new employees, except as "strike replacements," and had made no changes in benefits.

Levenson's letter characterized this disclosure as "a preliminary step" which "at this stage of the proceedings * * * should be sufficient for you to bargain intelligently," and offered to submit the employees' names and substantiating material to a third party for verification. Levenson gave the following reasons for the company's refusal to provide further requested information: (1) the company's doubts as to the union's motivation for making the request at the sixteenth bargaining session, eight months into the strike, given the numerous unfair labor practice charges the union had filed against the company, and the company's desire to avoid giving the union "ammunition for indeed another unfair labor charge"; (2) the company's "great obligation to protect the new men hired from coercive conduct and harassing tactics such as the union agreed not to further continue in its posting notice in case number 1-CB-3412;" (3) the hour information requested would require an individual analysis for each employee and "involve a great deal of difficulty in time and effort in preparing such a list"; and (4) regarding non-SGG employees "we do not understand that the law requires any disclosure of information concerning these companies * * *," since the SGI employees had voted to decertify the union prior to the strike.

The record contains no evidence of any response by the union, at the final bargaining session on December 9 or otherwise. Attorney Cohen did not testify. On December 17, 1976, the union filed an unfair labor practice charge alleging the company's "failure and refusal" to supply sufficient requested information.

The validity of the ALJ's conclusions with respect to the information disclosure issue, in this factual context, presents a close and complex question. The company's positions regarding the bargaining unit and non-unit information require separate analysis, and the ALJ's failure to distinguish legally and factually between these distinct types of information complicates our task.

C. *Bargaining Unit Wage and Hour Information*

The law is clear that the wage, hour, and benefit information requested regarding bargaining unit SGG employees (including the striker replacements, given that the bargaining unit is defined by jobs, not people, see note 8 *supra*) is presumptively relevant and must be disclosed on request, *Rockwell Standard, supra,* unless the company advanced a sufficient, good faith reason why full disclosure could not be made in the form or manner requested. *San Diego Newspaper Guild, supra; Borden, supra.*

The company offered two potentially adequate justifications for its limited disclosure: (1) with regard to the omission of names, its fear of harassment of the striker replacements if their identities were known; and (2) with regard to the incompleteness of the wage and hour data, the burdensomeness of producing weekly hours-worked data for each employee.

The record shows that the company's fear of harassment of replacements by strikers was a reasonable and *bona fide* one, in light of previous events during the strike.[33] There was, not surprisingly, considerable animosity between the two groups. One replacement, Raymond Irish, was assaulted, unprovoked, in a bar by

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[33] That the company had a good faith concern about the safety of the replacements is substantiated by the following passage in a January 27, 1977 letter from Levenson to the Board's regional office (in which the company offered to disclose replacements' names and other information in settlement of the information charge):

> I would like to emphasize, however, that I am very much concerned that the disclosure of the names will result in harassment to the newly hired men * * *. I would very much appreciate some sort of assurance by the union to you that there will be no retaliatory harassment against these men.

union president David Bates. Others were threatened by picketing strikers on several occasions or followed home. Replacements' car windows were broken and their tires slashed. In another instance, a striker attempted to run off the road a company truck driven by a replacement. On other occasions vandalism was directed against the company, with several glass and window smashing incidents reported. Under these circumstances, it could reasonably be found that there was a "clear and present danger" that union members would use the replacements' names to facilitate further harassment. *Shell, supra.* The union offered no assurances that the names would not be misused. Moreover, other than for verification purposes, the union's need for the replacements' names is not obvious. The company's offer of third party verification satisfies this concern and is indicative of the company's good faith concern regarding employee harassment. *Compare Pearl Bookbinding, supra.* The union's failure to pursue the matter except by filing unfair labor practice charges substantially weakens its position. *Cf. Emeryville, supra.* We hold that withholding employee names under these circumstances did not violate § 8(a) (5) or (1).

However, the company's justifiable failure to disclose employee names makes even more unjustifiable its unexplained failure to provide the requested job descriptions corresponding to the wage rates it furnished. In the absence of job descriptions, the union could not substantiate its allegation that the SGG striker replacements had received the 25 cent-per-hour wage increase granted to SGI employees, a fact which the company had never admitted during the negotiations, and which was proved by the company's subsequent wage and hour disclosure pursuant to settlement agreement. The wage increases were also concealed by the company's unjustified failure to respond to the union's request for the amount(s) and date(s) of any change in hourly wages.[34] Nor could the union verify on the basis of the information it received whether or not the company was in fact getting its work done for "less money" than union employees had been paid, or whether the replacements were indeed more productive. The company's statement that the new employees had not been "classified" expect as "strike replacements" is at best unresponsive. The relevant question, to which the union was entitled to a prompt answer, is replacements for *which* strikers, in terms of job description. In these respects, the company's response was legally insufficient and violated § 8(a) (5) and (1).

The sufficiency of the SGG wage and hour information provided presents a different, closer question. Again, such information is presumptively relevant, and was made more so by both the union's allegation that SGG replacements had received the disputed wage increase and the company's "better men for less money" claim. However, there is no evidence that the company's partial disclosure was designed to frustrate the union's bargaining effort or was merely a delaying tactic. The union asked for several types of detailed wage and hour data, and asked that the company supply it within a period, exclusive of weekends and the Thanksgiving holiday, of less than two weeks. The company supplied some of what was requested, describing that disclosure as "a preliminary step," stated that compiling the detailed hour information requested would be burdensome and time-consuming, and suggested an approximate method by which the average weekly hours per man could be calculated. The company did *not* refuse to provide further wage and hour data or contest the union's right to the data concerning SGG employees. The clear implication was that the company was willing to supply the same at a later date, given time to prepare it, if the initial disclosure did not satisfy the union's needs. There is nothing in the record either to support or rebut the company's assertion of burdensomeness. At this point we merely note, taking into account the extent of the data involved,[35] that this claim is not facially frivolous, and we find nothing either in the company's remarkably candid letter of December 9 or elsewhere to suggest that it was not made in good faith.

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"A union's bare assertion that it needs information * * * does not automatically oblige the employer to supply all the information in the manner requested." *Detroit Edison, supra,* 440 U.S. at 314, 99 S.Ct. at 1130. The union is not necessarily entitled to the information "in the precise form demanded." *Emeryville, supra,* 441 F.2d at 887. When the employer presents a legitimate, good faith objection on grounds of burdensomeness or otherwise, and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to attempt to reach some type of compromise with the employer as to the form, extent, or timing of disclosure. In these circumstances, immediate "resort to the Board is premature." *Emeryville, supra.* To be sure, the union need not indulge the company in protracted negotiations over the terms, content, and form of disclosure. *Id.* at 885. *Cf. Borden, supra,* 600 F.2d at 318 ("a company may not play dog-in-the-manger just to put the Union through the hoops"). Nor, however, can the union instantly put the company to the election of either immediately supplying everything demanded or having to defend yet another unfair labor practice charge. Good faith is required on *both* sides.

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[34] The testimony of various striker replacements shows that they not only started at a wage 25¢/hour higher than had previously been paid to (union) employees starting at the same job and skill level, but that some subsequently had received an additional 25¢/hour raise.

[35] One indication of the extent and detail of the requested wage and hour information is the handwritten data sheets supplied, covering 46 employees, pursuant to Board-approved settlement agreement on March 18, 1977, which sheets appear in the record as exhibits.

Here, the record contains no evidence that the union made any effort whatsoever to pursue the information request with the company, but immediately filed unfair labor practice charges (which were ultimately settled when the company agreed to disclose the additional SGG wage and hour data, *inter alia,* on March, 1977). This all-or-nothing approach casts doubt on the union's good faith need or desire for the information,[36] and made a "federal case" out of a minor dispute which manifestly should and could have been informally resolved without invoking the Board's burdensome remedial mechanism.

We hold, following *Emeryville* and *Shell, supra,* that "where, as here, the Company raises *bona fide* objections to the *form* in which information is requested" and indicates its willingness "to provide information sufficient to meet the Union's needs in a mutually satisfactory form," the Union must afford the company an opportunity to provide the data on mutually satisfactory terms. *Emeryville,* 441 F.2d at 885. Once the union has done so, but not before, the company's "refusal to provide adequately to meet the Union's needs within a reasonable time would support an unfair labor practice charge." *Id.* It is only where such problems cannot be worked out, after some further minimal effort at the bargaining table, that the problem is properly presented to the Board and courts. Thus, we find no violation with respect to the SGG wage and hour information, and need not consider the relevancy and sufficiency of the subsequent disclosure of such information on March 8, 1977.

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D. *Non-unit Wage and Hour Information*

The non-unit information regarding SGI and SGR employees presents a different question. With respect to such non-bargaining unit information, the Union must demonstrate the relevance, under the circumstances, of the requested information to bargainable issues in the case. *Rockwell-Standard, supra; Curtiss-Wright, supra.* When the union fails to advance reasons why the information is relevant or necessary to its performance as bargaining representative (and where the company does not itself put such information in issue), it is not for the Board or courts to supply potential justifications. Moreover, the union's theory of relevance must be reasonably specific; "general avowals of relevance" such as "to bargain intelligently" and similar boilerplate are insufficient. *Cf. Emeryville, supra.* However, where the relevance of the requested non-unit information is obvious in the context of the negotiations, the company cannot resist disclosure simply because the union has failed to make a formal presentation of its theory of relevance.

As to the information requested for SGI employees, the company plainly had no obligation to disclose such information to the union. The company in its December 9 letter explicity declined to make disclosure "unless [the union] can demonstrate either a legal precedent or a rational motivation for [the] information." The union made no effort to do so, and was not entitled to the SGI information.

However, the opposite result is required with respect to the information regarding the SGR employees. We held, in part VII, *supra,* that substantial evidence supports the Board's determination that bargaining unit glass replacement work was removed from SGG and given to SGR, and that the company's failure to disclose and bargain with respect to this action violated the Act. Thus, the erosion or diversion of bargaining unit work to SGR was clearly an issue in the case, having been made so by the company's covert reorganization and its presentation in Levenson's August 6 "agenda." *Compare Rockwell-Standard, supra* (disclosure required where erosion of unit work at issue) *with Western Mass. Electric, supra* (disclosure not required where diversion of unit work not at issue). *See* notes 29-30 *supra.* Furthermore, the company assigned returned striker Roland Ray to SGR early in the strike and concealed this fact from the union. In this context, where the company's own actions and bargaining "proposals" regarding SGR made the amount and type of work of SGR employees an issue of singular relevance to the union, the union was not obligated to demonstrate further the relevance of such information. The union's stated concern at the November 22 meeting was the wages and hours of "those employees the [company] had hired after the strike to do bargaining unit work," which at least potentially included some employees of SGR. The job descriptions, hours, and wages of SGR employees would have enabled the union to estimate the amount of SGG outside glass replacement work being done by SGR.[37] Although a more specifically-framed request might have gotten at such information more directly (*e.* g., "the percentage of outside glass replacement work done by SGR, in terms of hours worked, by week") and would have made

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[36] The urgency of the union's need for the information is even more questionable in light of the timing of the request. Despite the fact that wages had been the crucial issue from the outset, that replacements had been hired starting in June, 1976, that Levenson had praised the work of the replacements as early as the August 6 session and explicity made the "better men for less money" claim on October 22, the union made no request for wage and hour information until the end of the 16th bargaining session, over seven months into the strike. Yet when the company failed to respond to its satisfaction within two weeks, the union one week later filed its fourth of nine sets of unfair labor practice charges against the company.

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the union's need and theory of relevance clearer to the company, in light of the company's unlawful conduct with respect to SGR we think these omissions do not vitiate the union's right to the requested information. Thus, we affirm the ALJ's holding that the company's refusal to supply such information violated § 8(a)(5) and (1), and agree that the March 18 disclosure, to the extent it pertained to SGR (which is ambiguous), was too late to be of legal or practical significance.

However, the union's complete failure to respond to the company's explicit invitation to articulate its theory of relevance has a bearing on appropriate remedial measures.[38] Also, we note the absence of any evidence that the company's failure promptly to provide all the information to which the union was legally entitled in any way contributed to prolonging the strike. To the extent the ALJ's conversion finding can be interpreted as finding to the contrary, we hold that it is not supported by substantial evidence.

IX.

Course-of-Conduct and Overall Bad Faith Bargaining

The ALJ held that the company "engag[ed] in a course of conduct beginning April 12, 1976 designed to disparage the Union's leadership, undermine its effectiveness as bargaining agent during the negotiations, and destroy its majority," in violation of § 8(a)(5) and (1) of the Act. The ALJ stated that "this course of action was highlighted by specific incidents of bad faith which have been discussed in detail," reasoning as follows:

> This conclusion is supported not only by the specific unfair labor practices which I have found to have occurred in the negotiations themselves, but also by the unlawful conduct of Respondent's supervisors away from the bargaining table. These acts served to highlight a pattern of conduct in which the Union was placed in a position of constantly having to reduce its wage proposals while the Respondent made no movement at all, and constantly renegotiate, at times in the dark, items which had already been agreed to. Some of these items, as discussed herein, involved major corporate changes with adverse effects to bargaining unit employees. The Respondent argues that only economics and its corporate survival dictated its actions, and that the changes it made were simply for the purpose of getting the

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[37] Indeed, the wage and hour data furnished pursuant to settlement on March 18, 1977 listed a category of "other (non-SGG) employees doing some replacement work," pursuant to the term of the settlement agreement requiring disclosure of requested information "pertaining to all employes performing bargaining unit work."

[38] We note that the company, in declining to disclose the SGR information, was acting in reliance on a legal theory that, but for its actions with respect to SGR, would have been valid—*i. e.,* that the burden is ordinarily on the unnion to show the relevance of nonunit information. Our holding is merely that under the circumstances disclosure is required, not that the company's failure to disclosure was in bad faith.

> work done, but these important factors give the Respondent no right to run roughshod over the bargaining rights of its employees. Moreover, all this occurred in an atmosphere where the Union was constantly being chided with remarks about how well the strike replacements were getting along in their jobs and that the Company had found better men for less pay. In sum, Respondent's total conduct placed the Union in a position which no self respecting representative would tolerate. I find that such conduct at the bargaining table amounts to a total rejection of the principles expressed in Section 8(d).

We reverse the Board's course of conduct finding, holding that it is inconsistent with the requirements of due process, is not supported by substantial evidence, and is based on erroneous legal reasoning.

A. *Due Process*

The ALJ acknowledges that a course-of-conduct or overall bad faith bargaining violation "is not specifically alleged in the complaint." Nor, we add, was anything similar alleged, "specifically" or generally. Nevertheless, the ALJ found that during the lengthy hearing "the totality of the Respondent's conduct during the 1976 negotiations was fully litigated," and that the course of conduct issue "is implicit in the arguments made in the General Counsel's brief." First of all, even if such an argument appeared explicitly in the General Counsel's post-hearing brief, such post-hoc characterization of the case would not be relevant in determining whether the employer had notice of the issue and a meaningful opportunity to defend against it *at the hearing*. It is revealing that the company's detailed 80-page post-hearing brief—which left no stone unturned in arguing the facts and law regarding both the allegations in the complaint and additional points stressed at the hearing—devotes no attention to the purported course of conduct issue, except to state on its penultimate page:

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> Much has been said in this brief about the contents of this record. However, it is also important to point out what is missing. There is nowhere present the large tinge of discrimination that most of these type cases have had and there is no bad faith bargaining.

Thus, if the employer had notice of the course-of-conduct issue, it was both unduly subtle and untimely.

Second, our painstaking review of the 1308 page record leaves us firmly convinced that (a) the company made clear that it was not litigating overall bad faith bargaining, and (b) the "totality" of the company's conduct at the bargaining table was not fully litigated in the sense relevant to a course-of-conduct violation. In his opening statement, company attorney Levenson noted that the union's several charges of bad faith bargaining had been refused by the Board's Regional Director and again by the Appeals Section, and that no such charge appeared in the amended complaint. Levenson then stated,

> * * * I would conduct the case a lot differently if I had a charge of bargaining in bad faith, which I don't have * * *. Now the point I'm making is although I'm here to defend against what the complaint, and the amendment to the complaint, and the amendments to the amendment say, I'm not here defending the charges of bargaining in bad faith because that isn't before us with regard to the bargaining session[s].

Although there was some discussion on the point, neither the General Counsel nor the ALJ asserted the contrary.[39]

Much later in the hearing, another revealing colloquy took place:

> Mr. DiCIERC (for the General Counsel): I thought Mr. Levenson, at the beginning of this hearing, said that he didn't think [sic] that we had dismissed the case with regard to a course of conduct 8(a)(5), and so therefore he wanted to make sure that we were not going to have to go through each bargaining session piece by piece.

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[39] Levenson's statement was apparently prompted by the following remarks in the General Counsel's opening statement: "Respondent * * * embarked on a course of conduct which essentially converted the strike from an economic strike to an unfair labor practice strike"; and "* * * I think your Honor will have to evaluate [the purported negotiations regarding the effects of the transfer of work to SGR] as to whether there were actual negotiations or were * * * undertaken in what was essentially an atmosphere of bad faith." However, the reference to the company's "course of conduct," in context is reasonably interpretable as simply a convenient means of referring to the aggregate of the alleged discrete violations, which were enumerated immediately thereafter, rather than as alleging an independent violation of the Act.

> And now he brought in attorney Mayo Levenson to testify as to certain bargaining sessions. And now Mr. Levenson is talking about this issue to sustain various issues which I'm not aware of with regard to the wages at the bargaining table. I don't know what he's talking about.
>
> JUDGE DENISON (ALJ): * * * I want to litigate the issues in the complaint. That's all I want to litigate * * *. We'll take the negotiations when they come up if they come up * * *.

These excerpts from the record indicate that during the hearing both the parties and the ALJ were operating under the premise that neither the company's course of conduct, nor overall bad faith bargaining, were being tried, independently, implicitly, or otherwise. The record does not support the contention that the company had notice of this issue and an opportunity to meet it, or that the issue was in any sense "fully and fairly litigated" as due process requires. *See NLRB v. H.E. Fletcher Co., supra,* 298 F.2d at 600; *Boyle's Famous Corned Beef Co. v.' NLRB, supra* 400 F.2d at 162; *J.C. Penny Co v. NLRB, supra,* 384 F.2d at 483. Had the company known that its entire course of conduct or overall good faith was in issue, it is likely, as Levenson stated, that it would have litigated the case "a lot differently," *see Drug Package, Inc. v. NLRB, supra,* 570 F.2d at 1345; in particular by presenting detailed evidence of the conduct of the parties at each of the 17 bargaining sessions. Especially in a case as complex as this one, "[s]imply because violations could have been alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities." NLRB v. Pepsi Cola Bottling Co. of Topeka, supra, 613 F.2d at 274. Here, the ALJ improperly assumed the prosecutorial role, deciding an issue which he alone belatedly injected into the case. *NLRB v. Tamper, Inc., supra,* 522 F.2d at 789-90. We refuse to enforce a finding so at odds with fundamental fairness.

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At oral argument, the Board suggested that the company's failure to request post-hearing reopening of the record to receive additional evidence on the course of conduct issue foreclosed it from now arguing that thius issue was not fairly litigated.[40] This contention is without merit. The company amply preserved its appellate rights on the issue in its exceptions to the ALJ's decision timely filed on August 27, 1979, in which it strenuously objected to the ALJ's course-of-conduct finding on both procedural due process and substantive grounds.[41] It would impose an unfair and intolerable burden on a party to require the further step of attempting to reopen the evidence to litigate new matters not in issue at the hearing. Requiring the company to come forward after trial to rebut a violation neither charged, litigated nor proved by the General Counsel is to stand the adversary process on its head. Moreover, as a practical matter, reopening the record on the course-of-conduct issue here would likely require extensive testimony as to each of the 17 bargaining sessions, necessitating the recall of witnesses who had appeared at the original hearing; a wasteful and burdensome procedure that is without justification.

B. *The Merits*

Although the above holding disposes of the issue, we note that even if due process had been satisfied, we would nevertheless be compelled to reverse the course-of-conduct finding for want of substantial evidence, and because the ALJ's analysis is apparently based on faulty legal premises. The precise basis of the ALJ's substantive holding is unclear, but he apparently relied on (a) the various specific unfair labor practices found, and (b) the company's alleged unreasonable, unyielding, or antiunion positions and conduct at the bargaining table. We treat these sequentially.

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[40] On October 16, 1979, the company filed a post-hearing motion to reopen the evidence in order to offer a further letter from the union, dated October 4, 1979, reiterating the union's demand for "reinstatement of all of the men as a group," which motion the union and General Counsel opposed. The Board in a footnote to its order affirming the ALJ denied the motion to reopen on grounds of irrelevance. The company's (unsuccessful) attempt to supplement the record on one issue does not make its failure to do the same on other issues a waiver of its objections on such other issues.

[41] Section 10(e) of the Act, 29 U.S.C. § 160(e), provides in pertinent part that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Here, petitioners' exceptions were plainly "urged before the Board" and summarily rejected. Section 10(e) also empowers the court to order that additional evidence be taken before the Board where the movant shows "* * * there were reasonable grounds for the failure to adduce such evidence in the hearing * * *." No such motion is before the court.

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Of the numerous violations found by the ALJ, we have sustained only four—the wage increase, supervisor misconduct, failure to bargain regarding SGR, and nondisclosure of certain information. Each of these violations either presented close questions or had insubstantial practical consequences; even in combination they were insufficient to convert the nature of the strike. Each was essentially an isolated event, separate in time from the others in the context of a long and bitter strike marred by unfortunate incidents of misconduct on both sides. As this court has noted, "[i]ndividual acts or statements of a negotiating party which appear contrary to the required attitude cannot be drawn upon to dilute a finding of good faith where the totality of the party's conduct conforms to the dictates of the statute." *NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729, 731 (1st Cir. 1964). Unless a "course-of-conduct violation" means nothing more than the sum of several discrete violations, and thereby has no independent significance, further evidence of bad faith is required.[42]

The ALJ found that the company's course of conduct was "designed to disparage, * * * undermine, * * * and destroy * * *" the union. Thus, he found that the company was guilty of antiunion animus and implies that there was an overall company scheme, plan, or conscious pattern of behavior, manifested by the various unfair labor practices and bargaining positions, aimed at destroying the union. However, absent some articulable objective basis in the record, such conclusory assertions about the employer's state of mind cannot be sustained.

Section 8(d) of the Act requires the parties to "confer in good faith" in an effort to reach agreement, but explicitly states that neither agreement nor concessions are required. 29 U.S.C. § 158(d). In what has become a leading case on the subject, this court framed the inquiry regarding good faith bargaining thus:

> [T]he question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.

NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887, 74 S.Ct. 139, 93 L.Ed. 391 (1953). Since the intent to frustrate agreement or to undermine the union are rarely articulated for obvious reasons, bad faith is typically inferred from the unreasonableness of the employer's substantive positions at the bargaining table. *Id.* at 135; R. Gorman, *supra*, at 481. This, adamant employer adherence to proposals predictably unacceptable to the union, refusal to make meaningful concessions, and unprincipled insistence on substantive positions unreasonable under the circumstances may justify a finding of bad faith bargaining. *See* R. Gorman, *supra*, at 485–95. However, hard bargaining and the use of a company's relative economic strength to exert pressure on the union "is of itself not at all inconsistent with the duty of bargaining in good faith." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 490–91, 80 S.Ct. 419, 428, 4 L.Ed.2d 454 (1960). *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 109, 90 S.Ct. 821, 826, 25 L.Ed.2d 146 (1970); *South Shore Hospital v. NLRB*, 630 F.2d 40, 44 (1st Cir. 1980); *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1073 (5th Cir. 1971). "Adamant insistence on a bargaining position * * * is not in itself a refusal to bargain in good faith." Id. at 1072; *see NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). "The right to union representation under the Act does not imply the right to a better deal. The proper role of the Board is to watch over the process, not guarantee the results." *NLRB v. Tomco Communications, Inc.*, 567 F.2d 877 (9th Cir. 1978).

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Our review of the record compels the conclusion that this was simply a case of hard bargaining between an employer and union with a history of contentious, strike-plagued relations. The failure of the parties to reach agreement was due to the adamant, but lawful, adherence by both sides to positions close to their original proposals, especially on the wage issue. The fact that the union made more concessions on the wage issue than the company is itself of little significance.[43] As another court has noted in a smiliar context where the lack of company concessions on wages was alleged as evidence of overall bad faith bargaining, "[t]he Company was not obliged to increase its wage offer merely because the Union lowered its demand, particularly where the Union's reduced demand still amounted to a very substantial increase." *Sign & Pictorial Union v. NLRB,* 419 F.2d 726, 739 (D.C.Cir.1969). As Levenson stated, as the strike wore on the company's economic position apparently improved, strengthening its bargaining position and making it less rational or necessary to make further concessions. The company's eventual hiring of a full complement of replacements and its satisfaction with their performance further reduced its incentive to concede. This is in no way inconsistent with the Act. Where the union cannot by the use of the substantial economic weapons protected by the Act convince the employer to agree to terms acceptable to its members, the Board may not invervene to "equalize or neutralize pressures in the name of lack of good faith," *M. R. & R. Trucking Co. v. NLRB,* 434 F.2d 689, 695 (5th Cir. 1970), or to compel the employer to grant the union a better or "fairer" deal than the union was itself able to obtain. *See Tomco Communications, supra.*

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[42] The ALJ cited no authority for his course-of-conduct finding. The Board, in its brief, attempts to distinguish the "unlawful course of conduct" found from "bad faith bargaining" or "surface bargaining," but cites no authority either for the distinction or for what a "course-of-conduct" violation entails. The company argues that what was found was a garden variety § 8(a)(5) refusal-to-bargain in good faith, unsupported by either the complaint or the evidence.

The record shows that this simply was not the case of egregious employer behavior and flagrant violation of the Act which the ALJ's strong and indignant rhetoric attempts to convey. This case does not fit the procrustean bed of classic bad faith bargaining cases such as *Reed & Prince, supra* (evidence of overall bad faith included employer's delay of initial bargaining session, refusal to allow union to post routine notices to its members, unjustified delay in providing requested information, adamant refusal to consider key terms without a principled reason, and presenting an egregiously deficient and one-sided "proposed contract") or *Alba-Waldensian, Inc.,* 167 NLRB 695 (1967) (adamant insistence on maintaining existing wages and company's right to cut wages unilaterally, absolute refusal to consider checkoff of union dues or arbitration clause, refusal or delay in supplying wage data, insistence on a no-strike clause, refusal to adopt a formal grievance procedure, and wage and benefit increases to employees in nonunion plants).[44] *See* note 11 *supra.*

Another factor which militates against the ALJ's course-of-conduct finding and supports our conclusion that the issue was not fairly litigated is the relatively cursory evidence in the record as to the details of each bargaining session—the positions, proposals, statements, allegations, responses, and actions of the parties crucial to support inferences of good or bad faith.[45] Virtually **1105** no evidence was produced and nothing appears in the ALJ's decision as to the first four (pre-strike) of the 17 bargining sessions. Although the April 9, May 6, May 7, August 6 and October 22 sessions are summarized in moderate detail, six of the remaining sessions (*i.e.,* May 25, June 18, August 27, October 18, November 22, and December 9) are relegated to brief, two or three sentence descriptions, typically devoted mostly to the parties' positions on the wage issue; and the ALJ notes that regarding the September 14 and 15 meetings "[t]here is almost no evidence." By contrast, in *Alba-Waldensian,* the Trial Examiner's decision on which the Board's opinion was based included a painstakingly *detailed* review of *all* 22 negotiating sessions; a review which fills 34 double-coluimn, small-print pages in the NLRB Reports.

For all the above reasons, we reverse the Board's finding that petitioners were guilty of an unlawful course of conduct in violation of § 8(a)(5) and (1).

X.

Denial of Immediate Reinstatement

Pursuant to his finding that the company's unfair labor practices had prolonged and converted the strike, the ALJ found that the * * * persons named in paragraph 20 of the complaint for whom the Union unconditionally applied for reinstatement, and to whom the Respondent on March 25, 1977, refused reinstatement, are unfair labor practice strikers, and that by refusing reinstatement to them the respondent violated Section 8(a)(1) and (3) of the Act.

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[43] Although we are aware of the mischievous uses to which such statistics can be put, we note that one view of the wage negotiations is that the company increased its annual wage offer by 40 percent (from an aggregate 25¢ to 35¢ per hour), while the union reduced its annual wage demand by only 27 percent (from $1.10 to 80¢ per hour).

[44] Although he does not cite *Reed & Prince* or *Alba-Waldensian* in connection with the course-of-conduct violation, the ALJ's conclusion that "the company's conduct placed the union in a position which no self respecting representative would tolerate" is nearly identical to the language used in these cases to support a finding of bad faith bargaining. *See* 205 F.2d at 139; 167 NLRB at 696, 697.

[45] In *Reed & Prince, supra,* this court affirmed the Board's finding of refusal to bargain in good faith only "[a]fter an attentive review of *the entire record of the bargaining negotiations.*" 205 F.2d at 135.

The basic issue is whether the strike was an "economic" strike or an "unfair labor practice" strike at the time the permanent striker replacements were hired. There is no dispute that the strike began as an economic strike in support of the union's wage and other contract demands. Therefore the question is whether the strike was converted to an unfair labor practice strike by the employer's subsequent conduct, and if so, when.

A. *The Nature of the Strike*

The distinction between economic and unfair labor strikers determines reinstatement rights:

> It is settled that an employer may refuse to reinstate economic striker if in the interim he has taken on permanent replacements. *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345–46, [58 S.Ct 904, 910–911, 82 L.Ed. 1381]. It is equally settled that employees striking in protest of an employer's unfair labor practices are entitled, absent some contractual or statutory provisions to the contrary to unconditional reinstatement, with back pay, "even if replacements for them have been made." *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 278 [76 S. 93 Ct. 349, 355, 100 L.Ed. 309].

NLRB v. International Van Lines, 409 U.S. 48, 50–51, S.Ct. 74, 76–77, 34 L.Ed.2d 201 (1972). Economic strikers, upon unconditional request, are entitled to reinstatement to their former or substantially equivalent positions unless the employer has "legitimate and substantial business justifications" for denying the request, and having hired permanent replacements is a legally sufficient justification. *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378–79, 88 S.Ct 543, 545–546, 19 L.Ed.2d 614 (1967). However, such economic strikers do have right to preferential rehiring when the departure of permanent replacements creates vacancies. *Laidlaw Corp. v NLRB,* 414 F.2d 99 (7th Cir. 1969), *Cert. denied,* 397 U.S. 920, 90 S.Ct 928, 25 L.Ed.2d 100 (1970). *See NLRB v. Crimptex, Inc.,* 517 F.2d 501, 504 (1St Cir. 1975); *American Machinery Corp. v. NLRB,* 424 F.2d 1321, 1328 (5th Cir. 1970).

We have already held, in part V, *supra,* that the strike was not converted on April 12 by the wage increase. In addition, in light of the ALJ's finding that the stike "was thereafter prolonged by the Responden's unfair labor practices both at and away from the bargaining table," we have examined the record for evidence bearing on the question whether any of the three

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subsequent unfair labor practives which we have sustained might have prolonged and thereby converted the strike at a later date. Our review of the record with respect to the failure to bargain with respect to SGR, the supervisor misconduct, and the failure to disclose all of the required information, as noted in parts VI, VII, and VIII, *supra,* discloses no basis for an inference that any of these violations of the Act had any material effect on the nature, motivation, or length of the strike.

The fundamental stumbling block, from the prestrike negotiations in March 1976 to the reinstatement request in late March, 1977, was wages and to lesser extent the duration of the agreement. The parties never came close to agreement on the wage issue, and there is no indication that either party's adherence to its economic demands was caused by anythng other than "[d]eep conviction, firmly held," that their position was valid under the circumstances. *NLRB v. Herman Sausage Co., supra,* 275 F.2d at 231. Walter Dolbow's television statement in February 1977 that "we [are] on strike for more money" is one indication that is was the union's strong belief that its members were underpaid that kept the strikers on the picket lines for nearly a full year. To be sure, the union was bitterly unhappy with the company's bargaining positions and proposals, as reflected both by heated exchanges at certain bargaining sessions and the union's filing nine unfair labor practice charges over the course of the strike. It would be to disregard the realities of modern-day collective bargaining, however, not to recognize that in some instances an unfair labor practice charge may be more of a bargaining strategem than a credible indication that the Act has in fact been violated. Moreover, as discussed above, it is simply not the case that whenever in the course of a strike an employer commits an act that if found to constitute an unfair labor practice the strike is thereby transformed into an unfair labor practice strike. Some showing of prolongation and causation is required to support a finding of conversion.

It might be argued that in light of our holding regarding the effect of the wage increase and our reversal of certain unfair labor practice findings, the appropriate course would be for us to remand this case to the Board for a determination whether any of the three surviving unfair labor practice converted the strike. However, for several reasons we conclude that a remand is inappropriate. First, as noted above, we find the record to devoid of any evidence to support a finding of conversion that a remand would likely be pointless. Our holding that the ALJ's finding that the strike was "prolonged [after April 12] by Respondent's unfair labor practices * * *" is not supported by substantial evidence disposes of the matter. Second, the parties, the court, and the public have a strong interest in the prompt, accurate, fair and final disposition of labor cases. The events in question took place over four years, ago. A remand and the inevitable return to this court for another review would prolong the controversy still longer, without any indication that a more appropriate adjudication would be achieved. Rather, under these circumstances, we agree with the Court of Appeals for the Seventh Circuit that remand "would merely give the Board another bite at the proverbial cherry, and * * * piecemeal litigation would result." *NLRB v. Colonial Haven Nursing Home, Inc.,* 542 F.2d 691, 711 (7th Cir. 1976) (on petition for rehearing). Therefore, in the interests of finality, we decline to remand for further findings on the conversion issue and deny enforcement of those portions of the Board's remedial order which depend on the finding of conversion.

A. *Reinstatement Rights of Economic Strikers*

Because we hold that the strikers were economic strikers throughout the duration of the strike, we must consider their rights as economic strikers upon the request for reinstatement made on March 25, 1977. Since the ALJ proceeded under the assumption that the strikers were at all relevant times unfair labor practice strikers, he did not reach this issue. However, because the law is clear on the issue and because the company appears to have acted consistently with the law applicable to economic strikers, we find no need to remand on this issue. *See Colonial Haven, supra,* 542 F.2d at 707–11 (declining in equitable discretion to remand on the same issue under similar circumstances).

A threshold issue is whether, as the company contends, the reinstatement request was in fact conditional. The company bases this contention on the union's March 8 letter "unconditional[ly]" applying for "immediate reinstatement" of 22 named strikers, including David Bates, and the Union's March 11 letter clarifying that "unconditional reinstatement, as a group" was requested. By letter of March 21, the company informed the union that by reason of Bates' strike misconduct, it was terminating him, and that "Mr. Bates is the only one of the twenty-two that the company takes the position that it will refuse reinstatement because of strike misconduct." [46] The company now argues that the inclusion of Bates, in a "group" request, makes the request conditional. Rejecting this contention, the ALJ explained in a footnote:

> The Respondent has argued that the Union's offer of reinstatement is conditional because the list of strikers' names includes that of David Bates. I find no merit to this contention. At no time did the Union ever state that none of the strikers would return to work unless all of those listed in it March 8 offer were returned. Furthermore, no such implication can be drawn from the Union's letter protesting the Company's desire to conduct individual interviews of the strikers before deciding whether or not to reinstate them.

For substantially the reasons stated, we agree with the ALJ that the request was intended by the union to be, and was as a matter of law, unconditional. "The employer has the burden of showing that the offer to return was not unconditional." *NLRB v. Okla. Inn,* 488 F.2d 498, 505 (10th Cir.

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[46] After a detailed review of the evidence, the ALJ found "that the Respondent refused to reinstate David Bates because of serious instances of strike-related misconduct, and therefore the respondent did not violate Section 8(a)(1) and (3) of the Act as to him." This finding is not challenged by the General Counsel.

1973). The company has not met that burden. Indeed, in view of the fact that it failed to raise its contention regarding Bates and conditionality during the exchange of correspondence concerning the reinstatement request, the company's argument has more the appearance of a post-hoc rationalization than a serious legal contention.[47] The positions and actions of the parties make clear that the real controversy was not over the conditionality of the reinstatement request, but rather over whether the strikers were economic or unfair labor practice strikers, in light of the differing reinstatement rights afforded those two categories.

We have held above that the strikers were economic strikers at all relevant times. As such, "[t]he strikers * * * run the risk that they may be permanently replaced while the strike is underway, and the fact that such replacements are on the job provides an adequate justification for an employer's refusal of reinstatement." *NLRB v. Crimptex, Inc., supra,* 517 F.2d at 504. Here, the union took that risk, and all the SGG strikers were permanently replaced before the reinstatement request. However, under *Fleetwood Trailer* and *Laidlaw, supra,* the strikers have the right to be rehired before others are hired when the departure of their replacements creates vacancies, unless, in the words of § 2(3) of the Act, 29 U.S.C. § 152(3) defining "employee"), a striker has "obtained * * * other regular and substantially equivalent employment." *See Little Rock Airmotive, Inc. v. NLRB,* 455 F.2d 163 (8th Cir. 1972).

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The company, relying on its belief that the strikers were economic strikers, acted consistently with these requirements. It did not refuse reinstatement to any of the strikers except Bates, and his termination was found to be for good cause. With respect to all the other strikers, the company in its final letter to the union on March 25, 1977, stated that "upon proper application, the Company will reinstate those strikers who so desire when openings occur under the dictates of the law * * * for economic strikers * * *." The record shows, and the ALJ noted, that pursuant to this offer the company reinstated strikers Earl Curtis on March 21, 1977, George Light in July, 1977, and Henry Ward on October 3, 1977.[48] The uncontradicted testimony of company witnesses Edward Tribou and Andrew Soule indicated that when positions opened, SGG recalled those strikers whom they considered the "best men," "irrespective of seniority," whom management believed were not already working elsewhere,[49] and that no other positions had become available.

There is no claim before us that the company has reinstated strikers in a discriminatory manner, or that it otherwise employed unlawful criteria in choosing who to reinstate when a position became available or has failed to act in good faith. Nor is there any contention that the company has terminated its reinstatement offer or failed to keep it open for a reasonable time.[50] Therefore we hold that, on the record before us, petitioners did not violate § 8(a)(3) of the Act by refusing immediate reinstatement to the strikers as a group, and we deny enforcement of the portion of the Board's order that requires immediate reinstatement with backpay of twenty named strikers and the dismissal of their replacements.

XI.

Revocation of Settlement Agreements

With respect to the Regional Director's June 14, 1977 decision to revoke the three informal settlement agreements he had previously approved, the ALJ concluded:

> In view of all the findings of violations of the Act, I find that all the actions of the Regional

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[47] H. & F. Binch Co. v. NLRB, 456 F.2d 357 (2d Cir. 1972), cited by the company, is distinguishable. *Binch* held to be conditional a request for group reinstatement which was explicitly conditioned on all being reinstated together. *Binch* clearly involved economic strikers, who are not entitled to immediate reinstatement, and the Board there conceded that this fact made the group request conditional. Here, by contrast, the union in good faith took the nonfrivolous position that the strikers were unfair labor practice strikers. A union's group reinstatement demand, based on this premise, does not make the request conditional simply because the union's legal theory is eventually held to be incorrect.

[48] In addition, Walter Dolbow testified that striker Harold Douglas was recalled to work in March 1979. The ALJ makes no mention of this.

[49] Despite testimony on the subject by Tribou, Andrew Soule, and Levenson, the basis of SGG company officials' beliefs as to who was and was not working is unclear, and no attempts at direct verification by contacting the affected employees were made. An example is Walter Dolbow, who was not recalled, despite testimony that he was considered a "first-rate" glazier, on the basis of Andrew Soule's "understanding," based on "some second or third hand source," that Dolbow was working elsewhere.

[50] Disposition of the present case is without prejudice to any claim that may arise in the future for backpay, under *Laidlaw,* to any striker wrongfully denied reinstatement.

> Director in setting aside the settlement agreements, reopening Cases 1-CA-11856 and 1-CA-11964, and consolidating those cases for trial was a proper exercise of his discretion and authority.

The company argues, "alternatively" to its substantive arguments against the above unfair labor practice findings, that the Regional Director's revocation of the settlement agreements was an abuse of discretion. We find no merit to this argument.

In *Wallace Corp. v. NLRB,* 323 U.S. 248, 254–55, 65 S.Ct. 238, 241–242, 89 L.Ed. 216 (1944) the Supreme Court, after noting the strong policy favoring the settlement of labor disputes, approved the Board's practice of disregarding settlement agreements it had previously approved "where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice." In such cases, the Board, is "justified in con-

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sidering evidence as to [the employer's] conduct, both before and after the settlement." *Id.* This doctrine was later articulated as follows: "[T]he Board may not consider matters properly disposed by a settlement agreement 'unless there is a breach of the agreement or subsequent independent violation of the Act by the parties to the agreement.'" *Rogers Mfg. Co. v. NLRB,* 486 F.2d 644, 648 (6th Cir. 1973), *cert. denied,* 416 U.S. 937, 94 S.Ct. 1937, 40 L.Ed.2d 288 (1974), *quoting Lincoln Bearing Co. v. NLRB,* 311 F.2d 48, 50 (6th Cir. 1962).

By letter of June 14, 1977 the Regional Director informed the company that his investigations of various pending charges had disclosed that "certain terms of the settlement agreement[s] * * * have been violated." Such a finding justifies the Regional Director in setting aside his approval of the settlements and proceeding to issue a complaint on the underlying charges which he had previously found after investigation to have probable merit. There is no allegation that the Regional Director did not act in good faith or that he manipulated the settlement agreements to achieve purposes contrary to the Act. The fact that this court now reverses the Board's findings on several of the relevant unfair labor practices does not make the Regional Director retroactively guilty of abuse of discretion.

XII.

Withdrawal of Recognition

The ALJ found that the company further violated section 8(a)(5) and (1) of the Act by withdrawing recognition from the union March 25, 1977. On that date Levenson wrote Cohen a letter stating

> The company doubts that Local 1516 continues to represent the bargaining unit at Soule Glass & Glazing Company. Indeed, there is even doubt concerning your representations as the agent of all of the 22 strikers. However, even assuming the desire and eligibility of the 22 in returning, the Company has now made many more than that number of replacements. Our information is that they have no interest in representation by the Union * * *. The Company, therefore, is herewith withdrawing recognition of the Union as the established bargaining representative for Soule Glass & Glazing Company.

In support of his conclusion that this action violated the Act, the ALJ reasoned as follows:

> [T]he question of the Union's continued majority status [cannot be] raised in the context of unfair labor practices by the Employer designed to cause disaffection from the Union or to gain time in which to undermine the Union's majority. *Celanese Corporation of America,* 95 NLRB 664, 671–672; *Burroughs Corporation,* 180 NLRB 331; *Nu-Southern Dyeing and Finishing, Inc., et al.,* 179 NLRB 573. Thus, against the background of the unfair labor practices found in this Decision the Repondent was in no position to withdraw recognition from the Union, and in doing so violated Section 8(a)(5) of the Act. Furthermore, at the time recognition was withdrawn the Respondent was obligated to bargain in good faith with the Union by virtue of the settlement agreements in these cases, the last of which was approved * * * on March 4, 1977. The Board has held that an employer cannot justify such a refusal to bargain with a certified union within a reasonable time after the execution of a settlement agreement acknowledging its obligation to bargain, since the parties must have adequate time to attempt to negotiate their differences. *Poole Foundry & Machine Co.,* 95 NLRB 34.

A. *The Legal Standards*

After the passage of one year from the certification of a union as exclusive collective bargaining representative for a particular bargaining unit, the union enjoys a rebuttable presumption of continued majority. To overcome this presumption, the employer has the burden of demonstrating either (1) that the union in fact no longer has a majority; or, more likely (2) "a reasonable, good faith doubt of the union's

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majority." *E. g., NLRB v. Crimptex, Inc., supra,* 517 F.2d at 503; *National Car Rental System, Inc., v. NLRB,* 594 F.2d 1203, 1205 (8th Cir. 1979). The employer's doubt must be "reasonably grounded" and "based on objective considerations" to justify refusal to bargain with the union. *Burroughs Corp.,* 180 NLRB 331, 332 (1969). *See NLRB v. Middleboro Fire Apparatus, Inc.,* 590 F.2d 4, 8–9 (1st Cir. 1978) (employee statements of dissatisfaction with union are " 'objective, identifiable acts' on which * * * an employer ought to be able to rely"); R. Gorman, *supra,* at 110–11. Generally, several indicia of loss of majority support are required, and no one factor (e. g., high employer turnover or union "dormancy") is determinative. In reviewing the Board's determination of "reasonable good faith doubt," a court should respect the Board's "seasoned feel for the meaning of events in a labor-management setting," and "may not reverse unless [the court] deem[s] this a case of arbitrariness, irrationality, or abuse of judgment" as to the Board's ultimate conclusion. *Middleboro Fire Apparatus, supra,* 590 F.2d at 9.

Although mere high employee turnover is not a sufficient ground to negate a union's presumed majority status, the permanent replacement of striking employees presents a different situation. Striker repalacements are

> generally assumed * * * not [to] support the union and * * * ought not to be counted toward a union majority. When such strikebreakers or permanent replacements constitute a majority of the unit, the presumption of union majority is undermined. *Titan Metal Mfg. Co.,* 135 NLRB 196 (1962). But in computing the total workforce within which the majority is to be determined, the replaced economic strikers must be counted, at least during the first twelve months of the strike. *C. H. Guenther & Sons v. NLRB,* 427 F.2d 983 (5th Cir.), *cert. denied,* 400 U.S. 942 [91 S.Ct. 240, 27 L.Ed.2d 246] (1970).

R. Gorman, *supra,* at 112–13 (case citations added). *See National Car Rental, supra,* 594 F.2d at 1206 (quoting Gorman, supra, and holding replacements presumed antiunion).

However, an employer's prior unfair labor practices may "estop" it from withdrawing recognition based on good faith doubt, where the employer's own actions have undermined the union's support. As the Supreme Court stated in *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 687, 64 S.Ct. 830, 834, 88 L.Ed. 1007 (1944) (a unilateral wage increase case),

> [p]etitioner cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will.

Accord, NLRB v. Frick Co., 423 F.2d 1327, 1333 (3d Cir. 1970). *Compare NLRB v. Cott Corporation,* 578 F.2d 892 (1st Cir. 1978). The Board in *Burroughs Corp.,* 180 NLRB 331, 332 (1969) stated that the employer's good faith doubt "must not have been raised in the context [of] illegal *antiunion* activities, or other conduct by the employer *aimed* at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." (Emphasis added). *Accord, NLRB v. Sky Wolf Sales,* 470 F.2d 827, 830 (9th Cir. 1972). "The existence of an unfair labor practice prior to the refusal to bargain interjects an element of uncertainty about whether the employer thus caused the possible loss of majority. But if it is shown that the unfair labor practice did not significantly contribute to the loss of status, the employer may avoid a bargaining order." *National Cash Register Co. v. NLRB,* 494 F.2d 189, 195 (8th Cir. 1974).

Finally, despite a clear loss of majority by the union, an employer may be compelled to continue to bargain with the union for a "reasonable period" by virtue of its entry into a Board-approved settlement

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agreement with the union concerning previous unfair labor practice charges. *Poole Foundry & Machine Co. v. NLRB,* 192 F.2d 740, 743 (4th Cir. 1951), *cert. denied,* 342 U.S. 954, 72 S.Ct. 626, 96 L.Ed. 709 (1952); *NLRB v. Vantran Electric Corp.,* 580 F.2d 921, 923–24 (7th Cir. 1978). The rationale is both remedial and contractual. The company's Board-approved agreement to bargain in good faith with the union (a standard feature of § 8(a)(5) settlement agreements) "manifests an administrative determination * * * that some remedial action is necessary to safeguard the public interest[] * * *," *Poole, supra,* at 743; and may be the *quid pro quo* for the union's agreement to withdraw its unfair labor practice charges. *Vantran, supra,* at 924. *See Straus Communications, Inc. v. NLRB,* 625 F.2d 458, 463 (2d Cir. 1980); *NLRB v. All Brand Printing Corp.,* 594 F.2d 926, 931 (2d Cir. 1979).

B. *Loss of Majority*

We conclude that the ALJ erred, on this record, in finding that the company's withdrawal of recognition of the union violated the Act. First, the record shows that on March 25, 1977 SGG employed 29 permanent striker replacements hired during the strike, and the strikers numbered only 22. Counting all these employees, it is clear that the replacements constituted a majority. Not only are such replacements not presumed to support the union whose picket lines they have been crossing, but in this case the great majority of the replacements testified that they in fact wanted nothing to do with Local 1516 and preferred a nonunion shop. Absent countervailing factors or the operation of some doctrine of estoppel, this objective numerical fact alone is sufficient to support the company's withdrawal of recognition of the union.

No such countervailing factors or constraints are present here. In contrast to the situation condemned in cases like *Medo* and *Frick, supra,* the company's unfair labor practices, discussed above, cannot be said to have *caused* the union's loss of majority. Rather, the strike and the company's lawful hiring of permanent striker replacements did so. The union took the risk that the strikers would be permanently replaced, and knew replacements were being hired starting in May, 1976. Having failed in its attempt to clothe its strike in the "protective garment" of an unfair labor practice strike, *cf. NLRB v. Colonial Haven Nursing Home, supra,* 742 F.2d at 706, the union must accept the consequences of its actions.

Furthermore, as noted above, there has been no showing that the company's actions, including those found to be unfair labor practices, were motivated by antiunion animus. Here, the majority issue was *not,* in the language of the *Burroughs* decision relied on by the ALJ, "raised in the context of unfair labor practices by the Employer designed to cause disaffection with" or undermine the Union's support. 180 NLRB at 332. There is no evidence that any of the four unfair labor practices that we have affirmed affected union support among either the strikers or the replacements, except for the supervisor assault, which actually enhanced union support among the strikers.

C. *The Settlement Agreement*

We turn next to the settlement agreement, relied on by the ALJ, under the *Poole Foundry* rationale, as an added reason for barring the company from refusing to bargain on March 25. That agreement, signed by the parties on February 4, 1977 and approved by the Board's Regional Director on March 4, 1977, pertained to the union's December 17, 1976 charge regarding the information refusal. The posting notice issued pursuant to the settlement agreement stated in substance that the company would (a) not refuse to bargain collectively with the union, (b) furnish the union with the requested information "pertaining to all employees performing bargaining unit work," and (c) offer reinstatement to any striker not permanently replaced before December 9, 1976 and discharge if necessary any replacements hired between December

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9 and the date of compliance with the settlement agreement.[51] No bargaining sessions were held between the time of the settlement agreement and the withdrawal of recognition on March 25, 1977, although the parties did exchange letters regarding the reinstatement request. The settlement agreement was revoked by the Regional Director on June 14, 1977 following his investigation of two of the union's subsequent charges. The company, pur-

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[51] The record indicates that none of the 29 permanent replacements referred to above was hired on or after December 9, 1976.

suant to the settlement agreement, furnished the specified information and hired no more striker replacements.

The company argues that the Board could not rely on the settlement agreement, which the Board itself voided, as the basis for holding the company in violation of the Act. This argument has merit. As a matter of fairness, as well as basic legal principles, the Board in its discretion may elect either to rely upon the agreement and apply sanctions for its violation, including specific enforcement of the agreement to bargain, or it may void the agreement and prosecute the alleged underlying violations. It cannot set aside the agreement, reinstating the previous charges against the employer, and at the same time order compliance in the future with a promise in the voided agreement. Here, the company's obligations under the settlement agreement terminated June 14, 1977. Once the Board elected to revoke its approval of the settlement and proceed to prosecute the underlying charge, it lost the option to enforce terms of the voided agreement. It would be fundamentally unfair to allow the Board to disregard the settlement and compel the company to defend against the information refusal charge, and simultaneously to rely on the settlement to compel the company to bargain when it otherwise would have had no obligation to do so. The Board's action in setting aside the settlement agreement distinguishes the present case from *Poole, All Brand,* and *Straus, supra,* where settlement agreements were held to bar the employer's withdrawal of recognition.

We note also the effect of a bargaining order at the present time as a remedy for the company's failure to bargain with the union between March 9 and June 14, 1977. The likely results of this remedy are either to compel the parties to engage in several more months of futile negotiations (accompanied no doubt by a spate of additional unfair labor practice charges and further litigation), or to force unwanted representation upon the current SGG employees (at least pending an election).[52] Even if an agreement were reached between the company and the union, it is unlikely that it would be of any immediate benefit to the replaced strikers. Beyond the *in terrorem* effect of such results on future employers who are thinking of withdrawing recognition of a union (or considering whether to enter into a settlement agreement including a bargaining provision), we fail to see how a bargaining order in this case would serve the public interest in harmonious labor-management relations. Absent an appropriate reason for doing so—*e.g.*, to remedy the employer's previous antiunion conduct or genuine refusal to bargain in good faith—we decline to enforce the Board's bargaining order. For these reasons, we hold that the company did not violate § 8(a)(5) and (1) by withdrawing its recognition of the union.

XIII.

ALJ Bias and Credibility Determinations

Absent some showing of abuse, the ALJ is presumed free from bias. His findings on credibility will not be disturbed where the choice is among conflicting testimony or where some adequate reason is given for discrediting a witness. *E.g., NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978).

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It is true, as petitioners observe, that the ALJ consistently credited union witnesses (particularly Dolbow) and discredited company witnesses (particularly Levenson) whenever their testimony conflicted as to the events at the various bargaining sessions.[53] However, we find no merit in petition-

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[52] The latter problem was acknowledged, but determined not to have controlling significance, in *Poole* and *All Brand, supa.*

[53] The ALJ's overall evaluation of the respective credibility of Dolbow and Levenson and the factors on which his conclusions were based are set forth in the following passage:

> By far the greater amount of testimony concerning the actual bargaining was adduced by Walter Dolbow and Alan J. Levenson * * *. Walter Dolbow impressed me as an honest witness who was attempting to remember as best he could the events which occurred at each of a long series of negotiating meetings which ended almost a year prior to his appearance as a witness. Considering the fact that Dolbow testified entirely without the use of notes, he displayed a remarkable ability to remember detail, and, except where otherwise indicated, was a credible witness for the General Counsel. Alan J. Levenson, Esq., on the other hand displayed a poor independent memory concerning what transpired at the bargaining table, despite his status as the Respondent's chief negotiator and labor relations counsel, and found it necessary, for the most part, to rely on notes while testifying about the bargaining sessions. In addition, as did his father Mayo Levenson, Esq. when he testified, Levenson frequently departed from a precise exposition of the facts, and launched into self serving speeches concerning his thought processes and conclusionary assertions about Respondent's good intentions. In addition, when serving at the hearing in the other of his dual capacities as Respondent's chief trial counsel, Levenson adduced much testimony from important witnesses for the Respondent including Charles Soule, Edward Churchill, and Andrew Soule, through the re-

Continued

ers' allegation that the record demonstrates that bias of the ALJ against the company deprived them of a fair trial. The ALJ may credit the General Counsel's witnesses in preference to those of the employer, *Banner Biscuit Co. v. NLRB*, 356 F.2d 765, 768 (8th Cir. 1966), and here the ALJ gave adequate reasons for the majority of his credibility determinations. Although the record and the ALJ's decision do at times appear to indicate a certain hostility or impatience by the ALJ toward the company and its counsel, *cf. Medline Industries, Inc. v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979); *Caribe General Electric Inc. v. NLRB*, 357 F.2d 664, 665–66 (1st Cir. 1966), we find no indication that this apparent attitude in any way affected the fairness of the hearing or the integrity of the record.

As the length of this opinion indicates, many of the issues were close ones. The facts that the ALJ found for the General Counsel and against the company in all but one instance (the firing of David Bates) and that we have reversed a number of those findings do not, without more, show bias. Notwithstanding the protestations of a disappointed litigant, "rejection of an opposed view, even if total, 'cannot of itself impugn the integrity of a trier of fact.'" *NLRB v. Phaostron Instrument & Electronic Co.*, 344 F.2d 855, 859 (9th Cir. 1965); *see NLRB v. Superior Sales, Inc.*, 366 F2d 229, 233 (8th Cir. 1966).

XIV.

The Nature of Review in This Case

This case does not present issues of first impression. Nor is it a case where the

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court has reached out and intruded upon responsibilities assigned to the Board. We would have been happy to defer had the Board, applying its day-to-day familiarity with the labor law, arrived at its own findings explained by analysis of the issues and the evidence. Instead, the Board summarily affirmed the ALJ's decison, with only a single minor modification of the resulting order. Surely in some instances an ALJ's decision merits summary affirmance. This was not such a case.

The need for full examination of the issues and the evidence in this case has necessarily led us to review comprehensively the decisions in numerous areas of labor law. Our statements of the law in these areas are not an effort to revise or reshape the existing law. They are meant only to indicate the bases upon which we have proceeded in resolving the issues before us. There is always some risk that such extensive statements of the law may later be seized upon as fraught with significance in contexts for which they were not framed. We explicitly state that we do not regard our summaries of the law in these various areas as exhaustive, much less as intended to supersede or modify the underlying precedent in this Circuit and elsewhere.

XV.

Remedy

Under section 10(c) of the Act, 29 U.S.C. § 160(c), the Board has broad discretion in fashioning appropriate remedies which will "effectuate the policies of this [Act]." Where the Board has found a party guilty of an unfair labor practice and that finding is affirmed, the reviewing court is required to grant great deference to the Board's remedial order and will not disturb it "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1220, 87 L.Ed. 1568 (1943); *Fibreboard, supra*, 379 U.S. at 216, 85 S.Ct. at 405. However, it is also plainly true that where the court reverses the un-

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peated use of leading questions supplying answers relating to crucial issues, despite admonishments from the bench. I have thoroughly and carefully considered all of the above factors in writing the Decision, particularly concerning the findings of fact relating to Respondent's conduct during the negotiations.

Although we decline to disturb the ALJ's credibility determinations, we note that (a) on the first day of the hearing the ALJ told Levenson he *was* permitted to ask Charles Soule leading questions; (b) Dolbow *did* have "notes on every meeting," which the ALJ explicitly permitted Dolbow "to utilize * * * while testifying concerning the negotiating sessions" in order to refresh his recollection, and Dolbow did consult and refer to his notes at several points in the record; (c) Dolbow's testimony was not free of self-serving statements, including a categorical denial of any knowledge of any violence by strikers against the company or any mention of the subject during the negotiations ("The only violence I know of was caused by you people up in Bangor * * *.") and asserting legal conclusions regarding the company's unilateral" actions; and (d) the ALJ became increasingly impatient and irritated with Levenson's slow interrogation of witnesses, and on several occasions reprimanded Levenson for delaying the proceedings.

derlying unfair labor practice finding, the corresponding remedy will not be enforced. Also, it is implict in "abuse of discretion" review that the remedy must be in reasonable proportion to the violation; a *de minimis*, technical, or marginal violation of the Act cannot properly support a broad, draconian remedy.

In this opinion we have sustained four of the Board's findings of unfair labor practices: the wage increase, § 8(a)(1); the supervisor strike misconduct, § 8(a)(1); the unilateral transfer of bargaining unit work to SGR, § 8(a)(5) and (1); and the refusal to provide certain portions of the requested information, § 8(a)(5) and (1). We have held that the proved violations did not convert the strike, that the strikers were therefore economic strikers entitled only to preferential reinstatement whenever jobs become available, that the finding that the company was guilty of an unlawful course of conduct or overall bad faith bargaining was neither tried nor proved, and that the findings, that the company's acts were intended to disparage, undermine, or discriminate against the union and its adherents or were otherwise motivated by unlawful antiunion animus were not supported by substantial evidence.

In this context, we hold that the only appropriate remedies for the proved violations are a cease and desist order and an order for a posting notice. It is appropriate that the order include directives that the company cease and desist from the first two of the above unfair labor practices, and that it post notice of the type ordered by the Board, agreeing to do the same. The otherwise-justified provisions of the cease and desist order relating to the information refusal and diversion of bargaining unit work, and the corresponding affirmative remedial measures designed to benefit the union and restore the status quo ante (*i.e.*, providing additional information and restoring the lost work to the bargaining unit) are and will remain moot unless the union regains its status as bargaining agent. However, in order that these violations of the Act not go wholly unredressed, we direct that the notice posted also disclose the Board's determination of the latter two violations.

We realize that those parts of the Board's order that we have found sustainable impose quite limited sanctions. Indeed, an objection may be voiced that what remains to be enforced will have little practical impact because, as a result of its unsuccessful economic strike, the union no longer has the status of collective bargaining representative. This is an outcome, however, which neither we nor the Board can properly avoid; it is a consequence of legally permissible economic conflict, not unfair labor practices.

For the above reasons, we enforce only the provisions of the Board's Order requiring petitioners to cease and desist from the following actions (with appropriate modifications and deletions to eliminate language inconsistent with this opinion):[54]

> (a) Assaulting employees because of their participation in a strike or other union or protected concerted activities.
>
> (b) Offering employees raises or other inducements to return to work and cease participating in a strike or other union or protected concerted activities.
>
> * * * * *
>
> (e) Granting wage increased to other employees in excess of what is offered to * * * *union members* or supporters, *where the timing and amount of such increases is reasonably calulated to communicate to union members or supporters that it does not pay to support a union or participate in union activities, or which otherwise tends to restrain, coerce or interfere with employees' freedom of choice as to unionization and other protected activities.*

In addition, statements to the following effect shall be included in the notice to be posted by the company.

> In addition to the above, the Company has been found guilty of the following violations of the National Labor Relations Act against Glaziers Local Union 1516:
>
> (a) Unilaterally changing the type and amount of work of bargaining unit employees, by diverting outside glass replacement work to Soule Glass Replacement Company, without prior notice and bargaining.
>
> (b) Failing and refusing to furnish promptly to the union, on request, adequate relevant information concerning the wages and hours of striker

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[54] Our deletions are indicated with an ellipsis (. . .) and our additions appear in italics.

replacement employees and others performing bargaining unit work, necessary to the performance of the union's function as collective-bargaining representative.

In all other respects enforcement of the Board's order is denied.

Windsor Woodworking, Inc. v. NLRB

647 F.2d 859 (8th Cir.), May 8, 1981—249 NLRB 289

On petition to review Board Order

Before LAY, Chief Judge, ROSS, Circuit Judge, and VAN PELT, District Judge*

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ROSS, Circuit Judge: In this case Windsor Woodworking, Inc. (Windsor) of Des Moines, Iowa, petitions this court for review of orders of the National Labor Relations Board (NLRB or Board) dated May 5, 1980, and June 23, 1980, ordering Windsor to bargain collectively with Local Lodge No. 1513, International Association of Machinists and Aerospace Workers, AFL–CIO (union). NLRB has cross-applied for enforcement of its orders. We grant enforcement and deny the petition for review.

A representation election was held on December 22, 1978, involving employees of Windsor. Of the 57 votes cast, 12 were challenged. The vote, excluding the challenged ballots, was 25 for the union and 20 against the union. The Board ordered 5 of the votes counted which resulted in a 25–25 tie. The Board then ordered a hearing on whether the other 7 challenged ballots should be counted. These 7 votes had been cast by individuals who had been "let go" by Windsor. The hearing was held on April 17, 1979. On August 7, 1979, the Board adopted the recommendation of the hearing officer that the 7 votes be counted. The recommendation was based on a factual finding that these seven individuals had a reasonable expectation of returning to work. Windsor claimed they had no such reasonable expectation, but the Board held to the contrary. Following certification of the union, the company refused to bargain. The Board granted the General Counsel's motion for summary judgment on an unfair labor practice complaint and a bargaining order was issued.

A. Petitioner's claims

In this appeal Windsor urges that the Board erred for the following reasons:

1. A year earlier five employees had been let go at about the same time of the year and none of them returned to work.
2. A new plant with increased efficiency, coupled with a slow period in the industry as a whole, made it unlikely that there would be a need for additional hiring.
3. Windsor's general manager was asked by the hearing officer this question and gave this answer: "Assuming the market place to expand at normal growth levels as you have experienced in the past, would you be able to operate with the labor force you have?" His response was, "At normal growth levels, I would say 'yes.'" Windsor claims this testimony was unrefuted but was not credited by the hearing officer without stating a reason.

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4. The hearing officer did not place the burden of proof on the union nor did he resolve issues of credibility.
5. The Board granted the Regional Director's motion for summary judgment without considering the response of Windsor file on February 27, 1980, even though the order was not issued until May 5, 1980. Upon objection from Windsor, the Board refused to consider the response because, according to its records, it was filed seven days late.[1]

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*The Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

[1] Windsor's response was originally due on February 6, 1980, but upon Windsor's motion the time was extended to February 20 (according to the Board). Windsor claims to have received a telephoned telegraphic communication extending the time to February 28.

We find the Board's refusal to consider the response under these circumstances to be absolutely indefensible. We note in passing, the Board has waited on many occasions, including this case, until on or after the last day for filing before even requesting an extension of brief date on cases filed in this court. Apparently the Board has one set of rules for briefs filed with it and one set for filing briefs in this court. In this case, petitioner's brief was filed on November 4, 1980, and the Board's brief was not filed until December 22, 1980, even though it was due on December 3, 1980. The request for extension of time was not filed until December 5, 1980, and this court ordered the Board to file its brief by December 17, 1980. The brief was mailed on December 17, 1980, and received for filing on December 22, 1980.

The thrust of the response was to the effect that the union certified was different from the union defined in the complaint. It also alleged there was additional evidence which had been filed with the Board in August 1979 to the effect "there was not at the time of the complaint a reasonable expectation that any of the seven persons voting the remaining seven challenged ballots would be recalled to work." This included an affidavit of Mr. Carmichael dated August 7, 1979. Other arguments were made which Windsor had alread advanced.

The Board acknowledged the defect in identification of the union but indicated it was a technical error which would be corrected. We accept that explanation as reasonable. The failure to consider the additional evidence was error, but in our view would not have changed the result. This court has considered this additional evidence, including the affidavit of Carmichael stating that as of August 23, 1979, the number of workers had been reduced to 49 and would soon be reduced to 44. This change, eight months after the election and after the initial Board decision, does not affect the question of whether the seven employees who were "let go" could have reasonably expected to return to work as of the date of election. Compare *NLRB v. D.H. Farms Co.*, 465 F.2d 1230, 1231 (6th Cir. 1972) (eligibility of laid off employees determined at *pre* election hearing, therefore, hearing should be held on conditions as of date of election based on new evidence submitted by employer). See also *Kustom Electronics v. NLRB*, 590 F.2d 817, 820–22 (10th Cir. 1978); *NLRB v. Atkinson Dredging Co.*, 329 F.2d 158, 164 (4th Cir.), *cert. denied*, 377 U.S. 965, 84 S.Ct. 1647, 12 L.Ed.2d 736 (1964); *NLRB v. Jesse Jones Sausage Co.*, 309 F.2d 664, 666 (4th Cir. 1962). The failure of Windsor to state to the seven employees that they were terminated rather than laid off is some indication that Windsor, at the very least, wanted to retain its options.

B. The Board's claims

In response to the claims made by petitioner, the Board urges that there is substantial evidence on the record as a whole to support the Board's determination and gives these reasons:

1. The Board is vested with wide discretion in conducting elections and our review must be limited to whether the Board reasonably exercised its discretion.

2. Whether the employees had a reasonable expectation of being recalled to work "depends on objective factors, including the past experience of the employer, the employer's future plans, and the circumstances of the layoff, including what the employees were told as to the likelihood of recall." (Citations omitted.)

3. The burden of proof was not on the union.

4. In a prior layoff of employees of Windsor in early 1977, all but one of the employees were recalled to work.

5. The company's business was seasonal in nature and the employees were "let go" at the start of the slow season and before the new plant was in full production.

6. The company did not tell the seven employees that they would not be recalled. Mr. Kenny claimed that two days after the layoff, General Manager Carmichael told him that he didn't know how long the layoff would last. There is other similar but inconclusive evidence in the record as to Gordon Bell and Stephen Earp.

7. The Board properly refused to consider Windsor's response to the motion for summary judgment because it was untimely filed.[2]

C. Conclusion

Our study of the briefs and the record convinces us that there was substantial evidence on the record as a whole to justify the Board's conclusion. In reaching this conclusion, we rely on the evidence relating to the claims of the Board set forth above in paragraphs 4, 5 and 6. Although this evidence was not conclusive, it certainly permitted the inference that the employees had a reasonable expectation of returning to work.

The Board's order is hereby enforced.

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[2] See n.1.

Universal Security Instruments, Inc. v. NLRB

649 F.2d 247 (4th Cir.), May 12, 1981; certiorari denied November 2, 1981—250 NLRB 661

On petition to review Board Order

Before HAYNSWORTH, Chief Judge, BUTZNER, Circuit Judge, and WILLIAMS, District Judge*

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RICHARD L. WILLIAMS, District Judge: Universal Security Instruments, Inc. has petitioned this court to review a finding by the National Labor Relations Board of several violations of § 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The Board, through its General Counsel, has cross-petitioned for enforcement of its order and the union has intervened on behalf of the Board.

I. FACTUAL SETTING

The facts of this case were laid out in the Decision and Order of the Board and in the Administrative Law Judge's (ALJ) decision. *See* 250 NLRB No. 92 (1980). While we feel no need to repeat all that is printed there, we must, however, explain the factual setting of this case in some detail.

Universal was founded in 1969 and initially manufactured electromechanical sirens and other security equipment. After several years of working in small facilities, the company leased a plant in Baltimore, Maryland on Potee Street in 1971. In 1973 the Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO (the union), gained representation rights through a National Labor Relations Board

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conducted election. The union was to represent the production and maintenance workers at the Potee Street plant.

In August of that year the union and the company signed a three-year collective bargaining agreement. The agreement, among other things, contained a clause which recited that it was to cover all production and maintenance workers "at [Universal's] Baltimore, Maryland facility, at 2829 Potee Street * * *." The agreement also contained what was labelled a "Management Rights" clause which said that the union "recognizes that the Company shall have the sole and exclusive jurisdiction of the management and operation of its business, * * * and the right to relocate its plant or any portion thereof." The collective bargaining agreement extended to August 1, 1979, and this agreement was in effect at all times material to this case.

At about the same time that the company and the union were negotiating and signing the original collective bargaining agreement covering the Potee Street plant, the company entered the electronics field by making electronic smoke detectors and sirens. This was an expanding market, and because of this expansion, Universal leased a warehouse on Hollins Ferry Road in order to step up the production of smoke detectors and other electronic equipment. Hollins Ferry Road, which began production in 1975, was about 2.7 miles away from the Potee Street facility.

Universal originally staffed the Hollins Ferry Road plant with employees from Potee Street, who would punch in at Potee Street and be driven to Hollins Ferry Road. Eventually Universal hired employees directly for assigned to Hollins Ferry Road. The company voluntarily applied the union dues check-off provision of the existing collective bargaining agreement to the Hollins Ferry Road employees. In May of 1976 Universal formally recognized the union as the collective bargaining representative of the workers at Hollins Ferry Road without requiring proof that the union represented a majority of the workers at that plant.

The company's markets continued to expand and by the spring and summer of 1977, 300 employees were working at the Hollins Ferry Road facility. However, all parties to this action agree, and both the ALJ and Board found, that the conditions at the Hollins Ferry Road plant were poor and both workers and management were dissatisfied with the facilities.[1] Because of these poor conditions, the company began to look for a new, better plant.

After considering several locations, Universal settled on a plant location at Owings Mills, Maryland, which was about 27 miles away from its other two facilities. This location was chosen because it was easily accessible by Baltimore public transportation and the company planned to hire from the Baltimore metropolitan area labor pool. In fact, one of the bus lines which served the Owings Mills plant also ran by the Potee Street plant, a factor which company officials considered to be positive.

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*The Hon. Richard L. Williams, United States District Judge for the Eastern District of Virginia, sitting by designation.

[1] The ALJ on page 4 of his decision wrote:

> The ceilings were too high. Temperature and humidity could not be adequately controlled within and the employees were over-crowded. The Hollins Ferry Road facility was too hot in the summer and too cold in the winter. There was inadequate space for [Universal's] production operation. State and local authorities complained to [Universal] about fire hazards and inadequate sanitation.
>
> These conditions impaired plant operations. The overcrowded conditions in the plant production area caused [Universal] to move its research and quality control activity to a trailer. Further, these shortcomings caused poor productivity and poor product quality at the Hollins Ferry Road plant.

In March of 1977, Universal purchased the Owings Mills plant with the intention of using it to supplement its production facility at Hollins Ferry Road but not to replace that facility. Production began at Owings Mills in mid-September, 1977.

Although the company never informed the union formally of the impending expansion at Owings Mills, union members found out that the company was planning a new

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facility. They made several inquiries as to when the new plant was going to open and if the union would be recognized there, but these questions were never directly answered. In August or September of 1977 the site of the new plant was visited by union official and on or about September 12, 1977 the union requested that Universal recognize it as the bargaining representative of the employees of Owings. Mills. This request was denied by the company. After some organizational efforts by the union failed, the union filed a grievance against the company for denying this request. The General Counsel issued a complaint and notice of a hearing on January 6, 1978.

In early October, 1977, Universal officials decided that the Owings Mills plant, which was to be primarily staffed by newly hired employees, needed a certain number of experienced workers. Universal chairman Stephen Knepper authorized personnel director Robert O'Neill to recruit several Hollins Ferry Road employees for transfer to the new facility. O'Neill asked four Hollins Ferry Road workers if they would transfer to the new plant. He did not select the workers asked by seniority, but based the offers on recommendations by company management. Three of the four accepted the offer. At no time did the company notify the workers' bargaining representative that is was making these unilateral offers.

Again in late October the company offered transfers to 15 other Hollins Ferry Road employees, once again not selected on the basis of seniority. Twelve of these fifteen accepted the offer. The three who did not were laid off due to adverse business conditions.

By the end of September, 1977 Owings Mills and 65 production and maintenance employees, and by the end of October, 1977 the plant had 80 employees. Hollins Ferry Road at the same time had 200 and Potee Street about 50.

One of the 15 employees offered transfers in late October was Teresa Egitto. O'Neill informed her that she was laid off but could resume working at the Owings Mills plant. She testified that she was told that the work there would be the same, but that there was no union at the new facility and, because of this, the working conditions and benefits were better. She also claimed that O'Neill told her that if the employees at Owings Mills decided to have the union represent them, the working conditions at Owings Mills would deteriorate.

O'Neill also told several of the employees who had transferred that they would retain their seniority with the company for vacation purposes and other benefits, but that for layoffs, plant seniority would be the rule. Also, wages benefits and other terms and conditions of employment were different from that which was negotiated with the union and embodied in the collective bargaining agreement.

Because of various market problems, Universal began to experience serious setbacks in the smoke detector market, beginning at the end of October, 1977. These setbacks forced a general layoff which affected the employees of all three of the company's plants. This layoff was terminated in January of 1978, but the market setbacks, along with the inefficiency of the Hollins Ferry Road plant, made that facility unprofitable for the company. On February 1, 1978, Universal's director of operations Amadee Dean recommended to chairman Knepper that Hollins Ferry Road be closed down. The next day Knepper decided to follow this recommendation and began to plan for the plant's closure by the end of that month. On February 3, Kepper authorized O'Neill to offer transfers to Owings Mills to the Hollins Ferry Road employees. That same day O'Neill began making offers to the employees on a seniority basis. Each employee was asked to fill out a card acknowledging that the offer was made and indicating his or her decision on the offer. Those who refused transfers to Owings Mills were told that positions might not be open at Potee

Street, but that they would be placed on a preferential hiring list for that plant.

Seventy-two of the Hollins Ferry Road employees accepted the offer of transfer

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and thirty-one declined. Of the 31 who declined, two were given positions at Potee Street. The other 29 were laid off.

In addition to beginning the transfer process, the company also wrote to the union regarding the closure of the Hollins Ferry Road plant. In a letter dated February 3, 1978, a lawyer for the company wrote to union officials to inform them that "it will probably be necessary for the Comapny to close its Hollins Ferry Road * * * plant within the next few weeks * * *. [T]he Company is hereby offering to meet with you, at a mutually convenient time and place, to discuss all aspects of this matter, including, but not limited to, the impact that such closing would have upon the employees at that plant." That letter also informed the union that offers of transfer were going to be made "to as many of the Hollins Ferry Road plant employees as possible."

The first group of Hollins Ferry Road employees who accepted the transfers began to arrive for work at Owings Mills as early as February 8, 1978. they were told of the new health and wage improvements, which were different from those called for under the collective bargaining agreement They were also told of the change in the seniority system for layoffs. At this meeting O'Neill also told the transferees that no union would be recognized at the plant and, because of this, working conditions and benefits would be better than they were at Hollins Ferry Road.

The first of several meetings with union officials did not take place until February 14. The principal issue between the company and the union was whether or not the company planned to recognize the union as the bargaining representative at the new facility. The company steadfastly refused to do so. Some other minor topics were brought up, but apparently no major discussions were held on any other topics. The Hollins Ferry Road plant was closed permanently Februray 28, 1978.

The Board found that the production and maintenance employees at Owings Mills constituted an accretion to the bargaining unit at Potee Street and Hollins Ferry Road and, because of this, Universal had violated § 8(a)(5) and (1) of the Act [2] by refusing to recognize the union as the bargaining representative at Owings Mills and refusing to apply the terms of the collective bargaining agreement to the production and maintenance workers at that facility. The Board also found violations of these sections of the Act by Universal's unilateral transfer of unit working employees from Hollins Ferry Road to Owings Mills and by making offers of transfers to the employees without consulting and bargaining with the union. The Board also found that company's failure to bargain with the union over its decision to close the Hollins Ferry Road plant to be a violation of § 8(a)(5) of the Act and found that the company also failed to bargain with the union over the effects of that closing. The Board finally found that the company violated § 8(a)(1) by threatening employees with reprisals if they should try and have the union represent them at the new plant.

To remedy these violations the Board ordered:

(1) That the company cease and desist from these unfair labor practices and refrain from restraining empolyees in the exercise of their rights under § 7 of the Act;

(2) The company to recognize the union as the collective bargaining agent of the production and maintenance workers at Owings Mills, to apply the terms of the agreement to those employees retroactively, and to make the employees whole for any losses they may have suffered as a result of the

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unlawful refusal to apply the terms of the agreement to them;

(3) The company to bargain, upon request by the union, over the transfer of employees to the new plant, the closure of the Hollins Ferry Road plant, and the effects on employees of the plant closures;

(4) A limited back-pay award to be made to the 29 employees who were laid off after refusing transfers to Owings Mills;

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[2] § 8(a) reads as follows:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the excercise of the rights guaranteed in section 7.

(5) to refuse to bargain collectively with the representatives of his employees * * *.

(5) The company post appropriate notices at the Owings Mills facility and the Hollins Ferry Road plant, should that plant ever reopen.

Universal has asked this court to review the Board's decision and order and the Board has cross-petitioned for enforcement.

II. THE ACCRETION ISSUE

The Board found that Universal's Owings Mills plant constituted an accretion to the Hollins Ferry Road plant as of September 12, 1977, the approximate date on which the union representatives requested recognition of the union at Owings Mills.

" 'An accretion' occurs when new employees are added to an already existing [bargaining] unit." *N.L.R.B. v. Sunset House*, 415 F.2d 545, 547 (9th Cir. 1969). The additional employees are absorbed into the existing unit without first having an election "where these additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representative." *Lammert Indus. v. N.L.R.B.*, 578 F.2d 1223, 1225 n.3 (7th Cir. 1978).

If the employees hired and transferred to Owings Mills did constitute an accretion, Universal violated the Act by its failure to bargain, because it unilaterally changed wages, seniority and benefits—all unquestionably "terms and conditions of employment" within the meaning of § 8(d) of the Act[3]—of employees within a bargaining unit with which Universal already had a collective bargaining agreement. The company's duty to recognize the accretion is triggered by the request of the bargaining representative to negotiate. *Goodyear Tire & Rubber Co.*, 195 NLRB 767 (1972).

A finding of an accretion by the Board is similar to the Board's certifying a particular group of employees as an appropriate bargaining unit because in both the Board is using its expertise to determine the most appropriate mix of employees for a particular unit. *N.L.R.B. v. R. L. Sweet Lumber Co.*, 515 F.2d 785, 794 (10th Cir.), *cert. denied*, 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302 (1975); *N.L.R.B. v. Security-Columbian Banknote Co.*, 541 F.2d 135, 140–41 (3d Cir. 1976). And, just as when the Board certifies a unit, the Board's finding of an accretion is a matter which is generally committed to its discretion. *N.L.R.B. v. R. L. Sweet Lumber Co., supra; Lammert Indus. v N.L.R.B., supra; N.L.R.B. v. Security-Columbian Banknote Co., supra.* Thus, its finding "should not be set aside unless the reviewing court is convinced that the Board has acted in an arbitrary and capricious manner." *N.L.R.B. v. R. L. Sweet Lumber Co.*, 515 F.2d at 794.

In making its determination the Board must closely analyze the circumstances of the workers to determine whether the new and old employees truly share a "community of interest." To do this several factors are scrutinized. These are: (1) similarity of working conditions; (2) job classification; (3) skills and functions; (4) similarity of products; (5) interchangeabililty of employees; (6) geographical proximity; (7) centralization of managerial control; *Lammert Indus. v. N.L.R.B.*, 578 F.2d at 1225; (8) functional integration of the business; (9) collective bargaining history. *N.L.R.B. v. R. L. Sweet Lumber Co.*, 515 F.2d 785. *See also Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977).

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> In determining whether a group of employees represents an accretion to an existing unit the Board must consider unique and complex sets of facts in light of the somewhat conflicting policies of stability in bargaining relations, * * * and assurance to employees of the right to choose their own bargaining agents.

N.L.R.B. v. Food Employers Council, Inc., 399 F.2d 501, 504 (9th Cir. 1968) (citations omitted).

Chairman Knepper testified before the ALJ that Owings Mills was established to supplement Hollins Ferry Road's production of smoke detectors and that both plants produced the same product—the SS—200 model smoke detector—until the October 31 general layoff.

Also, workers were required to have similar skills at both plants, demonstrated by the fact that 15 Hollins Ferry Road employees were transferred in October, 1977 to Owings Mills to provide the new plant with experienced workers and to help train newly hired employees. Further, in February, 1978 Universal offered its workers at Hollins Ferry Road transfers to Owings Mills when the company closed down Hollins Ferry Road. Both of these factors tend to show that there were similar skills required at the two facililties.

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[3] § 8(d) provides as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agrreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

As for geographic proximity Owings Mills was about 27 miles away from Hollins Ferry Road. Despite this distance both plants drew their workers from the metropolitan Baltimore labor pool. In fact, Universal advertised for workers not only in suburban Baltimore newspapers but also in the *Baltimore Sun*. Also, Knepper chose the Owings Mills plant in part because of its proximity to a Baltimore city bus route which also ran past Potee Street.

A centralized management system controlled all three facilities. This included centralized control over production by director of operations Amadee Dean, who as part of his job established the qualifications for employees at Owings Mills. Also, the director of human relations, O'Neill, hired the new employees for Owings Mills and interviewed and transferred employees from Hollins Ferry Road to Owings Mills. He was in charge of hiring and firing and employee relations.

These factors relied upon by the Board show: (1) there was a similarity of skills required at Owings Mills and the other plants; (2) there was a similarity of product produced; (3) the new facility was geographically close to the other two facililties when the metropolitan area is viewed as a whole; and (4) management, and most importantly, employee relations, were centralized.

While the ALJ and the Board did not analyze all nine of the factors which have been identified in previous cases as helpful in making an accretion determination, those analyzed are certainly sufficient to show that the Board did not abuse its discretion in finding an accretion. There is no requirement that all of the listed factors be present, for to so require would be to hamstring the Board by requiring it to plug each unique case into an artificial test. The Board has a duty to "unearth[ ] the factors relevant to the accretion issue in the case under consideration * * * [and] then decide[ ] the relative weight to be attributed to each factor." *Kaynard v. Mego Corp.*, 484 F.Supp. 167, 172 (E.D.N.Y.1980).

Universal argues to this court that the union did not represent a majority of the Owings Mills employees on the date it opened (September 19, 1977); when the union filed its grievance (November 8, 1977); on the date when the union filed its first unfair labor practice charge (November 17, 1977); when it amended the charge (December 9, 1977); or on the date the complaint issued in this case (January 6, 1978). The company's assertion is that newly hired

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employees at Owings Mills outnumbered those transferred from its other plants, and that the newly hired employees had never expressed a preference for union representation.

Universal's argument misses the mark. The important fact is that at the end of the summer of 1977, the number of employees in the bargaining unit at Potee Street and Hollins Ferry Road had risen to between 350 and 360. At the end of September, 1977, there were only 65 factory workers and 8 supervisors at Owings Mills. When an accretion occurs, the smaller group of employees is treated as if it were a group of newly hired employees replacing workers within the unit. Replacement employees are presumed to support the unit in the same ratio as those replaced. *Lammert Indus. v. N.L.R.B.*, 578 F.2d at 1226. Because of the "community of interest" found in this case, this smaller group at Owings Mills automatically became part of the bargaining unit.

The accretion doctrine is applied more restrictively when the new group of employees is larger than the original unit. "[T]he Board is cautious in making such a finding, particularly when the accreted group numerically overshadows the existing certified unit, because it would deprive the larger group of employees of their statutory right to select their own bargaining representative." *Renaissance Center Partnership*, 239 NLRB 1247, 1247–48 (1979). This, however, is not the case at bar. For the stated legitimate reasons the Board has found a smaller new group to be an accretion, and such was well within the Board's discretion. Since the Board was within its discretion when it found an accretion, it follows the Universal violated § 8(a)(5) and (1) of the Act by its refusal to recognize the union as the bargaining representative of the Owings Mills employees and its failure to apply the collective bargaining agreement to those employees.

It also follows that Universal violated § 8(a)(5) and (1) by unilaterally changing term and conditions of employment of employees subject to a collective bargaining agreement. Universal's bargaining obligation is defined by § 8(d) of the Act. That section provides, in summary, that neither party to a collective bargaining agreement can unilaterally modify the agreement without first serving written notice and offering to negotiate.[4] When a specific item is included in a collective bargaining agreement, any unilateral change, therefore, violates the duty defined by § 8(d) and made unlawful by § 8(a)(5) and (1). *N.L.R.B. v. Baltimore News American Division,* 590 F.2d 554 (4th Cir. 1979).

Since Universal did not live up to the duty imposed by § 8(d) and enforced by § 8(a), to provide written notice and to offer to negotiate, the Board was supported by substantial evidence when it concluded that Universal violated the Act by altering the conditions of employment for the employees at Owings Mills, including the transferees.

III. THE CLOSING OF HOLLINS FERRY ROAD

The Board found that Universal had also violated § 8(a)(5) of the Act by failing to bargain over both the decision to close the Hollins Ferry Road plant, and the effects that closure would have on the unit members working there. This involves two separate questions which will be addressed individually.

A. *The Decision.*

An employer is required "to confer in good faith with respect to wages, hours and other terms and conditions of employment." Section 8(d). Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees * * *." These sections together make it an unfair labor practice for an employer to refuse to bargain in good faith over "wages, hours [and] * * * terms and conditions of employment," and these subjects are considered to be mandatory subjects over which the parties cannot lawfully refuse to bargain. *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.,* 356 U.S. 342, 348–49, 78 S.Ct. 718, 722, 2 L.Ed.2d 823 (1958). Bargaining subjects which are not mandatory are permissive and may be bargained over, but a party can also refuse to so bargain. *Id.*

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The Board has taken the position in this and other cases that an employer's decision to close one of its plants—a partial closing[5]—is a mandatory subject.[6]

The various circuit courts have not all agreed with the Board, with some holding that an economically motivated decision is not a mandatory subject,[7] while two circuits have recently adopted a theory that a partial closing is rebuttably presumed to be a mandatory bargaining subject.[8]

This court has yet to address this issue directly.

Universal claims, however, that no matter what the answer to this question is, the collective bargaining agreement it signed with the union gave the company the right to relocate its plant. The "management rights" clause in the agreement to which it points gave Universal the right to "relocate its plant or any portion thereof."[9]

Citing the Board's decision in *Ador Corp.,* 150 NLRB 1658 (1965) and *Consolidated Foods Corp.,* 183 NLRB 832 (1970), Universal claims that the clause demonstrates that the parties to the agreement bargained over how a relocation decision could be made and gave management the exclusive right to decide without further bargaining to move to Owings Mills.

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[4] See footnote 3 for full text of § 8(d).

[5] A "partial closing" is considered to be a closing of one or more facilities by the employer having more facilities than those which he is closing. *Textile Workers' Union v. Darlington Mfg. Co.,* 380 U.S. 263, 275, 85 S.Ct. 994, 1002, 13 L.Ed.2d 827 (1965).

[6] *See, e.g., Ozark Trailers, Inc.,* 161 NLRB 561 (1966).

[7] *See e.g., Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir. 1976); *N.L.R.B. v. Thompson Transport Co.,* 406 F.2d 698 (10th Cir. 1969); *N.L.R.B. v. Transmarine Navigation Corp.,* 380 F.2d 933, 939 (9th Cir. 1967); *N.L.R.B. v. Adams Dairy, Inc.,* 350 F.2d 108 (8th Cir. 1965); *cert. denied,* 382 U.S. 1011, 86 S.Ct. 619, 15 L.Ed.2d 526 (1966); *N.L.R.B. v. Royal Plating & Polishing Co.,* 350 F.2d 191 (3d Cir. 1965).

[8] *N.L.R.B. v. First Nat. Maintenance Corp.,* 627 F.2d 596 (2d Cir. 1980), *cert. granted,* ——— *U.S.* ———, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981); *Brockway Motor Trucks v. N.L.R.B.,* 582 F.2d 720 (3d Cir. 1978).

[9] Article XII of the collective bargaining agreement provides:

> The union recognizes that the Company shall have the sole and exclusive jurisdiction of the management and operation of its business, the direction of its workforce, including the asignment of tasks and machines to employees, the right to maintain discipline and efficiency in this plant, the right to promulgate nd enforce reasonable working rules, the right to hire, discipline and discharge employees subject to the provisions of this Agreement, the right to establish starting times and quitting times, to establish or discontinue shifts, to assign employees to shifts, and the right to relocate its plant or any portion thereof. It is agreed that the rights enumerated above shall be deemed to exclude preexisting rights of management not herein listed to operate its business in the manner it sees fit, provided that they do not conflict with other provisions of this Agreement.

It is clear that a union can waive its right to bargain over a mandatory subject, but such waiver "must be clear and unmistakable." *The Dow Chemical Co.*, 212 NLRB 333 (1974). "While it is true that a labor organization may enter into an agreement in which it waives the right to bargain about mandatory subjects of bargaining (wages, hours, etc.) such waiver * * * will not readily be implied." *R.L. Sweet Lumber Co.*, 207 NLRB 529, 538 (1973).

The Board found that the "management rights" clause in the agreement between Universal and the union did not clearly and unmistakably cover the transfer of employees in unit work from Hollins Ferry Road to Owings Mills. We agree. At the time of Owings Mills' opening it was not a relocation as that term is normally used. It was hoped that the plant would supplement the ongoing operations at Potee Street and Hollins Ferry Road.[10] The accretion occurred September 12, 1977 and the first transfer of employees from Hollins Ferry Road to Owings Mills did not occur until October. Until the decision to close Hollins Ferry Road was made on February 2, 1978, Universal intended to operate—and did operate—all three plants. Thus it is clear that the closing of Hollins Ferry Road was not a pure relocation and was nothing more than a partial closing. In no way can the union be said to have clearly and unmistakably waived its perceived right to demand bargaining over the closing. That the closing of Hollins Ferry Road occurred only a few months after the opening of Owings Mills does not obviate this fact.

In finding that the union had not waived its rights and that Universal had unlawfully failed to bargain over the closing decision, the ALJ ordered Universal to bargain with the union over the decision to close the plant—a decision which was irrevocably made in 1978. Since that time the plant has been abondoned by Universal and its lease on the property has long since expired. Bargaining over the decision to close, therefore, would accomplish nothing for the bargaining unit members. The Board has recognized before that when a plant has already been closed for economic reasons, and a bargaining order would not change that fact, such an order is inappropriate. In *Burroughs Corp.*, 214 NLRB 571 (1974), the employer did not contest a finding that it had violated the Act by failing to bargain over a decision to close, but contested the accompanying bargaining order because its lease had expired and its equipment removed from the plant. The Board refused to order bargaining, saying, "as the plant was closed for economic reasons and has been closed for some time, we do not believe any useful purpose would be served by requiring further bargaining with respect to the decision to close the plant." *Id.* at n.4.

We agree with this conclusion and apply it to this case. No useful purpose could possibly be served by a bargaining order requiring the parties to negotiate a foregone conclusion over three years after the fact.

This decision not to enforce this portion of the order can be said to be putting the cart before the horse since we have not yet settled the question of whether or not a partial closing decision is indeed a mandatory subject of bargaining. We are aware of the Supreme Court's holding in *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 99 S.CT. 1842, 60 L.Ed.2d 420 (1979), in which the Court wrote that the Board's judgment as to what is a mandatory bargaining subject is entitled to considerable deference." 441 U.S. at 495, 99 S.CT. at 1848, and that "the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the court might prefer another view of the statute." 441 U.S. at 497, 99 S.Ct. at 1849.

In this case, however, since we have specifically rejected the remedy ordered by the Board, we need not make a detailed analysis of the Board's judgment on the closing decision. Furthermore, we are convinced that establishing a rule for the judicial circuit would be of minimal value anyway since the Supreme Court has recently decided to review this issue. *N.L.R.B. v. First National Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980), *cert. granted*, ——— U.S. ———, 101 S.Ct. 854, 66 L.Ed.2d 798 (1981).

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[10] Universal's labor counsel, Earle K. Shawe, testified before the ALJ that the Owings Mills plant was to supplement Universal's other plants rather than to serve as a relocation of the Hollins Ferry Road plant.

Enforcement of this portion of the order is, therefore, denied.

B. *Closing Effects.*

Although there may be conflicting opinions as to whether an employer has a duty to bargain over a partial closing decision, it is clear that an employer must bargain with the union over the effects of that decision on the bargaining unit members. *N.L.R.B. v. North Carolina Coastal Motor*

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Lines, Inc., 542 F.2d 637, 638 (4th Cir. 1976). *See also, N.L.R.B. v. Triumph Curing Center*, 571 F.2d 462, 474 n.11 (9th Cir. 1978); *Royal Typewriter Co. v. N.L.R.B.*, 533 F.2d 1030, 1039 (8th Cir. 1976); *International Ladies Garment Workers' Union, AFL–CIO v. N.L.R.B.*, 463 F.2d 907, 917 (D.C.Cir. 1972).

Universal does not question its duty to bargain over the effects of its decision, but challenges the Board's conclusion that it did not bargain in good faith over the effects. The company points to its February 3, 1978 letter to the union inviting it to "discuss all aspects" of the closing, "including, but not limited to, the impact that such a closing would have upon employees at the plant." In that letter to the union it said it intended to offer employment to as many Hollins Ferry Road employees as possible at the new plant.

Several meetings between Universal officials and union representatives were held in February, at which meetings the principal bone of contention was the union's request that the company recognize the union voluntarily as the exclusive bargaining representative of the production and maintenance workers at the Owings Mills plant—a request the company consistently denied. Other specific problems were discussed, although no discussions were held on general problems associated with the transfer, such as servance pay and seniority questions. Universal claims that it stood willing to discuss these issues but the union never brought them up, thus waiving its right to complain later.

The Board concluded that these meetings were insufficient to satisfy the company's duty because they came to late for effective bargaining to take place. We believe the Board's conclusion is supported by substantial evidence.

The decision to close Hollins Ferry Road was made on February 2, 1978. The letter to union officials, dated February 3, 1978, stated that it would "probably" be necessary to close the plant "within the next few weeks." Meanwhile, however, the company began to make offers to transfer to the Hollins Ferry Road employees on February 3, 1978 and completed this process in just a few days, well before the first meeting with the union. Following interviews with each employee, Universal's O'Neill asked each employee to sign a form reciting that the employee had been offered a transfer and to fill out whether or not the offer was accepted.

The transfers began almost immediately. At least some of the former Hollins Ferry Road employees gathered at Owings Mills February 8, 1978, where they were told of the different wages and health benefits there, as well as the change in the seniority status for layoffs. This occurred almost a week before the first meeting with union officials.

In short, the mechanics of the transfer were well in motion by February 14, with many of the areas which could be expected to be bargained over—transfer, wages, seniority, etc.—having already been determined unilaterally.

In *N.L.R.B. v. Katz*, 369 U.S. 736, 82 S.CT. 1107, 8 L.Ed.2d 230 (1962), the employer had instituted several unilateral changes in mandatory bargaining areas while the matters were under negotiation with the union, with some of the changes being more advantageous to employees than those the employer offered the bargaining representative. In that case the Court wrote:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about affected conditions of employment under negotiation, and must of necessity obstruct the bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance.

369 U.S. at 747, 82 S.Ct. at 1114.

The Court went on to say that this type of action was "necessarily inconsistent with a sincere desire to conclude an agreement with the union." 369 U.S. at 745, 82 S.Ct. at 1112.

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The Board's policy is that even if the unilateral action is beneficial to the employees the employer is not free to bypass the bargaining representative. *Wellman Indus., Inc.*, 222 NLRB 204 (1976). In that case the Board said that such unilateral action is unlawful because whether or not an offer is beneficial is a matter of opinion, is relative depending upon the employees' alternatives, and places the employer in a position of making choices for employees which are to be made by the bargaining representative. *Id.* at 206.

In light of the sequence of events which occurred even before the first meeting with the union on February 14, it is clear that Universal had unilaterally made choices for its employees which should have been presented to the bargaining representative. The union's position was undercut by the time negotiations began. Universal's actions were clearly contrary to the spirit of the Act and the Board correctly found them to be so.

Universal's claim that by offering employment to the Hollins Ferry Road employees it removed the most central issue from the negotiations misses the point. The Act condemns such unilateral acts. The transfer offers should have been presented to the union to enable the union to negotiate as to the timing and the manner of the transfers, as well as any other effects with which it was concerned.

IV. UNIVERSAL'S THREATS

The Board's findings that the company's threats of reprisals if Owings Mills employees sought union representation is clearly supported by substantial evidence. Universal, while citing this as error, does not strenuously argue the point.

Universal's O'Neill warned employees Egitto that if the employees attempted to gain union representation at Owings Mills, the working conditions at that plant would deteriorate to the level at Hollins Ferry Road. These same comments were substantially repeated to the group of transferees from Hollins Ferry Road who gathered at the Owings Mills plant on February 8, 1978.

Such conduct violates the spirit of the Act, intimidating employees from exercising their right to organize as guaranteed by § 7 of the Act. *N.L.R.B. v. Renner, Plumbing Heating & Air Conditioning, Inc.,* 437 F.2d 893 (4th Cir. 1971). *N.L.R.B. v. Aerovox Corp. of Myrtle Beach, S.C.* 435 F.2d 1208 (4th Cir. 1970).

Universal does not challenge this legal conclusion. It does however challenge the factual findings by the ALJ and confirmed by the Board, that the O'Neill/Egitto exchange ever took place. O'Neill denied the exchange when he testified.

The ALJ specifically cited the discrepancies in Egitto's and O'Neills testimony and where they did conflict the ALJ credited Egitto's He did so based on demeanor and apparent conflicts between O'Neill's testimony and other evidence.

Universal has presented us with no sufficient reason to disturb this finding by the ALJ. The company's claim that O'Neill's testimony is buttressed by the fact that Egitto's was only one of hundreds of conversations O'Neill had with Hollins Ferry Road employees and no other employee testified to a similar conversation, in no way tends to suggest that that particular conversation did not take place. In fact, it could be said that with that many conversations compressed into a relatively short time, O'Neill might tend to forget the details of each one. Universal also says that there was no evidence that the company in any way mistreated its Hollins Ferry Road employees. However, *there was* evidence—evidence which the company does not dispute—that Hollins Ferry Road was inefficient, cold in the winter, hot in the summer, and overcrowded. While these conditions may not constitute mistreatment, employees transferring to Owings Mills no doubt would prefer more pleasant working conditions.

One of the ALJ's functions is to make factual findings. He did so and his findings are supported by substantial evidence. The fact that he credited one witness over another is no reason to disturb the findings since it is his job to determine what is fact when presented with a conflict.

V. THE BACK-PAY AWARD

Universal claims that the portion of the Board's order which requires it to pay back wages to the 29 employees who lost their jobs with the company after declining transfers from Hollins Ferry Road to Owings Mills—which the Board called a "limited" back-pay order—is unwarranted by the facts of the case and punitive in nature.

Before addressing the merits of this issue, however, we must address a procedural matter. The General Counsel for the Board claims that Universal is precluded from challenging this remedy since the company failed to request a reconsideration of the Board's award. It cites the Board's Rules found at 29 CFR § 102.48(d)(1) and (3) for the proposition that a party must move for reconsideration or rehearing when an alleged error arises in the first instance as a result of the Board's decision. Universal having failed to make such a motion, the General Counsel claims the rules bar Universal from objecting on this appeal.

Section 102.48(d)(1) provides:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record as to the Board's decision or order. A motion for reconsideration shall state with particularity the material error claimed. * * *.

Section 102.48(d)(3) provides:

> The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

The General Counsel cites *International Ladies Garment Workers' Union, Upper South Department, AFL-CIO v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3, 95 S.Ct. 972, 975 n.3, L.Ed.2d 189 (1975) to support this position. In that case the Supreme Court wrote that § 102.48(d)(1) precluded appeal when the Board adopted a theory not previously charged or litigated. The General Counsel also cited *N.L.R.B. v. Erlich's 814, Inc.*, 577 F.2d 68, 69 n.2 (8th Cir. 1978); *N.L.R.B. v. STR, Inc.*, 549 F.2d 641 (9th Cir. 1977); *N.L.R.B. v. Allied Products Corp.*, 548 F.2d 644, 652–54 (6th Cir. 1977).

We disagree with the General Counsel's position. The cases he cites are cases in which for some reason the Board issued a decision or an order which did not correspond to the issues and facts fully litigated before it. For instance, in the *STR* case, the court wrote at 642: "The complaint gave the Company more than ample notice that the Board would be examining the circumstances of [the] departure." In the *Allied Products Corp.* case the court wrote:

> Extraordinary circumstances for these purposes exist only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time.

548 F.2d at 654.

It appears clear from these and other cases that the Board regulation is designed for cases in which the Board surprises a party with matters which were not fully presented and litigated before the Board. In a case in which the parties have been made aware that an issue would or could be decided by the Board, and the parties have taken the chance to present their sides of the issue to the Board and the Board has issued its decision, the failure to request reconsideration under the regulation does not bar the losing party from citing the issue on appeal.

In issuing its back-pay order, the Board did not catch these parties by surprise. The ALJ had previously ordered the company to pay these 29 employees back wages and the company cited this finding in its exceptions to the ALJ's decision. From the record before us it appears clear that the parties fully litigated this issue and the failure on the part of Universal to move for reconsideration by the Board does not preclude it from citing the Board's order on appeal.

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Despite specifically finding that Universal did not act discriminatorily towards these employees, the Board issued its "limited" back-pay award to make the employees whole and "in order to recreate in some practical manner the situation in which the parties' bargaining position is not entirely devoid of economic consequences for [Universal]." While the Board enjoys broad discretion in fashioning remedies, *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 73 S.Ct.287, 97 L.Ed. 377 (1953), and a back-pay award "should stand unless [it is] * * * a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943), its order must be appropriate " 'and shall be adapted to the situation which calls for redress.' " *N.L.R.B. v. District 50, UMW*, 355 U.S. 453, 78 S.Ct. 386, 2 L.Ed.2d 401 (1958), quoting *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348, 58 S.Ct. 904, 912, 82 L.Ed. 1381 (1938). *See also, Local 60, United Brotherhood of*

Carpenters & Joiners of America, AFL-CIO v. N.L.R.B., 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961).

Many of the cases in which the Board has awarded employees back-pay in a partial closing context are cases in which the employees were laid off and given no other employment opportunities by their former employer. *See, e. g., P. B. Mutrie Transportation, Inc.*, 226 NLRB 1325 (1976); *Thompson Transport Co., Inc.*, 184 NLRB 38 (1970); or when the laid off employees were found to have been discriminated against. *Purolator Products, Inc.*, 160 NLRB 80 (1966).

The record in this case discloses that all 29 of these workers were offered transfers to Owings Mills. For reasons of their own, they declined the transfers. After declining, they were put on a preferential hiring list at Potee Street. Furthermore, the Board specifically rejected the ALJ's conclusion that these 29 employees had been unlawfully discriminated against.

Given these facts, we believe a back-pay award is inappropriate in this case. We fully recognize that Universal violated the Act by its failure to bargain over the effects of its closure decision and by offering these transfers unilaterally. However, placing these 29 employees on a preferential hiring list is all that is needed to vindicate the policies of the Act. A back-pay award, in our judgment, is not "adapted to the situation which calls for redress."

We therefore decline to enforce this portion of the Board's order.

VI. CONCLUSION

For the reasons stated, therefore, we enforce the Board's order except for those portions which require Universal to bargain with the union over its decision to close the Hollins Ferry Road plant and which would require the company to make a back-pay award to the 29 employees laid off after refusing transfers.

Reichart Furniture Company v. NLRB

649 F.2d 397 (6th Cir.), May 13, 1981; rehearing denied July 9, 1981—238 NLRB 1578

On petition to review and cross-petition to enforce Board Order

Before EDWARDS, Chief Judge, and ENGEL and MERRITT, Circuit Judges

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PER CURIAM: On receipt and consideration of a petition for review and a cross-application for enforcement of an order of the National Labor Relations Board cited at 238 N.L.R.B. 1578 (1978), this court notes that the threshold question in this case is whether or not the Board erred in overruling the Company's objections to the validity of the representation election at which the Union [1] prevailed by a vote of 15 to 9.

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Subequent to the election, the Company filed timely objections as to which the Regional Director conducted an administrative investigation, affording the Company full opportunity to proffer proof supporting the allegations and to provide additional information and clarification to aid in the Board's own investigation. Subsequent thereto, the Regional Director issued his report overruling the objections in their entirey and recommending that the Board certify the Union as the exclusive bargaining representative of the Company's employees. The Company thereupon filed timely exceptions to the Regional Director's report and sought a hearing on its objections. After considering the Regional Director's report and the Company's exceptions, affidavits and documents in support of its exceptions and its brief, the Board adopted the Regional Director's findings, conclusions and recommendations and certified the Union as the bargaining representative of the Company's employees.

Thereafter, the Union requested bargaining, which the Company refused, and the present unfair labor practice charge was filed contending that the Company's refusal to bargain violated Sections 8(a)(5) and (1) of the National Labor Relations Act. The Board specifically held that issues not raised by the Company in the prior representation proceeding were not "properly litigable in this unfair labor practice proceeding." 238 N.L.R.B. at 1579. Further, the Board reaffirmed its determination in the representation proceeding that the Comapany had failed to raise "substantial or material issues warranting a hearing" (*id.*) and granted summary judgment requiring the Company to cease and desist from refusing to bargain with the Union or continue to violate the National Labor Relations Act.

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[1] The contesting parties in the election were respectively the Retail Clerks International Union, AFL-CIO (the Union) and the Independent Furniture Workers of the Ohio Valley or Tri-State Area (the Intervenor).

On examination of the briefs and record in this case, the court holds the Board was acting within its appropriate discretion in denying a hearing since no challenge to the election advanced by the Company presented a substantial challenge to the fairness of the election. In *NLRB* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 177, 178 (6th Cir.1967), *cert. denied*, 389 U.S. 958, this court said:

> It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. Mere disagreement with the Regional Director's reasoning and conclusions do[es] not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot by the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof.

(Citations omitted.)

These principles have never been overruled in this court and in fact were reaffirmed in *Prestolite Wire Division* v. *NLRB*, 592 F.2d 302, 306 (6th Cir.1979).

As this court sees this record, it fails to present facutal issues and offers of proof thereon which demand and evidentiary hearing before the Board. This conclusion serves to distinguish this case from *Prestolite Wire, supra*, and *NLRB* v. *North Electric Co.*, 644 F.2d 580 (6th Cir.1981).

Merritt, Circuit Judge, concurring: I agree with the result reached by the Court in this case, but I do not think the opinion adequately articulates the distinction between this case and *Prestolite Wire Division* v. *N.L.R.B.*, 592 F.2d 302 (6th Cir.1979); *N.L.R.B.* v. *Curtis Noll Corp.*, 634 F.2d 1027 (6th Cir.1980) and N.L.R.B. v *North Electric Company, Plant No. 10*, 644 F.2d 580 (6th Cir.1981). In those cases this Court suggested that the N.L.R.B.'s own rules appear to require, and due process demands, that where a substantial ques-

tion is raised by an employer regarding the fairness of a representation proceeding, the Regional Director must include in the record transmitted to the Board "documentary evidence" gathered by the Regional Director in connection with his investigation. Section 102.69(g) states that "the Regional Director shall transmit the record to the Board," and that the record shall include "documentary evidence" in addition to certain other papers. In *N.L.R.B.* v. *North Electric Co., supra*, we rejected "the Board's position that it does not have to review the documentary evidence" stating that this position is "an abdication of its responsibilities under the National Labor Relations Act." (P. 584). This is the position of our Court stated in *Prestolite* and *Curtis Noll* as well.

I would not enforce this principle in the present case, however, because the company's arguments are insubstantial and in most instances frivolous. Its argument that remarks by the Board's agent during the election interfered with the election process and its claim that the Union made misrepresentations concerning its constitution and bylaws are to my mind frivolous. I do not see anything in the briefs or in the record that makes out a colorable claim. If the situtation were otherwise, however, and the case presented real questions concerning the fairness of the representation proceeding, I cannot at the present time see how either the Board or this Court could review the fairness of the election without having before us the documentary evidence on which the Regional Director based his decision. In the instant case the company has used a "shotgun" approach and has failed to proffer or suggest the probability of any facts that would warrant setting the election aside under applicable legal standards. For this reason I concur in the decision of the Court that the Board was excused from enforcing its rule requiring that all documentary evidence gathered by the Regional Director be made a part of the record

Delco Air Conditioning Division, General Motors Corporation v. NLRB

649 F.2d 390 (6th Cir.), May 13, 1981—244 NLRB 729

On petition to review Board Order

Before Weick and Boyce F. Martin, Jr., Circuit Judges, and Phillips, Senior Circuit Judge

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Phillips, Senior Circuit Judge: This case is before the court on the petition of Delco Air Conditioning Division, General Motors Corporation (the company) to review and set aside an order of the National Labor Relations Board, and the cross-application of the Board for enforcement of its order. For a recitation of the pertinent facts, reference is made to the decision and order of the Board reported at 24 N.L.R.B. No. 65.

The Board found that the Company violated § 8(a)(3) and (1) of the Act by discharging Robert L. Mullins because of his union activities, and violated § (a)(1) of the Act by conditioning an offer to reinstate Mullins upon his resigning as a Union Committeeman. The Board ordered the Company to offer Mullins immediate and full reinstatement with backpay to his former position or to a substantially equivalent position.

Upon consideration of the briefs, oral argument and the entire record, we conclude that the decision of the Board is not supported by substantial evidence on the record considered as a whole, and set aside the Board's order and deny enforcement.

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The evidence was heard by Administrative Law Judge Benjamin K. Blackburn, who died September 2, 1978, after the close of the hearing and before rendering a decision. Administrative Law Judge Thomas A. Ricci prepared a decision based upon the record. The Board adopted ALJ Ricci's credibility findings, concluding that an independent examination of the record disclosed no basis for reversing his determination or findings of fact based thereon.

The Company's employees were represented by Local 801, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC. At the time of his discharge, Mullins was a District Committeeman of the Union on the first shift. The Company contends that Mullins was discharged for just causes unrelated to Union activities.

The collective bargaining agreement recognized that it was the responsibility of management to maintain discipline and efficiency and the right of management to discipline and discharge employees for just cause. The record contains ample evidence of grounds for discharging Mullins. His Labor Relations Supervisor, Robert Burke, testified that during Mullins' approximately 19 months as an employee of the Company, he amassed the worst record of absenteeism and tardiness ever seen by Burke. The record contains considerable testimony as to misconduct on the part of Mullins.

For example, Mullins was discharged in 1976 for falsification of a travel card, but was reinstated in the settlement of a grievance. Burke testified that Mullins later admitted that he had falsified the time entry on the card. In September 1977 Plant Superintendent George Zeller accused Mullins of lying and cheating the Company, docked him for an hour's pay for his fraudulent attempt to receive compensation for time spent away from the plant and warned him that if he ever again was caught attempting to receive pay for time spent improperly out of the plant, he would be discharged.

The discharge involved in the current proceeding grew out of an incident on October 24, 1977. The Administrative Law Judge found that Mullins left the plant at 10 a.m., without signing out, in violation of Company rules. After his return Mullins was handed a written disciplinary notice reading "indefinite suspension", which later was changed to a straight discharge.

Five other employees of the plant had been discharged for engaging in similar fraudulent acts. A 1971 arbitration decision supported the discharge of a Union Committeeman for fraudulent collection of pay from the Company for time spent in conducting Union business outside the plant for which he received pay from the Union.[1]

It is the opinion of the court that substantial evidence on the record as a whole does not support the Board's conclusion that Mullins was discharged for Union activities. A more difficult question is presented as to whether the Company offered to reinstate him if he would resign as Union Committeeman.

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[1] The five page text of this arbitration decision, rendered March 19, 1971, appears in the appendix at pp. 532a–536a.

The Administrative Law Judge credited Mullins' testimony that the Company's Labor Relations supervisor, Burke, proposed in a telephone conversation that the Company would withdraw all records of discipline from Mullins' file and reinstate him if Mullins would resign as Union Committeeman. Mullins' testimony on this point, which is uncorroborated by any other evidence in the record, was as follows:

> During your first conversation with Mr. Burke that morning was there anything else that you can recall that Mr. Burke said to you as to making any suggestions to you with regard to your reinstatement?
>
> A. During the conversation, at the point where we were discussing the reprimand and the two weeks on my record, I said I couldn't live with that. Burke stated that upon my resignation as Com-
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>
> mitteeman that he would pull the two weeks.
>
> Q. What did you reply to that?
>
> A. I was to think about it, which I did. My reply to it was negative.

Mullins filed a grievance for his discharge. On November 11, 1977, Mullins telephoned Labor Relations Supervisor Burke and asked him if there was any way to settle his case. Burke testified he informed Mullins that, since there was an open grievance, he could not deal directly with Mullins; that Mullins stated he realized Burke could deal only with his Shop Committeeman with respect to the grievance, but nevertheless wanted to discuss settlement possibilities off the record; and that Burke agreed to talk with Mullins' Committeeman and "get back with" Mullins later "with the understanding that any conversation between Mr. Mullins and myself were only discussions and not formal proposals to settle the case."

Burke testified further that Mullins insisted that, in the event he was reinstated by settlement of the grievance, no record of discipline be placed in his record. The testimony of Burke includes the following:

> Q. Okay. Did he have a response to that?
>
> A. We talked about that for a couple of moments. He stated that—let me think of exactly what he did say. He was still somewhat opposed to the three days being on his record. He stated at that time that as long as he was a committeeman he wasn't worried about the three days. He said but I'm thinking about getting out of this whole business. I said well would you explain what you mean? He said well I am thinking about resigning as a district committeeman and going to the third shift. I said, Bob, I have no idea of what your intent is to resign or anything else but it doesn't have any bearing on this case. He told me at that time that he felt that if he went to the third shift with a three day on his record the first time he messed up he'd be living with a week out and he couldn't live with that. He wasn't worried about it as long as he was a committeeman but if he went to the third he didn't want that hanging over his head. I said, Bob, if that is the only thing from keeping us from settling this case on all the conditions said above then I would consider cancelling that discipline if and when you went to the third shift.
>
> Q. Okay. What was his response to that?
>
> A. Mr. Mullins said we have no problem. Call me back to work.
>
> Q. Okay, and what did you say?
>
> A. I said, Mr. Mullins, I cannot call you back to work. I have already told you I have to deal with your shop committeeman. I suggested that Mr. Mullins contact Mr. Miller and relate to him the discussions we had just had and have Mr. Miller get with me and when we set down and we both understood the terms of that agreement then I would call him back to work. Mr. Mullins stated that he would like to think about the whole thing for a while before he made a final decision and he talked about he really didn't think Mr. Miller would agree with the time equalization split. He would rather handle that on his own. I told him that due to some prior dealings that I had had with Mr. Miller it was imperative that I have the entire settlement in writing. Again he told me he would like to think it over. I said okay fine think it over and give me a call back.
>
> Q. Okay. Did you receive a call back?
>
> A. About 30 minutes later Mr. Mullins called me back.
>
> Q. Okay, and what was said?
>
> A. He told me that he did not feel that he could convince Mr. Miller to agree to the equalization split and he didn't think that he should

have the three day disciplinary layoff put on his record at all.

Q. Anything else said?

A. I told him that if that was the way he felt there was really no reason to continue this discussion and he agreed. I told him that I would contact Mr. Miller his shop committeeman and make him an offer along the same lines that we'd just

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talked about. He said that's fine, if Miller buys it that's okay with me.

Q. Okay, and did you subsequently have a conversation with Mr. Miller?

A. Yes, sir, I did. And I made him the formal proposal.

Q. Okay. Which proposal did you make to Mr. Miller?

A. To cancel the discharge and return to work without any compensation; place a three day disciplinary layoff on his record for violating shop rule 6; cancel the three day at the appeal step without any compensation; split the time equalization groups effective January 3rd.

Q. Was that the entire proposal that was made?

A. To the best of my knowledge, yes it was.

Q. *Was there any insistence on your part that Mr. Mullins resign as a committeeman?*

A. *Absolutely not.*

Q. What was Mr. Miller's response?

A. Mr. Miller said he would talk with Mr. Mullins and he came back I believe the following day and rejected the offer and the offer was withdrawn at that time.

Q. The offer was withdrawn by you?

A. Yes, sir. (Emphasis added.)

If the Board was correct in its factual conclusion that the Company offered reinstatement to Mullins upon the condition that he resign his position as Union Committeeman, the Company violated § 8(a)(1) of the Act; *Associated Truck Lines, Inc. v. NLRB,* 644 F.2d 884, 106 LRRM 2242 (1981); *Cameron Iron Works, Inc. v. N.L.R.B.*, 464 F.2d 609 (5th Cir. 1972).

However, the court concludes that this finding of fact by the Board is not supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *N.L.R.B. v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir 1964). *See also N.L.R.B. v. Otsego Ski Club-Hidden Valley, Inc.*, 542 F.2d 18 (6th Cir. 1976); *Metropolitan Life Insurance Co. v. N.L.R.B.* 371 F.2d 573, 582 (6th Cir. 1967); *N.L.R.B. v. Barberton Plastics Products, Inc.*, 354 F.2d 66, 69 (6th Cir. 1965) *N.L.R.B. v. Mt. Vernon Telephone Corp.*, 352 F.2d 977, 979 (6th Cir. 1965).

Although credibility determinations ordinarily are the prerogative of the Board, this court is unwilling to enforce a backpay award upon the uncorroborated testimony of Mullins who would be the beneficiary of reinstatement and the backpay award. *See Elias Brothers Big Boy, supra,* 327 F.2d at 427.

Significantly Administrative Law Judge Blackburn, who heard the testimony, made this statement at the close of the hearing regarding the credibility of Mullins' testimony on another issue:

> I would suggest and no matter how you structure your briefs in the beginning on all of these issues on credibility and what time he actually left the plant and so forth, my present feeling is that my finding of fact is going to be in the Respondent's favor, that he did leave the plant at 10:10 and did not come back until 12:06. Let me say why I think that at the moment because I want to preserve it for later on to see if it still seems like such a good reason to me when I write the decision. The thing that impresses me the most in this area is the existence of R-4 and R-5. R-4 is the Irrregular Hours Pass with the time out, time in on it. Coupled with the testimony of Mr. Kester yesterday which frankly I found quite persuasive, taking the two together at the moment I think I'm persuaded that I'm going to find against Mr. Mullins on the question of when he left the plant.

Administrative Law Judge Ricci, who inherited the case, also credited the Company's version of the facts on this issue and concluded that Mullins was not telling the truth when he denied leaving the plant while the guard's back was turned. Nevertheless, Administrative Law Judge Ricci credited the uncorroborated testimony of Mullins that he was offered reinstatement upon the condition that he resign as Union Committeeman.

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The order of the Board is set aside and enforcement is denied.

The costs of the proceedings in this court are taxed aginst the National Labor Relations Board.

NLRB v. Oesterlen Services for Youth, Inc.

649 F.2d 399 (6th Cir.), May 13, 1981; rehearing denied June 8, 1981; certiorari denied November 9, 1981—243 NLRB 563

On petition to enforce Board Order

Before Merritt, Brown and Jones, Circuit Judges

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Oesterlen Services for Youth, Inc., operates a mental health care facility in Springfield, Ohio. On October 20, 1978, an election was conducted among certain employees to determine whether they wished to be represented by the Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 (the Union). Of approximately 36 eligible voters, 17 voted for the Union, 12 voted against, and four ballots had been challenged. The number of challenged ballots was not sufficient to affect the results of the election.

On October 27, Oesterlen filed five objections to the election alleging that certain actions of the Board's agent and of the Union's observer prevented a fair election. The Regional Director conducted an administrative investigation. On December 11, the Regional Director overruled all of the Company's objections. The Board affirmed. Oesterlen refused to bargain with the Union. Thus, the Board petitioned for enforcement of its Order that Oesterlen violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* by refusing to bargain with the duly certified collective bargaining representative of its employees. Applying the well settled rule that "a party who seeks to overturn the results of a representation election has the burden to show that the election was not fairly conducted," *NLRB v. Bostik, Division, USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975), we grant enforcement.

During the election, the Board agent absented himself from the polling area for ten minutes, and took with him the unused ballots. Though he failed to seal the ballot box, both the Union's and Oesterlen's observers constantly watched the box. Three employees presented themselves to vote. Each employee was told that they could vote when the Board agent returned. The three employees subsequently voted. Oesterlen contends that the employees who failed to vote may have been influenced by the Board agent's action in leaving the polls and leaving the ballot box with the observers. However, no evidence has been presented in support of such contention. The employees known to have been in the polling area during the Board agent's absence eventually cast a ballot. On the basis of the above cited facts, we agree with the Board that the integrity of the election had been maintained. *Compare Anchor Coupling Co., Inc.*, 171 NLRB 1296 *with Kerona Plastics Extrusion Company*, 196 NLRB 1120 (1972).

Oesterlen also contends that the Union's observer engaged in unlawful electioneering with several of the employees. The Union's observer exchanged pleasantries with mostly every voter. During the Board agent's absence, one employee who wished to vote seated herself behind the observers' table and began a conversation with the Union observer. Oesterlen's observer stat-

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ed that the two discussed their work schedules as well as the fact that another employee had worked a full week before deciding to quit. Apparently, most employees know after one day whether they like the job. Additionally, the Union's observer stated to one employee that he intended to be at the site of the Union's organizational meetings later that evening. Finally, in response to a voter's question concerning the turnout at the polls, the Union observer stated his belief that "more" employees would probably vote at the shift change.

It is a well settled Board rule that prolonged conversations between observers and voters in the polling area are deemed prejudicial without investigation as to the content of the conversations. *Milchem, Inc.*, 170 NLRB 362 (1968). *See also Midwest Stock Exchange v. NLRB*, 620 F.2d 629 (7th Cir. 1980). However, not "any chance, isolated, innocuous comment or inquiry by an observer to a voter will necessarily void the election." *Milchem* at 363. The reasons for the rule set forth in *Milchem* are not difficult to fathom. As was aptly stated in *Midwest Stock Exchange*:

> The Board reasoned that the potential for distraction last minute electioneering, and unfair advantage, justified a 'strict rule' against such conduct without requiring an examination into the substance or effect of the conversations.

Applying these well settled principles to the above-cited facts, we hold that the record supports the Board's finding that the Union observer's conversations constitute nothing more than "innocuous" conversation that did not constitute electioneering.

We have reviewed Oesterlen's other allegations of error and find that they are without merit.

Accordingly, the Board's Order is ENFORCED.

The Standard Register Company v. NLRB

649 F.2d 412 (6th Cir.), May 14, 1981; rehearing denied June 29, 1981, certiorari denied December 14, 1981—243 NLRB 300

Before KEITH, BROWN and KENNEDY, Circuit Judges

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The case is before the court upon a petition by Standard Register Company to review the NLRB's order against the company. The Board's order is reported at 243 NLRB 32, and the supplemental order is reported at 246 NLRB 54. The issue presented by the company is whether the Board properly overruled the company's election objections and, therefore, properly found that the company's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The Standard Register Company is engaged in printing business forms at plants in Dayton, Ohio, and other locations in the United States. The company's Dayton employees had traditionally been represented by the Graphic Arts International Union, Local 508, O-K-I, AFL-CIC-CLC (GAIU). Employees at other company plants had been represented by the Dayton Printing and Graphic Communications Union Local 54, AFL-CIO (Pressmen).

On December 27, 1976, the Pressmen filed a petition with the Board seeking to represent the company's employees at the Dayton plant. The GAIU intervened in the election proceeding. On March 2, 1977, the parties executed a Stipulation for Certification upon Consent Election agreement providing for an election on March 11, 1977. Pursuant to the Stipulation, the ballot choices were: GAIU, Pressmen, and neither. The election was conducted as scheduled, and the results were: 57 votes for the GAIU, 52 votes for the Pressmen, and 40 votes for neither organization. Pursuant to the Board's rules and regulations, a runoff election between the union and GAIU was necessary, since none of the three choices on the ballot received a majority of the votes cast.

On March 17, the company filed timely objections to conduct which allegedly affected the results of the election. The company alleged that the GAIU improperly affected the outcome of the election by engaging in "impermissible promises and inducements, material misrepresentations of fact, and threats at a time when the compa-

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ny was effectively precluded from responding to them." GAIU had sent a handbill out less than 24 hours before the election which represented the salaries of GAIU-represented employees as compared to those of Pressmen, and which also allegedly included threats of non-representation by the GAIU if it were defeated.

Following an administrative investigation, the Board's regional director issued his Report on Objections on May 17, finding that the objections "raised no substantial or material issue affecting the result of the election," and recommending that the Board overrule the objections and direct a runoff election between the GAIU and the Pressmen. On June 2, the company filed timely exceptions to the director's report.

The runoff election was conducted on July 14. The results were: 73 votes for the Pressmen, 37 votes for the GAIU, and 10 challenged ballots, an insufficient number to affect the results of the election. On August 14, the company again filed timely objections to the runoff election based on the Board's refusal to set aside the initial election. Following an Administrative Investigation, the regional director issued his report on September 19, recommending that the company's objections be overruled. Following the company's filing of exceptions, the Board issued a Supplemental Decision and Certification Order on December 27, affirming the regional director's report and certifying the Pressmen as the collective bargaining representative of the company's employees.

On January 3, 1979, the Pressmen wrote to the company noting its certification as bargaining agent by the Board, and requesting the company to "enter into negotiations toward a new collective bargaining agreement at the earliest possible date." On January 24, 1979, the company replied, refusing to meet or to recognize the Pressmen because of the election irregularities. Since January 24, 1979, the company has refused to bargain with the Pressmen. On July 3, 1979, the Board granted the General Counsel's motion for summary judgment.

Upon consideration of the entire record together with the briefs and oral arguments of counsel, the court concludes that the misrepresentation by the union in this case did not meet the four criteria set forth by the Board in *Hollywood Ceramics, Co., Inc.*, 140 NLRB 221 (1962). That case held that the test for determining whether a misrepresentation is so egregious that an election must be voided is:

> * * * an election shall be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. 140 NLRB at 224.

In applying the *Hollywood Ceramics* standard, the Fifth Circuit formulated that test as:

> * * * (1) whether there has been a misrepresentation of a material fact; (2) whether the misrepresentation came from a party who was in an authoritative position to know the truth or who had special knowledge of the facts; (3) whether the other party in the election had an adequate opportunity to reply and to correct the misrepresentation * * *. Recently, this court added a fourth element to the test: whether the employees had independent knowledge of the misrepresented fact, so that they could effectively evaluate the propaganda. *NLRB v. Southern Foods, Inc.*, 434 F.2d 717, 720 (5th Cir. 1970).

Although the handbill's reference to $1.00 and $1.50 differentials overstated the amount the salary differences between the plants, it did convey the essentially correct message that the GAIU had won higher wages for its members than the Pressmen. In fact, in one category, employees earned $1.51 more at the GAIU plant. Therefore, we conclude that the Board did not abuse its discretion when it determined that the misrepresentation was not material under the *Hollywood Ceramics* test.

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The company contends that *Diamond Electronics Division of Arvin Systems, Inc., v. National Labor Relations Board*, 570 F.2d 156 (6th Cir. 1977), mandates a reversal of the Board's decision. We disagree. *Diamond* is distinguishable from the present case on its facts. There was no truth in the union's contention in *Diamond* that it had won a 40% increase in a single negotiation. Here, however, it is true that some GAIU members make $1.50 more than the Pressmen members. Most importantly, *Diamond* is distinguishable in that the union that misrepresented the increase there also won the election. Therefore, it was more difficult for the *Diamond* court to conclude that the Board had not abused its discretion when it concluded that the misrepresentation did not affect the election result. Here, the GAIU did not win the election and the Pressmen, the current collective bargaining agent, did nothing to adversely affect the "laboratory conditions" of the election process.

Accordingly, we deny the company's petition for review and enforce the Board's order in full.

CORNELIA G. KENNEDY, Circuit Judge, dissenting: I respectfully dissent. At the time of the election the GAIU was representing the employees in arbitration proceedings seeking back wages claimed to be owing. The GAIU handbill contained the following statement:

> As the company stated in their presentation to the employees, the GAIU has a case pending in Court regarding the "lost" $.45 wage increase. It would be to the Company's advantage if the GAIU was defeated in the election and would ultimately decide not to spend the remaining members' dues in an effort to collect the lost wage increase for its former members. This would relieve the Company of an approximately $4,000 pending liability per each affected member.

I agree with the dissenting member of the Board that this statement was "an impermissible threat * * * to abandon the bargaining representative's statutory duty to represent the unit membership after the election." The majority of the Board, concentrating on the GAIU's intention, held that the intent of the language was to negate implications in an earlier letter of the employer. It found that

> [n]owhere does the Intervenor [GAIU] indicate an intention to abandon its efforts to collect the disputed wages * * *. [i]n our view, the Intervenor was merely describing what the Employer would wish to have happen should the Intervenor [GAIU] lose the election.

The problem with the Board's holding is that is not what the leaflet says. It does not say that this is what the employer wants the GAIU to do. Rather it threatens that this is what the GAIU will do if not re-elected. We must read the language as it would be likely to be understood by the ordinary reader. It is what was said that is important, not what was intended to be said. Certainly the statement here was "reasonably susceptible of coercive implications." *G. H. Hess,* 82 N.L.R.B. 462 (1979). Our Court stated in *Plastic Masters, Inc. v. N.L.R.B.,* 512 F.2d 449, 450 (6th Cir. 1975):

> * * * in our opinion the intent or absence of intent on the part of the Union to influence the employees' votes by the overpayments is not a controlling factor. Whether the conduct of the Union was intended to influence the vote, these actions "undoubtedly had a tendency to influence the election results." *Collins & Aikman Corp. v. N.L.R.B.,* 383 F.2d 722, 729 (4th Cir. 1967).

In a decision in which it relied on our Court's holding in *Plastic Masters,* the Fifth Circuit explained:

> The intent test is inconsistent with the logic behind these holdings [setting aside representation elections]. The effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will. In determining whether an election should be invalidated, the focus should be on the effects of a particular act on the **416** electorate rather than on the actor's intent.

N.L.R.B. v. Gulf States Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978).

The threat here could not but have a tendency to influence the outcome of the voting. Employees who might have wished to vote for "no union," as well as those who might have wished to vote for the Pressmen, may have voted for the GAIU so as not to lose their claims to the back wages. The panel fails to discuss the effect on the election of the Union's threat.

In addition, the majority of the Court suggests that the overstatements of the wage differential between Pressmen and GAIU plans were not misleading under *Diamond Electronics Division of Arvin Systems, Inc. v. N.L.R.B.,* 570 F.2d 156 (6th Cir. 1977). The Board never analyzed the misleading nature of these statements. It simply asserted that the statements did not require setting the election aside. In *Diamond* the union overstated by 40 percent the wage increase it won in a bargaining session. Our Court ruled that "[t]his was a material misrepresentation with respect to wage rates, a matter of great concern to employees." *Id.* at 157. In this case the GAIU overstated the average wage differential between the GAIU represented Dayton plant and the Pressmen represented York and Fayetteville plants by 78 percent and 88 percent, respectively. This is more misleading than the statements at issue in *Diamond.*

The panel suggests the overstatements were not misleading because they conveyed the "essentially correct message that the GAIU had won higher wages for its members than the Pressmen." By the same token, the overstatement at issue in *Diamond* conveyed the "essentially correct" message that the union had won a wage increase for its members. *Diamond* forecloses the conclusion that such an "essentially correct" message is not materially misleading. I also disagree that this case is distinguishable from *Diamond* merely because the otherwise misleading statements were accurate with respect to one out of thirty-five job categories.

The majority further states that *Diamond* is distinguishable in that the union making the misstatement in *Diamond* won the election while the GAIU which made the wage overstatement here was the loser in the runoff election. The majority's position appears to be based on the assumption that the GAIU's misleading statements could only have hurt the Pressmen; that they could not have influenced the employees to vote union in preference to "no union." I disagree. The employees might well have believed that a company which paid its workers in different cities substantially different wages for comparable work is unfair, and that the protection of a union is necessary for employees of that company.

The GAIU received 20 votes less in the runoff election than it received in the first election. Had half of those 20 votes been given to the employer, the parties in the runoff election would have been the employer and the Pressmen. We can only speculate as to what the outcome of an election not influenced by material misrepresentations would have been. The Board should have required a new election. I would deny enforcement of the Board's order.

NLRB v. Laborer's International Union of North America, Local No. 721

649 F.2d 33 (1st Cir.), May 15, 1981—246 NLRB 691

On petition to enforce Board Order

Before ALDRICH, Senior Circuit Judge, WINTER, Circuit Judge,* and WYZANSKI, Senior District Judge.**

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PER CURIAM: The National Labor Relations Board petitions for enforcement of its order, 246 N.L.R.B. No. 108 (December 4, 1979), directing Laborer's International Union Local 721 (the Union), among other things, to cease and desist from its unfair labor practices in violation of §§ 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(b) (1976), and to rescind the unlawful disciplinary actions taken against two of its members. Although the Union claims its disciplinary actions were appropriate, we think that there was substantial evidence to support the Board's determination that the Union violated the Act in two respects. We direct that the Board's order be enforced in full.

I.

The Union disciplined the two members when they refused to participate in a strike called by the Union. The Union had requested that the employer of the two workers, a construction contractor, place a Union-designated steward at the jobsite as permitted by the collective bargaining agreement. The two men were the only Laborers at the jobsite, so the employer asked the Union to designate either man as the steward. The Union refused, and the employer likewise refused to hire an additional Laborer or to discharge either man then employed in order to take on a steward acceptable to the Union. The Union thereupon called the strike, which the two workers participated in for one day. After a work hiatus due to inclement weather, they resumed work in spite of the continuing strike call. The Union proceeded to discipline the two workers, notwithstanding the fact that the collective bargaining agreement also contained a valid no-strike provision applicable to this strike and a provision for arbitration of such disputes. The Union held a hearing and fined the men. They apparently declined to pay the fines, and the Union proceeded to suspend them, refusing to accept their tenders of regular dues. Finally, the Union sent a message to their employer which stated that the men were no longer members in good standing with the Union and should therefore be discharged according to a closed-shop provision of the collective bargaining agreement. The employer did not discharge the two workers. They nonetheless preferred charges against the Union with the General Counsel to the Board.

After the parties stipulated to the facts, a divided Board held that the Union violated § 8(b)(1)(A) of the Act by subjecting the two men to discipline because the strike violated a no-strike provision of the agreement. It determined that the employer's refusal to hire a Union-designated steward in violation of the collective bargaining agreement did not constitute an unfair labor practice sufficiently serious to justify the strike. The Board also held that the Union violated §§ 8(b)(1)(A) and 8(b)(2) of the Act by attempting to secure the employer's discharge of the two men.

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*Of the United States Court of Appeals for the Fourth Circuit, sitting by designation.

**Of the District of Massachusetts, sitting by designation.

II.

It is conceded for purposes of this appeal that the collective bargaining agreement's provision for union designation of a steward served a legitimate union objective. Accordingly, the employer's violation of the provision constituted an unfair labor practice, despite the fact that the Union refused to consider designating one of its two members on the job as steward and insisted upon a steward of its own choice, even if the employer had to discharge another Union member to hire the chosen individual. *Cf. The PaintSmiths, Inc. v. NLRB*, 620 F.2d 1326 (8 Cir. 1980), *rev'g* 239 N.L.R.B. 1378 (1979). The Supreme Court has long held that strikes called to protest unfair labor practices of employers do not violate general no-strike provisions of collective bargaining agreements in the absence of a more specific waiver of the right to strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). The Board, however, has interpreted the right to strike under *Mastro Plastics* as limited to disputes involving "serious" unfair labor practices. *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961). Because the steward designation dispute did not involve a "flagrant" unfair labor practice by the employer "threatening the very existence of the union itself," *Drake Bakeries, Inc. v. American Bakery Workers*, 370 U.S. 254, 266, 82 S.Ct. 1346, 1353, 8 L.Ed.2d 474 (1962), the Board determined that the employer did not commit an unfair labor practice sufficiently serious to justify the strike in view of the no-strike provision of the collective bargaining agreement and the availability of an arbitration procedure to settle the dispute.

We think the Board is correct in its view that *Mastro Plastics* does not justify strikes in violation of bargained-for no-strike provisions in labor agreements over any unfair labor practice, no matter how insignificant. National labor policy encourages dispute resolution without resort to industrial strife, especially arbitration. *See, e.g., Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 377–82, 94 S.Ct. 629, 636–39, 38 L.Ed.2d 583 (1974); *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 250–53, 90 S.Ct. 1583, 1592–93, 26 L.Ed.2d 199 (197)). Wooden application of a rule justifying strikes would completely vitiate the efforts of the parties to minimize disruptions by establishing mechanisms to resolve disputes through collective bargaining. *Mastro Plastics* contemplates strikes to protest unfair labor practices which threaten the integrity of the collective bargaining relationship. Permitting such strikes in defiance of no-strike provisions when the unfair labor practice is not so serious, however, would also undermine the collective bargaining relationship.

The Board, moreover, can best determine what unfair labor practices by an employer threaten a union's ability to represent a bargaining unit effectively and which do not. The Board's expertise is best applied in areas such as this, which emphasize factfinding and call for a flexible, case-by-case approach, and is best deferred to by the courts, subject of course to general supervisory review. We accept the Board's determination in this case that the employer's conduct did not warrant a strike. Substantial evidence in the record as a whole supports this determination for the record reveals that what was at stake was not a refusal on the part of the employer to honor the Union's contractual right to have a steward on the jobsite but a simple dispute as to the identity of the steward. There was thus, as the Board found, no effort on the part of the employer to "undermine the Union as the employees' collective bargaining representative."

III.

As a further step, we accept the Board's determination in this case that the Union's discipline of the two men who refused to participate in a strike unwarranted by a serious unfair labor practice violated § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). *NLRB v. Retail Clerks Union, Local 1179*, 526 F.2d 142 (9 Cir. 1975); *Mississippi Gulf Coast Bldg. v. Construction Trades Council*, 222 N.L.R.B. 649, *enf'd*, 542 F.2d 573 (5 Cir. 1976).

Although unions are permitted to assess fines to maintain discipline, the Act prohibits unions from maintaining discipline by interfering with the employment of their members. *See, e.g., Scofield v. NLRB*, 394 U.S. 423, 428 89 S.Ct. 1154, 1157, 22 L.Ed.2d 385 (1969). The imperative words of the union's message to the employer requesting the immediate implementation of the discharge provision of the collective bargain-

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ing agreement with respect to the two wrongfully disciplined workers unmistakably provide substantial support for the Board's finding of unlawful interference with employment of the two men in violation of §§ 8(b)(1)(A) and 8(b)(2) of the Act.

ENFORCEMENT GRANTED.

NLRB v. Container Corporation of America

649 F.2d 1213 (6th Cir.), May 18, 1981—244 NLRB 318

On petition to enforce Board Order

Before EDWARDS Chief Judge, BOYCE F. MARTIN, JR., Circuit Judge, and ENSLEN, District Judge*

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PER CURIAM: The National Labor Relations Board petitions for enforcement of an order requiring Container Corporation of America to cease its unfair labor practices under section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* The company cross-petitions for review of the NLRB's determination that it violated the Act by threatening to discipline an employee if he continued to post anti-management notices on the company's bulletin board. An individual charge brought by Union Vice President Young, alleging that the company had unlawfully threatened him if he refused to agree with changes in the employee break system, has been consolidated with the charge of Local 4018 United Paperworkers International Union, AFL—CIO.

The controversy between the Union and the company began when the Union Vice President posted on the company bulletin board a newsletter written by the Union President. This notice criticized the manner in which the company was proccessing grievances. The company claims it also contained virulent *ad hominem* attacks on the plant's General Manager. The notice alleged that management had treated employees in a "disgraceful manner," and announced the Union's intention to resist further unfair management behavior. It also criticized the General Manager and implied that he was a slave driver, and stated that "he expects more and more sq. (sic) footage from the 'chain gang' with nothing in return."

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After the General Manager saw the notice, he consulted the company's industrial relations advisor. He then called the Union President and told him he found the notice abusive, insulting, disruptive, and violative of the negotiated contract provision which allowed notices to be posted which related to "official union business." The General Manager announced that he would remove the letter from the board. Nevertheless, the notice reappeared the next day and was removed again. The General Manager then called a meeting with the Union Vice President and other Union committeemen during which he read aloud the relevant contract clause, reiterated his opinion of the notice, and threatened to suspend the Vice President if the notice reappeared on the board. The Vice President did not replace the notice and the Union filed charges with the NLRB against the company.

After a hearing on the charges, the Administrative Law Judge found that the "newsletter" was "official union business" within the meaning of the contract. The ALJ also found that the posting of notices was a statutorily protected activity because the company had given the Union a contractual right to use the board. He also found that the contents of the notice deserved the Act's protection because the remarks against management were not "egregious." Based on these facts, the ALJ determined that the company violated section 8(a)(1) of the Act. The NLRB modified these findings and found that, although the Union had no *statutory* right to use the bulletin board, nevertheless an employer who has permitted union access to a company board, either by formal rule or practice, may not then remove notices or discriminate against and employee who post notices which the company finds distasteful.

As an initial matter, we agree that the NLRB properly exercised its discretion under section 10(a) of the Act in refusing to defer to arbitration in this dispute. The determinative issue on appeal centers on the uncoerced exercise of employee rights under section 7 of the Act, rather than on construction of an embiguous contract provision. *See General American Transportation Co.*, 228 N.L.R.B. 808 (1977).

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*Honorable Richard S. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

The company attempts to justify the General Manager's actions and remarks by pointing to a historical company practice of removing propagandistic notices from the board which tended to create dissension, demean management, or ridicule personnel. Such notices were removed by the company during negotiations in 1969, 1971, and 1973. The company contends that the NLRB erroneously ignored this history.

The record reveals that the Union and the company fought a contracts battle on the bulletin board during their 1968 negotiations. By *mutual* agreement, the bulletin board was eliminated as a battleground. We agree with the ALJ that this agreement was limited to those particular contract negotiations and does not carry over to the instant controversy as a waiver of the Union's right to post notices relating to union business. Ample uncontradicted evidence supports the finding that employees were allowed to post personal notices, none of which related to employment, without censorship or company supervision. The Union President testified that "questions" had arisen about letters posted on the board in the past, but to his knowledge the company had never removed any notices. He also testified that he intended to convey to union members by his letter, the company's attitude towards the Union and its committee. Based on these facts, we see no reason to disturb the finding that the contents of the letter related to "official union business," namely, the grievance procedure and the Union President's perception of the company's attitude towards grievance steps.

Similarly, we agree with the ALJ's determination, adopted by the NLRB, that the remarks in the notice were not sufficiently egregious to fall outside the protection of section 7. Union rhetoric is protected by federal law even if it is "abusive" or "insulting." *National Association of Letter Carriers v. Austin,* 418 U.S. 264, 94 S. Ct. 2770, 41 L.Ed.2d 745 (1974). The record is barren of evidence to contradict the ALJ's

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view that the posted notice had no greater disruptive potential than literature distributed outside the plant. Accordingly, the company cannot justify removing the notice from the board on the basis that its contents were disruptive or unpleasant.

We turn now to discuss the individual charge that alleged that the company threatened Vice President Young and threatened to "make it hard" on union members. The NLRB found, in deciding the individual charge, that Mr. Grundy, a plant manager in training, coerced Vice President Young in the exercise of his section 7 rights and thereby violated section 8(a)(1).

Young testified that Grundy had stated to him that Grundy had visited one of the company's plants in which employees' first grievances were "placed in a desk drawer," and that subsequent grievances resulted in dismissals. Young also testified that Grundy intimated to him that the retiring plant manager "could make it hard" on union members. Grundy denied having made any such statements directly to Young. Rather, he testified that he had merely joked with other management personnel in the cafeteria and told them about the grievance remark which had been made by another plant manager, reputed to be a "character." Grundy testified that Young may have overheard this remark.

Young's testimony was uncorroborated. However, the record does contain evidence to support Grundy's testimony that Young disliked him because of a dispute over issuing warnings to employees, and that Young had threatened "to get" Grundy, the very day before he filed his charge against the company based on Grundy's alleged statement. After Grundy issued the disputed warnings, Young filed the charge, a full month after Grundy allegedly threatened him.

Viewing the record as a whole, we do not find substantial evidence to support the ALJ's credibility findings. He fully credited Young's testimony, a highly interested witness, although this testimony was not supported by other evidence. The uncorroborated testimony of an interested charging party does not amount to substantial evidence of an unfair labor practice. *N.L.R.B. v. Otsego Ski Club-Hidden Valley, Inc.,* 542 F.2d 18 (6th Cir. 1976). *See also N.L.R.B. v. Elias Bros. Big Boy, Inc.,* 327 F.2d 421 (6th Cir. 1964). Young testified that Grundy never threatened him personally. In light of Young's inability to recall with specificity the conversations in which Grundy allegedly made the challenged statements, we cannot say that substantial evidence supports the ALJ's and the NLRB's findings on this issue.

Accordingly, the NLRB's order is enforced in part and denied enforcement in part.

William A. Pascarell, Reg. Dir. v. New York Shipping Association, Inc., Council of North Atlantic Shipping Associations, International Longshoremen's Association, AFL–CIO, Atlantic Coast District, International Longshoremen's Association, AFL–CIO

650 F.2d 19 (3d Cir.), May 20, 1981

On appeal from preliminary injunction

Before SEITZ, Chief Judge, and ALDISERT and GIBBONS, Circuit Judges

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GIBBONS, Circuit Judge: The New York Shipping Association, Inc. (NYSA), the International Longshoremen's Association, AFL–CIO (ILA), and others, appeal from a preliminary injunction issued pursuant to Section 10(*l*) of the National Labor Relations Act, 29 U.S.C. § 1601(*l*), on a petition brought by William A. Pascarell, Acting Regional Director, on behalf of the National Labor Relations Board (the Board). The injunction prohibits the defendants from implementing certain provisions of a collective bargaining agreement

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between NYSA and ILA pending resolution of charges before the Board that those provisions, the Rules on Containers, violate Section 8(b)(4)(ii)(B) of the Labor Management Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B). Prior stages of this ongoing dispute are set out in *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980); *Consolidated Express Inc. v. New York Shipping Ass'n, Inc.*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied, In re International Longshoremen's Association*, ——— U.S.———, 101 S.Ct. 2008, 68 L.Ed.2d 318 (1981); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980); *Balicer v. International Longshoremen's Ass'n*, 364 F.Supp. 205 (D.N.J.), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1973). In the *Balicer* case the Regional Director on behalf of the Board obtained a Section 10(*l*) injunction preventing the operation of the Rules on Containers pending resolution of unfair labor practice charges pending before the Board. Since the charges involved alleged violations of Section 8(b)(4) that application was, under Section 10(*l*), mandatory. Compare Section 10(j), 29 U.S.C. § 160(j). A preliminary injunction issued, and thus from 1973 to date the Rules on Containers were never operative. The Board in a number of cases held that the Rules on Containers did in fact violate Section 8(b)(4). The effect of those decisions was to prevent implementation of the Rules. On June 20, 1980, however, the Supreme Court held that in deciding the Section 8(b)(4) charges the Board had applied on incorrect legal standard, and remanded for further consideration. *N.L.R.B. v. International Longshoremen's Ass'n*, supra.

The status quo from 1973 through 1980 was that the Rules on Containers were inoperative. This permitted continued operation of the businesses of certain freight consolidators who employed teamsters rather than longshoremen. Late in 1980, NYSA and ILA agreed to institute implementation of the Rules beginning January 2, 1981. Meanwhile, pursuant to the Supreme Court's mandate, the Board conducted an investigation of the Section 8(b)(4) charges in light of the Court's opinion, and concluded that complaints should be processed. That conclusion triggered the mandatory Section 10(*l*) duty to petition for injunctive relief pending the Board's final adjudication. By the time the district court considered that petition it was clear that the defendants intended to implement the Rules. Such implementation would drastically alter the status which prevailed from 1973 through 1980, by depriving the freight consolidators and their employees of business they had enjoyed for years. The district court issued a Section 10(*l*) injunction prohibiting implementation of the Rules pending the Board's decision on the pending charges. This appeal followed. Several objections to the district court order are advanced, none of which are meritorious.

First NYSA and ILA contend that the district court should not have entertained a Section 10(*l*) application, but should have referred the Board to the Court of Appeals from which the pending unfair labor practice cases were remanded for consideration of pendente lite relief. We reject that contention because it is plainly inconsistent with the structure of the Act. Authority of Courts of Appeals to enforce the prohibitions against unfair labor practices depends on 28 U.S.C. § 2112 and Section 10(e) of the Act, 29 U.S.C. § 160. Those statutes provide for enforcement of Board orders.

Section 10(e) authorizes appropriate temporary relief, but only in connection with enforcement of a Board order. The Board's unfair labor practice orders have been vacated. The Board itself lacks authority to order pendente lite relief, but must apply for such relief to a district court pursuant to Section 10(j) or (*l*). Undoubtedly the Congressional decision to direct the Board to the district courts for temporary relief reflects the reality that such relief will require the creation of some kind of factual record in advance of the creation of the Board's adjudicative record. The creation of such a record is a task for which an appellate court is unsuited. We do not hold

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that a court of appeals reviewing a Board decision pursuant to Section 10(e) lacks the power to enforce a board order pending a remand. *See* 28 U.S.C. § 1651. We hold only that if there is such power it in no way preempts the district court's section 10(*l*) authority or the Board's Section 10(j) discretion and Section 10(*l*) duty.

Next, NYSA and ILA contend that the district court erred in issuing a preliminary injunction upon a finding that there is reasonable cause to believe an unfair labor practice is present and the Board's legal theory is substantial and not frivolous. In applying that standard the district court applied the settled law of this circuit. *Consolidated Express Inc. v. New York Shipping Ass'n Inc.*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied, In Re International Longshoremen's Association,* ——— U.S.———, 101 S.Ct. 2008, 68 L.Ed.2d 318 (1981); *Hirsch v. Building & Construction Trades Council of Philadelphia & Vicinity,* 530 F. 2d 298 (3d Cir. 1976); *Samoff v. Building & Construction Trades Council of Philadelphia & Vicinity,* 475 F.2d 203 (3d Cir.), *vacated for mootness,* 414 U.S. 808, 94 S.Ct. 151, 38 L.Ed.2d 44 (1973); *Schauffler v. Local 1291, International Longshoremen's Ass'n,* 292 F.2d 182 (3d Cir. 1961). This panel is not free to disregard those cases. Moreover, for the reasons set forth therein we are convinced the rule they announce is sound.

Finally, NYSA and ILA contend that even assuming the *Hirsch-Samoff-Schauffler* test for determining whether pendente lite relief is appropriate the district court must under Section 10(*l*) determine what injunctive relief is "just and proper." Obviously the language of the statute would permit the district court to decline an injunction when there was no actual threat that the unfair labor practice charged before the Board was likely to continue pendente lite. That is not our situation, however, for NYSA and ILA agreed in late 1980 to change the status quo effective January 2, 1981, by putting into effect Rules on Containers which up to then had not been in operation. Those Rules involve non-frivolous substantial unfair labor practice charges. Given the fact that the Board's obligation to seek pendente lite relief against Section 8(b)(4) violations is mandatory, we cannot hold that the trial court erred in refusing to permit a change in the status quo by authorizing operation of the Rules, and putting the freight consolidators out of business, while the Board hearing went forward.

The judgment appealed from will be affirmed.

NLRB v. Tri-State Transport Corporation

649 F.2d 993 (4th Cir.), May 21, 1981—245 NLRB 1030

On petition to enforce Board Order

Before HAYNSWORTH, Chief Judge, INGRAHAM, Senior Circuit Judge,* and MURNAGHAN, Circuit Judge

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INGRAHAM, Circuit Judge: Pursuant to section 10(e) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(e) (1976), the National Labor Relations Board (the Board) seeks enforcement of its order issued on September 28, 1979, against Tri-State Transport Corporation (Tri-State) of Wheeling, West Virginia. After formal hearing, the Administrative Law Judge (ALJ) concluded that Henry Cunningham was an employee of Tri-State within the meaning of section 2(3) of the Act, 29 U.S.C. § 152(3) (1976). The ALJ further concluded that Tri-State discharged Cunningham for participating in a strike by other drivers against the company, in violation of section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976). The Board adopted the findings and conclusions of the ALJ and ordered

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*Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Tri-State to offer Cunningham reinstatement and make him whole for any lost earnings.

Tri-State raises two principal arguments on appeal. The first argument is that since counsel for the company was detained at the last moment by other legal proceedings and the company's defense was inadequately presented by its non-lawyer president Mrs. Jean Witsberger, and for other reasons, the company did not receive a fair hearing before the ALJ. The second argument is that since Cunningham was not an employee of Tri-State within the meaning of section 2(3) of the Act, the cessation of his business affiliation with Tri-State was not a violation of section 8(a)(1). Because we hold that Tri-State's position with respect to the second argument is correct, we do not reach the issues raised by the company in its first argument.

I.

The dispositive issue in this case is the legal status of Cunningham's relationship to Tri-State. This is the only issue on which the ALJ took testimony at the hearing. Based on the testimony given and the exhibits admitted, the ALJ found that Cunningham was an employee of Tri-State. On this application for enforcement, our standard of review is to determine whether there is substantial evidence on the record as a whole to support that finding. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Section 2(3) provides, in relevant part, that the term "employee" shall not include "any individual having the status of independent contractor." In enacting this provision, Congress did not define the status of independent contractor but intended instead that in each specific case the question whether an individual were an employee or an independent contractor was to be determined by the the application of general agency principles. *See NLRB v. United Insurance Co.,* 390 U.S. 254, 256, 88 S.Ct. 988, 989, 19 L.Ed.2d 1083 (1968); *NLRB v. A.S. Abell Co.,* 327 F.2d 1, 4 (4th Cir. 1964).

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Thus, the Board's decision in this case involved not only factual findings by the ALJ but also the application of common law principles to those facts. Accordingly, the decision, although not one in which the Board had to apply its special expertise, should be upheld if the Board chose between two fairly conflicting views. *NLRB v. United Insurance Co.,* 390 U.S. at 260, 88 S.Ct. at 991.

In distinguishing employees from independent contractors,

> there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common law agency principles.

Id. at 258, 88 S.Ct. at 990. Those common law principles may be referred to as the right-to-control test.

In this case, there is the further consideration that Tri-State is a trucking firm engaged in the interstate carriage of pipe, authorized to operate under a certificate of public convenience and necessity issued by the Interstate Commerce Commission (ICC). Tri-State also must comply with numerous regulations of the Department of Transportation (DOT). The common law test of right-to-control has proven especially difficult to apply in cases involving owner-operators and non-owner drivers of trucks leased to carriers governed by these ICC and DOT regulations. *See Local 814, International Brotherhood of Teamsters v. NLRB,* 512 F.2d 564, 568 (D.C.Cir. 1975) (Bazelon, J., dissenting).

Under the applicable regulations, carriers are required to demand certain information from and to impose certain rules on all drivers, regardless of the particular contractual arrangements between the carrier and those drivers.[1] The number and nature of the government controls create an appearance of employee status. This is true even in situations where the contractual arrangements expressly disclaim any such relationship[2] and the actual practice of the parties belies any such inference. As a result, the Board and the courts have struggled to develop an appropriate rule for weighing the government regulations in the assessment of the overall factual context. The following standard can be discerned from the cases: A contractor is an employee only if there was "a layer of carrier regulation put upon the contractor beyond what was required by government regulation, impairing the contractor's independence." *Local 814, International Brotherhood of Teamsters (Santini Bros., Inc.),* 208 N.L.R.B. 184, 197 n.18 (1974), *remanded for clarification,* 512 F.2d 564 (D.C.Cir. 1975), *clarified and upheld,* 223 N.L.R.B. 752 (1976).

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[1] For an appreciation of the extent of some of those regulations, see Parts 391, 392, 394, 395, 1043, and 1057 of 49 C.F.R. (1979).

[2] For example, the leases involved in this case were preprinted forms. In certain places, where choices were to be made, the parties were to signify their intent by striking out the unwanted language, thusly: "Lessor/agrees to accept * * *." On each lease, the following sentence was entirely stricken: "The Lessee shall be responsible for the driver or drivers of subject vehicles and said driver(s) shall be employees of the Lessee."

II.

We now turn to the record to examine the factual incidents of the relationship between Tri-State and Cunningham. At this point it is necessary to introduce one more principal actor of the *dramatis personae,* Joseph Coss. Coss owned two truck-tractors and two flatbed trailers of the type required in Tri-State's hauling business. Cunningham had driven for Coss before. Witsberger, president of Tri-State, was looking for access to more capacity than she had at the time. Witsberger learned from another about Coss and Cunningham. She called Cunningham and the drama began to unfold.

Coss was hospitalized at the time. Cunningham, armed with a power of attorney from Coss, went to Tri-State along with Coss' wife, Violet. A lease agreement covering one tractor-trailer rig was prepared

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by Tri-State's general manager and executed by Violet Coss for her husband, as lessor, and Jean Witsberger, president of Tri-State, as lessee. The lease provided for various divisions of responsibility between Coss and Tri-State, many of which provisions obligated Tri-State as the result of federal and state regulations. Apart from those, lessor Coss assumed responsibility for the following items: furnishing all licenses necessary for the intended operation of his truck and trailer; payment of all fines and penalties incurred as a result of any unlawful operation of the rig; and responsibility for all maintenance costs. Tri-State undertook to insure against damage to the public and to cargo, but Coss had to insure against damage to the equipment itself. Coss was to receive seventy-five percent of the gross revenue, out of which he was to pay the driver's wages and the costs of operating the equipment.[3]

The individual who was the general manager of Tri-State during the relevant period testified that he understood Cunningham to be a driver in the employ of the owner-broker of the equipment, Coss. Witsberger testified that Violet Coss represented her husband and Cunningham as being in "sort of a partnership." Violet Coss testified that her husband and Cunningham were not in fact partners. Cunningham testified that he considered himself to be an employee of Tri-State. Witsberger, proceeding *pro se,* did not cross-examine Cunningham concerning any representations made at that first meeting. There were no other witnesses called who were present at that meeting.

Witsberger testified without contradiction that if Cunningham were unable to drive the Coss tractor-trailer rig, she would have to contact Coss for his permission to put some other driver on that rig. Mrs. Witsberger further testified that in order to dispatch Cunningham, unless he called in, she had to contact Joseph or Violet Coss and have one of them instruct Cunningham to check with the company. Mrs. Coss verified this routing of information was employed on several occasions.

At the outset, Cunningham supplied certain information that was recorded by Tri-State's general manager on a form entitled "Application for Employment." The application form was introduced into evidence by counsel for the General Counsel. The form was only partially completed. Another application form was submitted on behalf of the General Counsel, covering a person conceded by Tri-State to be an employee, to show that Cunningham filled out the same form as the "other" employees. The information solicited from Cunningham was no more than that required by federal regulations,[4] and it is not surprising that a company whose general manager worked only part-time did not have special pre-printed forms for non-employee drivers. More significant to us is that the classification of the conceded employee was "Road driver," whereas the classification of Cunningham was "Road driver for Broker—J. Coss." Even more significant, perhaps, is the inscription that Cunningham on July 27, 1978, was "Discharged by Broker—J. Coss," and on September 18, 1978, was reinstated by Broker—J. Coss."

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[3] Cunningham's arrangement with Coss appears to have been that he would receive twenty-five percent of whatever amount Coss received from Tri-State.

[4] In fact, although the printed form seems to comport with the requirements of 49 C.F.R. § 391.21, responses were not recorded for many of the questions.

After Cunningham began driving, the first four checks for the lessor's seventy-five percent of the rig's weekly gross were made payable to Cunningham. Witsberger testified without contradiction that this arrangement was at the instruction of Coss, who did not want another source of his income jeopardized by extra earnings during the month he was hospitalized. Thereafter, having consulted his attorney regarding the matter, Coss instructed Witsberger to make the checks payable directly to him. Witsberger never made tax, social security, or other payroll deductions from the Coss-Cunningham earnings, as she did for certain other drivers who she considered to be employees of Tri-State.

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On one occasion, Witsberger attempted to dispatch Cunningham on a trip to Jamesburg, New Jersey. Cunningham refused to make the trip. On direct examination by counsel for the General Counsel, he testified that his reason for refusing the run was that "we couldn't make any money on that run because we had to cross the mountains and fuel was so high and we had to pay for our own turnpike fees." He further testified that Witsberger stated that she would call Coss and that "if [Cunningham] didn't want to make the run to just park the truck.

Subsequent to the lease covering the tractor-trailer rig that was to be driven by Cunningham, Coss entered into another lease agreement with Tri-State. The second lease covered a different tractor-trailor rig that Coss personally drove. Under this lease, Coss received only sixty-two percent of the gross revenue earned by the rig. Although Coss was contractually obligated to carry the physical damage insurance on the rig, he testified that he did not have it insured and was therefore "very careful with it." At one point when he was ill, Coss had another person drive that rig. On the third trip, the person had an accident that damaged the cargo on the flatbed trailer but that did not damage the rig itself. The driver was promptly terminated. Although Coss characterized the termination decision as having been made by Witsberger with his consent, it is instructive to note that Witsberger told Coss about the accident and then he, not Witsberger, went to the driver and demanded the keys to the truck.

On November 9, 1978, Witsberger sent a letter to Coss advising him that she was terminating the leases on his two tractor-trailer rigs. The following weekend, Coss contacted Cunningham. According to Cunningham, "[Coss] said that I was laid off because she fired his truck."

III.

The ALJ acknowledged in his opinion that "much, if not all of this so-called control is dictated by Interstate Commerce Commission rules and regulations and does not necessarily create an employer-employee relationship." He went on to conclude, however, that on balance the record facts supported "a finding that although Cunningham might have been (without any specific record showing) some sort of profit sharer or agent for Coss, he was also an employee of [Tri-State]." We reach the opposite conclusion. We find that there is not substantial evidence in the record to support the finding that Cunningham was an employee of Tri-State. Instead, the record substantially supports the conclusion that Cunningham was either an employee of or a profit sharer with Joseph Coss.[5] The factors relied upon by the ALJ are for the most part expressions or consequences of the rules and regulations of the ICC and the DOT. Once those controls are stripped away, what little control remains is simply not sufficient to support the conclusion that Tri-State was an employer of Henry Cunningham *qua* employee. *See, e.g., NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379 (3rd Cir. 1979); *Local 814, International Brotherhood of Teamsters (Santini Bros., Inc.),* 208 N.L.R.B. 184 (1974), *remanded for clarification,* 512 F.2d 564 (D.C.Cir.1975), *clarified and upheld,* 223 N.L.R.B. 752 (1976). Accordingly, the application for enforcement of the Board's order must be denied.

ENFORCEMENT DENIED.

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[5] We note that at the hearing the ALJ adverted to "a lead case on this called Greyhound," noting that perhaps Cunningham was an employee of *both* Coss and Tri-State for purposes of the right-to-contract test. We further note that the ALJ did not base any part of his written opinion on any case involving a party named Greyhound. The ALJ expressly stated that Cunningham's relationship to Coss "is not clarified in the record." Given our conclusion that Cunningham is *not* an employee of Tri-State, we need not question the propriety of the ALJ's failure to clarify the nature of his relationship to Coss.

MURNAGHAN, Circuit Judge, dissenting: The case concerns whether Henry Cunningham was an "employee" of Tri-State Transport Corporation (Tri-State), and

therefore covered by the National Labor Relations Act, 29 U.S.C. § 152(3) (1976), or whether he possessed independent contractor, or some other inconsistent status in relation to a vehicle lessor, deemed to exclude him from the protections of the Act. Because I believe that the record as a whole evidences substantial support for the Board's view that Cunningham was an employee within the meaning of § 2(3) of the Act, 29 U.S.C. § 152(3), I respectfully dissent.[1]

In the labor relations context, Congress has entrusted the Board with the principal duty of determining whether a particular person is an employee or not. Under the substantial evidence standard, where there are two "fairly conflicting views" of the matter, a reviewing court must defer to the Board's judgment. *NLRB v. United Ins. Co.*, 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968). Our mission on review is not to sift and weigh the evidence, or to choose between conflicting versions of the facts, but solely to determine whether the line the Board has drawn is reasonably based in the record. The majority view, unfortunately, allows insufficient weight to certain significant evidence upon which the Board has relied, and fails altogether to mention other facts which for the Board were dispositive. The majority decision amounts to a *de novo* review of Cunningham's status and concludes that Cunningham "was either an employee of or a profit sharer with Joseph Coss." At 997. There appears to be an implicit further conclusion that such status would preclude a finding that Cunningham was a Tri-State employee. With respect, I disagree with the majority's conclusions.

As a basis for departure, I first mention my agreement with the majority position that whether a particular person is an employee is to be tested under the "right to control" doctrine borrowed from the common law of agency. *NLRB v. A. S. Abell Co.*, 327 F.2d 1, 4 (4th Cir.1964). *See United Ins. Co., supra,* 390 U.S. at 258, 88 S.Ct. at 990. Applying the right to control criterion has proved to be a difficult proposition for both the Board and the courts of appeal in the context of the highly regulated trucking industry in which the classic employer-employee relationship is rarely found. In the interests of responsible trucking and highway safety, government agencies such as the Interstate Commerce Commission (ICC) and the Department of Transportation (DOT) require carriers to adopt particular relationships to equipment lessors and exert certain types of controls over the drivers of leased vehicles. One issue is the weight to be accorded those aspects of an employment relationship that are mandated by federal regulations. As does the majority, I reject the view that the forms of employee control mandated by such regulations, merely because compelled or "involuntary," should therefore be discarded in determining employee status.

First, many employers are "involuntarily" subject to the provisions of the Act. Second, while perhaps involuntary for an employer, obedience to ICC or DOT regulations is also involuntary for the employee. If Congress and various regulatory agencies have validly required the nation's shippers or haulers to exercise considerable control over their drivers in the interest of highway safety, there is no reason why such controls should not play a significant role in determining whether certain drivers are "employees" within the meaning of the Labor Relations Act. For purposes of tort law and workers compensation, the government regulations create what has been termed a "statutory employee." *White v. Excalibur Ins. Co.*, 599 F.2d 50, 52-53 (5th Cir.), *cert. denied,* 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 F(1979). Consequently, if the overall effect of government regulations is to *require* someone to exercise employerlike controls over a particular person, he is nonetheless an employee. Congress contemplated that such a statutory employee should be accorded the labor Act's protec-

tions against potential abuses of employer power, even though the employer might have preferred a relationship other than that of employer-employee.

Recognizing that the right to control, and not the reason for its existence, is the crucial element, apparently every reviewing court decision in the trucking context relies on regulatory mandates as significant, if not definitive, factors in resolving the question of whether a particular driver is an employee. *See, e.g., NLRB v. A Duie Pyle, Inc.*, 606 F.2d 379, 385 (3d Cir.1979); *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1225 (5th Cir.1975), *cert. denied*, 442 U.S. 1047, 95 S.Ct. 2665, 45 L.Ed.2d 700 (1975). Therefore, we are called upon carefully to consider all incidents governing the actual relationship between the parties, *see United Ins. Co., supra*, 390 U.S. at 258–60, 88 S.Ct. at 990–91, without regard to whether some of the control derives from government regulation. *See Doran Hauling & Rigging Co., v. NLRB*, 462 F.2d 190, 194 (6th Cir.1972). Furthermore, and in any event, the Board relied on ample evidence showing that Tri-State exercised controls over Cunningham that substantially exceeded Tri-State controls arguably mandated by federal regulations.

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[1] Obviously, this is not to say that, acting independently as a finder of fact, I would have reached the same result as the NLRB. I conclude only that there was substantial evidence to support the decision which the NLRB reached.

Evidence received at the hearing showed that Cunningham, an unemployed driver, had accompanied Violet Coss, wife of Joseph Coss, to negotiate the equipment lease.[2] The same day, Cunningham filled out an "Application for Employment" required by Tri-State of all its employees.[3] In accordance with federal regulations governing "regularly employed drivers," Cunningham was given a physical examination and a truckdriving test.[4] Significantly, the lease gave Tri-State "exclusive possession, control, and use of equipment for the duration of this Agreement." *See Deaton, supra*, 502 F.2d at 1225 ("Control over trucks involves control over drivers"). Tri-State also assumed responsibility for insuring the truck and the driver for public liability and property damage.

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Over and beyond the "involuntary" incidents to which we have referred, and which constitute evidence that an employer-employee relationship existed between Tri-State and Cunningham, the Board also relied on extensive record evidence showing that Tri-State, as a matter of choice and not as a consequence of ICC or DOT mandates, repeatedly and directly exercised controls over Cunningham's work. The controls took three distinct forms: first, the evidence was abundant and uncontradicted that Jean Witsberger, President of Tri-State, held herself out to Cunningham, Coss, and Coss' wife as Cunningham's "boss,", and imposed upon Cunningham a special code of conduct; second, Tri-State exercised direct and immediate supervision of Cunningham's work; and third, Tri-State enforced certain rules that effectively prevented Cunningham from seeking or accepting other work.

First, the evidence showed that Tri-State held itself out as Cunningham's employer. Under General Counsel examination, Cunningham testified without contradiction that, after he had filled out the employment application and passed the tests, Witsberger took him aside, and, in private, gave him instructions:

> Q. Who did you talk to after you completed all of these application procedures?
>
> A. Jean Witsberger.
>
> Q. What do you recall being said at that time?

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[2] Cunningham stated at the hearing that he possessed a power of attorney from Coss to negotiate the equipment lease. However, Violet Coss, not Cunningham, actually signed the lease. Moreover, Cunningham stated that the parties did not bargain over the terms of the lease. Therefore, there is little significance in the fact that Cunningham may have assisted Violet Coss on behalf of the hospitalized Joe Coss.

[3] The majority opinion dismisses the significance of Tri-State's giving Cunningham an "Application for Employment" to fill out for several reasons. First, it states that the application "was only partially completed," implying that substantial sections were left blank. However, the form was as complete as a similar form introduced into evidence, which had been submitted by an admitted Tri-State employee. Cunningham responded to each section of the three-page form, leaving blank such items as "reason for [previously] leaving [Tri-State]" when he had already indicated he had never previously worked for the company. Second, the majority suggests the application solicited only information "required by federal regulations." However, federal regulations specifically exempt carriers from requiring applications of "a person who is not a regularly employed driver * * * [or who drives] on an intermittent, casual, or occasional basis," or who is a regularly employed driver of another carrier. *See* 49 C.F.R. 391.63, 391.65 (1977). If, as suggested by the majority, Cunningham was employed by another carrier, Cunningham need not have filed this information. Therefore, Cunningham's filling out the application suggests he did something more than required by federal regulations. Cunningham indicated on his application form that he was not currently employed.

Third, the majority speculates that "it is not surprising that a company whose general manager worked only part-time did not have special preprinted forms for non-employee drivers." At 996. However, neither should it surprise us that a company that hired Cunningham as its employee might use the same form required of other employees. Moreover, there was no testimony to the effect that Tri-State did *not* have forms for non-employee drivers. The Board was entitled to point to the "Application for Employment" as evidence of Cunningham's employee status.

Finally, the majority opinion gives no weight to the fact that, in response to the application inquiry "are you now employed?" Cunningham wrote "no." And, in a space denominated "Applicant hired/rejected," a Tri-State official had checked the "hired" space and written in the "date employed" as June 10, 1978.

[4] Also in accordance with government regulations, the leased equipment bore Tri-State's name and address.

A. She said that she leased the truck and I was hired as a driver.

Q. Do you recall anything else?

A. She said I was hired and was working for Jean Witsberger not Joe Coss, and I was not to have any unauthorized passengers, no hitchhikers, and no female passengers, and there would be no moonlighting or we would be dismissed, and if we didn't turn our logs in on time we wouldn't get paid.

Q. Do you recall anything else being said at that time?

A. She said that there would be no drinking, or loafing in the shop or we would be dismissed.[5]

Some of the instructions directed to Cunningham by Witsberger (no drinking while driving, e.g.) are mandated by law.[6] Some (e.g., loafing in the shop, moonlighting, turning in of logs on time) are not. The substance of Witsberger's instructions possesses the character of an employer's charge to its employee. Combined with Witsberger's demand, as stated by the ALJ, "that Cunningham follow *only* her instructions," the demand for compliance with the employee code of driver behavior, no matter how reasonable or unreasonable the rules it contained, structured Cunningham's working environment in a manner supportive of the Board's conclusion that Cunningham was an employee subject to Tri-State's control. *See Aetna Freight Lines v. NLRB,* 520 F.2d 928, 931 (6th Cir. 1975), *cert. denied,* 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 314 (1976). The majority opinion is altogether silent on that testimony, and consequently accorded it no significance.

In addition to the content of the instructions, it is worth noting the context in which they were made. After directing Cunningham to complete an application form and take tests required of other employees, Witsberger excused a bystander—Mrs. Coss—in order to instruct Cunningham in Tri-State's special rules of employee conduct, without an outsider present. Referring to the time of the initial signing of the lease, Mrs. Coss testified under cross-examination by Witsberger that "I assumed he was your [Tri-State's] driver, if you recall you asked me if I would step outside for a **1001** while, you wanted to instruct your driver in privacy, and I went out on the porch at that time, [and in] approximately ten or fifteen minutes you opened the door and told me I could come back in."

Moreover, that Witsberger, not Coss, possessed the authority to hire and fire Cunningham is illustrated by each incident in which there was conflict between Witsberger and Cunningham.[7] For example, Witsberger, not Coss, threatened to discharge Cunningham after she learned he might have carried an unauthorized female passenger. Further, Cunningham was required to accept all dispatch assignments directly from Tri-State; this too supports the Board's conclusion that Tri-State exercised control over Cunningham. On one occasion, Cunningham initially refused to make a run to Jamesburg, New Jersey, because, since Tri-State's drivers received a percentage of the gross, he thought he would lose money. However, after Witsberger became angry, Cunningham decided to make the run rather than risk losing his job. Again, it was Witsberger, not Coss, who prevailed on Cunningham to make the run. Indeed, Coss testified that since he, too, lost money on the run, he would have told Cunningham not to make the run if he had thought it would do any good. Yet Witsberger's wishes were the ones that counted.

On several other occasions, according to Cunningham, Witsberger in direct communication with him emphasized that she, not Coss, was the "boss." The term certainly carries the connotation of "employer." Additionally, Coss testified about two instances in the first of which Witsberger "made the rules clear that she was the boss[;] I tried to interrupt her once and she said to me[']I am not through talking[']." On the second occasion, when Cunningham was refusing to make the Jamesburg run, Coss told Witsberger "Jean, you are his boss, I am not his boss, you ordered him to take it, you do what you want to * * *." [8] Again, the testimony, although not mentioned by the majority, supports the Board's conclusion.

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[5] Joe Coss testified that Witsberger subsequently repeated the conversation to him. His version of what occurred was substantially the same as Cunningham's version. Moreover, President Witsberger admitted the conversation occurred, though she contended that the rules were required by DOT regulations.

[6] Even as to the requirements mandated by regulation, a word should be said about the penalty for infraction. A federal regulation forbids drivers from drinking. *See* 49 C.F.R. § 392.5. But the regulation neither requires a lecture on the rule by the carrier, nor necessitates that, for infraction of the regulation, the driver be dismissed.

[7] As support for its belief that Cunningham was an employee of Coss, not Tri-State, the majority points to an incident in which a driver of another of Coss' vehicles was involved in an accident and Coss, not Witsberger, took the other driver's keys away. Whatever probative value the symbolic act of collecting keys from the *other* driver has for suggesting that Coss was *his* employer, the issue here is *Cunningham's* status.

Turning from *assertions* by Tri-State of employer status over Cunningham to evidence that Tri-State in fact *exercised* direct and immediate supervision over Cunningham's work, it should be observed that it was Tri-State, not Coss, who dispatched Cunningham on various trips, told him where to go, what loads to pick up, and where to deliver the loads. The Witsberger sometimes left messages with the Coss's for Cunningham to call in does not support the majority declaration that *dispatch* information was "routed" through Joe Coss. At 996. No one testified that Coss ever personally directed Cunningham where to go or what loads to pick up. On the contrary, Tri-State's dispatch procedure called for Witsberger, not Coss, to direct Cunningham to his destination. Tri-State set the schedule of hours and driving timetables, and checked his activities through the use of logs. If Cunningham did not already know what route to follow, he checked with Tri-State, not Coss. When he reached the end of a run, he was to call Witsberger, not Coss, for instructions regarding any backhaul. The long distance phone calls were paid for by Tri-State. Upon returning from a run, Cunningham would again contact Witsberger. The occasional use of Coss as a relay for getting the message to Cunningham provides no necessary inference that Coss controlled Cunningham's routes, or, indeed, contributed in any way to the content of the message. Substantial evidence supports the Board's conclusion that Witsberger dispatched Cunningham and that she did not go through Coss in controlling Cunningham's movements.

In *Aetna Freight Lines, supra,* 520 F.2d at 930, the court relied primarily upon two indicia of control, in addition to the elements imposed by governmental regulation, in sustaining a Board finding that an employer/employee relationship existed. First, Aetna exercised control over the hiring and firing of drivers by "employing lease cancellation as a means of enforcing driver discipline and discharge." *Id.* at 930. Here, Witsberger once threatened to discharge Cunningham after she learned he might have carried a female passenger.[9] Moveover, Cunningham made the Jamesburg run out of fear he would otherwise lose his job. Finally, when Cunningham refused to break the strike, the same day Witsberger indeed cancelled the equipment lease, and, accordingly, Cunningham's employment "partly in retaliation for Cunningham's refusal to cross [Tri-State's] employees' picket line," in the words of the ALJ. The company's retention of the right to discharge Cunningham is a further indication of his employee status.

Second, in *Aetna,* drivers took complaints to and received instructions concerning daily tasks from Aetna, and not the equipment owner. Here, like the employer in *Aetna,* Tri-State directly supervised and gave daily instructions to Cunningham. Tri-State did all dispatching, and required Cunningham to report directly to it, not to Coss. In addition, when Cunningham did not know what routes to take, he asked Witsberger. Finally, Cunningham retained little discretion over whether to accept particular assignments, a conclusion aptly illustrated by the Jamesburg incident. In sum, to quote the ALJ below, "[Tri-State] exercised virtually complete control over Cunningham's hours of work and other conditions of employment."

Other courts have reached results similar to *Aetna.* In *NLRB v. Deaton, Inc. supra,* 502 F.2d at 1226–28, for example, the court upheld a Board finding that nonowner drivers of leased vehicles were employees where, in addition to the controls mandated by federal regulations, the carrier (1) exercised power over the qualifications of the drivers that were hired beyond that required by law, and (2) exercised power over a driver's conduct by threatening the equipment owner with lease cancellation. *See also News-Journal Co. v. NLRB,* 447 F.2d 65 (3d Cir. 1971), *cert. denied,* 404 U.S. 1016, 92 S.Ct. 676, 30 L.Ed.2d 664 (1972); *Frank Hager, Inc.,* 230 NLRB 476, 477 n.10 (1977) (owner-operators are employees where carrier exercised control over "the assignment of runs, including the distance, the nature of the load, and to whom they deliver, the maintenance of their equipment, the selection of their insurance, and the performance standards with which they must comply").

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[8] The majority refers to Witsberger's testimony that if Cunningham were unable to drive the leased vehicles, "she would have to contact Coss for his permission to put some other driver on that rig." At 996. However, President Witsberger admitted that her statement was purely hypothetical as the situation had never arisen. The ALJ described no significance to Witsberger's conjecture in the heat of litigation. Furthermore, the terms of the lease contradict Witsberger's assertion. The lease provided that Tri-State "shall have exclusive possession, control, and use of equipment for the duration of this Agreement." While the lease vests explicit authority over the vehicle in Tri-State, it says nothing about Coss' authority to approve a driver. In any case, even if Coss' approval of a substitute driver would have been required, little light is thereby cast upon Cunningham's relationship to Tri-State. There is nothing surprising about an arangement between the lessor and the lessee of equipment by which the lessor would only permit it to be operated by a *lessee employee* approved by lessor.

[9] Cunningham's version of the event was corroborated by Coss. Coss testified about a conversation with President Witsberger in which she told him of her suspicion and stated that if she ever caught Cunningham with a female rider *she* would discharge him. Tri-State made no effort to discredit the story, of which the versions of Cunningham and Coss were consistent and which supported a conclusion that Cunningham was an employee of Tri-State.

The situation here is even stronger than that in *Aetna, et al.* Unlike *Aetna,* Tri-State held itself out as Cunningham's employer. Tri-State established detailed rules of day-to-day conduct for all its drivers, including both Cunningham and Coss (who also, on occasion, drove for Tri-State), infraction of which risked immediate termination. Thus, the parties' practices and understandings support the Board's conclusion that Cunningham was Tri-State's employee.

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Finally, indicative all on its own of the employer-employee relationship existing between Tri-State and Cunningham was Tri-State's insistence that Cunningham not engage in any backhauling on his own. The work Cunningham performed was performed exclusively for Tri-State. At the end of a run, Cunningham was required to return empty to the plant unless Tri-State had a pickup to assign him. Cunningham simply did not have the characteristics of an independent contractor when he depended solely on Tri-State for direction. The prohibition upon backhauling indicates that Cunningham lacked an enterpreneurial interest that diverged from Tri-State's. As pointed out below by the Administrative Law Judge, Tri-State's ban on moonlighting effectively gave it control over the amount of Cunningham's earnings.

In *Ace Doran Hauling & Rigging Co. v. NLRB, supra,* 462 F.2d at 194 (enforcing Board determination of employee status where drivers drove exclusively for company, and performed duties similar to those of other employees, even though driver-owners could refuse trips and were permitted to backhaul), the "exclusivity" principle was utilized to distinguish between those drivers who were employees because they "dr[o]ve 'exclusively' for Ace," and those who also performed other, unrelated work for the truckowner and were therefore nonemployees. *See also News-Journal Co. v. NLRB, supra,* 447 F.2d at 68 (upholding Board finding of employee status because the Board considered, among other factors, "the possibility of realizing additional profits through the exercise of enterpreneurial skill"). The absence of any possibility of Cunningham's realizing additional profits supports the Board's conclusion that he was Tri-State's employee.

The majority relies heavily on the method by which Cunningham was paid to support its assertion *ab initio* that Cunningham "was either an employee of or a profit sharer with Joseph Coss." At 997. It is true that the lease stated that Coss would receive "75% of gross revenue, including all driver wages and fringes which are the responsibility of the lessor [Coss]." However, the provision pertains to the *method* by which whoever drove the vehicle would receive payment, and itself sheds no light on the particular issue of what Cunningham was required to do, and of who supervised his activities. Indeed, uncontradicted hearing testimony indicates that Witsberger explicitly told Cunningham he would be paid 25% of the gross, because "her drivers get 25%." Further, even despite lease language to the contrary, when Cunningham first began driving the Coss equipment for Tri-State, Tri-State deducted Cunningham's 25% share from the rental, paid that directly to Cunningham, and then transmitted the balance to Coss. In addition, the ALJ found that Tri-State required Cunningham to maintain a trip log which had to be correctly maintained and turned over to it before Cunningham, as well as Coss, would be paid. That Tri-State, whose general manager wrote the lease, chose an indirect method by which to pay Cunningham cannot obscure the fact that it set the percentage of his wages and controlled his total income by virtue of its control over his driving assignments.[10]

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[10] In footnote 3. At 996, the majority opinion hypothesizes: "Cunningham's arrangement with Coss appears to have been that he would receive twenty-five percent of whatever amount Coss received from Tri-State." The record contains no evidence that Coss and Cunningham ever made any such agreement. The only evidence pertaining to the percentage Cunningham would receive was Witsberger's statement to Cunningham that "her drivers get 25%."

Continued

Even were the majority correct in asserting that Cunningham was either an employee of or profit sharer with Coss, such conclusion does not resolve Cunningham's relationship to Tri-State. In *Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 898, 11 L.Ed.2d 849 (1964), the Supreme Court affirmed that two employers may exercise sufficient control over an employee to qualify as a "joint employer." In *Boire,*

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the Board had found that Greyhound had contracted with another company to provide janitorial services at four terminals. While the independent contractor "hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question." 376 U.S. at 475, 84 S.Ct. at 895. In addition, the Board had found that Greyhound had prompted the discharge of a cleaning employee and that the independent contractor's supervisor visited the terminals irregularly. *Id.* Subsequent to the Supreme Court's decision, the Fifth Circuit enforced the Board determination that Greyhound was a joint employer. *NLRB v. Greyhound Corp.,* 368 F.2d 778 (5th Cir. 1966). In light of *Boire,* surely the evidence relied on here by the Board is sufficient to support its decision that Tri-State was Cunningham's employer. Even if the evidence is given the gloss put on by the majority, at best we would face two conflicting versions of the facts in which event the Board's interpretation controls. *See United Ins., supra,* 390 U.S. at 260, 88 S.Ct. at 991.

There is another important reason for affirming the Board's decision. While there is no evidence in the case of intentional evasion of the Act, a ruling contrary to the Board's will encourage other employers to seek to expand the "nonemployee" category constructed by today's decision through unconventional arrangements with their employees.

Therefore, since the Board's order is supported by substantial evidence in the record as a whole, I would grant the application for enforcement.[11]

The majority also points out that Tri-State did not make payroll deductions from Cunningham's earnings, although it did so for its other employees. Nothing in the record indicates who, if anyone, complied with legal requirements that payroll deductions of that nature be made.

[11] Tri-State also contended that it was denied a fair hearing because, though it had engaged an attorney, it was represented at the hearing only by its president, Jean Witsberger, who is not an attorney. Tri-State neither requested a delay in the hearing, nor gave any indication to the ALJ that it preferred to appear with counsel. Additionally, although midway through the proceeding President Witsberger indicated that Tri-State's counsel was tied up elsewhere that day, she did not request postponement. Ms. Witsberger, president of an interstate carrier, was accorded great latitude in presenting her case to the ALJ, who also gave her assistance.

In factfinding proceedings such as this, a *pro se* litigant undoubtedly struggles at a grave disadvantage when opposed by attorneys well-versed in the legal significance attached to certain facts, and skilled in the art of exposing them to a hearing officer. However, the Labor Relations Act allows a party to choose its representative in appearing in Board proceedings, *see* 29 U.S.C. § 160(b) (1976), including a nonattorney. *See Tred-Air of California, Inc.*, 193 NLRB 672, 673 (1971), *enforced,* 82 LRRM 2080 (9th Cir. 1972), *cert. denied,* 411 U.S. 906, 93 S.Ct. 1529, 36 L.Ed.2d 195 (1973) (corporation may be represented by its president). Absent evidence that Tri-State objected to proceeding at the hearing without counsel, the case raises no tenable issue of due process. *Local Union No. 742, UBCJA v. NLRB,* 377 F.2d 929 (D.C. Cir. 1967).

Beaird-Poulan Division, Emerson Electric Company v. NLRB

649 F.2d 589 (8th Cir.), May 21, 1981—247 NLRB 1365

On remand from 571 F.2d 432

Before BRIGHT and MCMILLIAN, Circuit Judges, and RENNER,* District Judge

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MCMILLIAN, Circuit Judge: The Beaird-Poulan Division of Emerson Electric Company (the Company) petitions this court to review and set aside the supplemental decision and order [1] of the National Labor Relations Board (the Board) issued on February 25, 1980. The Board had overruled the Company's objections to the representation election and found that the Company violated § 8(a) (5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.*, by refusing to bargain with the United Auto Workers Union (the Union), as the duly certified representative of the Company's employees. The Board cross-petitions, pursuant to § 10(e) of the Act, for enforcement of its order.

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*The Honorable Robert G Renner, United States District Judge for the District of Minnesota, sitting by designation.

[1] 247 N.L.R.B. No. 180, 103 L.R.R.M. 1389 (1980).

For the reasons discussed below, the Company's petition to set aside is denied and the Board's order is enforced in full.

The Company, a Missouri corporation, has two plants for the manufacture of chain saws in Shreveport, Louisiana. In mid-February of 1976, the Union began its organizational campaign at these two plants. The Company actively opposed the Union's organizational campaign. All participants agree that the campaign was intense and vigorous.

On April 30, 1976, pursuant to a stipulation for certification upon consent election, the Board conducted a secret ballot election. The tally showed that 402 ballots were cast for the Union, 383 ballots were cast against the Union, and 10 ballots were challenged. On May 19, the Union requested the Company to recognize and bargain collectively with it. Since that date, the Company has continued to refuse such requests.

The Company filed timely objections to the election. After investigating these objections and considering the evidence submitted by the Company, the Regional Director made credibility resolutions adverse to the Company. He recommended to the Board that each Company objection be overruled and that the Union be certified as the bargaining representative. The Company filed timely objections to the Regional Director's report. The Company asked the Board to review and set aside the election or, in the alternative, to order a hearing to resolve the factual issues. On November 23, 1976, the Board rejected the Company's request for a hearing, overruled the objections, and certified the Union as exclusive bargaining representative.

On December 13, 1976, the Union filed an unfair labor practice charge with the Board. The Board's General Counsel issued a complaint alleging that the Company's refusal to bargain with the Union violated § 8(a) (5) and (1) of the Act. The Company admitted its refusal to bargain but contended that it had no duty to bargain because the Board improperly certified the Union. Thereafter, on May 25, 1977, the Board granted the General Counsel's motion for summary judgment. The Board also held that the Company had failed to raise substantial or material issues which would warrant an evidentiary hearing.

The Company then petitioned this court for review. On March 2, 1978, the Board's cross-application for enforcement was denied and the case was remanded for a hearing on the alleged misconduct in the representation election. The salient language in that opinion was the following: "Although we make no factual findings with regard to the alleged misconduct, we do find that the company presented specific allegations of misconduct sufficient to set aside the election, if true, and is entitled to an evidentiary hearing." *Beaird-Poulan Division, Emerson Electric Co. v. NLRB*, 571 F.2d 432, 434 (8th Cir. 1978).

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After nine days of hearings, the administrative law judge (ALJ) recommended to the Board that the Company's objections be overruled. On February 25, 1980, the Board adopted the findings and recommendations of the ALJ, affirming the Union's certification and finding that the Company violated § 8(a) (5) and (1) of the Act by refusing to bargain. Because of that decision, the Company once again filed a petition for review in this court.

It is axiomatic that representation elections are not to be set aside lightly. The burden of showing grounds for doing so is on the party seeking to overturn the election. And that burden is a heavy one, requiring the objecting party to show by specific evidence not only that improprieties occurred, but also that they interfered with employees' exercise of free choice to such an extent that they materially affected the election results. *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124, 81 S.Ct. 434, 435, 5 L.Ed.2d 455 (1961); *NLRB v. Griffith Oldsmobile, Inc.*, 455 F.2d 867, 871 (8th Cir. 1972).

I. *The Coercive Incidents*

The Company argues that the Board's decision overruling its objections to the election is not supported by substantial evidence. It contends that the Union conducted a campaign of fear and intimidation, including predictions of violence and economic detriment to employees opposed to the Union, which permeated the entire atmosphere thereby destroying the laboratory conditions required by the Board in its election proceedings.

For review of the Board's decision, the standard is whether the Board acted within the "wide degree of discretion" vested in it by Congress regarding representation matters. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330–31, 67 S.Ct. 324, 327–328, 91 L.Ed. 322 (1946); *Macy's Missouri-Kansas Division v.*

NLRB, 389 F.2d 835, 842 (8th Cir. 1968) "[T]he Court is bound by the fact-finder's assessment of 'credibility of witnesses and the weight to be given their testimony,' unless such assessment is 'shocking to [its] conscience.' " *Keokuk Gas Service Co. v. NLRB*, 580 F.2d 328, 334 (8th Cir. 1978). We look first, therefore, to the credibility determinations made by the ALJ.

The ALJ's Supplemental Decision set forth exhaustively the testimony of each witness. Regarding each of the over twenty instances of alleged misconduct, he detailed the conflicts between different witnesses' versions of the event, the internal inconsistencies in a single witness' version, or the other factors [2] that entered into his determination. Significantly, in discussing the first incident, he stated:

> As has appeared and will appear throughout this Decision, I have been unable to credit in full the testimony of any of the principal witnesses. Much of the testimony suggests a tendency to embellish or revise the facts in a direction which is favorable to the witness' own point of view. Where as here, 2 or 3 years elapsed between the events in question and the hearing, and most of the witnesses have a partisan interest in the outcome of the case, their testimony must be viewed with considerable caution.

Ultimately, the ALJ did not credit testimony about several alleged instances of misconduct, including some of the most serious charges such as brandishing a gun, threatening anti-Union employees and their families, and vandalizing Company property. He further found that several incidents including arguments, an automobile accident, an attempted break-in, and flat tires, were unrelated to the election because they were **593** personal matters or occurred after the election or were totally fortuitous. He credited accounts of five arguably coercive incidents, which we will discuss below, but concluded that they were not sufficiently serious to warrant setting aside the election.

After our reveiw of the entire record, it is difficult to imagine more detailed or better reasoned credibility findings than those made by the ALJ in this case. Because his assessments are supported by substantial evidence in the record and are not shocking to the court's conscience, we are bound by them. We will disregard, therefore, the alleged incidents which the ALJ discredited.[3]

The ALJ credited the following five incidents:

1. Employee Anether Hall, a member of the pro-Union committee, told employee Willie Daniel that the Union would take him to court because he had stopped attending Union meetings.

2. Employee Bernice Franklin testified that employee Beverly Washington told her that Beverly had said to employee Mary Windham that Mary could get hurt wearing an anti-Union sticker but that Beverly was only kidding.

3. Employee Edwin Bachman, a member of the pro-Union committee, asked employee Estelle Nugent to vote for the Union. When she replied that she did not think the employees needed a union, he said that there might be "complications," like the air let out of her tires or her tires slashed or acid poured on her car. He added that he was not implying that this would happen to her but that "there could be complications."

4. At a Company meeting for 35 to 40 employees, employee Bobby Brewer, a member of the pro-Union committee, complained that only pro-Union employees were receiving written warnings for tardiness. Employee Charles Davis defended the Company, saying that the anti-Union employees were also being subjected to the Company's tardiness program. Brewer then shook her finger at Davis and shouted, "if [you are] so damned smart why [don't you] get up there [with the Personnel Manager]" and "you better watch your white ass or someone is going to get you good, brother."

5. At another of the Company meetings, employee James Alford asked the Personnel Manager how much money the Company's president made. Em-

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[2] In this case, the ALJ's credibility assessments were primarily based upon his analysis of the contents of the various witnesses' testimony, rather than the demeanor of the witnesses. Particular weight is given to credibility findings based upon demeanor. *Canteen Corp.*, 202 N.L.R.B. 767, 769, 82 L.R.R.M. 1748 (1973). A court may make an independent evaluation of credibility findings based on other factors. *Id.* But the court must still defer to credibility findings, based on other factors, which have sufficient support in the record.

[3] The Company has cited numerous cases for the proposition that threats such as those discredited here are sufficient to warrant setting aside an election. *E. g. NLRB v. Van Gorp Corp.*, 615 F.2d 759 (8th Cir. 1980); *Wilkinson Mfg. Co. v. NLRB*, 456 F.2d 298, 304 (8th Cir. 1972); *Gabriel Co.*, 137 N.L.R.B. 1252, 50 L.R. R.M. 1369 (1962). The obvious distinction, however, is that in the cited authorities the allegations were credited, whereas here they were not.

ployee Herbert Robinson asked Alford what difference that made. Alford retorted that he would "straighten" Robinson out.

None of these direct or implied threats was ever carried out.

We turn next to the ALJ's conclusion that the credited incidents did not warrant setting aside the election. Having made creditibility assessements and findings of fact, the ALJ proceeded to make conclusions of law about the effect of the five credited incidents, which he concluded "fell far short of demonstrating a pattern of intimidation directed at anti-union employees or even at a single anti-union employee."

He defined the scope on remand thusly:

> I reject the Company's argument in its brief that my sole function in deciding this case is to resolve the credibility questions posed by the evidence concerning the Company's objections. The Board's order directing a hearing in accordance with the Court's remand, specifically rejects that the Administrative Law Judge hearing this proceeding shall prepare a decision containing findings of fact, conclusions of law and recommendations. The Company's argument is based on the premise that the Court of Appeals resolved all of the legal issues in this case when it held that a hearing was warranted. That premise is erroneous. The Court could not and did not resolve these questions, because the factual record was incomplete. Rather, the Court simply held, in essence, that the Company came forward with evidence which if fully credited, unexplained or uncontradicted by credible evidence and interpreted in a manner most favorable to the Company's position, would warrant setting aside the election. Insofar as the Court cited decisional authority in support of its conclusion, I have considered and, where appropriate, discussed those authorities insofar as they are applicable or inapplicable to the facts as determined in this Supplemental Decision.

The Company again asserts that our previous decision is the "law of the case," citing *Synalloy Corp., Blackman-Uhler Chemical Division* 239 N.LR.B. 637, 99 L.R. R.M. 1702 (1978). In short, the Company urges that we had considered already the specific allegations of misconduct and determined that they were "sufficient to warrant setting aside the election, if true * * *."

We must agree with the ALJ, however, that the above-quoted language was not intended to limit the scope of authority of the Board. There were over twenty specific allegations of misconduct; all but five were discredited. In fact, all of the incidents that this court listed as "examples of alleged violence and intimidation," 571 F.2d at 434 n.2, were discredited. The opinion gave no guidance on the effect of any single incident or of any combination of incidents. We did not hold that each incident "if true" was sufficient to warrant setting aside the election. Until the facts were determined, this court could not and did not determine their legal effect. Therefore, the ALJ correctly developed a full record and reached conclusions of law.

"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as ideal as possible to determine the uninhibited desires of the employees * * *." *General Shoe Corp.*, 77 N.L.R.B 124, 127 (1948). An election will be overturned where the objecting party has proven the occurrence of violence or threats of violence. A distinction is made, however, between coercive actions undertaken by a party and coercive actions undertaken by individual employees or third parties. Because "neither unions nor employers can prevent misdeeds * * * by persons over whom they have no control," less weight is given to misconduct by individual employees or third parties. *NLRB v. Griffith Oldsmobile, Inc., supra,* 455 F.2d at 870. Accordingly, where the threats or violence are not attributable to the union or the employer, the election will be overturned only if the coercive actions have created "an atmosphere of fear and reprisal such as to render free expression of choice impossible" *Id.* A small number of isolated and non-coercive threats would not be sufficient to justify setting aside the election. *Abbott Laboratories v. NLRB*, 540 F.2d 662, 665–67 (4th Cir. 1976) ("rough talk" not sufficient).

The Company has proven five threats. Nowhere does the Company maintain that these threats were either authorized or condoned by the Union, but the Company does argue strenuously that three of the incidents were attributable to the Union because pro-Union committee members had apparent authority to act on behalf of the Union. We agree with the ALJ, however, that the pro-Union committee was a "large and amorphous" group whose members were not viewed by the employees as Union agents. *See Certain Teed Products Corp. v. NLRB,* 562 F.2d 500, 509–10 (7th Cir. 1977) (campaign activity alone does not establish the requisite close connection with the union). *Compare NLRB v. Georgetown Dress Corp.,* 537 F.2d 1239 (4th Cir. 1976) (committee was union's only contact with workers; no professional organizers). Therefore, this election will be overturned only if the five threats created "an atmosphere of fear and reprisal."

The Company has recited numerous incidents which allegedly coerced anti-Union employees and created "an atmosphere of fear and reprisal." But the testimony relied upon by the Company to establish several of these incidents has been expressly discredited, and the Company failed to

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prove that several of the remaining incidents were related to the election campaign. The ALJ found that only five incidents actually occurred, were potentially coercive and were related to the election campaign. Moreover, none of the five credited incidents involved Union representatives or employees acting as agents of the Union, and none resulted in any physical harm of violence. *Compare NLRB v. Van Gorp Corp.,* 615 F.2d 759 (8th Cir. 1980) (escalating threats culminating in an act of violence). Once the discredited and unrelated incidents are omitted, the Company is left contending that five empty threats, occurring during a ten-week election campaign involving over 800 eligible voters, so tainted the election process that it was an abuse of discretion to allow the election results to stand. We reject that contention and, therefore, affirm the ALJ's conclusion that the arguably coercive threats did not warrant setting aside the election.

II. *Misleading Handbill*

The Company also contends that, immediately before the election, the Union made material misrepresentations in a handbill about a contract between the Union and another employer, namely Huck Manufacturing Company (Huck).

Beginning on April 22, 1976, at small group meetings held for its employees, the Company began to review the Union's record after it organized employees at Huck. Using the chart entitled "UAW Promises vs. Performance," the Company spokesman made the point that, despite the Union's preelection promises there, the Union had been unable to negotiate improvements or sign a labor contract at Huck. Employees began to question the Union representative about the situation at Huck.

On April 29, between 6 a.m. and 7 a.m.—less than twenty-four hours before the polls were to open—the Union issued a handbill with "The Huck Story." The handbill stated in relevant part:

> The UAW and Huck entered negotiations for a contract at Waco, Texas. Negotiations have now been completed and a contract agreed upon by the UAW and Huck *and accepted by the members*
>
> *The UAW-Huck contract provides:*
>
> 1) Fully paid Hospitalization Insurance for the employee and their dependents
>
> 2) Fully paid sick and accident insurance that pays the employee 50% of his base rate up to fifty-two (52) weeks, Example—An assembler at Huck, under the UAW-Huck contract earns $4.47 per hour—or $178.80 for a 40 hour week. If sick and disabled, this assembler will draw sick benefits of $89.40 a week for an illness up to 52 weeks.
>
> 3) Wage rate up to $5.73, per hour.
>
> 4) A $9,000 *Company paid* life insurance policy.

(Emphasis in original.)

The handbill thus contained four questionable statements. First, Huck had no "assemblers" and no assembly line operation whatsover, whereas about one-third of the Company employees were assemblers. Apparently the handbill referred to Huck's "assembly-band annealer set up," which is a higher job classification. Second, the non-existent "assemblers" classification at Huck was listed as earning $1.17 per hour more than the actual assemblers at the Company. Third, the Union and Huck had not executed a contract. Although the Union had "agreed upon" the substantive terms, when it signed Huck's proposed agreement, it changed the duration clause. As a result, Huck broke off negotations and the contract was not executed.[4] Fourth, the proposed contract, which was not in effect in any event, provided for $6,000 in current insurance benefits with an eventual increase to $9,000.

Between 9 a.m. and 11:30 a.m. of that same morning, the Company posted its response. The Union's flier was annotated,

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enlarged to poster size and placed on all the main plant's bulletin boards.[5] The annotations reiterated that no contract was in effect at Huck, stated that Huck employees had a $6,000 life insurance policy, and asserted that the Huck "assemblers" did not perform work comparable to the Company's assemblers. They did not, however, clarify that Huck had no employees classified as "assemblers" because the company did not learn this fact until after the election.

The ALJ found that Huck was not a major campaign issue. He also found that the statements in the union flier were "either literally true, or believed to be true by the parties involved, although each statement was arguably misleading." For example, it was "literally true" that the union membership had accepted the contract, although the contract was not executed. Similarly, it was "literally true" that the contract provided for certain benefits, although the contract was never in effect. On the other hand, the Union "believed" that it had a contract with Huck because, on April 3, the Union notified Huck that the Union accepted Huck's proposed contract. It was not until May 6—after the certification election at the Company—that the Union's international representative altered the duration clause of the proposed contract, and not until May 17, that Huck broke off negotiations and the contract.

Therefore, the ALJ held that there was no misrepresentation which would warrant setting aside the election. Alternatively, he found that the Company had had an adequate opportunity to respond to the handbill prior to the election.

In assessing preelection campaign statements for both employers and unions, the Board does not ordinarily "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccuracies and unlawful statements." *Linn v. United Plant Guard Workers,* 383 U.S. 53, 60, 86 S.Ct 657, 662, 15 L.Ed.2d 582 (1966) *citing Stewart-Warner Corp.,* 102 N.L.R.B. 1153, 1158, 31 L.R.R.M. 1397, 1399 (1953). The standard for reviewing alleged campaign misrepresentations is the following:

> [A]n election * * * [will] be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election * * *. [E]ven where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have a real impact on the election.

ITT Blackburn Co. v. NLRB, 545 F.2d 58 (8th Cir. 1976), *citing Hollywood Ceramics Co., Inc.,* 140 N.L.R.B. 221, 224, 51 L.R.R.M. 1600, 1601–02 (1962). The burden is on the objecting party to prove prejudice to the fairnesss of the election. *NLRB v. Target Stores, Inc.,* 547 F.2d 421, 424 (8th Cir. 1977).

The wording of the handbill may have implied that the Huck contract was in effect or that the Huck employees were currently receiving benefits provided in that contract. The ALJ's conclusion that these did not amount to material misrepresentations is nevertheless supported by substantial evidence. First, the references to the status of the contract were literally true. Second, the contract terms were actually negotiated by the Union but were not in effect for a reason that was beyond the Union's knowledge. *See NLRB v. Southern Health Corp.,* 514 F.2d 1121, 1125 (7th Cir. 1975) (negotiated terms exceeded wage stabilization guidelines; distinguishing cases where a union took credit for terms it had not negotiated).

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The ALJ's conclusion that the "assembler" wage rate was not a material misrepresentation is not, however, supported by substantial evidence. Misrepresentations about wages "go to what is perhaps the most crucial issue of any organization effort: whether the company is paying the bargaining unit employees as much as it would if the employees were represented by the union." *J.I. Case Co. v. NLRB*, 555 F.2d 202, 205 (8th Cir. 1977). *See La-Cresent Constant Care Center, Inc. v. NLRB*, 510 F.2d 1319 (8th Cir. 1975). The ALJ noted that Huck had no employees in the classification of "assembler" and further that there was no basis for comparing the functions of the Huck employees at the higher wage rate with the assemblers at the Company. Almost one-third of the employees at the Company were assemblers. Therefore, the statement in the Union handbill that "assemblers" at Huck earned more, under a Union contract, than non-Union assemblers did at the Company could reasonably be expected to affect significantly the outcome of the election.

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[4] Subsequently the Union lost a decertification election at Huck, so the Union and Huck never did have an executed contract.

[5] The Company poster actually preceded the Union flier to the satellite plant. There the poster arrived at 3:45 p.m. on the 29th, and the flier arrived on the morning of the 30th, just before the election.

The issue remains, then, whether the Company had an adequate opportunity to reply to the misrepresentation about "assembler" wage rates.

"Adequate time to reply must mean adequate time to make an effective reply * * *. [A] last minute bare denial cannot be an effective reply." *Cross Baking Co. v. NLRB*, 453 F.2d 1346, 1350 (1st Cir. 1971). It is particularly difficult for an employer to rebut a union's misrepresentations about the terms of a contract it negotiated because "workers would be likely to give special weight to a Union official's interpretation of the language of a collective bargaining agreement to which the Union is a party * * *." *NLRB v. Van Gorp Corp., supra*, 615 F.2d at 762 (union representative reinforced misrepresentation by quoting from contract which was complex and confusing). It has been held that a company does not have an adequate opportunity to reply to a letter first circulated the day before the election where "[t]he claims of the union were largely based upon calculations using figures derived from other unidentified calculations. Any reply would necessarily have required careful preparation." *J.I. Case Co. v. NLRB, supra*, 555 F.2d at 207.

This situation can be distinguished, however, from a "last minute bare denial" or a reply necessitating "careful preparation." In fact, the Company had already disseminated the correct information during its employee meetings. When the Company learned of the handbill, its personnel director had already been in contact with the Huck management and gathered all the information on the contract. That morning the assistant personnel director again telephoned Huck and received more detailed information, including the duties performed by the Huck "assemblers" who earned $4.47 per hour. The preparation was complete. Within hours, the Company formulated a point-by-point reply, had it blown up to poster size, and placed copies on the plants' bulletin boards. The evidence showed that the bulletin boards were an effective means of communicating with the employees; due to high interest in the campaign, they went to read any notice posted there.

The Company did rebut the misrepresentation about "assembler" wage rates. The reply stated that the Huck "assemblers" did not perform work comparable to the assembly line workers at the Company. Certainly, the employees understood that if the functions were not comparable the wages would not be comparable, regardless of the name. Therefore, the Company had an adequate opportunity to reply to the one material misrepresentation in the handbill.

III. *Adversarial Hearing*

The Company contends that the ALJ improperly sanctioned the adversarial role of the General Counsel at the hearing. This court has held that there is no denial of due process merely because a hearing on remand is conducted in the context of an unfair labor practice proceeding rather than a representative proceeding.[6] *NLRB v. Commercial Letter, Inc.* 496 F.2d 35, 38 (8th Cir. 1974). But the Company says it is not objecting to the context per se but because the General Counsel assumed such an adversarial role that substantial prejudice to the Company resulted.

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The Board has set forth the following standard for the General Counsel in presenting evidence:

> * * * the role of a responsible agent of the Board in attempting to assure that a determinative issue concerning employee choice in a Board-conducted election be resolved on the basis of competent evidence and a record fully

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[6] Our remand directions did not specify which type of hearing should be conducted.

presenting the evidence developed in the prehearing investigation.

Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel, 173 N.L.R.B. 1349, 69 L.R.R.M. 1590 (1968).

The Company's only specific allegation of misconduct was that the General Counsel failed to call Company witness Roger Tyson. At the hearing, Tyson was called as a rebuttal witness by the Company and the ALJ struck his testimony as improper rebuttal testimony. The record shows, however, that Tyson testified concerning evidence that was not mentioned in his investigatory affidavit. Thus the General Counsel was not on notice of the evidence that the Company sought to introduce on rebuttal. Consequently, in failing to call Tyson, the General Counsel was not attempting to deny the Company a full and fair hearing.

Here, the ALJ explicitly held:

> * * * General Counsel recognized that as a government representative, it was obliged to present available material evidence unknown to the Company whether favorable or unfavorable to the Company's position. I am satisfied that this was done.

Furthermore, responding to an identical complaint that the General Counsel resisted introducing evidence favorable to the Company in order to enhance its chances of success in the unfair labor practice charge, the Fourth Circuit reasoned:

> An alleged conflict of interest said to arise from the dual role played by the Board's attorney in consolidated proceedings may be more apparent than real, and a denial of due process cannot be established by this theoretical conflict, at least where, as here, the company was adequately represented by competent counsel * * *. The company was given ample opportunity to produce evidence of its own and to cross-examine adverse witnesses. (citations omitted)

Barrus Construction Co. v. NLRB, 483 F.2d 191, 195 (4th Cir. 1973). *See also NLRB v. Bancroft Manufacturing Co.,* 516 F.2d 436, 446 (5th Cir. 1975), *cert. denied,* 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976) (". . . the ULP hearing boasts all of those procedural safeguards ordinarily associated with the concept of due process").

The Company in this case has likewise received due process. The General Counsel recognized its duty to present material evidence unknown to the Company. The Company was ably represented by counsel. The Company had the opportunity to produce evidence and to cross-examine adverse witnesses. And, finally, the Company demonstrated no prejudice as a result of the General Counsel's dual role at the hearing. Therefore, the Company had a full and fair hearing.

Accordingly the Company's petition to set aside is denied and the Board's order is enforced in full.

Hickory Springs Manufacturing Company v. NLRB

645 F.2d 506 (5th Cir.), May 21, 1981—247 NLRB 1208

On petition to review Board Order

Before BROWN, COLEMAN and GEE, Circuit Judges

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GEE, Circuit Judge: Campaign tactics preceding a representation election held among twenty over-the-road truck drivers at the petitioning em-

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ployer's Fort Smith, Arkansas, facility draw before us two interesting questions of labor law. The first concerns the effect of "sincere-money" payments exacted by the union as a precondition to its organizing effort—a sort of *Savair*-in-reverse condition.[1] The second involves the effect on the election's validity of pre-election threats of picket line violence, arguably made or adopted by the union, and of threats and misconduct by union supporters in and about the polls. The Regional Director agreed with the employer that the last of these required a hearing for resolution but overruled all its other objections. In a split decision, with two of five members dissenting, the Board overruled all of the employer's objections, rejected the Regional Director's recommendation of a hearing on the violence issue, and certified the union as bargaining representative without more ado. The employer's refusal to bargain, the Board's consequent certification and bargaining order, and the employer's petition to us constitute the procedural vehicles by which the validity of that certification and the election on which it depends are brought forward. Since, for the reasons that follow, we partly disagree with the Board's disposition, we deny enforcement, vacate the Board's order, and remand for a hearing.

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[1] *National Labor Relations Board v. Savair Mfg. Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973).

The "Sincere-Money" Payments

The union's campaign opened in the fall of 1977 with a meeting of fifteen or sixteen of the twenty drivers, held in a rest area near Fort Smith. Present and taking the lead there were a union business agent, Cecil Douthitt, and one of the drivers, B.J. Bramlett. After an exhortation by Mr. Bramlett and the consequent signing of union authorization cards, Mr. Douthitt took the floor and advised the assembly that before the union would go further it would be necessary for a majority of the drivers to pay a total of forty dollars each, representing one month's dues and an initiation fee. He explained that the union set this condition because of an unsuccessful organizing campaign held three years earlier, when a large percentage of the drivers signed cards but most voted against the union. Douthitt observed that there had been a lot of laughter at the union then but that this time the union would do the laughing—all the way to the bank and regardless of the election's outcome. Seven of the drivers paid directly, and Bramlett paid for seven more who were caught short on condition that he be reimbursed next payday. The employer contends that Douthitt's action in requiring these payments interfered with the employees' freedom of choice in the election and rendered it invalid.

In support of its contention the employer advances essentially two arguments, one deriving from authority and one from logic. The authority relied on is *National Labor Relations Board v. Savair Manufacturing Co.*, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973). In that case the Court invalidated an election because of a campaign maneuver of a somewhat similar type to that employed here: waiver by the union of a ten dollar initiation fee for those employees who signed union representation slips before the election but not for those who signed them thereafter.[2]

As we read its opinion, the *Savair* Court discerned one basic vice in the tactic used there and other, subsidiary faults of a lesser nature. The major vice was characterized as buying of endorsements, and the Court concluded that "the statutory policy of fair elections . . . [does not permit] endorsements, whether for or against the union, to be bought and sold in this fashion." 414 U.S. at 277, 94 S.Ct. at 498. To do so, the Court observed, permits the union to paint a false pre-election picture of employee support and subjects rank and file opponents of unionization to the fear of facing a wrathful union regime should the union carry. We are unable to grasp fully the force of the Court's final observation, since it ap-

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pears to us that the danger noted will always be present for any opponent who makes his opposition known; but except for it, we see no application of the *Savair* rationale to this case.

Here there was no vote buying, rather the contrary. Here we view not a special concession to those who endorsed the union in the course of the election campaign but rather an unusual, union-emposed obstacle to employee support of the organizing effort. Nor is any *false* depiction of employee support presented by the tactic, since support with cash as well as words is true support indeed. In short, whatever the merits or demerits of the tactic employed here, *Savair* does not condemn it.

The argument from logic is not so readily rejected. It is patently true and must be conceded straight away that the preliminary cash investment in union victory exacted by Mr. Douthitt tended to advance the moment of decision for or against unionism by the drivers who paid. This being so, the opportunities of the employer to change their views in the course of the campaign were plainly diminished and their freedom of choice at the moment of casting their ballots somewhat preempted.

The matter is one of degree, however, and for several reasons we do not think the interference was of the type or of the degree of severity that we need condemn. As for its type, it was entirely legitimate: no duress was involved, and the choice to put up the "sincere money" or not was a free one. Indeed, it was a lesser step than another that would also have been entirely legitimate: affiliation with the union in advance of the election by drivers who wished to join it. What Douthitt required was no more than an early voucher of commitment to the union cause, and we know of no rule or doctrine disqualifying persons from participation in organizing campaigns or elections on the basis of their degree or timing of commitment, whether for or against the union cause.[3]

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[2] There, as in our case, the union's winning margin was paper thin: one vote.

We therefore concur with the Board and the Regional Director that the sincere-money tactic, while perhaps inelegant or unwise, was not improper. The matter is otherwise, however, as to the objections based on the threats of picket-line and strike violence and on misconduct at the polls, subjects to which we now turn.

The Threats of Violence

In our circuit, it is settled that when an objector such as Hickory Springs makes out a prima facie case by its affidavits the Board must grant a hearing and may not conclude that one is unwarranted by "considering matter turned up by the regional director, * * * weighing the relative factual data and * * * making credibility determinations." *NLRB v. Claxton Manufacturing Co.,* 613 F.2d 1364, 1373 (5th Cir. 1980). Even so, "considerable weight must be assigned to [the Board's] determinations regarding the existence or nonexistence of substantial and material factual issues." *Id.* at 1365–66 (quoting *NLRB v. Osborn Transportation, Inc.*, 589 F.2d 1275, 1282 (5th Cir. 1979)). Bearing these holdings in mind, we turn to the showing here made by Hickory Springs.

As related by the Board in its opinion, 239 N.L.R.B. 641, 99 L.R.R.M. 1715 (1978):

> [T]he Employer alleges that there was "[h]arassment of employees eligible to vote in the representation election." The Regional Director concluded that a hearing should be held for the purpose of resolving certain of the issues raised by this objection. The Petitioner thereafter excepted to this conclusion contending that, *even if the statements testified to by employee witnesses were made and/or adopted by union officials, they did not constitute grounds for setting aside the election. We agree.*
>
> Each of the statements alleged to have been made or adopted by union officials related to what actions the Union would take in the event of a strike. Thus, at a union meeting one employee allegedly stated that if there were a strike and anyone crossed the line, they should be "taken out and have the dog... beat out of them." Another employee stated that, in the event of a strike, if company trucks were caught on the road, there were lots of teamsters and anyone pulling a load would find themselves in a gully. Another employee cited a particular stretch of road where this could be accomplished. It is alleged that Union Representative Cecil Douthitt was present when these statements were made but did nothing to disavow or put a stop to them. At another meeting, presided over by the president of the Local Union, an employee asked what would be done in the event of a strike. The Local's president replied that whatever would be necessary on the picket line would be done. An employee stated that anyone who crossed the line would "get it." Another employee purportedly stated that, if there was any stomping done, he would be in the middle of it. The Employer's witness said he echoed the sentiments of the last employee and added that if anyone bothered his family "that would be it." Finally, a question was raised about the nonunion firm which leased its trucks to the Employer. The witness said that the Local's president stated that "Ryder would be taken care of."

(footnotes omitted and emphasis added).

As the emphasized passage evidences, it was the conclusion of the Board majority in this case that even if the quoted threats of beatings, "stompings," and assorted mayhem were made or adopted by union officials in the course of this organizing campaign, not even a prima facie case justifying a hearing on whether the election should be set aside was made out by the employer. This is so, says the Board, because they include no specific threat directed at employees' conduct during or vote in the impending election. Since the threats were all conditioned on what the union would do in the event of a strike after winning the election, it is said, they could not have destroyed the proverbial "laboratory conditions" necessary for a valid election. Moreover, says the Board, such nasty words are likely to repel voters who, after all, need only vote against the union and so evade these threatened consequences of union victory. With all such deference to the Board's expertise in the labor field as we are often adjured to accord, we think that view myopic and far too narrow.

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[3] Two subsidiary arguments by the employer merit brief notice. The employer attempts to make capital of the circumstance that the drivers probably—the record is not entirely clear—signed the endorsement cards before Douthitt advised them of the required payment. We see small significance in this possibility, since all it amounted to was a second opportunity to opt against support of the union by refusing to pay up.

The employer also views with alarm Bramlett's advance of "sincere money" for the seven impecunious (or reluctant) drivers at the first meeting, an advance that is said to have created an obligation to repay. Doubtless it did create at least a moral one, but it too could have been countermanded simply: "Don't put up any money for me. I want to think about it; and if you do, that's your lookout."

Unless, as the record does not indicate, Bramlett was so formidable an individual that merely to disagree with him in a matter of free choice was to risk life or limb, we fail to see how several opportunities to disagree could be more coercive than one.

In the first place, we find in the record affidavits establishing, prima facie, that the Board's version of the facts is, to be kind, incomplete. These affidavits assert that B. J. Bramlett—coyly referred to as "an employee" by the director's report and as to these matters ignored entirely by the Board majority—did indeed engage in other threats than those related and in some specifically directed to the election. Mr. Bramlett was the driver who, as detailed above, exhorted the drivers at the first organizational meeting in favor of the union and advanced several hundred dollars in "sincere money" for seven drivers who could not (or would not) do so at that time themselves. In another exchange, omitted in the administrative accounts excepting for the outraged dissents of the Board minority, Bramlett advised a group of drivers awaiting a run that in the event of a strike, "there were ways to stop Hickory. You've heard about drivers being pulled out of trucks, and trucks being burned. You've heard about drivers being run off the road."

And against the background of this and other strike-related threats came election day. Polling was at the shipping office, Bramlett was the official observer for the union. According to one affidavit, "[e]ach time the door opened and closed to let a new voter in. Each time someone would finish voting, Bramlett would holler out 'Send another one in.' The NLRB man never said anything about this." By another:

> On the day of the election there was a group gathered about 15 feet from the door to the shipping office. *Ron Jones and Joe Hill were telling everybody that was there and everybody that arrived that if they didn't vote yes they were going to get fired.* I was there the whole time and this was told to everyone that was present. Often everyone voted, they came back to this group. Ron and Joe did this also, and continued to talk as they were previously.
>
> *Bramlett made the statement to most everybody in my presence that if he found out anyone voted against the union, he was going to beat their ass.*

Affidavit of Gerald W. Haney, R. 84 (emphasis added). So much for laboratory conditions.[4]

Even were the board's canvass of the record a complete one, however, and were the matter referred to above not a part of it, we could not concur in the Board's conclusions. To do so would be to issue a free license to union officials and organizers[5]—it should be recalled that the Board majority assumed in its opinion that the union made or ratified most of the above-quoted statements—to make whatever threats they wish of burnings, beatings, and suchlike to come so long as they do not relate them specifically to the campaign or election. This we decline to permit the Board to do, for such a course of action flies in the face of human experience. Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer. In short, we reject the view that such pervasive threats of violence as these can be said, in effect as a matter of law, not to have created a coercive atmosphere sufficient to contaminate the election because they were merely conditional ones.[6]

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[4] The report of the Regional Director, Mr. Raymond A. Jacobson, incorrectly states that, "All of the employer witnesses testified that they had not been threatened in any way [at the election]." R. 18. It further construes and trims the affidavit of Haney in the first passage emphasized above:

> The third witness testified he heard two drivers he identified as union supporters make the statement that if the Union wasn't voted in, everybody might as well find another job, that they would all be fired. This statement was not directed at any one person, but at the group as a whole. (R. 18).

To be sure, the director's interpretation is a possible construction of the statements attributed to Jones and Hill. Another, more sinister one, exists however: that after a union victory, it would find out those who voted "No" and procure their discharge. One purpose of hearings is to resolve such ambiguities.

We find the director's "no threats" misstatement especially hard to understand, since the statement attributed to Bramlett appears immediately after those of Jones and Hill (see above), and none of them appears anywhere else in the record.

[5] And presumably, since such matters are supposed to be treated evenhandedly, to employers as well.

It may be that at the hearing that we direct it will become apparent that the affidavits in the record before us overstate matters or even that they are not true. Other evidence may expose Bramlett's fulminations as mere puffery or establish that

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he was not such a surrogate for the union as he seems on the present record. These things are for the administrator. But it is not for him to deny a hearing on such a showing as was made here. We note, moreover, as we did in *Claxton*[7] that it should not be necessary for us as a reviewing court to parse the record and determine whether, in denying a hearing, the Board has made submerged credibility choices by ignoring matter standing clear on the face of affidavits.

We DENY enforcement of the Board's order appealed from, VACATE it as to the employer's objections 2 (strike violence) and 3 (conduct of union supporters in and near polls), and REMAND for a hearing on these objections. It is so ORDERED.

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[6] Among those recounted by us in *Claxton* is a similar one:

> A fourth employee stated that a union adherent, who had twice tried unsuccessfully to get her to sign an authorization card, said that "if anyone tried to cross a picket line there probably would be guns and knives and that people could get hurt and have their arms broken." She said that this conversation scared her * * *. The regional director did not mention this affidavit in his report.

613 F.2d at 1368.

[7] 613 F.2d at 1373.

Fall River Savings Bank v. NLRB

649 F.2d 50 (1st Cir.), May 22, 1981—250 NLRB 935

On petition to review Board Order

Before CAMPBELL, BOWNES and BREYER, Circuit Judges

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LEVIN H. CAMPBELL, Circuit Judge: Fall River Savings Bank petitions for review of an order requiring it to bargain with Local 1325 of the United Food and Commercial Workers. The Board cross-petitions for enforcement of its order.

Fall River Savings Bank (the Bank) operates out of five branch offices in the Fall River, Massachusetts area, in addition to its main office in Fall River. Each branch office is staffed by a Branch Mana-

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ger, an Assistant Branch Manager,[1] from one to four tellers, and a janitor. The main office is the headquarters for the Bank's officers and professional staff; a number of tellers also work there. On February 28, 1978, Local 1325 of the Retail Clerks International Association petitioned the Board for certification as the bargaining representative of all the Bank's regular full- and part-time employees, excluding "supervisors and guards as defined in the Act." On March 24, 1978, the Retail Clerk's Union and the Bank entered into a "Stipulation for Certification upon Consent Election," which defined the bargaining unit as:

> All regular full-time and part-time employees at the Employer's Offices * * * excluding the president, vice-presidents, assistant vice-presidents, treasurers, assistant treasurers, branch managers, guards and supervisors as defined in the Act.

The election was held on April 28, 1978. Of 44 uncontested votes, 23 were for the Union and 21 against. Seven ballots were challenged; when these ballots were eventually opened after the Board's ruling on exceptions, the final tally was 28 votes for the Union and 23 against. The Bank filed timely objections to the conduct of the election, all of which were rejected by the Regional Director. The Board adopted most of the Regional Director's recommendations, but directed that a hearing be held to receive evidence on two categories of objections. The hearing was to focus on: 1) the supervisory or employee status of the five Assistant Branch Managers; and 2) the effect of the pro-union activity of various supervisory personnel.[2] After nine days of hearings, held between October 23 and November 21, 1978, the Administrative Law Judge (ALJ) recommended that the objections be overruled and that the challenged ballots be opened. On December 6, 1979, the Board issued its "Supplemental Decision and Direction" adopting the ALJ's recommendations. This decision included a footnote which stated:

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[1] The use of this term has become a bone of contention between the parties; several witnesses testified that these persons were commonly referred to as "backup tellers" up to the time of the Union campaign, suggesting that the term "Assistant Branch Manager" was introduced in an effort to endow them with supervisory status for purposes of the labor law. Since job titles are not determinative of supervisory status, *NLRB v. Sayers Printing Co.*, 453 F.2d 810, 815 (8th Cir. 1971), the dispute has no bearing on our decision; we find it convenient to use the title "Assistant Branch Manager" here.

> On June 7, 1979, the Retail Clerks International Association and the Amalgamated Meatcutters and Butcher Workmen of North America merged, forming the United Food and Commercial Workers Union, AFL–CIO. The name of the Union herein, formerly Local 1325, Retail Clerks International Association, has been amended to reflect this change.

The Union was certified on December 20, 1979. The Bank did not seek reconsideration of either the December 6 decision or the Certification two weeks later.

Between December 20, 1979 and January 7, 1980, the Union sent to the Bank at least three letters requesting that bargaining sessions be scheduled. Each such letter was sent on stationery bearing the letter head of the "United Food and Commercial Workers International Union, AFL–CIO, Local No. 1325." The Bank responded on January 10, 1980, essentially reasserting its previous objections to the election. The Union then filed a charge with the Board, which, on January 29, 1980, issued a complaint charging the Bank with refusing to bargain in violation of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5).

The Bank answered the complaint on February 13 reasserting several of its objections to the election. Upon motion by the general counsel, the Board on March 25, 1980 transferred the proceeding to itself and issued a notice to show cause why summary judgment should not be granted. On April 14, 1980, the Bank amended its answer to raise, for the first time, a defense based on the merger between the Retail Clerks International Association and the Amalgamated Meatcutters and Butcher Workmen. The Board refused to address this issue on the ground that it was not timely raised; it granted summary judgment for the general counsel, along with the order now under review, on July 24, 1980.

The Bank raises four issues for our consideration: 1) whether the Assistant Managers of the three largest branches are "supervisors" as defined in section 2(11) of the Act, 29 U.S.C. § 152(11);[3] 2) whether the pro-union conduct of supervisors requires tht the election be set aside; 3) whether the Board erred in refusing to grant a hearing on the Bank's allegation of a threat made by one supervisor to an employee; and 4) whether the Board's certification of the United Food and Commerical Workers is invalid because of the Board's failure to inquire into the validity of the merger between the Retail Clerks International Association and the Amalgamated Meatcutters. We resolve each of these issues against the Bank and enforce the Board's order.

I. *The Status of the Assistant Branch Managers*

Section 2(3) of the Act, 29 U.S.C. § 152(3), excludes from the definition of "employees" for the purpose of the Act "an individual employed as a supervisor." Section 9(b), 29 U.S.C. § 159(b), in turn limits to employees the persons who may be included in bargaining units designated by the Board. Section 2(11) defines the term "supervisor" as follows:

> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline

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[2] The Board's decision referred specifically to the allegations described in paragraphs B1, B5 and D2 of the Regional Director's report. These allegations involved: 1) attendance at Union meetings by Branch Managers, Assistant Branch Managers, and Assistant Treasurers, and pro-union speeches at one such meetings by one Branch Manager and one Assistant Branch Manager; 2) pro-union letters distributed to employees by one Branch Manager and one Assistant Branch Manager; and 3) visits by an Assistant Branch Manager on behalf of the Union to the home of one employee.

[3] The Bank has not challenged the Board's conclusion with respect to the Assistant Managers of the two smallest branches. We therefore do not consider these individuals.

> other employees, or reasonably to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"By well-settled construction, this section is to be read in the disjunctive, with the existence of any one of the statutory powers sufficient to confer supervisory status." *Maine Yankee Atomic Power Co., v. NLRB,* 624 F.2d 347, 360 (1st Cir.1980); *NLRB v. Magnesium Casting Co.,* 427 F.2d 114, 117 (1st Cir.1970), *aff'd,* 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed. 735 (1971). We have repeatedly held that application of the statutory test is a question of fact for the Board, *Stop & Shop Companies, Inc. v. NLRB,* 548 F.2d 17, 18 (1st Cir. 1977); *NLRB v. Magnesium Casting Co., supra; NLRB v. Swift & Co.,* 292 F.2d 561, 563 (1st Cir. 1961). While the Board's discretion in this area is not unlimited, *Maine Yankee Atomic Power Co. v. NLRB, supra; NLRB v. Metropolitan Petroleum Co.,* 506 F.2d 616 (1st Cir.1974), the Board's determination should be sustained if supported by substantial evidence.

The Bank contends that Assistant Branch Managers are supervisors primarily because they are in charge of the branch during the absence of the Branch Manager. The parties stipulated to the supervisory status of Branch Managers, who are ordinarily the highest ranking persons present in each branch. While both Managers and Assistant Managers spend much of their work day performing the routine chores of a teller, Branch Managers, and to a lesser degree Assistant Managers, perform some functions which tellers do not perform. Managers open the branch with a key; they turn on the branch computers with a "supervisory override" key; they initiate and assist tellers in the process of "proving out" in which each tellers balances his or her trans- **54** actions at the end of the day; they accept applications for loans, which are then forwarded to the main office; they approve passbook loans through application of a mathematical formula; they authorize the cashing of particularly large checks; they sign bank checks; and they assign tellers to windows according to a pre-arranged rotation system. With regard to personnel management, there was some conflicting testimony, but the Board reasonably found that hiring, firing, promotions and salary increases were all handled by the main office, without significant reliance on recommendations from the branches, and that Branch Managers would discipline tellers formally only after consultation with the main office.

Managers are absent from their branches during lunch hours, management meetings (which Assistant Managers do not attend), illness, and vacations, although there was testimony that higher officials from the main office make a practice of supervising at branches when Branch Managers are absent for extended periods. Also, Assistant Managers rotate with Managers for work on Saturday mornings, when the branches operate with a reduced staff. On these occasions, unless a supervisor from the main office is present, the assistant Branch Manager is the highest ranking person in the branch.

We have had several occasions to consider the status of employees who, while otherwise serving as ordinary workers, are occasionally called upon to take charge of others during the absence of a superior. *NLRB v. Sayers Printing Co.,* 453 F.2d 810 (1st Cir.1971); *NLRB v. Magnesium Casting Co.,* 427 F.2d 114; *NLRB v. Swift & Co.,* 292 F.2d 561; *NLRB v. Quincy Steel Casting,* 200 F.2d 293 (1st Cir.1952). We have taken the position in such cases that "spasmodic and infrequent assumption of a position of command and responsibility does not transform an otherwise rank and file worker into a spervisor." *Quincy Steel Casting,* at 296. While the Bank seeks to distinguish these cases, arguing that Assistant Branch Managers take charge on a more regular than "spasmodic" basis, we think the Board could properly view the limited occasions on which Assistants were in charge as a factor significantly weakening the claim of managerial status.

Moreover, even on those occasions when the Managers were absent, the Board could find, on this record, that the duties performed by Assistant Managers did not involve significant supervisory authority. The Bank argues that the Assistant Branch Managers, on these occasions, possess authority responsibly to direct and to discipline tellers. As a primary example, the Bank cites the "proving out" process. This process is essentially a matter of checking computations to insure that the transaction records are accurate. Each teller proves his or her own window; from the testimony the

Board could find that the primary role of the person in charge is to initiate the process by instructing the first teller when to begin. If a teller is unable to prove, the person in charge, as well as other tellers, may assist him or her in searching for the error. If the error is not found by closing time, the manager directs the tellers to continue looking for it; but several withnesses testified that this process never continues for longer than an hour, after which time the employees all leave and continue the search the next day. The Board concluded that this process is "routine or clerical," not requiring "the use of independent judgment," and we find substantial record support for this conclusion. *See Goldies, Inc. v. NLRB,* 628 F.2d 706 (1st Cir.1980) ("countermen" who occasionally assign tasks to "partsmen" and give them instructions found not supervisors).

The Bank contends that Assistant Branch Managers have authority to discipline tellers. In support of this, the Bank relies on three incidents. In one, Assistant Branch Manager Griffin had experienced what he termed a "personal conflict" with Charlotte Snell, a teller who had worked unsuccessfully in several branches and was being given a last chance at Griffin's branch. Feeling unable to bring the problem to the Branch Manager because of her friendship with Snell, Griffin went to Charles Murray, then Vice President, and suggested that Snell be transferred to another branch. Murray then discharged Snell. The Board reasonably concluded that the incident was "an isolated instance with unusual circumstances and not indicative of supervisory authority." Griffin obviously had no authority to take any independent action against Snell, and even his recommendation of transfer was not followed. Snell's discharge appears to be less the result of any recommendation by Griffin than of her long history of inadequate performance. *See Stop & Shop Companies, Inc.,* 548 F.2d 17 (pharmacy managers whose recommendations on hiring and firing were sometimes ignored found to have no authority "effectively to recommend" such action).

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In a second incident, the Bank asserts that Assistant Manager Gail Silva once "directed" an employee not to report to work on a Saturday. Silva's testimony was that, when the teller called in at 11:00 to say that she had just awoken, Silva replied, "Well * * * I don't know what to tell you, but for an hour and a half it would be foolish to come in." The Board saw nothing in this incident to suggest an exercise of supervisory authority, nor do we. A third incident relied upon by the Bank, involving a written warning issued (after the election) by Assistant Manager Nancy Savage Ferreira to a teller who was absent without excuse, similarly failed to prove supervisory status. The warning was issued only after clearing with, and on instructions from, the main office.

The Bank argues also that Assistant Managers have authority to train and evalute new tellers. This activity was mentioned by only one witness, and then in vague terms. By itself such activity, if it occurred, would not establish supervisory status, experienced employees may instruct new personnel without possessing supervisory authority. *See Magnesium Casting,* 427 F.2d at 118 (not unusual that most skilled workers would command respect even through not supervisors). Similarly, management's solicitation, in this context, of the opinions of more experienced employees about the performance of newcomers did not necessitate a finding of supervisory status.

Other duties cited by the Bank as managerial, such as possession of the branch and computer keys, power to approve checkcashing, and authority to sign checks, are not directly related to supervision of employees. These responsibilities do indeed suggest that Assistant Managers are among those persons whom the bank considers particularly reliable and trustworthy. But we cannot say that such duties and traits required a finding that Assistant Managers play a role in which "they must be representatives of the interests of their employer vis-a-vis other employees." *Stop & Shop Companies, Inc. v. NLRB,* 548 F.2d at 17. Nor does the slightly higher pay received by Assistant Managers compel a finding of supervisory authority.[4] Pay differential may be explained by any number of differences in skill, seniority, reponsibilities, or market power; here the Board could rationally attribute it to seniority, experience, and the various other reponsibilities of a non-supervisory nature assigned to Assistant Managers. *See NLRB v. Metropolitan Petroleum Co.,* 506 F.2d 616 (dispatchers paid less per hour than drivers whom they supervised); *NLRB v. Sayers Printing Co.,* 453 F.2d at 815 (higher pay "of no legal significance").

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[4] There was testimony that tellers were paid between $106 and $133 per week at the time of the election. Assistant Branch Managers received "in the area of" $144 to $146. Branch Managers, unlike tellers and Assistant, were paid on an annual basis, at a rate of between $8,000 and $12,000. Tellers and Assistant Branch Managers fill out weekly time reports; Branch Managers do not.

The Board has a large measure of informed discretion when it comes to deciding who, as a practical matter, falls within the definition of supervisor. *Stop & Shop Companies, Inc. v. NLRB,* 548 F.2d at 18; *NLRB v. Swift & Co.,* 292 F.2d at 563. We find substantial record support for its determination.

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II. *Pro-Union Activity of Supervisors*

The Bank contends that the election should be set aside because pro-union activities by certain of its own supervisors interfered with the "laboratory conditions" under which the election was conducted. The Board has a "wide degree of discretion" in matters relating to representation proceedings, *NLRB v. A.J. Tower Co.,* 329 U.S. 324, 334, 67 S.Ct. 324, 329, 91 L.Ed. 322 (1946). A party urging that an election be set aside carries the "heavy burden" of demonstraing that the Board has abused its discretion. *Melrose Wakefield Hospital Association v. NLRB,* 615 F.2d 563, 566 (1st Cir. 1980); *NLRB v. S. Prawer & Co.,* 584 F.2d 1099, 1101 (1st Cir. 1978). The Board has found pro-union activity by supervisors objectionable on two possible grounds: first, it may lead employees to the false conclusion that their employer favors the union; and second, it may cause employees to support the union out of fear of retaliation by the particular supervisors rather than out of free choice. *Stevenson Equipment Co.,* 174 NLRB 865 (1969). *Accord, Catholic Medical Center v. NLRB,* 620 F.2d 20 (2d Cir. 1980) (employees may be confused or coerced); *NLRB v. San Antonio Portland Cement Co.,* 611 F.2d 1148 (5th Cir. 1980) (supervisory support objectionable only if it contains "seeds of reprisal"); *see also NLRB v. Underwood Machinery,* 179 F.2d 118 (1st Cir. 1949) (supervisors' solicitation of union authorization cards objectionable only if "the signing employee was subject to a reasonable apprehension that his failure to sign could have adverse consequences"). Unless one or both of these effects appears to have flowed from the supervisors' conduct, the Board has declined to set aside an election.

The Bank's complaints of pro-union activities by supervisors here center on the activities of certain Assistant Branch Managers. Our holding in Part I makes it unnecessary to address these claims. The Bank's remaining objections relate to the conduct of several Branch Managers and an Assistant Treasurer. The Bank contends that these personnel attended numerous union meetings and invited other employees to do so; that one Branch Manager volunteered to telephone and visit employees on behalf of the Union, made a pro-union speech, and sent a letter to employees expressing support for the Union; that another Branch Manager was elected to be the employees' "liaison with the union" and on one occasion questioned a teller as to how she would vote; and finally that an Assistant Treasurer made a pro-union speech at one meeting.[5]

The Board found support for some, but not all, of these claims, and our review of the record persuades us of the reasonableness of the Board's findings. Generally, the Board found that several supervisors made known their support for the Union, but that no supervisor ever told any employee how to vote or threatened any form of retaliation against employees who failed to support the Union. The Board found also that Bank management expressed unambiguous opposition to the Union in a series of strongly worded letters to employees. On the basis of these factual findings, the Board concluded that the activities of supervisors neither misled employees as to the Bank's position nor caused them to fear retaliation, and that there was therefore no need to set aside the election.

The bank does not challenge the standards applied by the Board; its argument is that the supervisors' activities did in fact mislead employees and cause fear of retaliation. First, the Bank asserts that employees may have been confused about manage-

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[5] The Bank contends, somewhat inconsistently, both that its management was unaware of the extent of supervisory support for the Union, and that it attempted to control the activity of supervisors but was unable to do so. The Board found, on the basis of explicit testimony, that Bank officers were told of the supervisors' activities early in the union campaign; thus the Bank could have taken steps to head off any unwanted conduct by them. The reason supervisors are unprotected by the Act is precisely that employers are entitled to demand their complete loyalty—and take disciplinary measures to secure it. An employer who fails to exercise its authority may not later be heard to complain of the results of its inaction. *NLRB v. Lamar Electric Membership Corp.,* 362 F.2d 505 (5th Cir. 1966).

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ment's position since "the bank's employees cannot be expected to be able to adequately understand that the very real, pro-union proselytizing by supervisors is to be differentiated from the abstract concept of the position of 'Bank management.' " We find nothing in the record that necessitates a finding that any such confusion existed—and much to indicate that the employees could and did make this distinction. Each employee who was questioned on the subject demonstrated a clear understanding of the identity of Bank management and of its views on the Union campaign.

The Bank's second contention is that the supervisor's "active and vocal" support for the Union coerced employees by implying threats of retaliation. We think the Board was entitled to reject this contention. It is clear that certain supervisors favored the Union, and that employees knew this; but without evidence of any threats, express or implied, this does not compel a finding of coercion, *Compare Turner's Express v. NLRB,* 456 F.2d 289 (4th Cir. 1972) (foremen warned employees that they would "get tough" if the Union lost, and that anti-union employees would "pay for it"). Here there was no significant evidence of threats,[6] and none that any employee feared retaliation; those employees who were asked about such fears stated that they had none.[7]

In rejecting the Bank's claim of coercion by Branch Managers, the Board relied also on the Managers' limited power to retaliate against tellers. The Bank criticizes this reasoning, quoting *Turner's Express v. NLRB,* 456 F.2d 289, for the point that an employee's immediate supervisor may be more influential than a more distant corporate official. In *Turner's Express,* however, the immediate supervisor had substantial influence on hiring, firing, and wage-setting; here the Branch Managers' ability to injure the interests of tellers was more limited. *See NLRB v. Kane,* 435 F.2d 1203 (4th Cir. 1970) (low level of supervisor's authority weighs against inference of coercion). Thus we think the Board could take into account the relatively limited power of the Managers as well (far more importantly) as the absence of threating conduct, in refusing to set aside the election on grounds of coercion.

III. *The Alleged Threat by Pimental*

The Bank complains that it has been denied due process by the Board's refusal to grant a hearing on an incident it describes as an "express threat" by Assistant Treasurer Pimental to Debra Paulhus, a clerical employee. According to the Bank, Pimental asked Paulhus' husband how Paulhus intended to vote. Mr. Paulhus replied that he did not know, and Pimental told him that in 1977 Debra had been on a "hit-list" of employees to be fired by Vice President Murray. The Bank has raised this incident, both before the Board and in this court, as an example of "supervisory pressure" on an employee; the Bank has not attempted to put forward any theory of this incident as part of a union-organized campaign to mislead employees with false rumors about management's plans. The Board saw no "substantial and material issue" arising from this incident as it was presented by the Bank, and that conclusion was within the Board's discretion. Pimental is not alleged to have suggested that he himself had some intention of firing Paulhus if she failed to support the Union. Taking the Bank's account of the incident as true, the Board could reasonably conclude that the incident did not demonstrate coercion by a supervisor and therefore was not a basis for setting aside the election. No hearing, therefore, was necessary.

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IV. *The Union Merger*

As outlined in the statement of the facts, the Board certified the United Food and Commercial Workers on December 20, 1979, after having noted in its order of December 6 that this Union was the result of a merger between the petitioning Retail Clerks International Association and another Union. The Bank raised no objection to the substitution of the new Union for its predecessor until it filed its amendment answer to the unfair labor practice charge on April 14, 1980.[8] At the time the Board refused to address the issue, citing its rule against litigation in an unfair labor practice proceeding of issues which could have been raised in the representation proceeding. The Bank now argues that it has been denied a hearing on the validity of the merger, and that the Board's action in certifying the new Union without affording such a hearing was beyond its power.

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[6] We find reasonable the Board's disagreement with the Bank's characterization of Branch Manager Boleski's letter as containing "thinly veiled threats."

[7] The Bank cites the testimony of teller Clare Pires, who stated:

> I figured that if I said I was for the union the other bank management basically from downtown wouldn't like it, and if I said I was against the union the people I have to work with every day wouldn't like that too much either. But I still had to make up my own mind.

This scarcely compels a finding that Pires feared retaliation from anyone, let along that supervisors would retaliate because of an anti-union stance.

Union mergers are a relatively frequent occurance, and the Board has developed a set of procedures for responding to them. Ordinarily, the successor union petitions for amendment of the certification of representation under 29 C.F.R. § 102.61(e). The Board then conducts an inquiry, in which the employer may participate if it wishes, to determine whether the merger was accomplished through valid procedures and whether the resulting union continues to represent the unit employees. If the Board is satisfied that these criteria are met, it then amends the certification to reflect the merger, and the new union assumes the position of the old. On review, the courts have treated the Board's determination as one of fact, to be upheld if supported by substantial evidence. *E.g., NLRB v. Bear Archery,* 587 F.2d 812 (6th Cir. 1977); *NLRB v. Pearl Bookbinding,* 517 F.2d 1108 (1st Cir. 1975); *NLRB v. Commercial Letter, Inc.,* 496 F.2d 35 (8th Cir. 1974).

Here, the record contains no formal petition by the United Food and Commercial Workers,[9] and no evidence of any inquiry by the Board.[10] The Board's action, *sua sponte,* and without any record support, was irregular. Had the Bank raised a timely objection to this procedure, we think the Board would have had an obligation to afford either the usual procedure or some reasonable equivalent in which the Bank might contest the validity and effect of the merger. *Paper and Tanner Co. v. NLRB,* 474 F.2d 1256 (6th Cir. 1973). But the Bank failed to do so. The Board was within its discretion in refusing to address the matter when, later, it was raised.

Under the Board's longstanding rule and practice, *see* 29 C.F.R. § 102.67(f), which the courts have repeatedly endorsed, a party to an unfair labor practice proceeding may not raise an issue which was or could have been litigated in the prior representation proceeding, in the absence of newly discovered or previously unavailable evidence or special circumstances. *Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 141–42, 91 S.Ct. 599, 601, 27 L.Ed.2d 735 (1971); *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162, 61 S.Ct. 908, 917, 85 L.Ed. 1251 (1941); *S.D. Warren Co. v. NLRB,* 353 F.2d 494, 497 (1st Cir. 1965), *cert. denied,* 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 300 (1966).

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The Bank argues that it had no opportunity to raise the issue in the representation proceeding, since it was unaware of the merger until the Board's order of December 6, at which time the representation proceeding was effectively concluded. The Board determined, however, that the Bank could have raised the issue by way of a motion for reconsideration under Rule 102.65(e)(1), which provides, in part, as follows:

> A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision for reconsideration or rehearing, except that no motion for reconsideration or rehearing will be entertained pursuant to this paragraph by the regional director with respect to any matter which can be raised before pursuant to any other section of the rules in this part, or by the Board with respect to any matter which could have been but was not raised before it pursuant to any other section of the rules in this part.

The rule permits the filing of a motion within ten days after service of the decision in the proceeding. Since the decision in the representation proceeding occurred on December 20, the Board says the

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[8] The Bank asserts that it raised this issue both in its letter to the Union and in its first answer by stating that it would not recognize the Union as the lawfully certified representative of the bargaining unit. We have examined both these documents, and we find nothing in either to put the Board or the Union on notice that the Bank intended to contest the merger.

[9] Since no Union had yet been certified at the time of the merger, the Union could not have petitioned for amendment of certification. It could, however, have accomplished the same result by moving for amendment of the representation petition filed by the Retail Clerks Union. The record does not indicate whether the Union did so or not.

[10] The Board's present position is that it "did nothing more than amend the name of the Union's international affiliate," and that in doing so it merely chose not to "ignore the realities of life." This position begs the question, however, without any inquiry haveing been conducted, it is impossible to know whether the merger effected a mere change of name or whether its impact was more substantial.

Bank could have filed a motion as many as 24 days after the December 6 order had alerted it, to the merger. The Board also points out that the rule allows a party to request an extension of time for filing a motion, so that the Bank might have requested and obtained additional time. 29 C.F.R. § 102.65(e)(2).[11]

The Bank argues that a motion for reconsideration would not have been appropriate here, or at least that the rule failed to give notice of its applicability to a case such as this. The Bank interprets the rule as limited to claims of factual errors made during the consideration of election objections already raised by the parties. For this, the Bank cites no cases, but relies on language referring to "any finding of material fact" and to "additional evidence sought to be adduced" contained in the following part of the rule:

> A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and what result it would require, if adduced and credited. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the regional director the Board believes should have been taken at the hearing, will be taken at any further hearing.

We do not think this language necessarily limits motions for reconsideration in the manner claimed. Doubtless most motions relate to errors having their genesis in prior proceedings. A movant is thus told by this part of the rule that in cases of an error of procedure or of law, he must state the error with particularity, while in cases of an error of fact, he must make specific reference to the record. The rule goes on to describe the type of evidence that may be taken at a rehearing, limiting such evidence to newly discovered or previously unavailable material. We read this language as limiting the evidence that may be introduced when the issued reopened is one which has already been considered, but we see nothing to indicate a firm intention to limit the types of issues that may be raised. The cases offer ho hint that the rule is limited in the way the Bank suggests. *See Garment Workers v. Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3, 95 S.Ct. 972, 975, n.3, 43 L.Ed.2d 189 (1975) (employer claims due process violation in Board order based on theory not charged or litigated; Court refuses to consider because of employer's failure to move for reconsideration); *NLRB v. Local 345*, 612 F.2d 598 (1st Cir. 1980) (Union moved reconsideration of order in which Board *sua sponte* amended ALJ's proposed order); *NLRB v. Beth Israel Hospital*, 554 F.2d 477, 482 n.4 (1st Cir 1977), *aff'd*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978) (employer contests Board's *sua sponte* expansion of litigated issue; failure to seek reconsideration no bar because Board's ruling too ambiguous to provide notice of its scope). *See also NLRB v. Maine Sugar Industries Co.*, 425 F.2d 942 (1st Cir. 1970) (decided before present Rule 102.65; in absence of formal provision for motion for reconsideration, party not barred from raising in unfair labor practice proceeding issue which could not have been raised in representation proceeding because evidence was not yet available).

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From the language of Rule 102.65(e)(1) and its treatment in these cases, we hold that the Bank had sufficient notice that it could contest the Board's treatment of this new issue by seeking reconsideration under the rule. Where the Bank had an opportunity and failed to use it, the Board was entitled to apply its rule and policy against relitigation.

The Bank seeks to avoid this result by arguing that a motion for reconsideration "is optional, not mandatory." The Bank cites Rule 102.65's provision that a party "may" seek reconsideration and that "A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies." But the optional language in Rule 102.65(e)(1) might more reasonably be thought to serve other purposes. For example, it serves to recognize that a motion for reconsideration need not be filed in every circumstance—as, for example, where the issue has already been raised and decided. *E. g., NLRB v. Mercy Hospitals of Sacramento,* 589 F.2d 968 (9th Cir. 1978), *cert. denied,* 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 458 (1979); *see also NLRB v. Annapolis Emergency Hospital,* 561 F.2d 524 (4th Cir. 1977). In such a case, reconsideration would be futile—if it were allowed at all in the absence of new evidence. Here, however, the merger issue had not been raised previously, and a motion for reconsideration provided the Bank with an opportunity to raise it in the representation proceeding. Under the rule against relitigation, the Board requires one who has an opportunity to raise an issue to use that opportunity or be barred from contesting the point in the later proceeding. As the motion for reconsideration was such an opportunity, the Board could penalize its disuse by declining to afford another opportunity, later. *NLRB v. Sambo's Restaurant, Inc.,* 641 F.2d 794 (9th Cir. 1981) (section 10(e) bar against raising issues on appeal which could have been but were not presented to the Board applies where party failed to seek reconsideration of action by the Board *sua sponte); Amax Coal Co. v. NLRB,* 614 F.2d 872, 877 n.13 (3d Cir. 1980), *cert. granted,* ——— U.S. ———, 101 S.Ct. 917, 66 L.Ed.2d 838 (1981) (*same*); *NLRB v. Allied Products,* 548 F.2d 644 (6th Cir. 1977) (same).[12]

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[11] At oral argument, the Bank sought to explain its delay by saying that it needed time to question its employees as to their knowledge of the merger before it could determine whether it had grounds to contest the validity of the merger. Were this so, it could have sought an extension of time, which it did not do.

The Bank argues, citing *Burns Electronic Security Services, Inc. v. NLRB,* 624 F.2d 403 (2d Cir. 1980), that the Board has acted arbitrarily in applying the rule against relitigation because the rule's purposes are not served here. We disagree. Indeed, we think this is a classic instance where the purposes are served. A cardinal purpose of the rule is to prevent delay, and delay is precisely what would have resulted

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had the Board chosen to consider the merger issue after it had been raised at the eleventh hour in the unfair labor practice proceeding. By the time of that proceeding, a full two years had passed since the Bank's employees voted in favor of Union representation. Through a lengthy series of proceedings contesting the representative status of the Union, the Bank had managed to avoid bargaining during this period. Had the Bank raised the merger issue in December 1979, when it received the Board's decision, the issue could have been considered promptly, as adjunct to or in the context of the representation proceeding. All challenges to the Union's representation would have been settled, and bargaining could have begun.[13] Instead, the Bank remained silent until April, 1980,[14] some four months after the Board's order, when it suddenly asserted its right to contest the merger.[15]

Since the Bank failed to raise the issue in a timely manner, the Board was within its discretion in refusing to afford a hearing.[16] As the Supreme Court observed in *United States v. L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952), and as we quoted in *NLRB v. Rexall Chemical Co.,* 370 F.2d 363, 366 (1st Cir. 1967),

> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred

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[12] The Bank attempts to distinguish these cases by pointing out that the parties involved had failed to present their claims to the Board at all, while the Bank did raise this issue in the unfair labor practice proceeding. The relevance of these cases here, however, is not for their application of section 10e, but for their view of of the significance of the motion for reconsideration: where the failure to use an opportunity to raise an issue operates to bar assertion of that issue at a later time, whether before the Board or in court, the motion for reconsideration is such an opportunity.

[13] The Bank relies on *NLRB v. Pearl Bookbinding Co., Inc.,* 517 F.2d 1108, as a case in which a union merger was contested during an unfair labor practice proceeding. There, however, the merger occurred after the union was certified, so that the employer had no opportunity to contest the merger during the representation proceeding.

[14] The Board now argues that the issue was not properly raised even then, since the Bank failed to seek permission to amend its answer, as required by Rule 102.23. That rule provides that an answer may be amended without permission at any time before the hearing date, but after that date only with permission. Here, the hearing date was set for June 25, 1980. It appears, therefore, that the Bank was entitled under the Board's rules to amend its answer without permission at the time when it did so. Nevertheless, we see no abuse of discretion in the Board's refusal to hear the new issue raised in the amended answer.

[15] The Board, noting the lack of any mention of the merger as a ground for refusing to bargain in the Bank's letter to the Union, as well as the Bank's failure to move for reconsideration, termed the merger issue an "afterthought." The Bank's motives are not determinative, but the Board could consider them in exercising its discretion, and it could reasonably assume that if the Bank seriously questioned the validity of the merger and intended to resist the bargaining on that ground, it would have challenged the merger immediately upon learning of it. We also note that the Bank has apparently not alleged or offered to prove facts which would show that as a result of the merger the Union is "substantially different—other than in name and affiliation—from the prior union." *NLRB v. Pearl Bookbinding Co., Inc.,* 517 F.2d at 1111, a crucial factor in determining the propriety of a union's continued certification as a bargaining representative following a merger. *Id.,* at 1112.

[16] We note that the Sixth Circuit is considering, but has not decided, a similar issue in *L. M. Berry & Co. v. NLRB,* No. 80-1354.

against objection made at the time appropriate under its practice.

The petition for review is denied. The petition for enforcement is granted.

NLRB v. Supreme Bumpers, Inc., d/b/a Precision Plating

648 F.2d 1076 (6th Cir.), May 22, 1981—243 NLRB 230

On petition to enforce Board Order

Before EDWARDS, Chief Judge, KENNEDY, Circuit Judge, and CELEBREZZE, Senior Circuit Judge

1076

PER CURIAM: The National Labor Relations Board seeks enforcement of its order [1] requiring the employer in this case to rehire two employees who were found to have been discharged, in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act, *as amended,* 29 U.S.C. §§ 151–169 (1976).

On consideration of the record before and the opinion of the Administrative Law Judge who heard the evidence, we find a record sharply in conflict as to why the discharges occurred. The company contended that the discharges were due to re-

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peated absenteeism on the part of these two employees, whereas the employees' testimony was to the effect that they were among the strongest of the advocates of a union in the plant and that the discharges took place only after an effort was made on behalf of unionization.

The Administrative Law Judge made an analysis of the credibility of the employee witnesses as compared to that of the management witnesses too lengthy to quote in full. But, three paragraphs we deem appropriate:

> c. The discharges
>
> In view of the foregoing, I conclude that Respondent had knowledge of the union activities and sympathies of T. Jones and James Burton, and further evinced an animosity toward unionization by its employees of its Detroit plant. The discharges occurred within the context of interrogations and threats. Burton was the prime activist for the Union. His discharge occurred shortly after Fred Jones became aware of the fulfillment of Burton's threat to organize the Union. T. Jones' discharge thereafter occurred subsequent to his continued expressions of support for the Union. In view of the circumstances herein, including Fred Jones' constant presence in the shop and proximity to employees, including carpooling, it can be inferred that in any event, Respondent was well aware of the full extent of the union organizing efforts of its employees. *Famet, Inc.,* 202 NLRB 409 (1973); *Wiese Plow Welding Co., Inc.,* 123 NLRB 616 (1959).
>
> Respondent contends that Burton and T. Jones were deficient in their work habits. Yet, they were never disciplined for their alleged disruptive activities. Other employees had left priority work undone. There is no evidence that they were disciplined. I do not find the testimony of Fred Jones and Opalewski credible with respect to the extent of the discriminatees alleged deficiencies. Their testimony was inconsistent and puts Respondent in a posture of advancing shifting reasons for the discharges. When Burton was disciplined in November, he was disciplined solely for absenteeism. When he was laid off, no initial reference was made to his deficient work performance. Had his misconduct been as severe as portrayed, surely some reference in Respondent's records would have been made of it. Similarly, the termination notice in the records of each employee refers to no such misbehavior. I credit the testimony of Burton and T. Jones that no reference of work deficiencies was ever mentioned to them upon their terminations.
>
> With respect to the absenteeism records of both men, such on its face appears excessive. However, in comparison with other polishers, their records are not exceedingly disproportionate, particularly with respect to months of their employment in 1978. I find persuasive Burton's testimony that the critical factor for piece rate production is not so much the hours clocked in, but rather, the number of bumpers that were produced. There was no testimony by Respond-

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[1] 243 N.L.R.B. No. 45.

ent's witnesses of any deficiency with respect to the actual number of bumpers produced by either employee. In this respect, Opalewski characterized these employees as "good" or "very good." Thus, they apparently had the capacity and did produce satisfactorily in view of their facility as qualified and experienced polishers.

The decisive finding of fact on the part of the Administrative Law Judge was: "I conclude that the real reason for the discharges in this case is the union activities and sympathies of the dischargees."

This court, of course, is not retrying the sharp factual dispute presented by this record. All we are required to determine is whether or not there is substantial evidence on the whole record to support the findings of the Board, which accepted the Administrative Law Judge's recommendations. Since we do find such substantial evidence, enforcement is granted in relation to the **1078** order of the National Labor Relations Board.

NLRB v. Circo Resorts, Inc., d/b/a Circus, Circus

646 F.2d 403 (9th Cir.), May 26, 1981; rehearing denied August 10, 1981—244 NLRB 880

On petition to enforce Board Order

Before MERRILL and SCHROEDER, Circuit Judges and EAST, District Judge

405

SCHROEDER, Circuit Judge: This is a petition by the NLRB to enforce its order following findings of unfair labor practices. The case arises out of alleged unfair labor practices which occurred during efforts to organize the stagehands of the Circus, Circus Hotel & Casino in Reno in the weeks immediately following the completion of construction of the facility and prior to its opening. The Board found that the employer was guilty of unfair labor practices in connection with interrogation of employees concerning union activities, wage increases, threats of reprisals, and the discharge of two employees who were union members. The Board ordered that the employer cease and desist from the practices and bargain with the union.

We are called upon to decide whether the record supports a finding of unfair labor practices, whether the union of stagehands was an appropriate unit, and whether the order was appropriate.

The first unfair labor practice finding is based upon the questioning by the entertainment department supervisor of three of the six stagehands about their union membership. After making the inquiry, the supervisor told one of the employees that it was premature to have a union, and that the company was afraid of "what was happening at MGM," where a union was organizing. On another occasion he told another employee, "We don't want a union in here. The union may come in here in a year or so, but we don't want it in now." While questioning of employees concerning union activities in not a per se violation of § 8(a)(1) (29 U.S.C. § 158(a)(1)), *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 725 (9th Cir. 1980), the determination by the Board that interrogation has been coercive is entitled to be upheld so long as there is substantial evidence to support it. *NLRB v. Ft. Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). We find that the Board's finding of an unfair labor practice is supported by the evidence.

The next unfair labor practice finding arose out of the firings of two stagehands who were active in obtaining other stagehands' signatures on union authorization cards. The employer contends that the firings were for ecomonic reasons, but the administrative law judge credited testimony that the firings had been followed by statements that the two had been too obvious in their union activities and that more workers would not be employed until "this union thing was over." The conclusion that the company violated §§ 8(a)(1) & 8(a)(3) (29 U.S.C. §§ 158(a)(1) and (a)(3)) by the firings and the threat of reprisal by remaining understaffed are supported by the record. *See NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242-43 (9th Cir. 1980).*

A closer question is presented by the finding that wage increases granted in late August were unfair labor practices. The increases were granted to two stagehands who discovered a disparity in wages and protested strongly. The immediate dilemma faced by the company was to choose between meeting the protests or risk losing employees at a time when they were badly needed. While wage increases granted prior to an election generally carry a presumption of illegal motive, the employer is entitled to justify the timing of the increase. *NLRB v. Anchorage Times Pub. Co.*, 637 F.2d 1359 (9th Cir. 1981). In this case, given the unusual circumstances, the Board should have considered the justifications offered and should not have based a finding of unfair labor practices solely upon the

timing of the increase. *See Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1130 (9th Cir. 1978); *Paoli Chair Co., Inc.*, 213 N.L.R.B. 909 (1974). The order should be modified to delete the reference to wage increases.

The employer's contention that one of the discharged employees, Sorce, was a supervisor within the meaning of the Act, 29 U.S.C. § 152(11), is without merit. An employee who gives minor orders or directives is not necessarily a supervisor for purposes of the Act. *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1383–84 (9th Cir. 1976). There was no evidence, apart from a suggestion for a possible job candidate, that Sorce was engaged in supervisory activities.

Also without merit is the contention that the two discharged employees, Sorce and Bledsoe, were not bona fide employees. The authority relied on by the company relates to employees who are actually on the payroll of the union for organizing purposes. *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). There is no suggestion that these employees were working for anyone other than this employer at the time of the discharge.

Although the unit approved by the Board was small, we cannot agree that the Board was required to include all of the manual employees of the hotel and casino complex in the same unit and that its choice of a unit of stagehands was arbitrary and capricious. *See Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1037 (9th Cir. 1978); *Atlas Hotels, Inc. v. NLRB*, 519 F.2d 1330, 1334 (9th Cir. 1975) "The critical determinant is whether the employees share a substantial community of interest sufficient to justify their mutual inclusion in a single bargaining unit." *Pacific Southwest Airlines v. NLRB, supra* at 1038. Here the administrative law judge found that the stagehands were an appropriate unit because they performed identical duties, they all had training or experience in that area, their work was confined to a particular part of the hotel, and they did not work with other maintenance workers. We cannot say that the Board's decision was arbitrary or capricious.

We turn finally to the appropriateness of the order. The company objects to the order as being overly broad and as improperly containing an order to bargain. The injunction against unfair labor practices other than the ones specifically found may be justified where there is a danger of their commission in the future because of the employer's past course of conduct. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 437, 61 S.Ct. 693, 700, 85 L.Ed. 930 (1941); *Polynesian Cultural Center, Inc. v. NLRB*, 582 F.2d 467, 476 (9th Cir. 1978). With respect to bargaining orders, the standards to be followed are those contained in NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), which held that a bargaining order may be warranted where unfair labor practices have tended to undermine union majority strength and would interfere with a fair election. *See also Pay'N Save Corp. v. NLRB*, 641 F.2d 697, 702–703 (9th Cir. 1981); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1243 (9th Cir. 1980). Although this cannot be viewed as an extreme case clearly warranting an order to bargain as a matter of law, the union here had majority status and this can not be viewed as a "minor case" within the standards laid down in *Gissel*. In addition, since a small bargaining unit is involved, the need for a bargaining order is greater. *Pay'N Save Corp. v. NLRB, supra* 641 F.2d at 703. The pattern of activity engaged in by the employer during a short period of time, which included discharges for union activity and the refusal to replace the discharged employees until after an election, indicates a concentrated effort to nip union organization in the bud. The Board's order was warranted.

Order enforced as modified.

Clayton v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America

107 LRRM 2385, May 26, 1981—623 F.2d 563

On certiorari to 9th Cir.

Before BURGER, Chief Justice, and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, Justices

Justice Brennan delivered the opinion of the Court: An employee seeking a remedy for an alleged breach of the collective-bargaining agreement between his union and employer must attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before he may maintain a suit against his union or employer under § 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a). Republic Steel Corp. v. Maddox, 379 U.S. 650, 652–653, 58 LRRM 2193 (1965); see Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563, 91 LRRM 2481 (1976); Vaca v. Sipes, 386 U.S. 171, 184, 64 LRRM 2369 (1967). The question presented by this case is whether, and in what circumstances, an employee alleging that his union breached its duty of fair representation in processing his grievance, and that his employer breached the collective-bargaining agreement, must also attempt to exhaust the internal union appeals procedures established by his union's constitution before he may maintain his suit under § 301.

I

After eight years in the employ of ITT Gilfillan, Clifford E. Clayton, a member of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and a shop steward of its Local 509, was dismissed for violating a plant rule prohibiting defined misbehavior. Pursuant to the mandatory grievance and arbitration procedure established by the collective-bargaining agreement between ITT and Local 509. Clayton asked his union representative to file a grievance on his behalf on the ground that his dismissal was not for just cause. The union investigated Clayton's charges, pursued his grievance through the third step of the grievance procedure, and made a timely request for arbitration.[1] It then withdrew the request, choosing not to proceed to arbitration. Clayton was notified of the union's decision after the time for requesting arbitration had expired.[2]

The UAW requires every union member "who feels aggrieved by any action, decision, or penalty imposed upon him" by the union to exhaust internal union appeals procedures before seeking redress from a "civil court or governmental agency." UAW Constitution, Art. 33, § 12. These procedures, established by Arts. 32 and 33 of the UAW Constitution and incorporated into Art. IV of Local 509's bylaws, direct the employee first to seek relief from the membership of his local. Art. 33, § 3. If not satisfied with the result obtained there, the employee may further appeal to the International Executive Board of the UAW, and eventually to either the Constitutional Convention Appeals Committee or to a Public Review Board composed of "impartial persons of good public repute" who are not members or employees of the union. Arts. 32, 33, §§ 3–11.

Clayton did not file a timely internal appeal from his local's decision not to seek arbitration of his grievance.[3] Instead, six months after the union's withdrawal of its request for arbitration, Clayton filed this action under § 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), in the District Court for the Central District of California. He alleged that the union had breached its duty of fair representation by arbitrarily refusing to pursue his grievance past the third step of the grievance procedure, and that the employer had breached the collective-bargaining agreement by discharging him without just cause.[4]

Both the union and the employer pleaded as an affirmative defense Clayton's failure to exhaust the internal union appeals procedure. Jt. App. 12, 18. The District Court sustained this defense, finding that Clayton had failed to exhaust the internal appeals procedures; that those procedures were adequate as a matter of law; that Clayton had been advised of their existence; and that his failure to ex-

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[1] The collective-bargaining agreement between Local 509 and ITT Gilfillan establishes a four-step grievance procedure, with binding arbitration as the fourth step. Art. IX of the agreement provides that if the union wishes to request arbitration, it must do so within 15 working days after completion of the third step of the grievance procedure. Jt. App. 31–36.

[2] Clayton was notified of the union's decision by a letter written by the International Representative responsible for servicing Local 509. Jt. App. 78–79. Neither the union nor the employer contests Clayton's allegation that he received this letter more than 15 working days after completion of the third step of the grievance procedure. See Jt. App. 7, R.T. 88–99.

[3] Under Art. 33, § 3 of the UAW Constitution, Clayton had 30 days from the date the union withdrew its request for arbitration to initiate the internal union appeals procedures.

[4] To prevail in an action under § 301 against either the employer or the union, an employee must ordinarily establish both that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570–571, 91 LRRM 2481 (1976).

haust could not be excused as futile. R.T. 397–404. Accordingly, the Court dismissed Clayton's suit against both the union and the employer.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of Clayton's suit against the union and reversed the dismissal of his suit against the employer. 623 F.2d 563, 104 LRRM 2118 (1980). Focusing on the adequacy of the relief available under the internal union appeals procedure, the Court of Appeals held that Clayton's failure to exhaust was fatal to his claim against the union, because by filing an internal appeal Clayton might have received money damages, the relief he sought in his § 301 suit against the union. Id., at 566. However, the Court held that Clayton's failure to exhaust did not bar his suit against the employer, because the internal appeals procedure could not result in either reinstatement of his job, which was the relief Clayton sought from the employer under § 301, or in reactivation of his grievance. Id., at 569–570.

In No. 80-5049, Clayton argues that his § 301 claim against the UAW and Local 509 should be allowed to proceed despite his failure to exhaust internal union procedures. In No. 80-54, ITT Gilfillan argues that if Clayton's failure to exhaust bars his suit against the union, it must also bar his suit against the employer.

The Courts of Appeals are divided over whether an employee should be required to exhaust internal union appeals procedures before bringing suit against a union or employer under § 301. Some hold that the employee's failure to exhaust internal union procedures may not be asserted as a defense by an employer.[5] Others permit the defense to be asserted by an employer if the internal appeals procedures could result in reactivation of the grievance.[6] With respect to a union, some courts hold that the employee's failure to exhaust is excused if union officials would be so hostile to an employee that he could not hope to obtain a fair hearing.[7] Others would also excuse the employee's failure to exhaust if the substantive relief available through the internal procedures would be less than that available in his § 301 action.[8]

We granted certiorari to resolve the conflict.———U.S.———(1980). We reverse the dismissal of Clayton's suit against the union and affirm the reversal of the dismissal of his suit against the employer. We hold that where an internal union appeals procedure cannot result in reactivation of the employee's grievance or an award of the complete relief sought in his § 301 suit, exhaustion will not be required with respect to either the suit against the employer or the suit against the union.

II

In Republic Steel Corp. v. Maddox, supra, we were asked to decide whether an employee alleging a violation of the collective-bargaining agreement between his union and employer must attempt to exhaust exclusive contractual grievance and arbitration procedures before bringing suit under § 301(a).[9] In deciding that issue we looked to principles of federal common law. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457, 40 LRRM 2113 (1957). Two considerations influenced our decision to require exhaustion. First, Congress had "expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." 379 U.S., at 653.[10] Second, a contrary rule, allowing an employee to bring suit under § 301 without attempting to exhaust the contractual grievance procedures, would "deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." Ibid.[11] The rule established by Republic Steel was thus intended to protect the integrity of the collective-bargaining process and to further that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over the interpretation and application of collective-bargaining agreements. See Hines v. Anchor Motor Freight, Inc., supra, 424 U.S., at 567, 570–571.

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[5] See, e.g., Johnson v General Motors, 641 F.2d 1075, 1083, 106 LRRM 2688 (CA2 1981); Geddes v. Chrysler Corp., 608 F.2d 261, 264, 102 LRRM 2756 (CA6 1979); Petersen v. Rath Packing Co., 461 F.2d 312, 315, 80 LRRM 2833 (CA8 1972); Retana v. Apartment, Motel, Hotel, and El. Op. Union. 453 F.2d 1018, 1027, n.16, 79 LRRM 2272 (CA9 1972).

[6] See, e.g., Varra v. Dillon Companies, Inc., 615 F.2d 1315, 1317–1318, 103 LRRM 2755 (CA10 1980); Baldini v. Local Union No. 1095, 581 F.2d 145, 150, 99 LRRM 2535 (CA7 1978); Winter v. Local Union No. 639, ——— U.S. App. D.C. ———, 569 F.2d 146, 150–151, 97 LRRM 2372 (1977); Harrison v. Chrysler Corp., 558 F.2d 1273, 1278, 95 LRRM 2953 (CA7 1977).

[7] See, e.g., Fizer v. Safeway Stores, Inc., 586 F.2d 182, 183–184, 99 LRRM 3116 (CA10 1978); Winter v. Local Union No. 639, supra. 569 F.2d at 149; Imel v. Zohn Mfg. Co., 481 F.2d 181. 184, 83 LRRM 2797 (CA10 1973), cert. denied. 415 U.S. 915, 85 LRRM 2465 (1974).

[8] See, e.g., Tinsley v. United Parcel Service, Inc., 635 F.2d 1288, 1290, 106 LRRM 2049 (CA2 1980); Geddes v. Chrysler Corp., supra. 6708 F.2d at 264; Baldini v. Local Union No. 1095, supra, 581 F.2d, at 149; Buzzard v. Local Lodge 1040, 480 F.2d 35, 41, 82 LRRM 3130 (CA9 1973). These cases compare the relief available through internal procedures with the relief available *against the union* under § 301.

[9] Section 301(a) of the Labor-Management Relations Act of 1947. 29 U.S.C. § 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in any industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[10] Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

The contractual procedures we required the employee to exhaust in Republic Steel are significantly different from the procedures at issue here. In this case, the Court is asked to require exhaustion of *internal* union procedures. These procedures are wholly a creation of the UAW Constitution. They were not bargained for by the employer and union and are nowhere mentioned in the collective-bargaining agreement that Clayton seeks to have judicially enforced.[12] Nonetheless, Clayton's employer and union contend that exhaustion of the UAW procedures, like exhaustion of contractual and arbitration procedures, will further national labor policy and should be required as a matter of federal common law. Their argument, in brief, is that an exhaustion requirement will enable unions to regulate their internal affairs without undue judicial interference and that it will also promote the broader goal of encouraging private resolution of disputes arising out of a collective-bargaining agreement.

We do not agree that the policy of forestalling judicial interference with internal union affairs is applicable to this case.[13] This policy has been strictly limited to dispute arising over *internal* union matters such as those involving the interpretation and application of a union constitution. As we stated in NLRB v. Marine Workers, 391 U.S. 418, 68 LRRM 2257 (1968), the policy of deferring judicial consideration of internal union matters does not extend to issues "in the public domain and beyond the internal affairs of the union." Id., at 426, n. 8.[14] Here, Clayton's dispute against his union is based upon an alleged breach of the union's duty of fair representation. This allegation raises issues rooted in statutory policies extending far beyond internal union interests. See United Parcel Service, Inc. v. Mitchell, ——— U.S., ———, ———, n. 2. 107 LRRM 2001 (STEWART, J., concurring); Hines v. Anchor Motor Freight, Inc., supra, 424 U.S., at 562; Vaca v. Sipes, supra, 386 U.S., at 182; Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964).

Our analysis, then, focuses on that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements. Concededly, a requirement that aggrieved employees exhaust internal remedies might lead to nonjudicial resolution of some contractual grievances. For example, an employee who exhausts internal union procedures might decide not to pursue his § 301 action in court, either because the union offered him a favorable settlement, or because it demonstrated that his underlying contractual claim was without merit. However, we decline to impose a universal exhaustion requirement lest employees with meritorious § 301 claims be forced to exhaust themselves and their resources by submitting their claims to potentially lengthy internal union procedures that may not be adequate to redress their underlying grievances.

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[11] We also noted that exhaustion would serve the interests of both the union and the employer.

"[It] complements the union's status as exclusive bargaining representative by permitting [the union] to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees." 379 U.S., at 653.

Moreover, exhaustion would not adversely affect the employee:

"[I]t cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." Ibid.

We concluded that since an employee bringing a § 301 claim is asserting rights created by a collective bargaining agreement, he should also be required to pursue the dispute resolution procedures created by that agreement See Hines v. Anchor Motor Freight, Inc., supra, 424 U.S., at 562–563, Vaca v. Sipes, supra, 386 U.S. at 184.

[12] Indeed, the parties concede that Clayton has exhausted the grievance and arbitration procedures that were expressly created by the collective-bargaining agreement.

[13] This policy has its statutory roots in § 101 (a)(4) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(4), which is part of the subchapter of the Act entitled "Bill of Rights of Members of Labor Organizations." Section 101(a)(4) provides:

"No labor organization shall limit the right of any member thereof to institute an action in any court, * * * *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal * * * proceedings against such organizations or any officer thereof * * *."

[14] In NLRB v. Marine Workers, 391 U.S. 418, 68 LRRM 2257 (1968), we held that respondent union could not discipline one of its members for failing to exhaust internal appeals procedures before filing an unfair labor practice charge with the NLRB, because the unfair labor practices charge was "in the public domain and beyond the internal affairs of the union." Id., at 425. "A proceeding by the [NLRB] is not to adjudicate private rights but to effectuate a public policy," and "[a]ny coercion used to discourage, retard, or defeat * * * access [to those proceedings] is beyond the legitimate interests of a labor organization." Id., at 424. Moreover, "[t]here cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member. If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had." Id., at 425. See also 105 Cong. Rec. 17899. 86th Cong., 1st Sess. (1959) (remarks of Sen Kennedy) (§ 101(a)(4) not intended "to eliminate existing grievance procedures established by union constitutions for redress of alleged violations of their *internal governing laws*").

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As we stated in NLRB v. Marine Workers, supra, 391 U.S., at 426, and n. 8, courts have discretion to decide whether to require exhaustion of internal union procedures. In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.

Clayton has not challenged the finding of the lower courts that the UAW internal appeals procedures are fair and reasonable. He concedes that he could have received an impartial hearing on his claim had he exhausted the internal union procedures. See Glover v. St. Louis-San Francisco R. Co., 393 U.S. 324, 330–331, 70 LRRM 2097 (1969). Accordingly, our inquiry turns to the second factor, whether the relief available through the union's internal appeals procedures is adequate.

In his suit under § 301, Clayton seeks reinstatement from his employer and monetary relief from both his employer and his union.[15] Although, the UAW Constitution does not indicate on its face what relief is available through the internal union appeals procedures,[16] the parties have stipulated that the Public Review Board can award backpay in an appropriate case, R.T. 35–36, and the two decisions of the Public Review Board reprinted in the Joint Appendix both resulted in awards of backpay. Jt. App. 89–109. It is clear, then, that at least some monetary relief may be obtained through the internal appeals procedure.[17]

It is equally clear that the union can neither reinstate Clayton in his job, see supra n. 158 nor reactivate his grievance. Article IX of the collective-bargaining agreement between Local 509 and ITT Gilfillan provides that the union may obtain arbitration of a grievance only if it gives "notice * * * to the Company in writing within fifteen (15) working days after the date of the Company's decision at Step 3 of the Grievance Procedure." By the time Clayton learned of his union's decision not to pursue the grievance to arbitration, this 15-day time limit had expired. See supra n. 2. Accordingly, the union could not have demanded arbitration even if the internal appeal had shown Clayton's claim to be meritorious. The union was bound by its earlier decision not to pursue Clayton's grievance past the third stage of the grievance and arbitration procedure.[18] For the reasons that

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[15] Jt. App. 8–9. Reinstatement is available only from the employer, because the union has no power to order reinstatement under the collective-bargaining agreement. Damages, however, can be assessed against both the employer and the union. As we stated in Vaca v. Sipes, supra, 386 U.S., at 197–198, an employee who establishes that the union breached its duty of fair representation in processing his grievance, and that the employer breached the collective-bargaining agreement, may be entitled to an award of damages.

"apportion[ed] * * * between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer."

[16] The UAW Constitution states only that the Constitutional Convention Appeals Committee has "the authority to consider and decide all appeals submitted to it," Art. 33, § 8, and that the Public Review Board has the "authority and duty to make final and binding decisions on all cases appealed to it." Art. 32, § 3(a), and to "dispose of all facets of the appeal." Art. 33, § 11.

[17] The record does not indicate whether this monetary relief includes backpay only, or whether is also may include prospective monetary relief incidental or punitive damages, relief that Clayton is apparently seeking in his § 301 action. See Jt. App. 9.

[18] The parties stipulated at trial that once Local 509 withdrew its request for arbitration, that "was the end of the road so far as remedies under the contract were concerned." R.T. 109; see also R.T. 260, 268. That stipulation is consistent with the collective-bargaining agreement. Although Art. VIII, which establishes time limits for processing *grievances*, states that "[t]he time limits contained herein may be extended by

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follow, we conclude that these restrictions on the relief available through the internal UAW procedures render those procedures inadequate.[19]

Where internal union appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would advance the national labor policy of encouraging private resolution of contractual labor disputes. In such cases, the internal union procedures are capable of fully resolving meritorious claims short of the judicial forum. Thus, if the employee received the full relief he requested through internal procedures, his § 301 action would become moot, and he would not be entitled to a judicial hearing. Similarly, if the employee obtained reactivation of his grievance through internal union procedures, the policies underlying Republic Steel would come into play,[20] and the employee would be required to submit his claim to the collectively-bargained dispute-resolution procedures.[21] In either case, exhaustion of internal remedies could result in final resolution of the employee's contractual grievance through private rather than judicial avenues.

By contrast, where an aggrieved employee cannot obtain either the substantive relief he seeks or reactivation of his grievance, national labor policy would not be served by requiring exhaustion of internal remedies. In such cases, exhaustion would be a useless gesture: it would delay judicial consideration of the employee's § 301 action, but would not eliminate it.[22] The employee would still be required to pursue judicial means to obtain the relief he seeks under § 301. Moreover, exhaustion would not lead to significant savings in judicial resources, because regardless of the outcome of the internal appeal, the employee would be required to prove *de novo* in his § 301 suit that the union breached its duty of fair representation and that the employer breached the collective-bargaining agreement.[23] As we recently stated, one of the important federal policies underlying § 301 is the "relatively rapid dispostion of labor disputes." United Parcel Service, Inc, v. Mitchell, supra, ——— U.S., at ———, quoting United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 707, 61 LRRM 2545 (1966). This policy is undermined by an exhaustion requirement unless the internal procedures are capable of either reactivating the employee's grievance or of redressing it.[24]

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mutual agreement in writing by the parties concerned," there is no comparable waiver provision in Art. IX, which establishes the 15-day time limit for requesting *arbitration*. See also Tinsley v. United Parcel Services, Inc., supra, 635 F.2d, at 1292; Baldini v. Local Union No 1095, supra, 581 F.2d, at 150; Harrison v. Chrysler Corp., supra, 558 F.2d, at 1279.

Although most collective-bargaining agreements contain similarly strict time limits for seeking arbitration of grievances, there are some exceptions. The UAW informs us that "[s]ome employers and unions have, through collective bargaining, agreed to allow the reinstatement of withdrawn grievances where a union tribunal reverses the union's initial decision. This is true, for example, in the current UAW contracts with the major automobile and agricultural implement manufacturers." UAW Brief 18, n. 40. In such cases, the relief available through the union's internal appeal procedures would presumably be adequate.

[19] Accordingly, we need not discuss the third factor, whether exhaustion of the union's otherwise adequate internal appeals procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

[20] Allowing a defendant in a § 301 action to demand exhaustion of internal union procedures when those procedures could lead to reactivation of a stalled grievance is wholly consistent with Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965). In Republic Steel, we held that an employer may rely on a provision in a collective-bargaining agreement requiring its employees to submit all contractual grievances to arbitration prior to bringing suit under § 301. If a provision in the collective-bargaining agreement also permits reactivation of a grievance after an internal union appeal, an employer or union should also be able to rely on that provision and thus defend the § 301 suit on the ground that the employee failed to exhaust internal union procedures.

[21] In addition, by reactivating the grievance, the union might be able to rectify the very wrong of which the employee complains—a breach of the duty of fair representation caused by the union's refusal to seek arbitration—and the employee would then be unable to satisfy the precondition to a § 301 suit against the employer.

[22] Of course exhaustion might deplete the employee's energy and resources to the point where he chooses not to pursue his § 301 claim in court, but that result is surely inconsistent with federal policy.

[23] Even if the union admitted during the internal appeals procedure that it had breached its duty of fair representation, an admission the UAW has apparently made only once in the 20 years preceding 1977, see Klein, "Enforcement of the Right to Fair Representation: Alternative Forums," in The Duty of Fair Representation 103 (1977), the employee would still not be saved the time and expense of proving that breach in his § 301 suit. While a union's admission that it breached its duty of fair representation is certainly evidence a court can consider, an employer defending a § 301 suit would still be entitled to prove that no such breach had occurred. See Vaca v. Sipes, supra, 386 U.S., at 186–187.

[24] We are also not persuaded by the Court of Appeals' assumption that exhaustion would narrow and focus the issues for ultimate judicial determination. The Court of Appeals stated:

"The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But *the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now.*" 623 F.2d, at 566 (emphasis added).

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In reliance upon the Court of Appeals' opinion in this case, the UAW contends that even if exhaustion is not required with respect to the employer, it should be required with respect to the union, because the relief Clayton seeks *against the union* in his § 301 suit is available through internal union procedures. But cf. supra, n. 17. We disagree. While this argument might have force where the employee has chosen to bring his § 301 suit only against the union, the defense should not be available where, as here, the employee has filed suit against both the union and the employer. A trial court requiring exhaustion with respect to the suit against the union, but not with respect to the suit against the employer, would be faced with two undesirable alternatives. If it stayed the action against the employer pending resolution of the internal appeals procedures, it would effectively be requiring exhaustion with respect to the suit against the employer, a result we have held would violate national labor policy. Yet if it permitted the action against the employer to proceed, and tolled the running of the statute of limitation in the suit against the union until the internal procedures had been exhausted, it could very well find itself with two separate § 301 suits, based on the same facts, proceeding at different paces in its courtroom. As we suggested in Vaca v. Sipes, supra, 386 U.S. at 197, this is a result that should be avoided if possible. The preferable approach is for the court to permit the employee's § 301 action to proceed against both defendants, despite the employee's failure to exhaust, unless the internal union procedures can reactivate the grievance or grant the relief that would be available in the employee's § 301 suit against both defendants.

III

In contrast to contractual grievance and arbitration procedures, which are negotiated by the parties to a collective-bargaining agreement and are generally designed to provide an exclusive method for resolving disputes arising under that agreement, internal union appeals procedures are created by the union constitution and are designed to settle disputes between an employee and his union that arise under that constitution. Because of this distinction, the policies underlying Republic Steel, encouraging private resolution of grievances arising out of the collective-bargaining process, are not directly applicable to the issue whether to require exhaustion of internal union procedures.

We conclude that the policies underlying Republic Steel are furthered by an exhaustion requirement only where the internal union appeals procedures can either grant the aggrieved employee full relief or reactivate his grievance. For only in those circumstances is there a reasonable possibility that the employee's claim will be privately resolved. If the internal procedures are not adequate to effect that relief, the employee should not be required to expend time and resources seeking a necessarily incomplete resolution of his claim prior to pursuing judicial relief. If the internal procedures are inadequate, the employee's failure to exhaust should be excused, and he should be permitted to pursue his claim for breach of the duty of fair respresentation and breach of the collective-bargaining agreement in court under § 301.

There are three reasons why we are not persuaded by this analysis. First, the record *does* indicate why the union withdrew its request for arbitration of Clayton's grievance. The letter from Local 509's International Representative to Clayton, informing him that the union had withdrawn its request for arbitration, listed five reasons in support of the union's decision. See supra n. 2. Second, since the UAW Constitution does not on its face require any of the decisionmaking panels of the union to explain the reasons underlying their disposition of an employee's internal union appeal, there is no guarantee that exhaustion will result in a useful interpretation of union rules. Third, in many cases the union tribunal is not permitted to consider certain allegations the employee could assert under § 301. In this case, for example, Clayton alleges that the union "acted *arbitrarily* * * * and discriminatorily" in refusing to seek arbitration of his grievance. Jt App. 6 (emphasis added). The UAW constitution, however, states that the Public Review Board can only consider allegations that the employee's grievance "was improperly handled [by the union] because of fraud, discrimination, or collusion with management." Art. 33, § 8(b) (emphasis added). This standard offers the aggrieved employee less protection than the "arbitrary, discriminatory or in bad faith" standard for breach of the duty of fair representation that we developed in Vaca v. Sipes, supra, at 190. As the General Counsel to the Public Review Board has stated:

> "The UAW acknowledges that it has a duty of fair representation to its members. Moreover, it acknowleges that its members may assert a claim for a breach of the duty of fair representation within the system of internal remedies. It does not concede to its members, however, that arbitrary, perfunctory, or negligent conduct amounts to a breach of the duty of fair representation, nor does it permit them even to assert this type of claim before the PRB, since the standard of review is jurisdictional. That is, unless the requisite claim is made (fraud, discrimination, or collusion) the board may not entertain it." Klein, "Enforcement of the Right of Fair Representation: Alternative Forums," supra, at 99.

See also Johnson v. General Motors, supra, 641 F.2d, at ——. Of course, if an allegation cannot be considered by the Public Review Board, no record helpful to a court will be made with respect to that issue. In sum, we conclude that the prospect that exhaustion would create a record helpful to a court in a subsequent § 301 action is too speculative to be given much weight.

In this case, the internal union appeals panels cannot reactivate Clayton's grievance and cannot grant Clayton the reinstatement relief he seeks under § 301. We therefore hold that Clayton should not have been required to exhaust internal union appeals procedures prior to bringing suit against his union and employer under § 301.

AFFIRMED IN PART, REVERSED IN PART.

JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

I join Justice REHNQUIST's dissent, and write briefly to emphasize a rationale—suggested by an *amicus curiae**—that is consistent both with national labor policy and the relevant precedents.

In briefest summary, I would hold that in the circumstances of this case no issue concerning the breach of the union's statutory duty of fair representation properly can be said to arise *at*

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all. The union has not made a final determination whether to pursue arbitration on Clayton's behalf. Clayton should not be able to claim a breach of duty by the union until the union has had a full opportunity to make this determination. No such opportunity exists until Clayton exhausts the procedures available for resolving that question. Thus, as Clayton cannot claim a breach of duty by the union, he cannot bring a breach of contract suit under § 301 against his employer.

In my view, the asserted distinction in a tripartite case such as this one between contractual and internal union remedies, ante, at 7, is immaterial. The situation presented in this case is well within the doctrine, underlying Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965), that employees must pursue all procedures established for determining whether a union will go forward with a grievance. Employees must pursue available procedures even if the collective-bargaining agreement contains time limits that appear on their face to bar revival of the grievance. As the Court noted in John Wiley & Sons v. Livingston, 376 U.S. 543, 556, 55 LRRM 2769 (1964), "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." Therefore, "it best accords with the usual purposes of an arbitration clause and with the policy behind federal labor law to regard procedural disagreements not as separate disputes but as aspects of the dispute which called the grievance procedures into play." Id., at 599. Thus, the question whether such time limits should be waived in a particular case is itself an arbitrable matter.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL join, dissenting.

The Court of Appeals for the Ninth Circuit held that the defense of exhaustion of internal union remedies was available to the union defendant in this § 301 action but not to the employer defendant. The result of this ruling was to put the employer in the unenviable position of having to defend the manner in which the union represented one of its employees (Clayton) during a grievance procedure. The Court's opinion today rights what I view as the principal error in the decision below by requiring the actions against the employer and union to proceed simultaneously. Ante, at 14. The Court reaches this conclusion by holding that in this particular case the exhaustion defense should not be available to either the union or employer. I, however, view differently than does the Court the benefits to be obtained from requiring exhaustion in this case, and would require Clayton to exhaust his intraunion remedies before proceeding against either his union or employer.

The court does not require exhaustion of internal union remedies in this case because it finds the remedies cannot provide Clayton with all the substantive relief he seeks (i.e., money damages *and* reinstatement) or with reactivation of his grievance. Ante, at 12. The Court, however, concedes that where the internal remedies can provide such relief, the exhaustion defense should be available to the employer and union alike. Id., at 12, and n. 20. Presumably, this would require exhaustion in a § 301 case where the only relief sought was money damages and money damages were obtainable through the internal union procedures. In such a case, the employee would be able to obtain all "the substantive relief he seeks." Ibid.

The Court creates a three prong test for determining when a district court shoud exercise its discretion and require exhaustion of intraunion remedies. Ante at 9. Admittedly, a district court when exercising this discretion should carefully consider the first criterion referred to by the Court—whether union officials are so hostile to the employee that he could not obtain a fair hearing on his claim. Ibid. However, there is no question that this criterion does not come into play in this case. Ante. at 9.

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*Brief for the American Federation of Labor and Congress of Industrial Organizations. 3–4, 5–14.

The second prong of the Court's test is "whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301 * * *." Ibid. Exhaustion is not required in this case, the Court says, because the UAW's internal union appeals procedures cannot provide Clayton with reinstatement or reactivation of his grievance.

However, no prior case of this Court has held that exhaustion should not be required unless the internal union remedies can provide all the substantive relief requested or reactivation of the grievance. The principal difficulty with the Court's opinion lies in its framing of this second criterion which reflects much too narrow a view of the purposes of the exhaustion defense and the benefits which will likely result from requiring exhaustion in a case where a union has established a means for reviewing the manner in which it has represented an employee during a grievance. It is

worth noting that neither NLRB v. Marine Workers, 391 U.S. 418, 68 LRRM 2257 (1968), on which the Court so heavily relies, nor any other case of this Court, supports the language used by the Court in the second prong of its test. In fact, Marine Workers simply states exhaustion should not be required "when the administrative remedies are inadequate." Id., at 426, n. 8. Our focus therefore should be on the adequacies of the union remedies when viewed in the context of the underlying purpose of the exhaustion defense—which is, to encourage private rather than judicial resolution of disputes.

The exhaustion of intraunion remedies, even where those remedies cannot provide reinstatement or reactivation of a grievance, does promote private resolution of labor disputes. Resort to the intraunion appeals procedures provides the union with its first opportunity to focus on the issue of fair representation—as opposed to the alleged breach of the collective-bargaining agreement. Resort to the union appeals procedures gives the union an opportunity to satisfy the employee that its decision not to pursue a grievance was correct. If successful on this score, litigation is averted. Where a union determines through its appeals procedure that it mishandled an employee's grievance, litigation may also be averted because at that point both the union and the employer have a strong incentive to pursue private resolution of the grievance. Even where a collective-bargaining agreement does not provide for reactivation of a grievance, it is reasonable to assume that many employers, when confronted with both a determination by a union that it had breached its duty of fair representation and the immediate prospect of an employee commencing litigation, would seriously consider voluntarily reactivating the grievance procedure to avoid the additional burden and costs of litigation. Should litigation nonetheless occur, exhaustion may well have narrowed the factual and legal issues to be decided and thus result in a savings of judicial resources. A fact that should also not be discounted is that the conscientious handling by a union of an employee's intraunion appeal cannot help but enhance the union's prestige with its employees. Cf. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 58 LRRM 2193 (1965). Exhaustion promotes union democracy and self-government as well as the broader policy of non-interference with internal union affairs. A union's incentive to maintain internal procedures which provide substantial procedural protection and which can afford significant substantive relief will be greatly undermined if an employee can simply bypass the procedures at will.

The error in the Court's analysis results in part from its apparent belief that intraunion remedies must provide a complete substitute for either the courts or the contract grievance procedure in order to be deemed "adequate." The purpose of intraunion remedies, however, is quite different. These remedies are provided to facilitate or encourage the private resolution of disputes, not to be a complete substitute for the courts. Intraunion remedies can serve this purpose so long as they have the capacity to address whether the union wrongfully handled the grievance. Obviously, if a union appeals procedure cannot address this question, exhaustion should not be required.

An additional question which is also of great importance is whether a union should ever be found to have breached its duty of fair representation when a union member shuns an appeals procedure which is both mandated by the union constitution and established for the purpose of allowing the union to satisfy its duty of fair representation. It seems to me not at all unreasonable to say that a union should have the right to require its members to give it the first opportunity to correct its own mistakes. Responsible union self-government demands a fair opportunity to function. This is especially true in a situation such as here where exhaustion of the union remedies could eliminate the need to litigate altogether. Congress has recognized the importance of these values in § 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4). This section provides in part:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or any proceeding before any administrative agency * * *. *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * *."

In § 101(a)(4), Congress has restricted the power of unions to limit the rights of their members to resort to the courts. At the same time, however, Congress gave the judiciary the discretion to require union members to exhaust hearing procedures. As this Court explained in Marine Workers, the language in § 101(a)(4) is:

> "* * * a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency." 391 U.S., at 426.

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Section 101(a)(4) reflects what I believe to be the reasonable compromise Congress reached when trying to balance two somewhat competing interests—furtherance of the national labor policy in favor of private resolution of disputes on the one hand and the desire not to unduly burden or "exhaust" an individual employee with time-consuming procedures on the other. It is fair to say that § 104(a)(4) represents Congress' judgment that limiting access to the courts for at least 4 months is not an unreasonable price to pay in exchange for the previously mentioned benefits exhaustion may provide.

The language of § 104(a)(4) also goes a long way to satisfy the third prong of the test set forth by the Court today. Exhaustion of internal union procedures should not be required where such would unreasonably delay an employee's opportunity to obtain a judicial hearing on the merits of his claim. Ante, at 9. Intraunion procedures which take years to complete serve no worthwhile purpose in the overall scheme of promoting the prompt and private resolution of claims. But a requirement that an employee not be permitted to go to court without first having pursued an intraunion appeal for at least 4 months does substantially further this national labor policy without placing any unfair burden on an employee. As such, I think all interested parties would be well served by a requirement that employees exhaust their intraunion procedures for this limited period of time prescribed by Congress.

H.A. Artists & Associates, Inc. v. Actors' Equity Assn., et al.

107 LRRM 2394, May 26, 1981—622 F.2d 647

On certiorari to 2d Cir.

Before BURGER, Chief Justice, and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, Justices

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JUSTICE STEWART delivered the opinion of the Court: The respondent, Actors' Equity Association (Equity), is a union representing the vast majority of stage actors and actresses in the United States. It enters into collective-bargaining agreements with theatrical producers that specify minimum wages and other terms and conditions of employment for those whom it represents. The petitioners are independent theatrical agents who place actors and actresses in jobs with producers. The Court of Appeals for the Second Circuit held that the respondents' [1] system of regulation of theatrical agents is immune from antitrust liability by reason of the statutory labor exemption from the antitrust laws, *H.A. Artists & Associates, Inc. v. Actors' Equity Assn.*, 622 F.2d 647, 104 LRRM 2801.[2] We granted certiorari to consider the availability of that exemption in the circumstances presented by this case. —— U.S. ——.

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[1] The respondent Donald Grody is the Executive Secretary of Equity.

I

A

Equity is a national union that has represented stage actors and actresses since early in this century. Currently representing approximately 23,000 actors and actresses, it has collective-bargaining agreements with virtually all major theatrical producers in New York City, on and off-Broadway, and with most other theatrical producers throughout the United States. The terms negotiated with producers are the minimum conditions of employment (called "scale"); an actor or actress is free to negotiate wages or terms more favorable than the collectively bargaining minima.

Theatrical agents are independent contractors who negotiate contracts and solicit employment for their clients. The agents do not participate in the negotiation of collective-bargaining agreements between Equity and the theatrical producers. If an agent succeeds in obtaining employment for a client, he receives a commission based on a percentage of the client's earnings. Agents who operate in New York City must be licensed as employment agencies and are regulated by the New York City Department of Consumer Affairs pursuant to New York law, which provides that the maximum commission a theatrical agent may charge his client is 10% of the client's compensation.

In 1928, concerned with the high unemployment rates in the legitimate theater and the vulnerability of actors and actresses to abuses by theatrical agents,[3] including the extraction of high commissions that tended to undermine collectively bargained rates of compensation, Equity unilaterally established a licensing system for the regulation of agents. The regulations permitted Equity members to deal only with those agents who obtained Equity licenses and thereby agreed to meet the conditions of representation prescribed by Equity. Those members who dealt with nonlicensed agents were subject to union discipline.

The system established by the Equity regulations was immediately challenged.[4] In Edelstein v. Gillmore, 35 F.2d 723, the Court of Appeals for the Second Circuit concluded that the regulations were a lawful effort to improve the employment conditions of Equity members. In an opinion written by Judge Swan and joined by Judge Augustus N. Hand,[5] the court said:

"The evils of unregulated employment agencies (using this term broadly to include also the personal representative) are set forth in the defendants' affidavits and are corroborated by common knowledge * * *. Hence the requirement that, as a condition to writing new business with Equity's members, old contracts with its members must be made to conform to the new standards, does not seem to us to justify an inference that the primary purpose of the requirement is infliction of injury upon plaintiff, and other personal representatives in a similar situation, rather than the protection of the supposed interests of Equity's members. *The terms they insist upon are calculated to secure from personal representatives better and more impartial services, at uniform and cheaper rates, and to improve conditions of employment of actors by theater managers.* Undoubtedly the defendants intend to compel the plaintiff to give up rights under existing contracts which do not conform to the new standards set up by Equity, but, as already indicated *their motive in so doing is to benefit themselves and their fellow actors in the economic struggle.* The financial loss to plaintiff is incidental to this purpose." 35 F.2d at 726 (emphasis added).[6]

The essential elements of Equity's regulation of theatrical agents have remained unchanged since 1928.[7] A member of Equity is prohibited, on pain

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[2] The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 amd 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113.

[3] Such vulnerability was, and still remains, particularly acute for actors and actresses without established professional reputations, who have always comprised the overwhelming majority of Equity's members.

[4] The challenge was grounded on allegations of common law tortious interference with business relationships.

[5] Judge Manton dissented without opinion.

[6] For contemporary descriptions of agent abuses of actors and actresses, see generally A. Harding, The Revolt of the Actors (1929). See also "New Rules for Actors," New York Times, September 24 1928, at 20, col. 3: The New Republic, October 24, 1928, at 263 Cf. Ribnik v. McBride, 277 U.S. 350, 359–375 (Stone, Holmes, and Brandeis, JJ., dissenting) (general abuses by employment agencies, particularly at times of widespread unemployment). The Court's decision in Ribnik v. McBride was overruled unanimously in Olsen v. Nebraska, 313 U.S. 236.

[7] The petitioners do not dispute this. The regulations have undergone revision in some details, largely as a result of negotiations between Equity and Theatrical Artists Representatives Associates (TARA), which until shortly before this litigation began was the only association voicing

Continued

of union discipline, from using an agent who has not, through the mechanism of obtaining an Equity license (called a "franchise") agreed to comply with the regulations. The most important of the regulations requires that a licensed agent must renounce any right to take a commission on an employment contract under which an actor or actress receives scale wages.[8] To the extent a contract includes provisions under which an actor or actress will sometimes receive scale pay—for rehearsals or "chorus" employment, for example—and sometimes more, the regulations deny the agent any commission on the scale portions of the contract. Licensed agents are also precluded from taking commissions on out-of-town expense money paid to their clients. Moreover, commissions are limited on wages within 10% of scale pay,[9] and an agent must allow his client to terminate a representation contract if the agent is not successful in procuring employment within a specified period.[10] Finally, agents are required to pay franchise fees to Equity. The fee is $200 for the initial franchise, $60 a year thereafter for each agent, and $40 for any subagent working in the office of another. These fees are deposited by Equity in its general treasury and are not segregated from other union funds.

In 1977, after a dispute between Equity and Theatrical Artists Representatives Associates (TARA)—a trade association representing theatrical agents, see n. 7, supra—a group of agents, including the petitioners, resigned from TARA because of TARA's decision to abide by Equity's regulations. These agents also informed Equity that they would not accept Equity's regulations, or apply for franchises. The petitioners instituted this lawsuit in May 1978, contending that Equity's regulations of theatrical agents violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

B

The District Court found, after a bench trial, that Equity's creation and maintenance of the agency franchise system were fully protected by the statutory labor exemptions from the antitrust laws, and accordingly dismissed the petitioners' complaint. H.A. Artists & Associates Inc. v. Actors' Equity Assn., 478 F.Supp. 496, 104 LRRM 2794 (SDNY). Among its factual conclusions, the trial court found that in the theatrical industry, agents play a critical role in securing employment for actors and actresses:

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> "As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously condsidered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audition for his client.
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> * * * * *
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> Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment." 478 F.Supp., at 497, 502.

The court also found "no evidence to suggest the existence of any conspiracy between Actors' Equity and TARA or between Actors' Equity and

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the concerns of agents with regard to their representation of Equity members. Until their voluntary resignation in late 1977, most of the petitioners were members of TARA. The petitioners are now members of the National Association of Talent Representatives (NATR). Unlike TARA, which functions only in the legitimate theater field, NATR also functions in the field of motion pictures and television. In those fields, agents operate under closely analogous agent regulations maintained by the Screen Actors Guild and the American Federation of Television and Radio Artists.

The history of the negotiations and disputes between Equity and TARA are described in the opinion of the District Court in the present case H.A. Artists & Associates, Inc. v. Actors' Equity Assn., 478 F.Supp. 496, 498, 104 LRRM 2794 (SDNY).

[8] The minimum, or "scale" wage varies. In August 1977, for example, the minimum weekly salary was $335 for Broadway performances, and $175 for performances off-Broadway. Scale wages are set by a collective-bargaining agreement between Equity and the producers, to which the agents are not parties. When an agent represents an actor or actress whose professional reputation is not sufficient to demand a salary higher than scale, the agent hopes to develop a relationship that will become continually more remunerative as the performer's professional reputation grows, and with it the power to demand an ever higher salary. No agent is required to represent an actor or actress whom he does not wish to represent.

[9] It is Equity's view that commissions in the industry are not necessarily related to efforts by the agents, and that an agent often functions as little more than an "order taker," who is able to collect a percentage of a client's wages for the duration of a show for doing little more than answering a producer's telephone call. Indeed, an agent may collect a commission on the salary of an actor or actress he represents even if the client obtains the job without the agent.

[10] Equity argues that this restriction is necessary because there is an incentive for agents to represent as many actors and actresses as possible and not necessarily to serve them all well—because an agent receives a commission whenever his client is employed at a salary higher than scale, regardless of the extent of his involvement in obtaining employment for the client.

Producers," and concluded that "[t]he Actors Equity franchising system was employed by Actors Equity for the purpose of protecting the wages and working conditions of its members." Id., at 499.

The Court of Appeals unanimously affirmed the judgment of the District Court. It determined that the threshold issue was, under United States v. Hutcheson, 312 U.S. 219. 232, 7 LRRM 267, whether Equity's franchising system involved any combination between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." 622 F.2d 647, 648–649, 104 LRRM 2801. If it did, the court reasoned, the protection of the statutory labor exemption would not apply.

First, the Court of Appeals held that the District Court had not been clearly erroneous in finding no agreement, explicit or tacit, between Equity and the producers to establish or police the franchising system. Ibid. Next, the court turned to the relationship between the union and those agents who had agreed to become franchised, in order to determine whether those agreements would divest Equity's system of agency regulation of the statutory exemption. Relying on American Federation of Musicians v. Carroll, 391 U.S. 99, 68 LRRM 2230, the court concluded that the agents were themselves a "labor group," because of their substantial "economic inter-relationshp" with Equity, under which "the union could not eliminate wage competion among its members without regulation of the fees of the agents." 622 F.2d, at 650, 651. Accordingly, since the elimination of wage competition is plainly within the area of a union's legitimate self-interest, the court concluded that the exemption was applicable.[11]

After deciding that the central feature of Equity's franchising system—the union's exaction of an agreement by agents not to charge commission on certain types of work—was immune from antitrust to challenge, the Court of Appeals turned to the petitioner's challenge of the franchise fees exacted from agents, Equity had argued that the fees were necessary to meet its expenses in administering the franchise system, but no evidence was presented at trial to show that the costs justified the fees actually levied. The Court of Appeals suggested that if the exactions exceeded the true costs, they could not legally be collected, as such exactions would be unconnected with any of the goals of national labor policy that justify the labor antitrust exemption. Despite the lack of any cost evidence at trial, however, the appellate court reasoned that the fees were sufficiently low that a remand to the District Court on this point "would not serve any useful purpose." 622 F.2d, at 651.

II

A

Labor unions are lawful combinations what serve the collective interests of workers, but they also possess the power to control the character of competition in an industry. Accordingly, there is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment.[12] In the years immediately following passage of the Sherman Act, courts enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed "socially or economically harmful." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485 (Brandeis, J., dissenting).[13] In response to these practices, Congress acted, first in the Clayton Act, 38 Stat. 731, and later in the Norris-LaGuardia Act, 47 Stat. 70, to immunize labor unions and labor disputes from challenge under the Sherman Act.

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Section 6 of the Clayton Act, 15 U.S.C. § 17, declares, that human labor "is not a commodity or article of commerce," and immunizes from antitrust liability labor organizations and their members "lawfully carrying out" their "legitimate objectives." Section 20 of the Act prohibits injunctions against specified employee activities, such as strikes and boycotts, that are undertaken in the employees' self-interest and that occur in the course of disputes

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[11] The Court of Appeals recognized that even if there had been an agreement between Equity and a "non-labor group," the agreement might still have been protected from the antitrust laws under the "non-statutory" exemption. 622 F.2d, at 649, n. 1. See Connell Construction Co. v., Plumbers Local 100, 421, U.S. 616, 622, 89 LRRM 2401. See n. 19, infra.

[12] See generally Meltzer, Labor Unions, Collective Bargaining and the Antitrust Law, 32 U. Chi. L. Rev. 655 (1965); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14 (1963). See also Leslie. Principles of Labor Antiturst. 66 VA. L. Rev. 1183 (1980).

[13] See Winter, supra n. 12, at 30–38.

"concerning terms or conditions of employment," and states that none of the specified acts can be "held to be [a] violation * * * of any law of the United States." 29 U.S.C. § 52. This protection is re-emphasized and expanded in the Norris-LaGuardia Act, which prohibits federal court injunctions against single or organized employees engaged in enumerated activities,[14] and specifically forbids such injunction notwithstanding the claim of an unlawful combination or conspiracy. While the Norris-LaGuardia Act's bar of federal court labor injuctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes.[15]

In United States v. Hutcheson, 312 U.S. 219, 7 LRRM 267, the Court held that labor unions acting in their self-interest and not in combination with non-labor groups enjoy a statutory exemption from Sherman Act liability. After describing the congressional responses to judicial interference in union activity, id., at 229–230, the Court declared that

> "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgement regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activites are the means," Id., at 232 (footnote omitted).

The Court explained that this exemption derives not only from the Clayton Act, but also from the Norris-LaGuardia Act, particularly its definition of a "labor dispute," see n. 14, supra, in which Congress "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act." 312 U.S., at 236. Thus under Hutcheson, no federal injunction may issue over a "labor dispute," and "§ 20 [of the Clayton Act] removes all such allowable conduct from the taint of being a 'violation of any law of the United States' including the Sherman Act." Ibid.[16]

The statutory exemption does not apply when a union combines with a "non-labor group." Hutcheson, 312 U.S. at 232. Accordingly, antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade. In Allen Bradley v. Electrical Workers, 325 U.S. 797, 16 LRRM 798, for example, the Court held that a union had violated the Sherman Act when it combined with manufacturers and contractors to erect a sheltered local business market in order "to bar all other businessmen from [the market], and to charge the public prices above a competitive level." Id., at 809.[17] The Court indicated that the union efforts would, standing alone, be exempt from antitrust liability, ibid., but because the union had not acted unilaterally, the exemption was denied.[18] Congress "intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." Id., at 811.[19]

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[14] As is true under the Clayton Act, the specified activities are protected only in the context of a labor dispute. The Norris-LaGuardia Act defines a labor dispute to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating fixing maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. 29 U.S.C. § 113.

[15] In Milk Wagon Drivers' Union v. Lake Valley Farm Prod., 311 U.S. 91 103. 7 LRRM 276, the Court stated: "For us to hold, in [the face of the Norris-LaGuardia Act], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act involved would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress."

[16] See also Apex Hosiery Co. v. Leader. 310 U.S. 469.6 LRRM 647. There, in the Term preceding that in which the Hutcheson case was decided, the Court reasoned that the Sherman Act prohibits only restraints on "commercial competition," id., at 497, 499, 510–511—or those market restraints designed to monopolize supply, control prices, or allocate product distribution—and that unions are not liable where they merely further their own goals in the labor market.

[17] In Hunt v. Crumboch, 325 U.S. 821. 16 LRRM 808, decided the same day as Allen Bradley, the Court ruled that the labor exemption protected a union's boycott of a truck hauler through successful secondary pressure on purchasers of the hauler's services with whom the union had contracts, because of the absence of union participation in a conspiracy with the hauler's competitors. See 325 U.S. at 824: Meltzer, supra n. 12. at 677. and n. 74.

[18] United Mine Workers v. Pennington, 381 U.S. 657. 59 LRRM 2369, also dealt with a union combination with employers, but the grounds of decision were unrelated to the antitrust exemption.

[19] Even where there are union agreements with nonlabor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory" exemption to shield such agreements if they are intimately related to the union's vital concerns of wages, hours and working conditions. See, e.g., Meat Cutters v. Jewel Tea, 381 U.S. 675, 59 LRRM 2376. This nonstatutory exemption was described as follows in Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 622, 89 LRRM 2401:

> "The Court has recognized * * * that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business

Continued

B

The Court of Appeals properly recognized that the threshold issue was to determine whether or not Equity's franchising of agents involved any combination between Equity and any "non-labor groups," or persons who are not "parties to a labor dispute." 622 F.2d at 649 (quoting Hutcheson, 312 U.S., at 232).[20] And the court's conclusion that the trial court had not been clearly erroneous in its finding that there was no combination between Equity and the theatrical producers [21] to create or maintain the franchise system is amply supported by the record.

The more difficult problem is whether the combination between Equity and the agents who agreed to become franchised was a combination with a "non-labor group." The answer to this question is best understood in light of American Federation of Musicians v. Carroll, 391 U.S. 99, 68 LRRM 2230. There, four orchestra leaders, members of the American Federation of Musicians, brought an action based on the Sherman Act challenging the union's unilateral system of regulating "club dates," or one-time musical engagements. These regulations, *inter alia* enforced a closed shop; required orchestra leaders to engage a minimum number of "sidemen," or instrumentalists; prescribed minimum prices for local engagements;[22] prescribed higher minimum prices for traveling orchestras; and permitted leaders to deal only with booking agents licensed by the union.

Without disturbing the finding of the Court of Appeals that the orchestra leaders were employers and independent contractors, the Court concluded that they were nonetheless a "labor group" and parties to a "labor dispute" within the meaning of the Norris-LaGuardia Act, and thus that their involvement in the union regulatory scheme was not an unlawful combination between "labor" and "non-labor" groups. The Court agreed with the trial court that the applicable test was whether there was "job or wage competition or some other economic interrelationship allecting legitimate union interests between the union members and the independent contractors." 391 U.S., at 106.

The Court also upheld the restrictions on booking agents, who were *not* involved in job or wage competition with union members. Accordingly, these restrictions had to meet the "other economic interrelationship" branch of the disjunctive test quoted above. And the test was met because those restrictions were "at least as intimately bound up with the subject of wages '* * * as the price floors.' " Id., at 113. The Court noted that the booking agent restrictions had been adopted, in part, because agents had "charged exorbitant fees, and booked engagements for musicians at wages * * * below union scale."[23]

C

The restrictions challenged by the petitioners in this case are very similar to the agent restriction upheld in the Carroll case.[24] The essential features

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markets requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions * * *.

"The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on the differences in wages and working conditions." (Citation omitted.)

Neither the District Court nor the Court of Appeals in this case decided whether the nonstatutory exemption would independently shield the respondent from the petitioners antitrust claims. See n. 11, supra.

[20] Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization and not an independent contractor or entrepreneur. See Los Angeles Meat Division Local 626 v. United States 371 U.S. 94, 51 LRRM 2448; Columbia River Packers Assn. v. Hinton 315 U.S. 143, 9 LRRM 403. See generally 1 Areeda & Turner, Antitrust (1978) § 229c, at 195–198. There is no dispute about Equity's status as a bona fide labor orgnization.

[21] As the employers of Equity's members, producers are plainly a "non-labor group." Employers almost always will be a "non-labor group," although an exception has been recognized, for example, when the employer himself is in job competition with his employees. See American Federation of Musicians v. Carroll, 391 U.S. 99, 68 LRRM 2230 (orchestra leaders who both lead an orchestra and play an instrument).

[22] These consisted of a minimum scale for sidemen, a "leader's fee," which was twice the sidemen's scale in orchestras of at least four, and an additional 8% for social security, unemployment insurance, and other expenses. In addition, if a leader did not appear but designated a subleader, and four or more musicians performed, the leader was required to pay from his leader's fee 1.5 times the sidemen's scale to the subleader.

[23] The Court did not explicitly determine whether the second prong of the Hutcheson test for the statutory exemption had been met, i.e., whether the union had acted in its "self-interest." But given its various finding that the challenged restrictions were designed to cope with job competition and to protect wage scales and working conditions. 391 U.S. at 108, 109, 110, 113, it clearly did so *sub silentio*.

[24] Several cases before Carroll also upheld union regulation of the practices of independent entrepreneurs affecting the wages or working

Continued

of the regulatory scheme are identical: members are permitted to deal only with agents who have agreed (1) to honor their fiduciary obligations by avoiding conflicts of interest, (2) not to charge excessive commissions and (3) not to book members for jobs paying less than the union minimum.[25] And as in Carroll, Equity's regulation of agents developed in response to abuses by employment agents who occupy a critical role in the relevant labor market.[26] The agent stands directly between union members and jobs, and is in a powerful position to evade the union's negotiated wage structure.

The peculiar structure of the legitimate theater industry, where work is intermittent, where it is customary if not essential for union members to secure employment through agents, and where agents' fees are calculated as a percentage of a member's wage, makes it impossible for the union to defend even the integrity of the minimum wages it has negotiated without regulation of agency fees.[27] The regulations are "brought within the labor exemption * * * [because they are] necessary to assure that scale wages will be paid * * *." Carroll, 391 U.S. at 112. They "embody at direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." Teamsters Union v. Oliver, 358 U.S. 283, at 294, 43 LRRM 2374. Agents must therefore, be considered a "labor group," and their controversy with Equity is plainly a "labor dispute" as defined in the Norris-LaGuardia Act: "representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113.

Agents perform a function—the representation of union members in the sale of their labor—that in most nonentertainment industries is performed exclusively by unions. In effect, Equity's franchise system operates as a substitute for maintaining a hiring hall as the representative of its members seeking employment.[28]

Finally, Equity's regulations are clearly designed to promote the union's legitimate self-interest. Hutcheson, 312 U.S. at 232. In a case such as this, where there is no direct wage or job competition between the union and

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conditions of union members. See Milk Wagon Drivers Union v. Lake Valley Co., 311 U.S. 91, 7 LRRM 276; Teamsters Union v. Oliver, 358 U.S. 283, 43 LRRM 2374 (Oliver I); Teamsters Union v. Oliver, 362 U.S. 605, 46 LRRM 2180 (Oliver II). In Milk Wagon Drivers, the Court held that the union had engaged in a "labor dispute" within the meaning of the Norris-LaGuardia Act when it attempted to organize independent "vendors" who supplied milk to retail stores. There the union feared that the "vendor system" was designed to escape the payment of union wages and the assumption of union-imposed working condition. In Oliver I, the Milk Wagon Drivers decision was invoked to protect from state antitrust challenge a union's successful efforts to prescribe through collective-bargaining agreements a wage scale for truck drivers, and minimum rental fees for drivers who owned their own trucks. The union feared that driver-owners, whose fees included not only an entreprenurial component but also a "wage" for the labor of driving, might undercut the union scale by charging a fee that effectively included a sub-scale wage component. The Court's stated that "[t]he regulations embod[ied] * * * a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract" (358 U.S. at 294. See also Oliver II, 362 U.S., at 606 after remand to the state court).

[25] Indeed, the District Court in Carroll, whose judgment was "affirmed by this Court * * * in its entirety," 391 U.S., at 114, drew parallels with the restrictions at issue in the present case. The court noted that "[a]pparently, similar abuses by booking agents existed in other fields, too. Edelstein v. Gillmore, 35 F.2d 723, 726 (2d Cir. 1929) (actors)." 241 F.Supp., at 892.

The petitioners argue that theatrical agents are indistinguishable from "numerous other groups of persons who merely supply products and services to union members" such as landlords, grocers, accountants, and lawyers. But it is clear that agents differ from these groups in two critical respects the agents control access to jobs and negotiation of the terms of employment. For the actor or actress, therefore, agent commissions are not merely a discretionary expenditure of disposable income, but a virtually inevitable concomitant of obtaining employment.

[26] See Carroll v. AFM, 241 F.Supp., at 881–882; Harding, supra n. 6, at 319–325.

[27] The Court of Appeals found that "the union *cannot* eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d 647, 651, 104 LRRM 2801 (emphasis added). Wage competition is prevented not only by the rule precluding commissions on scale jobs. Actors and actresses could also compete over the percentage of their wages they were willing to cede to an agent subject only to the restrictions imposed by state law.

[28] In many industries, unions maintain hiring halls and other job referral systems, particularly where work is typically temporary and performed on separate project sites rather than fixed locations. By maintaining halls, unions attempt to eliminate abuses such as kickbacks, and to insure fairness and regularity in the system of access to employment. In a 1947 Senate Report, Senator Taft explained: "The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall" S. Rep. No. 1827, 81st Cong., 2d Sess., 13, quoted in Teamster v. NLRB, 365 U.S. 667, 673–674, 47 LRRM 2906.

The National Labor Relations Board and the Courts have ruled that union demands for hiring halls are a mandatory subject of collective bargaining and that strikes to obtain such provisions are protected activity. See, e.g., Houston Chapter Assoc. General Contractors, 143 NLRB 409, 53 LRRM 1299, enforced, 349 F.2d 449, 59 LRRM 3013 (CA5); NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768, 771, 60 LRRM 2334 (CA9). Cf. Teamsters v. NLRB, 365 U.S., at 672–673, 676.

the group it regulates, the Carroll formulation to determine the presence of a non-labor group—whether there is "some * * * economic interrelationship affecting legitimate union interests * * *" 391 U.S., at 106—necessarily resolves this issue.

D

The question remains whether the fees that Equity levies upon the agents who apply for franchises are a permissible component of the exempt regulatory system. We have concluded that Equity's justification for these fees is inadequate. Conceding that Carroll did not sanction union extraction of franchise fees from agents,[29] Equity suggests, only in the most general terms, that the fees are somehow related to the basic purposes of its regulations: elimination of wage competition, upholding of the union wage scale, and promotion of fair access to jobs. But even assuming that the fees no more than cover the costs of administering the regulatory system, this is simply another way of saying that without the fees, the union's regulatory efforts would not be subsidized—and that the dues of Equity's members would perhaps have to be increased to offset the loss of a general revenue source.[30] If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests would be affected.[31]

III

For the reasons stated, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for preceedings consistent with this opinion.

It is so ordered.

Justice **BRENNAN**, with whom the Chief Justice and Justice **MARSHALL** join, concurring in part and dissenting in part

I join all but Part II-D of the Court's opinion. That part holds that respondents' exaction of a franchise fee is not a "permissible component of the exempt regulatory system." Ante, at 17. Rather, I agree with the Court of Appeals that the approximately $12,000 collected annually in fees is not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system," 622 F.2d 647, 651, 104 LRRM 2801 (CA2 1980), and thus is not "unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor," ibid.

The Court justifies its conclusion by suggesting that, since the union could increase its dues to offset the revenue lost from invalidation of the fee system, "there is no reason to believe that any of [the union's] legitimate interests would be affected," if the fee system were found to violate the antitrust laws. Ante, at 17. The union could of course raise its dues, but the issue here is whether the conceded antitrust immunity of the franchising system includes the franchise fee.

I find somewhat incongruous the Court's conclusion that an incident of the overall system constitutes impermissible regulation, but that agents in general may be significantly regulated because they are not a "non-labor group." This incongruity is highlighted by the similarity between union hiring halls and the franchising system, a similarity which the Court itself acknowledges: "Equity's franchise system operates as a substitute for maintaining a hiring hall as the respresentative of its members seeking employment." Ante, at 16. The Court disregards this similarity in concluding that the franchising system does not "directly benefit" the agents who are required to pay the fees. Ante, at n. 31. It reaches this conclusion by incorrectly assuming that the only parties who directly benefit from the hiring hall and the franchising system are employers and employees and producers and actors, as the case may be. But surely the agents also benefit

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[29] See Carroll, 241 F.Supp., at 881. We have, in fact, found no case holding that a union may extract such fees from independent agents who represent union members.

[30] As already indicated, the franchise fees are not segregated in any manner but merely deposited in the union's general fund.

[31] The respondents offer union hiring hall fees as an analogy in support of Equity's collection of franchise fees. In that context, the respondents argue, without citation, a union may impose reasonable fees upon employers to meet the costs of maintaining a union-run hiring hall. But even if the respondents' statement of labor law is correct, the analogy would not be persuasive. Assuming that hiring hall fees are so imposed, the fees are borne by parties who directly benefit from the employment services of the hiring halls and are collected by the entities that provide them. That is not true in the present case.

The view expressed in the separate opinion filed today as to who are the beneficiaries of the franchising system will undoubtedly surprise the agents who brought this lawsuit. Post. at———.

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from the franchising system, which provides an orderly and protective mechanism for pairing actors who seek jobs with producers who seek actors. The system is thus the means by which the agents ultimately receive their commissions; it is as much the source of their livelihood as it is that of the actors.

Because the fee is an incident of a legitimate scheme of regulation and because it is commensurate in amount with the purpose for which it is sought, I would also affirm this holding of the Court of Appeals.

NLRB v. Nixon Gear, Inc.

649 F.2d 906 (2d Cir.), May 26, 1981—251 NLRB 1392

On petition to enforce Board Order

Before LUMBARD, MANSFIELD and MESKILL, Circuit Judges

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MESKILL, Circuit Judge: The National Labor Relations Board ("the Board") seeks enforcement of an or-

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der issued against Nixon Gear, Inc. ("the Company") on August 27, 1980, directing the Company to bargain in good faith with District Lodge No. 137, International Association of Machinists & Aerospace Workers, AFL-CIO ("the Union"). Following the Union's narrow victory in a representation election, the Company filed objections to certain pre-election conduct on the part of the Union. Without holding an evidentiary hearing upon the Company's objections, the Board granted certification to the Union and subsequently issued the order, enforcement of which is requested here. We deny enforcement of the Board's order.

BACKGROUND

The Company manufactures and sells custom gears at its facility in Syracuse, New York, where the representation election was held. After the Union filed a petition for certification as the collective bargaining representative for eligible employees at the Company's Syracuse facility, the Board conducted a representation election on December 19, 1979. Of the 45 eligible employees, 44 voted. The result was 23 to 21 in favor of the Union. No ballots were challenged, but the Company filed timely objections to conduct affecting the results of the election. The Company objected, *inter alia,* that the Union had circulated campaign literature containing material misrepresentations to which the Company did not have adequate time to respond and that the Union had made improper financial and job-related inducements to eligible employees. The Company requested a hearing on its objections.

The Regional Director conducted an investigation of the objections pursuant to section 102.69 of the Board's Rules and Regulations, 29 C.F.R. § 102.69 (1980), but did not hold a hearing.[1] Based upon his investigation, the Regional Director recommended to the Board that all of the Company's objections be overruled and that the Union be certified. His investigation revealed the following.

The Company's first two objections alleged that the Union had distributed campaign literature which contained material misrepresentations. At issue were statements made in a handwritten notice captioned "Ask Yourselves Why." The Company contended that the following four paragraphs of this handbill contained material misrepresentations:

> Ask yourselves why the company:
>
> * * * * *
>
> B. Has awarded pay raises to certain individuals and *most notably not* to known pro-union persons? This smacks of discrimination.

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[1] Section 102.69 provides in pertinent part:

> (d) The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under § 102.62(b) or § 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objetions and challenges, the parties shall have the rights set forth in paragraphs (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith.

29 C.F.R. § 102.69(d) (1980).

C. Offered $10 hourly to pro-union man to campaign against union? He refused.

D. Would not inform the wife of an injured employee of procedures to follow for benefit of medical coverage, state disability, etc.?

E. Will pay for only *4* days this shutdown instead of *5* days? This surely proves they care for you.

A. 22 (emphasis in original). Copies of the handbill were distributed by the Union to employees who attended the Union meeting held on December 15, 1979 and were further distributed at the plant early on the morning of December 18. The Company contended that it first became aware of the literature on December 18, the day before the election.

The Regional Director listed the "testimony" concerning the truthfulness of each paragraph.[2] The Company produced evidence that the allegedly discriminatory pay raises denounced in Paragraph B were actually awarded pursuant to the Company's established practice of scheduling raises to coincide with employees' anniversary dates with the firm. Furthermore, the Company pointed out that some of the employees who received rasies appeared to be actively supporting the Union by, for example, wearing Union buttons. With respect to Paragraph C, the Regional Director apparently misunderstood the Company's position. He stated that the Company admitted that the $10 per hour bribe was offered, but the company claims that it has consistently denied the bribe attempt.[3] With respect to Paragraph D, the Company conceded that an employee's wife had not been informed of procedures to follow to obtain benefits for her injured husband, but explained that this had occurred more than 2½ years earlier under the Company's previous owners. With respect to Paragraph E, the Company conceded that that year there had been four paid shut-down days instead of five, but explained that the reduction was caused by the different way holidays fell in those years. The Regional Director concluded that none of the alleged misrepresentations warranted holding a hearing or overturning the election.

Turning to the Company's objection that the Union had made improper financial and job-related inducements to eligible employees, the Regional Director first reviewed statements from employee witnesses who claimed to have heard rumors that Larry Darling, a co-worker, had been promised more favorable employment at a local unionized plant of the Miller Brewing Company ("Miller") in return for his efforts on behalf of the Union at Nixon Gear. The testimony of those who had spoken with Darling showed that he was confident that he would obtain employment at Miller, where his wife already was employed. It appeared that Darling's activities on behalf of the Union had been limited to attending one or two Union meetings. The investigation failed to reveal that the Union itself told employees that it had offered a job to Darling or that Darling was an agent of the Union. Moreover, at least once early in campaign, Darling denied the rumor. Based on all of the above, the Regional Director concluded that this portion of the Company's objection did not warrant a hearing and recommended that it be overruled.

The Regional Director was equally unmoved by another example of alleged improper financial and job-related inducements by the Union. The Company's complaint arose out of events at a Union organizational meeting held in late November. At that meeting, the Union presented a Union steward or official from Miller who compared the Nixon Gear benefits with those available at a Union plant where he had worked prior to obtaining employment at Miller. Witnesses who attended the meeting stated that they formed the impression that the Union had helped the speaker obtain his job at Miller, but conceded that neither the Union nor the speaker ever said this explicitly. The Regional Director dismissed their "testimony" as specu-

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[2] The record does not clearly set forth the methodology of the investigation. The Regional Director's repeated references to the "testimony" of the Company and employees, however, probably should not be taken to imply that anyone offered sworn oral testimony respecting the objections. The record contains written affidavits, but does not contain any transcripts. The Regional Directors' conclusions apparently were drawn primarily from his review of the record submitted to him including the sworn statements of witnesses, documentary evidence, and the parties' statements of position, A. 11.

[3] In its exceptions to the Regional Director's findings, the Company denied that such a bribe was ever offered and stated that it had consistently denied this allegation throughout the Regional Director's investigation. The Company requested that the Regional Director contact the former Company officer who allegedly had made the bribe, and provided the Regional Director with the information needed to contract him, A 29 n.l, but apparently the Regional Director did not pursue the matter.

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lative and, also without a hearing, recommended that this portion of the objection be overruled. After rejecting other Company objections not at issue here,[4] the Regional Director recommended that the Company's objections be overruled in their entirety and that a Certification of Representation be issued.

The Board declined to order a hearing and adopted the Regional Director's findings and recommendations with one change. Although the Regional Director found that the Company had admitted that its vice president had offered the $10 per hour bribe, the Board concluded that even if the accusation were false, such a misrepresentation would be insufficient, in the circumstances of this case, to warrant setting aside the election. On April 3, 1980 the Board certified the Union as the exclusive representative of the eligible employees at the Company.

After the Board's decision, the Union requested that the Company commence collective bargaining, but the Company refused. In response to the ensuing unfair labor practices complaint, the Company admitted its refusal to bargain, but raised the invalidity of the election as a defense. The Board granted the General Counsel's motion for summary judgment against the Company, finding that the Company's refusal to bargain violated §§ 8(1)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1) (1976), and issued the order which it now seeks to enforce.

DISCUSSION

The Company argues that the evidence submitted by it in support of its objections was sufficient to require the Board to direct that an evidentiary hearing be conducted. As the party seeking a hearing, the Company bears a heavy burden, *see Bausch & Lomb Inc. v. NLRB,* 404 F.2d 1222, 1226 (2d Cir. 1968). "The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse," *NLRB v. Olson Bodies, Inc.,* 420 F.2d 1187, 1189 (2d Cir. 1970), *cert. denied,* 401 U.S. 954, 91 S.Ct. 966, 28 L.Ed.2d 237 (1971), lest appellate interference threaten the essential functioning of a system that governs, according to well-settled standards, the conduct of nearly 10,000 elections annually. *Henderson Trumbull Supply Corp. v. NLRB,* 501 F.2d 1224, 1228 (2d Cir. 1974). Nevertheless, according to those well-settled standards the Company was entitled to a hearing if "by prima facie evidence, it demonstrate[d] the existence of 'substantial and material factual issues' which, if resolved in its favor, would require the setting aside of the representation election." *NLRB v. Bristol Spring Manufacturing Co.,* 579 F.2d 704, 706–07 (2d Cir. 1978); *NLRB v. Newton-New Haven Co.,* 506 F.2d 1035, 1036 (2d Cir. 1974); *Polymers, Inc. v. NLRB,* 414 F.2d 999, 1004–05 (2d Cir. 1969), *cert. denied,* 396 U.S. 1010, 90 S.Ct. 570, 24 L.Ed.2d 502 (1970); *NLRB v. Joclin Manufacturing Co.,* 314 F.2d 627, 631–32 (2d Cir. 1963). With these general considerations in mind, we examine the Company's claim that the Board erred by not directing a hearing into the Union's alleged misconduct.

A. *The Misrepresentations*

In this proceeding the Company raises two independent grounds for requir-

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ing a hearing: the Union's alleged misrepresentations and its improper inducements to eligible employees. With regard to the Union's alleged misrepresentations, the Company presses upon us the impropriety of the Union's charge that the Company had "[o]ffered $10 hourly to [a] pro-union man to campaign against [the] union." The Board assumed *arguendo* that this charge was false, but, as the Board recognized, not every misrepresentation made in the course of a campaign requires the setting aside of the election. "A certain degree of inaccuracy and ambiguity is recognized as indigenous to campaign propaganda," *Baumritter Corp. v. NLRB,* 386 F.2d 117, 120 (1st Cir. 1967), because

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[4] The Company does not challenge the Board's decision overruling these other two objections. In one of these objections, the Company alleged that the Union threatened eligible employees with physical harm, damage to personal property, and adverse changes in their working conditions if the Union failed to win the election. The Board overruled this objection because the Company presented no evidence in support of it and would not or could not provide the names of any potential witnesses. In its final objection, the Company alleged that "[b]y the foregoing, as well as other acts and conduct, [the Union] interfered with the employees' free choice in the election and with the laboratory conditions under which Board elections are to be conducted." The Board overruled this objection because it raised no specific allegations of misconduct other than those already made in the first four objections.

"[p]rattle rather than precision is the dominating characteristic of election publicity," *Oslon Rug Co. v. NLRB,* 260 F.2d 255, 257 (7th Cir. 1958). We generally rely upon the parties themselves to correct inaccurate, untruthful statements, for when opposing parties publicly debate the merits of their positions we may confidently leave to the common sense of the voters the appraisal of the positions. *Linn v. United Plant Guard Workers,* 383 U.S. 53, 60, 86 S.Ct. 657, 661, 15 L.Ed.2d 582 (1966). Nevertheless, where a misrepresentation arises under circumstances which effectively preclude the voters from ascertaining its falsity, we do not hesitate to set aside the result of the representation election.

The principal factors which guide our inquiry into the effect of the misrepresentation are well-known and are derived from the Board's decision in *Hollywood Ceramics Co.,* 140 N.L.R.B. 221, 224 (1962).[5] These factors are (1) whether the other party had adequate opportunity to reply and correct the misrepresentation; (2) the extent to which the declarant could reasonably be viewed by the employees as being in a position to know the facts; (3) the ability of the employees to evaluate the statement on the basis of their own independent knowledge of the facts; and (4) the influence it might reasonably have had upon the employees. *Henderson Trumbull Supply Corp. v. NLRB, supra,* 501 F.2d at 1229. The Board found that, even if the Union's bribery charge was false, the election would not have to be set aside under these standards and, hence, refused to direct an evidentiary hearing to determine whether the charge was false. We now review whether that refusal to order a hearing exceeded the Board's discretion.

The Company argues persuasively that it did not have a reasonable opportunity to reply to the Union's misrepresentation. The Company stated that it first learned of the misrepresentation on December 18, 1979, the day before the election. It is unlikely that the Company could have replied adequately before the election. Time would have been needed to learn the specifics behind the Union's charge, check their accuracy, and issue a denial. Even had this process been completed, the Company might well have been unable to contact all of the voters. Some of them may not have been at the plant that day and, under the Board's own rules, the Company could not order its employees to attend a meeting held for the purpose of rebutting the Union's charge. Such a "captive audience" meeting held by an employer within twenty-four hours of an election constitutes a *per se* ground for setting aside an election won by the employer. *Peerless Plywood Co.,* 107 N.L.R.B. 427, 429 (1953). Thus, the Company had demonstrated by prima facie evidence that it did not have an adequate opportunity to respond to the misrepresentation. The second and third factors of the *Hollywood Ceramics* test are also satisfied. The employees could reasonably have expected that the Union's charge was directly based on testimony from the employee who was offered the bribe and, since the charge did not specify which employee was bribed, the employees could not independently investigate the charge's truthfulness.

Therefore, the Board's refusal to order a hearing must rest on the basis that the false

charge did not have a significant influence on the employees and, hence, on the election. The Board characterized the misrepresentation as "immaterial," reasoning that the allegation of bribery was wholly unrelated to wages and benefits or any other overriding issue in the campaign. "Rather the thrust of the Union's statement [was] that the Company strongly opposed the Union and was willing to wage a vigorous campaign to keep the Union out, a fact presumably already known by the Company's employees." NLRB Brief at 16. We reject this view of the effects of the Union's charge. The Union charged that the Company had stooped to bribery in order to win the election. An employee undecided about Union representation who believed the charge to be true might well be indignant enough at this underhanded tactic to show his protest at the polls by voting for the Union. He might feel a greater need for a union to protect him against his unscrupulous employer. Furthermore, the entire credibility of the Company's campaign might be undermined by the implication that a Company supporter had been bribed. Thus, the fourth factor of the *Hollywood Ceramics* test is satisfied and, assuming that the charge was false, the election would have to be set aside. We shall discuss our disposition of the petition following our review of the Company's claim that the Board improperly refused to direct an evidentiary hearing into whether the Union offered financial and job-related inducements to eligible employees.[6]

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[5] The Board overruled *Hollywood Ceramics Co., supra,* in *Shopping Kart Food Market,* 228 N.L.R.B. 1311 (1977), but reinstated the *Hollywood Ceramics* test in *General Knit of California,* 239 N.L.R.B. 619 (1978).

B. *Improper Inducements*

The Company offered evidence tending to show that the Union promised to obtain employment at Miller for Larry Darling, a current Company employee, if Darling supported the Union and the Union prevailed in the election; that the Union helped Company employees to obtain Miller employment application forms; and that a speaker at a Union meeting created the impression that the Union had helped him obtain employment at Miller. From the record, it appears that the Company's employees might have believed that the Union, which represented Miller's employees, was able to exert a significant influence over Miller's hiring decisions.

The Company was entitled to a hearing if its evidence demonstrated that there was a substantial and material factual issue which, if resolved in its favor, would require the setting aside of the representation election. *NLRB v. Bristol Spring Manufacturing Co., supra,* 579 F.2d at 706–07. We conclude that the Company's allegations, if true, required the Board to set aside the election. In *NLRB v. Madisonville Concrete Co.,* 552 F.2d 168 (6th Cir. 1977), an election was set aside when the Union paid the fine and attorney's fees of an employee who received a $5 traffic ticket. And in *NLRB v. Bristol Spring Manufacturing Co., supra,* this court indicated that it would have set aside an election if the Union had improperly made payments of $5 and $20 to several employees. The alleged misconduct by the Union here is far more serious than in the above instances where petty sums of cash were at stake and the Union did not explicitly condition its beneficence on the employee's support in the election. Here the Union is charged with promising to obtain improved employment for an employee on the express conditions that the support the Union in the campaign and the Union prevail in the election. Since the Union would have lost the election had a single pro-Union voter changed his mind and his vote, a tainted Darling vote for the Union would be sufficient by itself to change the result of the election. The effects of the alleged misconduct, however, might be far more broad than this. The plant was abuzz with rumors about the Union's offer to Darling. Furthermore, employees who attended a Union organizational meeting thought that the speaker implied that he got his job at Miller with the help of the Union. The Company's

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employees could reasonably have concluded that their support of the Union would help them obtain more attractive employment at Miller whereas their support of the Company would hurt their chances of ever obtaining employment at Miller. Thus, the Company's allegations, if true, required the election to be set aside and the Company was entitled to a hearing if it demonstrated, by prima facie evidence, the existence of substantial and material factual issues supporting its allegations.

Our review of the affidavits in the record[7] reveals the following evidence tending to support the Company's allegations. One affiant stated that when he asked Darling if "he had gotten the union involved at Nixon because the union had promised him a job at Miller Brewing in return," Darling indicated that this was true, and that only later in the campaign did Darling deny it. Another affiant claimed that Darling said that he was "quite confident of obtaining a job at Miller because he had the number one and number two men from the Union to get him in." Rumors that the Union had promised Darling a job were all over the shop and several affiants stated that Darling obtained Miller employment application forms for them through his Union connections. One affiant wrote that she had tried, without success, to obtain a Miller employment application form for three or four months, but that Darling obtained one for her the day after she told him about her problem. He told her that "he had gotten both his job and my application through union officials at Miller Brewing." Several affiants stated that the speaker at a Union organizational meeting attended by about seventeen employees gave the impression that he had received a job at Miller through the Union.

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[6] Because the Company did not press in this proceeding its objections to the Board's handling of the alleged misrepresentations in Paragraphs B, D, and E of "Ask Yourselves Why," it is unnecessary for us to review them.

[7] The Board argues on technical procedural grounds that several of these affidavits were not part of the formal record in the initial proceeding before the Regional Director. NLRB Brief at 25 n.19. We do not attach significance to this alleged technical defect in the record. The Board's Field Examiner witnessed the depositions and, thus, we assume that the Regional Director considered them when he stated, "All evidence adduced during the investigation, including sworn statements of witnesses, documentary evidence, and the parties' statements of position, have been fully and carefully considered. * * *" A. 11.

Despite this evidence strongly indicating that the Union offered improper inducements to eligible employees, the Board denied that the Company had raised substantial and material factual issues respecting the Union's conduct to warrant a hearing. Apparently, the Board reached this conclusion because the Company did not produce nonhearsay testimony directly showing that the Union had promised Darling a job at Miller, that the Union had intended to spread rumors that it could help employees obtain employment at Miller, or that the Union's speaker at the organizational meeting had intended to create the impression that the Union had helped him to obtain employment at Miller.

By taking this position, the Board placed far too high a burden on an employer who seeks a hearing to prove that improper inducements were offered by a union. Firsthand testimony establishing that the Union intended the improper conduct could come only from Darling or Union officials. But it was impossible for the Company to obtain their testimony because without a hearing an employer must rely upon the voluntary cooperation of witnesses to develop its case, *see Johnnie's Poultry Co.*, 146 N.L.R.B. 770, 775 (1964). The Board wrongly penalized the Company for failing to produce evidence which at that point could have been discovered only through the voluntary cooperation of those whom the Company had charged with misconduct. "Given the very limited discovery permitted in cases of this type, it is only when parties are given an opportunity to introduce evidence and examine witnesses that improprieties in the conduct of an election may be revealed." *NLRB v. Bristol Spring Manufacturing Co., supra,* 579 F.2d at 707; *Home Town Foods, Inc. v. NLRB,* 379 F.2d 241 (5th Cir. 1967). Thus, the Board's insistence upon a stronger showing of improper Union conduct was wholly unreasonable in this case. For the Board to hold, despite the Company's strong

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prima facie case, that there was not even a substantial and material factual issue respecting the Union's conduct, was an abuse of its discretion.

The Board's abuse of its discretion was exacerbated by the circumstances of this case. The election result was extremely close. We have previously admonished the Board that "[t]he need for a hearing is particularly acute when * * * an election is close, for in such a situation, 'even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election.' " *NLRB v. Bristol Spring Manufacturing Co., supra,* 579 F.2d at 707, *quoting Henderson Trumbull Supply Corp. v. NLRB, supra,* 501 F.2d at 1230. We conclude that the Board's failure to direct a hearing into the Company's objections to the Union's alleged misrepresentations and improper inducements was arbitrary and capricious. *See Ithaca College v. NLRB,* 623 F.2d 224, 229 (2d Cir. 1980).

The only question remaining is how we should dispose of this matter. Although we are empowered to remand the proceedings for a hearing, we are not required nor are we inclined to do so. We will grant the relief that furthers the equitable principles which govern judicial action. *See Ithaca College v. NLRB, supra.* The Company urges us not to remand the proceedings. It points to the great expense and delay to which it has been needlessly subjected by the Board's refusal to order a hearing. The Company fears to order a hearing. The Company fears that the delay has decreased its prospects of prevailing at a hearing because witnesses' memories fade and some key witnesses' memories fade and some key witnesses may be unavailable. Other factors also encourage us to avoid any further delay in the disposition of this proceeding. The Union's election victory was very narrow, the labor force at the Company has undoubtedly changed since the election, and there is no way of knowing at this time if the Union enjoys a majority of support. In light of these factors, we conclude that a remand would be inappropriate. *See Ithaca College v. NLRB, supra,* 623 F.2d 230; *NLRB v. Producers Cooperative Association,* 457 F.2d 1121, 1126–27 (10th Cir. 1972). Accordingly, the Board's petition for enforcement is denied.

United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL–CIO v. NLRB

655 F.2d 1267 (D.C. Cir.), May 26, 1981—243 NLRB 27

On petition to review Board Order

Before TAMM, WALD and MIKVA, Circuit Judges

Opinion for the court filed by Circuit Judge TAMM

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TAMM, Circuit Judge: In this case a labor union challenges the finding by the National Labor Relations Board that the union violated section 8(b)(4)(ii)(B) of the National Labor Relations Act. Because we find that the result reached by the Board is not supported by substantial evidence, we reverse, and remand for further proceedings.

I. BACKGROUND

Theater Techniques, Inc. (TTI) is a general contractor that supplies theatrical settings, props, and draperies for Broadway productions, motion pictures, and television programs. Nolan Scenery Studios, Inc. (Nolan) is similarly involved in the manufacture of settings, although primarily in the painting [1] of scenery and props. Although Nolan has on occasion acted as a general contractor, its usual contractual relationship with TTI from January of 1977 to June of 1978 was that of subcontractor for the painting of scenery and props provided by TTI.

Nolan is a party to a collective bargaining agreement with United Scenic Artists, Local 829 of the Brotherhood of Painters and Allied Trades, AFL–CIO (Local 829 or Union). This agreement contained the following relevant clause:

> For the purpose of clarification, it is specifically provided herein that the jurisdiction of the Union shall include all Scenic Artists' work for Broadway Production, "Off-Broadway," Resident and Regional Theatres . . . etc. This includes painting and application of all decorative material when applied by any means including all scenic creative art work, whether applied by painting or otherwise. It is agreed between the parties that the jurisdiction of the Union with regard to sculpturing shall include drawings, pounces and application of pounces, modeling or sculpturing over and above the rough blocking, in accordance with past practice.

Joint Appendix (J.A.) at 321. Nolan's president, Arnold Abramson, stated his understanding that this agreement prohibited his company from subcontracting out any sculpturing work that had been assigned to it. J.A. at 150.

The alleged unfair labor practice at issue here involved the painting of scenery for a show entitled "Stop the World I Want to Get Off." TTI entered into a contract with Nolan on April 26, 1978 for the painting of certain elements for this show. Exhibit 3A, J.A. at 308–09. Other elements were added by a separate contract dated April 28, 1978. Exhibit 3B, J.A. at 310–11. TTI shipped the necessary props and materials to Nolan on May 3 and 8. Included within the last shipment were the design sketches and materials necessary to construct the "environment unit." At least four pieces of sculpture had to be created as a part of this unit. Nolan fabricated two of these pieces while two props, a dragon's head and an airplane, arrived at Nolan already fabricated.

On May 9, Abramson telephoned the president of TTI, Peter Feller, to inform him that Nolan employees refused to work on those two prefabricated props. Abramson informed Feller later that day that a Union representative would visit the Nolan plant and that Abramson would see that the props were painted. Doug LeBrecht, assistant business representative for the Union, visited the plant on May 9 and spoke separately with Abramson, Nolan employees, and the designer for the show in question.

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Abramson testified that he informed LeBrecht that the props had come from TTI. *United Scenic Artists, Local 829, 243 N.L.R.B. No. 7 (June 25, 1979) (Board Decision),* J.A. at 6.

On May 10, Abramson telephoned the Union business representative, Domingo Rodriguez, about the two prefabricated props. Rodriguez gave his permission for the painting of the props by Nolan employees but told Abramson that Nolan had violated the collective bargaining agreement which, Rodriguez asserted, entitled Nolan's employees to all of the sculpturing work. Rodriguez also informed Abramson that Nolan would be assessed a certain monetary amount based upon an estimate of the amount of time it would have taken Nolan employees to fabricate the props. Feller testified that

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[1] The meaning of the term "painting" was disputed in this case. *E.g.*, Joint Appendix (J.A.) 257–59, 273–74. Unless otherwise stated, the term is used in its ordinary meaning in this opinion.

Abramson subsequently informed him that the Union planned to charge Nolan in the future for painting props fabricated elsewhere as if Nolan employees had actually executed them. On May 11, Rodriguez sent a telegram to Abramson that stated:

> It has come to our attention that you intend to paint sculpture which has not been produced by scenic artists employed by you. Painting of such sculpture constitutes a flagrant violation of Section 1 of the collective bargaining agreement between United Scenic Artists Local 829 and Theatrical Contractors Association Inc. to which you are a party. We demand that any and all work on such sculpture be stopped immediately and that you immediately comply with your contractual commitments.
>
> It has also come to our attention that Nolan has entered into an illegal conspiracy with Theatre Techniques, Inc. [TTI] to deprive scenic artists of work opportunities. Please be advised that this Union will take appropriate action to the maximum extent permitted by law to counteract the effects of your improper activities.

J.A. at 320

TTI filed charges before the Board on May 12, alleging that the Union had encouraged the refusal of Nolan employees to paint certain props sent by TTI to Nolan and that the Union had threatened Nolan with a financial penalty should it continue to paint props from TTI; a complaint issued on June 7. The Administrative Law Judge, after hearing evidence and considering the parties' briefs, found that the Union had induced or encouraged a work stoppage in violation of section 8(b)(4)(i)(B) and violated the secondary boycott provision, section 8(b)(4)(ii)(B). National Labor Relations Act (Act), 29 U.S.C. §§ 158(b)(4)(i)(B) & (ii)(B) (1976). *United Scenic Artists, Local 829,* Case 2–CC–1553, Decision of the Administrative Law Judge (Sept. 22, 1978) (*ALJ Decision*), J.A. at 15–30. A Board panel, after evaluating exceptions to this decision, reversed the ALJ's decision as to the work stoppage violation, but upheld his finding of a violation of the secondary boycott provision. *Board Decision,* J.A. at 4–14. The Union petitioned for review of this decision and order; the Board cross-petitioned for enforcement.

II. DISCUSSION

The "secondary boycott" provision of the Act, states simply that it shall be an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce" where "an object thereof is—forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *." 29 U.S.C. § 158(b)(4)(ii)(B) (1976). The Union attacks the Board's decision that it violated this provision on two fronts. First, the Union argues that it possessed no "secondary" objective but was concerned only with the preservation of work for its members. Second, the Union contends that the conduct of its business representative did not amount to threats, coercion, or restraint within the meaning of the Act.

The Supreme Court has made clear that section 8(b)(4)(ii)(B), despite its broad language, does not ban all union actions that may cause a cessation of business between employers. Instead, only union activity with a "secondary" objective is prohibited. *NLRB v. Enterprise Association of Pipefitters, Local 638,* 429 U.S. 507, 510, 97 S.Ct. 891, 894, 51 L.Ed.2d 1 (1977); *National Woodwork Manufacturers Association v. NLRB,* 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). The evaluation of activity as primary or secondary depends upon whether the activity was " 'addressed to the labor relations of the contracting employer *vis-a-vis* his own employees,' *National Woodwork, supra,* at 645, 87 S.Ct. at 1268, and is therefore primary conduct, or whether the [activity] was 'tactically calculated to satisfy union objectives elsewhere', 386 U.S., at 644, 87 S.Ct. at 1286, in which event the [activity] would be prohibited secondary activity." *Enterprise,* 429 U.S. at 511, 97 S.Ct. at 894–95. The secondary objective need not, however, be the union's *sole* objective for the activity to be prohibited. *Enterprise,* 429 U.S. at 530 n.17, 97 S.Ct. at 904 n.17; *Local 644, United Brotherhood of Carpenters v. NLRB,* 533 F.2d 1136, 1149 (D.C.Cir.1975).

The Board began its analysis of the union activity here by pointing out the well-established principle that "Section 8(b)(4)(ii)(B) is violated where a union employs unlawful pressure to claim work that the immediate employer is not in a position to award." J.A. at 10. In *Enterprise* the Supreme Court upheld the Board's determination that the union of steamfitters had violated the statutory provision at issue here when it refused to install climate-control units because the factory-installed internal piping on the units violated its collective bargaining agreement which provided that the piping be done by the steamfitters. There, similar to the case at hand, the general contractor had specified the installation of particular units and the subcontractor, the employer organized by the union, had no contractual right to select other units. The Court held that the Board's emphasis upon this "right to control" was a matter within its discretion and did not constitute "a departure from the totality-of-the-circumstances test recognized in *National Woodwork.*" 429 U.S. at 524, 97 S.Ct. at 901.

The Union argues in this court that *Enterprise* is distinguishable because here Rodriguez, the Union representative, possessed a reasonable, good faith belief that Nolan, rather than TTI, had the right to control the disputed work. Rodriguez testified that be believed that Nolan had the painting contract for the show in question and therefore control over whatever sculpting was to be done. J.A. at 231–32, 257. The ALJ found the whole of Rodriguez's testimony "unreliable," however, J.A. at 20, and the Board found no reason to overturn credibility determinations made by the ALJ. J.A. at 4 n.1. Were this merely a question of credibility, we would agree that it is properly left to the ALJ and the Board. *Amalgamated Clothing Workers v. NLRB,* 527 F.2d 803, 806 (D.C.Cir. 1975), *cert. denied,* 426 U.S. 907, 96 S.Ct. 2229, 48 L.Ed.2d 832 (1976).

Resolution of credibility questions does not provide us, however, with the necessary record evidence to support the foundation upon which the Board apparently based its decision. An examination of that decision suggests that the Board, ignoring Rodriguez's discredited testimony, assumed the Union knew the terms of this particular contractual relationship and therefore the locus of the "right of control." As the record now stands, substantial evidence cannot be found to support this unstated assumption. Even apart from Rodriguez's direct testimony that he had no knowledge of TTI's contractual control over the sculpturing work in question, J.A. at 231, 237, 265, much of the evidence on this point suggests that the Union did not know the provisions of the contract. For example, record evidence suggests that Local 829 had no way of knowing the existence of subcontractual arrangements on particular shows. J.A. at 84, 149. In this case, moreover, Rodriguez testified that the shop report filed on Nolan made no mention of any involvement by TTI. J.A. at 213–15.

Record evidence upon which the Board might have based its unstated inference includes the apparent understanding by Abramson of TTI's absolute right of control, J.A. at 125, and the visit by the assistant union representative LeBrecht to Nolan during which LeBrecht spoke with scenic artists, Abramson, and the designer of the show. J.A. at 18, 129. Although Abramson stated that he informed LeBrecht that the props had come from TTI, J.A. at 130, nothing in the record before us contradicts Rodriguez's assertion that Abramson told him only that the designer "had requested" that TTI execute the pieces in question rather than Nolan. J.A. at 232. This record is therefore inadequate to support an unstated assumption drawn by the Board that the Union had knowledge of TTI's complete control over the disputed work. *NLRB v. Yeshiva University,* 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1980); *NLRB v. General Telephone Directory Co.,* 602 F.2d 912, 920 (9th Cir. 1979).

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Underlying the Board's decision in this case, however, may be an implicit holding that the Union's mistaken belief as to the locus of the right of control fails to constitute an adequate defense to the charged 8(b)(4)(ii)(B) violation. Because the Board's decision does not reveal that it explicitly addressed this issue,[2] we will not decide this troublesome question. We note in passing, however, that to allow a good-faith but mistaken belief that the pressured employer had the contractual right of control in such a situation to constitute a defense to an alleged violation of section 8(b)(4)(ii)(B) would appear to comport best with the statutory requirement of a secondary "object." *But see General Truck Drivers, Local 85,* 243 N.L.R.B. No. 94 (1979); *National Association of Broadcast Employees,*

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[2] As appellate counsel for the Board noted at oral argument, the Board seemingly did not "address the situation of a bona fide belief that Nolan had controlled it all from the beginning and subcontracted a part away."

Local 31, 237 N.L.R.B. 1370, 1379 (1978), *enforced,* 631 F.2d 944 (D.C. Cir. 1980).

Because we reverse and remand for futher proceedings, we have no occasion to reach two further troubling questions raised by this case. First, unlike *Enterprise,* the economic "pressure" exerted by the Union in this case was in the form of a request for estimated hours for the purpose of calculating a monetary assessment. In essence, the Union made known its request for "premium pay" for painting the prefabricated props. The Union contends that such a request of an immediate employer, even where the employer is powerless to award the disputed work, constitutes primary activity. *See Local 742, United Brotherhood of Carpenters v. NLRB,* 533 F.2d 683 (D.C.Cir. 1976), *vacated* and remanded in light of *Enterprise,* 430 U.S. 912, 97 S.Ct. 1322, 51 L.Ed.2d 590 (1977). *But see Local 742, United Brotherhood of Carpenters,* 237 N.L.R.B. 564 (1978) (Board action upon remand). The Union also contends, moreover, that the mere request for an estimate of hours in this case, without more, does not rise to the level of "coercion" made unlawful by section 8(b)(4)(ii)(B). We intimate no position on these issues.

III. CONCLUSION

Our statutory duty in this case is to examine the administrative record to determine whether the result reached by the Board is "supported by substantial evidence on the record considered as a whole," 29 U.S.C. § 160(e) (1976). Taking care not to substitute our own view of the facts, we cannot discover adequate record evidence supporting the apparent, albeit unstated, assumption made by the Board that the Union in this case knew that TTI possessed absolute contractual control over the disputed work. Upon remand the Board must at least develop adequate evidentiary support, for this assumption. Should some alternative rationale underlie the Board's decision here, however, fuller explication of such a rationale is required. Only after the basis of the Board's decision is made clear can meaningful judicial review occur. The decision of the Board is therfore reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

NLRB v. Moving Picture and Projection Machine Operators Union, Local No. 143, affiliated with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO

649 F.2d 610 (8th Cir.), May 27, 1981—248 NLRB 1245

On petition to enforce Board Order

Before HEANEY and HENLEY, Circuit Judges, and PECK,* Senior Circuit Judge

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HEANEY, Circuit Judge: The National Labor Relations Board found that the Motion Picture and Machine Operators Union, Local No. 143, had violated Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(A) & (b)(2) by refusing to refer David Brueske for employment through its exclusive hiring hall because he was not a member of the Union. It entered an order requiring the Union to cease and desist from refusing, for discriminatory reasons, to register or refer Brueske or other employment applicants and from maintaining an exclusive hiring arrangement or practice with any employer in which Union members receive preference in hiring or referral over nonmembers. The Board also ordered the Union to register Brueske for referral, to refer him for employment on a nondiscriminatory basis, to make him whole for loss of earnings and to post appropriate notices. The Board now asks this Court to enforce its order. We modify the Board's order and enforce it as modified.

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The Union has a collective bargaining agreement with the movie theaters in the St. Louis area. Under that agreement, employees are required to become and remain members of the Union on and after the 30th day following the beginning of their employment. While the agreement does not provide for an exclusive hiring arrangement, the Union does operate a hiring hall and, as a matter of practice, the theater operators hire only those persons who are referred to them for employment by the Union. It is thus clear that the Union operated an exclusive hiring hall and is obligated to comply with Sections 8(b)(1)(A) and 8(b)(2) of the Act.[1]

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*John W. Peck, U.S. Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

The Union maintains a card file with a card for each theater in the St. Louis area. Each card notes the name of each projectionist who has been referred by the Union to that theater and the time he has spent training or working there. The Union also maintains a list of projectionists which states the amount of time that each projectionist has spent working or training at the theaters to which he or she has been referred. Those who are on the list are either members of the Union or in the training programs sponsored by the Union. Vacancies in permanent positions are posted at the Union Hall for two weeks. Anyone who is on the projectionist list can bid for the vacancy and the bidder who is shown by the list to have worked the longest period of time is referred to the employer for the job if he or she is qualified.

Referrals to temporary jobs are made from the same list. Only those who have worked or trained at the theater making the request are considered and selection from among those eligible is based on an attempt to equal out their yearly earnings.

The Union conducts a training program through which persons are placed at various theaters without pay to become proficient at running the equipment—usually for a period of one to four weeks. After a trainee has worked at a theater for the required period of time, he or she may be referred to that theater for paid employment. Meanwhile, training at other theaters continues. After a trainee has completed the training program at each of the theaters with whom the Union has an agreement, the trainee is requested to join the Union.

Anyone is eligible to apply for training. Applications are screened by a committee of the Union which selects a number of candidates to be interviewed and evaluated when there are openings. The committee makes recommendations to the membership of the Union which accepts or rejects the selections by a majority vote.

Questions about the legality of the Union's referral system were brought to the Board's attention by David Brueske. Brueske had worked as a projectionist in New York from 1971 until 1975 and was a member of the New York Local Union during much of that period. In late 1975, Brueske withdrew from the Local and moved to East St. Louis, where he enrolled

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in Southern Illinois University. While at the University, Brueske did additional work with projection equipment. On April 19, 1979, Brueske contacted the business agent of Local No. 143 about obtaining work as a projectionist. He was told about the Union's training program. Thereafter, Brueske, along with sixty others, made application to be included in that program. He was interviewed by the committee but was not accepted. Eleven others were. On July 19, 1979, he filed an unfair labor practice charge against the Union. The Board concluded that the Union's referral system was operated in an unlawful manner because referrals were based on Union membership considerations. It entered the order described in the first paragraph of this opinion.

In our view, substantial evidence on the record as a whole supports the Board's finding that the Union operated an exclusive hiring hall. While the collective bargaining agreement did not require the employers to hire only those persons recommended by the Union, the fact is that they consistently followed this practice over a number of years. See *N.L.R.B. v. International Union of Operating Engineers,* 279 F.2d 951 (8th Cir. 1960). Something more is required, however, before a violation of Sections 8(b)(1)(A) and 8(b)(2) of the Act can be found. The Board must prove that the Union refused to refer applicants who were not members of the Union because they were not members. *N.L.R.B. v. Local 542, 542A and 542B, Int'l Union of Operating Engineers,* 485 F.2d 387 (3d Cir. 1973); *N.L.R.B. v. Hod Carriers, Local 300,* 336 F.2d 459 (9th Cir. 1964), or that the Union allowed only Union members access to its hiring hall, *N.L.R.B.*

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[1] (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

29 U.S.C. §§ 158(b)(1)(A) & (b)(2).

v. Local 269, IBEW, 357 F.2d 51 (3d Cir. 1966); *Local 138, Int'l Union of Operating Engineers v. N.L.R.B.,* 321 F.2d 130 (2d Cir. 1963). Our question then is whether the Board carried its burden. We think that it did in part. Substantial evidence supports the Board's finding that only Union members were referred to employers for permanent jobs. Brueske testified that the Union's business agent told him that he "could not qualify for permanent jobs without being a union member, having two years seniority and then permanent jobs would go out on a bid basis and the employer would have some preference among men who knew the booths." While there is evidence to the contrary in the record, we accept the Board's credibility findings on this matter.

Substantial evidence does not support the Board's finding, however, that the Union refused to refer non-Union members to temporary jobs. To the contrary, the record shows conclusively that trainees who were not members of the Union were frequently referred to temporary jobs. Moreover, it shows that applicants were accepted for the training program without regard to Union memberships or affiliation. Furthermore, there is no evidence that the Union committee or membership gave preference to the relatives or friends of Union members or for that matter that they applied any standard other than the stated standard of availability, reliability and competence in selecting persons for the training program. There is, finally, no evidence that the Union gave preference to Union members over trainees in referring persons for temporary employment.

It follows from what we have said that the Union violated Sections 8(b)(1)(A) and 8(b)(2) of the Act by refusing to refer nonmembers of the Union for permanent employment. The Board order must be enforced insofar as it relates to permanent employees but cannot be insofar as it relates to temporary employees or trainees. Paragraphs 1(a) and 1(b) of the Board's order will, therefore, be amended to read as follows:

> Moving Picture and Projection Machine Operators Union, Local No. 143, affiliated with the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, its officers, agents, successors, and assigns, shall:
>
> 1. Cease and desist from:
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>
> (a) Refusing to register for referral or refer David Brueske, or any other applicant, for permanent employment by theaters in the St. Louis, Missouri, area, for discriminatory reasons.
>
> (b) Maintaining, enforcing, or otherwise giving effect to an exclusive hiring arrangement or practice with any employer pursuant to which Union members receive preference in hiring or referral over nonmembers for permanent employment.

One additional matter requires consideration. The Board's order requires the Union to register David Brueske for referral and to refer him for employment on a nondiscriminatory basis and make him whole for any loss of earnings he may have suffered from the discrimination against him. The Board's order must, on the basis of what we have heretofore said, be enforced insofar as it requires the Union to register David Brueske for referral for permanent employment and refer him for permanent employment[2] on a nondiscriminatory basis; *i.e.,* if he is as well qualified as others on the list, he must be referred for permanent employment on the same basis as those who are members of the Union. The Board's order as to back pay must also be enforced, subject to one qualification. An evidentiary hearing must be held to determine whether Brueske was in fact as well qualified as others on the referral list. If he was as well qualified, then a determination will have to be made as to the earnings he lost by not being referred on a nondiscriminatory basis. If he was not, he is not entitled to such remuneration. This hearing can, of course, be a part of the compliance conference.

The Board's order is reforced as modified. Costs will be taxed to the Union.

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[2] The Board's order does not speak to the issue of whether Brueske should be admitted to the training program. Indeed, the Board conceded at oral argument that the training program was not violative of the Act if selections are made on the basis of objective criteria and there is no basis in the record to suggest that they were not.

NLRB v. Kiawah Island Company, LTD

650 F.2d 485 (4th Cir.), May 27, 1981—247 NLRB 307

On petition to enforce Board Order

Before WINTER, SPROUSE and ERVIN, Circuit Judge

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SPROUSE, Circuit Judge: The National Labor Relations Board petitions for enforcement of its decision and order that the respondent, Kiawah Island Co., Ltd., violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. §§ 158(a)(1), (3),[1] by interfering with their employees' rights to organize a union and by terminating two kitchen employees who were responsible for initiating the organizational effort at the Company's resort.

We grant enforcement of the Board's order finding an 8(a)(1) violation, but conclude that there is not substantial evidence to sustain the Board's finding of an 8(a)(3) violation. We, therefore, deny enforcement of that part of the Board's order.

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I.

Kiawah operates a 10,000-acre resort on Kiawah Island, South Carolina. It includes a 160-room oceanfront hotel, the Inn, which contains restaurant facilities. The Inn commenced operation in May 1976, and from the beginning had difficulty with maintaining proper standard of cleanliness in its food storage, preparation and service facilities. The State of South Carolina, through its Health and Environmental Agency, makes regular inspections of such facilities. There are three standards ratings: "A," "B" and "C". A grade of "C" indicates an unsatisfactory inspection and denotes an inferior operation.

The first inspection of the Inn's kitchen was made on June 1, 1976, immediately before the facility opened, and resulted in a "C" rating. At a follow-up inspection on June 4, an "A" rating was awarded. A "C" rating was again received on July 20, an "A" rating on July 27, and a "C" rating on November 30.[2]

Kiawah made a number of personnel changes from June 1, 1976 through the early part of 1977, in an attempt to rectify the situation and maintain a satisfactory rating for the food facilities. The general manager, Forrest, established a regular kitchen cleanup crew on June 2 or 3, with James Hymes as supervisor, and instituted a crash cleaning program. After the July 20 "C" rating, Forrest was discharged and the chief night auditor was assigned to retrain the kitchen cleaning crew and develop procedures for them to follow. After the November 30 "C" rating, the vice-president of resort operations, Taylor, concluded that the separate kitchen cleanup crew, with Hymes as a working foreman, was inefficient and turned the total responsibility for cleanliness over to the chef, Charvet. Hymes was demoted to a nonsupervisory leadman position and his pay was reduced. Shortly thereafter, Hymes and Robert Murray (the latter had been employed as a member of the cleaning crew since November 3), contacted a representative of the Union.[3] Hymes and Murray were given authorization cards and ultimately obtained signatures from 40-50 coworkers.

Although there is some conflict in the testimony, it is apparent that Kiawah became aware of the Union's attempts to organize in early December and contacted labor counsel for advice in countering the union effort. On January 22, 1977, the senior vice-president assembled the employees and delivered a speech which contained, among other things, the following statements: "[I]f you sign that card, I think you will be sorry" and "The company is not going to let the union mess things up without a fight. I can tell you right now that the company will fight the union just as hard as the law permits and that is pretty darn hard. Unfortunately for you, when a company and a union get into a fight it is the employees who get hurt." The Administrative Law Judge and the Board found that this action threatened employees with retaliatory action for exercising their section 7[4] rights.

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[1] Sections 158(a)(1) and (3) provide:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the excercise of the rights guaranteed in section 157 of this title; * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

[2] The Company was permitted to post a "B" rating following this inspection, however.

[3] Hotel, Motel, Restaurant Employees and Bartenders Union, Local 270, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO.

[4] 29 U.S.C. § 157.

On March 7, 1977, the Union filed a representation petition with the Board. The following week, Kiawah held a meeting of its supervisors and instructed them to explain to the employees the benefits they were currently being provided, that a union was unnecessary and that the Company was opposed to it. Supervisors Cheshire and Clifton met with employee Haywood on or about March 22, 1977, to disseminate the Company's antiunion message. Haywood asked Cheshire why she had not received a previously promised raise. She testified that he replied, "on account of the union," and that the increase would be considered a "bribe" because the Union had filed a representation petition.

On April 25, 1977, supervisor Smythe told employee Cohen he "didn't know if [Cohen] was involved with the union or not * * * but the union probably could get [the employees] in trouble." Cohen then asked Smythe about a raise he was supposed to get; Smythe responded that Cohen had not received it because the Union had them "in a hole." Sometime after April 25, Smythe approached a group of employees. When one said something about the Union Smythe replied, "You might get a lot of people in trouble." The Administrative Law Judge found all these actions by Kiawah to have threatened employees in violation of 8(a)(1).

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II.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547 (1969), the Supreme Court expressed a now familiar rule on section 8(a)(1) coercion:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

It is for the Board to make these determinations and where substantial evidence supports its conclusions an appellate court will not substitute its own judgment for that of the Board. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357 (4th Cir. 1969).

Here, Kiawah, after consulting with counsel, exhibited an explicit antiunion animus in its activities countering the Union's attempts to organize. Considering all the evidence, there is substantial evidence that the vice-president's speech and the contacts made by supervisors had the effect of coercing the involved employees from exercising protected rights. We therefore grant enforcement to that part of the Board's order relating to the 8(a)(1) violations.

III.

We reach a different conclusion, however, with respect to the Board's findings that Kiawah discharged employees Hymes and Murray for their union organizational activities in violation of sections 8(a)(3) and (1) of the Act. We therefore deny enforcement of that part of the Board's order.

It is true Kiawah knew of the Union's attempt to organize when it fired Hymes and Murray. It is also true, however, that valid reasons for their discharges existed prior to, and independent of, any union activities. After the initial inspection of the Inn's food facilities, which resulted in a "C" rating, Kiawah's vice-president of resort operations, Taylor, reprimanded the general manager, Forrest. Forrest instituted a crash program to correct the deficiencies, established a regular kitchen cleanup crew and promoted a housekeeping department employee (Hymes) as supervisor. Despite these actions, however, Kiawah subsequently received "C" as well as "A" ratings and continued its efforts to improve.

After the second "C" rating was received (July 20, 1976), Forrest was discharged. Taylor temporarily assumed responsibility for managing the Inn, and the chief night auditor was assigned to retrain the kitchen cleaning crew and develop procedures for them to follow. On November 30, 1976, an inspection by the state agency again resulted in a "C" rating. Sometime between November 30 and December 2, chef Charvet recommended that Hymes and Murray be terminated. On December

2, Taylor sent a memo to certain supervisors expressing his feeling that the November 30 "C" rating was totally unacceptable and "in direct correlation to management effectiveness." He concluded that the separate kitchen cleanup crew was not going to work and ordered Charvet to assume total responsibility for the kitchen's cleanliness.

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Charvet's recommendations that Hymes and Murrary be terminated were submitted to food and beverage director Scott and personnel director Smith; Scott rejected the recommendations, deciding to give them another opportunity to improve their job performance, but demoted Hymes to a nonsupervisory position.

Although Hymes and Murray contacted the Union shortly after Hymes' demotion, and the Company soon became aware of their organizational efforts, Kiawah continued its efforts to obtain and maintain satisfactorily clean food facilities. Scott conducted an inspection of the kitchen facilities on February 18 and found them unsatisfactory in terms of cleanliness. Hymes and Murrary, who apparently worked the evening before the inspection, were suspended for three days. The executive vice-president, Brumley, inspected the kitchen on February 26, as part of a series of inspections of all departments, and found the kitchen to be unclean. He sent a memo with specific inspection observations to Scott. Based on this, Hymes and Murray were terminated for unsatisfactory performance; the manager of the dining room was demoted; the third member of the cleaning crew and two dishwashers were issued disciplinary warnings; and Scott was reprimanded.[5] Subsequent to Hymes and Murray's discharges, Kiawah continued to receive unsatisfactory ratings from the South Carolina Halth and Environmental Agency, and Charvet, Scott, a subsequent food and beverage director and a subsequent chef were terminated.

A discharge, of course, violates the Act only if precipitated by a discriminatory motive or unlawful intent. *NLRB v. Consolidated Diesel Electric Co.*, 469 F.2d 1016 (4th Cir. 1972). Where the evidence can support inferences of both discriminatory and nondiscriminatory reasons for the discharge, the rule announced in *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568 (4th Cir. 1977), still controls in this circuit.[6] "It is settled in this circuit, and most of the others, that 'it is enough [to find an unfair labor practice] that a discriminatory motive was a factor in the employer's decision' " *Id.* at 569 (footnote omitted).

Neptune emphasizes, however, that it need be determined that the improper motive is a factor in the discharge.

> In the end after weighing all relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for a finding that the employee would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity.

Id. at 570; *American Thread Co. v. NLRB* 631 F.2d 316, 320 (4th Cir. 1980). *See NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979).

Language in our cases indicates a "shifting" burden of proof were there is evidence of both discriminatory and valid reasons for the discharge. *See, e.g., Appletree, supra.* If initial evidence of union membership and employer animus is unrebutted by evidence of proper employer motive, the Board may well rest on that evidence to find an 8(a)(3) violation. The introduction by the employer of evidence of proper motive casts a greater responsibility on the Board—to weigh all the evidence; and, in this sense, a shifting burden concept might be useful. More accurately, however, the burden is on the General Counsel throughout to show that a discriminatory motive retaliative against the exercise of protected activity was a factor for the discharge. *NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804 (4th Cir. 1975).

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In weighing conflicting evidence of good and bad employer motive, we have directed the Board to find a violation if the bad motive was a "factor." *American Thread, supra; Neptune, supra.* We have also directed the Board to "find and identify 'an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one,' that is, why he rejected the 'supportable' cause and 'chose a cause intended to discourage union activity.'" *Appletree,* 608 F.2d at 993. Any apparent tension between the *Neptune* language and that of *Appletree* is eased when the basic proof of structure under the NLRA is considered. An appellate court must affirm the Board-determined unfair labor practices when they are supported by substantial evidence. *Universal Camera Corp., supra; Owens-Corning Fiberglass Corp., supra.* In determining whether there is substantial evidence to support a Board finding that bad motive was a "factor" in an employment discharge, we, of course, must look to all the evidence, including the employer's evidence of proper motivation. Should the Board have failed to identify and weigh the latter evidence, it will have failed its mission as a fact-finder.

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[5] There was conflicting evidence on who terminated Hymes and Murray and the reasons given them. The Board made several credibility findings supporting the testimony of Hymes and Murray. We make no determination as to the validity of these findings; assuming they are valid, however, we still find no substantial evidence to support the finding that Hymes and Murray were discharged for their union activities.

[6] A suggestion for rehearing *en banc* was denied, with Judges Russell, Widener and Hall dissenting.

This does not mean that an employer *qua* employer is entitled to any greater evidentiary consideration than an employee *qua* employee. Giving evidentiary preference to either in this context would be contrary to the purpose of the Act. But, as stated in *Neptune, supra,* mere union membership does not insulate a worker from being discharged for just cause—there must be evidence demonstrating it was a factor. Likewise, an employer's antiunion animus in and of itself does not destroy his right to discipline for just cause—it must have been a reason for the discharge. If both good and bad motives are involved, the evidence must demonstrate why the good motive was not the sole reason for the discharge. Where the employer has a legitimate business motive but would not have discharged the employee for that reason except for his union membership or antiunion animus on the part of the employer, the discharge is unlawful. *Amercian Thread, supra; Neptune, supra.* A mere declaration by the Board that the reason advanced for the discharge was pretextual, however, is not sufficient to overcome a showing of bona fide reasons by an employer. *Firestone Tire & Rubber Co. v. NLRB,* 539 F.2d 1335, 1337 (4th Cir. 1976). The "burden cannot be sustained by evidence that rises no higher than conjecture or suspicion." *Appletree,* 608 F.2d at 993. The ultimate reason, perhaps overly simply stated, is that a plaintiff or complainant has the affirmative burden of proving his case.

Kiawah presented cumulative and uncontradicted direct evidence that Hymes and Murray were fired for considerations having nothing to do with the Union. Kiawah experienced continued difficulty in maintaining satisfactorily clean food facilities immediately prior to its opening and continuing long after Hymes and Murray were discharged. It made continuous attempts to rectify the problems. It disciplined and discharged numerous employees, both supervisory and nonsupervisory. It expressed disapproval with the quality of the performances of Hymes and Murray proceeding their contact with the Union.

As we said in *Neptune, supra:*

> The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance.

Id. at 570.

Direct evidence strongly inferring that Kiawah was motivated by sound business reasons, so completely overcomes the circumstantial evidence of the timing of the discharges cited by the Board that the latter cannot be considered substantial. The union membership of Hymes and Murray alone does not serve to shield them from discharge for just cause, and under these circumstances their employer's antiunion animus does not control.

We conclude, therefore, that the order of the Board finding that Hymes and Murray's discharges were motivated by their union activities is not supported by substantial evidence.

ENFORCEMENT GRANTED IN PART AND DENIED IN PART.

WINTER, Circuit Judge, concurring and dissenting: While I concur in the majority's conclusion that substantial evidence supports the Board's finding of § 8(a)(1) violations, I think that substantial evidence in the record as a whole also supports the Board's conclusion that Kiawah discriminatorily discharged Hymes and Murray in violation of § 8(a)(3) of the Act because of their efforts to bring about union representation at the Inn. I therefore respectfully dissent from that portion of the majority's opinion setting aside the finding of a § 8(a)(3) violation and declining to enforce the portion of the Board's order based thereon.

The record reflects the difficulties experienced by Kiawah in maintaining health standards in its dining facilities. The essential question before us is whether those difficulties were the sole motivation for Kiawah's discharge of Hymes and Murray, or whether the Board has met it burden of demonstrating that an unlawful discriminatory motive was a factor in the decision. *See Neptune Water Meter Co. v. NLRB,* 551 F.2d 568, 569–70 (4 Cir. 1977). The direct evidence in the record of discriminatory motive is relatively slight, but, to my mind, the circumstantial evidence is sufficiently compelling to support the Board's conclusion.

The discharges did not occur until March 2, 1977, over three months after the last state health inspection, conducted on November 30, 1976, but only thirty-nine days after Kiawah began its campaign to forestall union representation at the Inn. The majority apparently agrees that there is substantial evidence to support the Board's finding that Kiawah was well aware of unionizing activities. As I view the record, Hymes and Murray were the prime movers to organize the employees and Kiawah was well aware of their role. In any event, the state inspector testified that his November 30 review of the Inn's kitchen revealed deficiencies not only in the cleanliness of the kitchen and its equipment but also in the handling of food, an activity for which Hymes and Murray had no responsibility. Even subsequent to the discharges of Hymes and Murray the state health authorities continued to find serious deficiencies in the Inn's kitchen operations, and Kiawah offered evidence that it fired the Chief Chef, the Food and Beverage Director, and their respective successors as a result. Their terminations are entirely consistent with the conclusion of Kiawah vice-president Taylor's memorandum responding to the November 30 inspection in which he stated that: "The grade of the restaurant is in *direct* correlation to management effectiveness." But Kiawah's discharges of Hymes and Murray cannot be said to be entirely consistent with the memorandum, because Kiawah significantly terminated only Hymes and Murray among its kitchen employees despite the continuing health problems with the kitchen operations. Except for the discharges of Hymes and Murray, the evidence shows that Kiawah held its kitchen *managers* accountable for the deficiencies. It is noteworthy that the discharges of Hymes and Murray did not lead to any improvement in the kitchen cleaning, despite the testimony in the record suggesting that Hymes and Murray performed their tasks poorly.

The immediate circumstances of the discharges of Hymes and Murray appear particularly suspect when viewed in light of all of the evidence of Kiawah's efforts to upgrade sanitary standards in the Inn's kitchen and its campaign against union representation. Kiawah restructured its kitchen cleaning operations in early December 1976, relieving Hymes of his supervisory duties and allegedly placing full responsibility for cleanliness with Chief Chef Charvet. Kiawah clearly did not hold Hymes responsible for its previous difficulties with the state health authorities. Although Charvet apparently sought to terminate Hymes, Kiawah officially stated that its reason for the demotion was managerial error in establishing the supervisory position and that Hymes would be considered for a comparable post were one to become available. After Kiawah became aware of pro-union activity among the employees at the Inn, it established a formal Disciplinary Action Policy on January 25, 1977, which, according to the company, merely documented the "essence" of prior disciplinary "practice." The policy provided for suspension and possible discharge in the event of repeated reprimands. Hymes and Murray never received a reprimand. Kiawah first suspended them and eventually discharged them.

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On February 16, Kiawah issued its first disciplinary suspension to Hymes for allegedly falsely punching in Murray's time card on February 12 when he was absent. It took this action despite the fact that Hymes not only denied this infraction but notified a company supervisor of Murray's absence at the time and admitted a day later that he left work during the shift to bring Murray to work. Morever, Kiawah disciplined him without investigating the possibility that another of the four or five employees in the area punched Murray's card.

On February 18, after an inspection of the kitchen by the Food and Beverage Director, Kiawah suspended Hymes and Murray for three days because of the unsatisfactory cleanliness of the kitchen. It took this action solely against Hymes and Murray without disciplining the apparently absent third member of the night-cleaning crew, one Solomon Stanley, despite the inspection report's notations of "accumulations" of grease and dirt. In addition, Chief Chef Charvet attributed other deficiencies noted in the report to dishwashers and cooks who were similarly not disciplined. Finally, the suspension was the first disciplinary action taken by Kiawah against cleaning employees after seven months of problems. Previously, these problems had been addressed on an ad hoc basis and corrected. The employees had received no disciplinary warnings and Kiawah conceded that the problems noted in the February 18 inspection were of the same character as problems previously noted.

Another inspection was conducted by another Kiawah officer on February 26, and it revealed unsatisfactory conditions in the kitchen. On March 2, Kiawah discharged Hymes and Murray, but the third night-cleaning crew member, Stanley, merely received a warning, as did two dishwashers.

These circumstances, demonstrating a gross disparity of treatment between Hymes and Murray and other kitchen employees responsible for cleaning, amply support the Board's conclusion that Kiawah's asserted motivation for the discharges was a pretext and that in fact the disciplinary sanctions against Hymes and Murray which were begun in February were pursued to the point of discharge because of their active solicitation of employees of the Inn on behalf of the union. As we explained in *Neptune Meter,* the rule articulated in *Firestone Tire and Rubber Co. v NLRB,* 539 F.2d 1335, 1337 (4 Cir. 1976), requiring the Board to find "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one * * *":

> is not to be read to mean that there is a dichotomy between good and bad reasons. It does not change the rule in this circuit that discriminatory motivation need be only a factor in the discharge. Rather, [*Firestone*] made clear that where there is evidence of a proper motive for dismissal, the Board's mere characterization of the Company's assigned reason as "pretextual," without citation of evidence indicating invidious purpose, will not suffice.

551 F.2d at 569. I think that substantial evidence in the record supports the Board's finding that Kiawah would not have singled out Hymes and Murray for the extraordinary disciplinary action of discharge except for the in pro-union activity. I accordingly would enforce the Board's order to reinstate these two men.

NLRB v. Martins Ferry Hospital Association

Martins Ferry Hospital Association v. NLRB

649 F.2d 445 (6th Cir.), May 27, 1981; certiorari denied November 30, 1981

On appeal from S.D. Ohio

Lively and Merritt, Circuit Judges, and
Phillips, Senior Circuit Judge

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Harry Phillips, Senior Circuit Judge: Case No. 79-3408 is before the court on the appeal of Martins Ferry Hospital Association of Martins Ferry, Ohio, (the Hospital) from the order of District Judge Robert M. Duncan, requiring the Hospital to obey a subpoena duces tecum issued by the Board. Judge Duncan directed the Hospital to turn over to the Board the original or copies of

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IRS W-4 forms [1] of its employees, for use by the Board in connection with the General Counsel's investigation of Board Case No. 8-CA-10755. The stated purpose of the Board is to compare the signatures on the W-4 forms with purported signatures of employees on union membership authorization cards now in the Board's possession to determine whether a union is authorized to represent a majority of certain employees of the Hospital.

Case No. 79-3409 is before the court on the appeal from the summary judgment of District Judge Duncan refusing to order the Board to disclose to the Hospital the membership authorization cards purportedly signed by certain Hospital employees.

On September 25, 1979, this court entered a stay order in case No. 79-3408 and consolidated the two cases for hearing on appeal.

We affirm the decision of the district court in case No. 79-3409. We dissolve the September 25, 1979, stay order entered by this court in case No. 79-3408, modify the judgment of the district court in that case and affirm it as modified.

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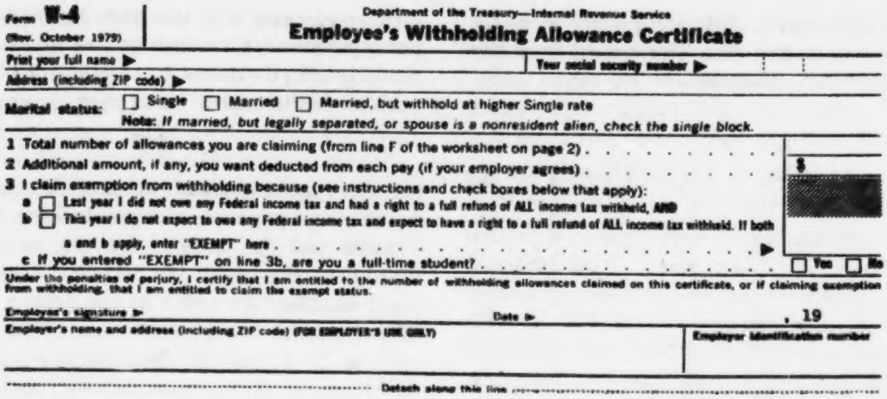
[1] The W-4 form in part is as follows:



Form **W-4**
(Rev. October 1979)

Department of the Treasury—Internal Revenue Service

Employee's Withholding Allowance Certificate

Print your full name ▶ | Your social security number ▶

Address (including ZIP code) ▶

Marital status: ☐ Single ☐ Married ☐ Married, but withhold at higher Single rate
Note: *If married, but legally separated, or spouse is a nonresident alien, check the single block.*

1 Total number of allowances you are claiming (from line F of the worksheet on page 2) . . . .
2 Additional amount, if any, you want deducted from each pay (if your employer agrees) . . . . $
3 I claim exemption from withholding because (see instructions and check boxes below that apply):
a ☐ Last year I did not owe any Federal income tax and had a right to a full refund of ALL income tax withheld, AND
b ☐ This year I do not expect to owe any Federal income tax and expect to have a right to a full refund of ALL income tax withheld. If both a and b apply, enter "EXEMPT" here . . . . ▶
c If you entered "EXEMPT" on line 3b, are you a full-time student? . . . . ☐ Yes ☐ No

Under the penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate, or if claiming exemption from withholding, that I am entitled to claim the exempt status.

Employee's signature ▶ Date ▶ , 19

Employer's name and address (including ZIP code) (FOR EMPLOYER'S USE ONLY) | Employer identification number

Detach along this line

I

On September 15, 1976, the Licensed Practical Nurse and Skilled Employees Professional and Economic Security Program, Inc. (LPN–SHEP), a labor organization, filed with the Board a petition requesting that an election be held among the Hospital's technical employees. LPN–SHEP claimed to represent at least 30 per cent of the technical employees. Authorization cards purportedly signed by employees designating LPN–SHEP as their collective bargaining representative were submitted to the Board.

Another labor organization, Local 1199, National Union of Hospital and Health Care Employees (Local 1199), also filed three petitions seeking representation of three separate units of the Hospital's employees. Two of these three petitions claimed that 30 per cent or more of the employees in the requested unit supported Local 1199 as their collective bargaining representative. The third petition averred that a substantial number of employees supported Local 1199. On September 30, 1976, LPN–SHEP, in connection with a third labor organization, intervened with respect to one of Local 1199's petitions.

The Regional Director ordered elections in the three voting units petitioned for by the labor organizations. On December 16, 1978, elections conducted by the Board were held at the Hospital. A majority of the eligible voters in each unit voted against representation by any labor organization. Local 1199 filed 27 objections to the election, alleging pre-election misconduct by the Hospital. On January 24, 1977, Local 1199 filed an unfair labor practice charge against the Hospital, averring various acts allegedly **448** rendering a fair election impossible. Local 1199 also claimed that it represented a majority of the Hospital's employees, as demonstrated by signed authorization cards, and that the Hospital unlawfully refused to bargain with this Union. The Board was asked to issue an order requiring the Hospital to bargain with Local 1199 as the exclusive representative of its employees in the respective units.

At the request of the General Counsel, the Board issued a subpoena duces tecum requiring the Hospital to produce IRS W–4 forms, or if such forms were unavailable, other documents bearing signatures of all employees in the involved units covering the period from June through October 1976. On June 1, 1978, the Board denied the Hospital's petition to revoke the subpoena, stating that the "information sought appear[ed] to be relevant to the matter under investigation." The Hospital refused to comply with the subpoena.

On August 1, 1978, the Board filed an application in the district court for an order requiring that the Hospital obey its subpoena duces tecum. The appeal from the decision of the district court granting the relief prayed by the Board is case No. 79–3408.

On June 5, 1978, the Hospital filed its complaint in the district court under the Freedom of Information Act praying an injunction requiring the Board to make available to the employer the membership authorization cards allegedly executed by its employees. The district court granted the Board's motion for summary judgment, holding that the membership application cards are exempt from the Freedom of Information Act. The appeal from this judgment is case No. 79-3409.

II

It is well settled that a subpoena issued by the Board pursuant to 29 U.S.C. § 161(1) should be enforced if "the matter under investigation is within the jurisdiction of the Board and . . . the evidence subpoened is related to that matter and is described with 'sufficient particularity.' " *N.L.R.B. v. ITT Telecommunications,* 415 F.2d 768, 769 (6th Cir. 1969); *United States v. Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950). *See also Goodyear Tire and Rubber v. N.L.R.B.,* 122 F.2d 450 (6th Cir. 1941). This rule includes IRS W-4 forms signed by employees of a company against which a charge of unfair labor practice is pending before the Board. *N.L.R.B. v. Playskool, Inc.,* 431 F.2d 518, 519 (7th Cir. 1970).

Section 10057, N.L.R.B. Casehandling Manual (Part One), Unfair Labor Practice Proceedings, contains this statement of Board policy:

> *Authorization Cards: Establishing Authenticity*
>
> In all proceedings before the Board, the General Counsel offers only evidence which he has reason to believe is true and authentic. *It is mandatory upon Regions to establish the authenticity of authorization cards before issuance of complaint.* (Emphasis added.)

In his order requiring the Hospital to obey the subpoena duces tecum issued by the Board, District Judge Duncan emphasized that the Board is attempting to determine the asserted majority status of Union 1199 and needs to use IRS W-4 forms or other documents in the employer's possession bearing employee signatures in order to determine the validity of signatures on authorization cards. The Union is seeking a bargaining order pursuant to *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 614, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969), which held that the Board may issue a bargaining order to remedy employer unfair labor practices which have undermined the majority strength of the Union to such an extent as to prevent the holding of a fair election "where there is a showing that at one point the union had a majority."

The Hospital contends that the subpoena unnecessarily interferes with the right of privacy of hospital employees. It is true that Form W-4 contains personal information concerning employees which could be of no interest to or concern of the Board, such as marital status, number of income tax allowances claimed, amount desired to be deducted each payday, exemptions from withholding claimed and the ground for the exemptions. To avoid this disclosure of private information, this court modifies the order of the district court so as to permit the Hospital, in lieu of furnishing the original W-4 forms to the Board, at the option of the Hospital to provide legible copies of W-4 forms of its employees during the period specified in the subpoena, made by a coping machine, obliterating all information on the form except the full name and address, social security number and signature of the employee and the date the W-4 form was signed. With this modification, the judgment of the district court in case No. 79-3408 is affirmed.

III

The district court correctly held that the union authorization cards sought by the Hospital are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. *N.L.R.B. v. Robbins Tire and Rubber Co.,* 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978); *Howard Johnson Co. v. N.L.R.B.,* 618 F.2d 1 (6th Cir. 1980); *Madeira Nursing Center, Inc. v. N.L.R.B.,* 615 F.2d 728 (6th Cir. 1980); *N.L.R.B. v. Hardeman Garment Corp.,* 557 F.2d 559 (6th Cir. 1977). Authorization cards, like the witness statements in *Robbins Tire,* are investigatory records in the possession of the Board for enforcement purpose. Authorization cards are not discoverable by an employer under the rules of the Board, and discovery cannot be attained under the Freedom of Information Act.

The Hospital contends that the district court failed to protect the Hospital's fifth amendment right to substantive due process by permitting the Board to engage in pre-trial discovery while denying the Hospital equal discovery. We hold this contention to be without merit. *N.L.R.B. v. Valley Mold Co.,* 530 F.2d 693, 695 (6th Cir.), *cert. denied,* 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976).

If the current investigation conducted by the General Counsel should result in the filing of a complaint, the Hospital will be entitled to a due process hearing, including an opportunity to compare signatures an authorization cards with signatures on the W-4 forms, and to introduce evidence in opposition to any effort on the part of the General Counsel to obtain a *Gissel* bargaining order. Any failure on the part of the Board to conduct a due process hearing can be challenged in proceedings before the Board and, if necessary, by petition to review filed in this court. *ITT v. Electrical Workers,* 419 U.S. 428, 448, 95 S.Ct. 600, 612, 42 L.Ed.2d 558 (1975); *N.L.R.B. v. Valley Mold Co., Inc., supra,* 530 F.2d 693 (6th Cir.), *cert. denied,* 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976).

The judgment of the district court in case No. 79-3408 is modified as hereinabove set forth, and affirmed as modified. The judgment of the district court in case No. 79-3409 is affirmed. No costs are taxed. Each party will bear its own costs in this court.

NLRB v. Allen's I.G.A. Foodliner

651 F.2d 438 (6th Cir.), May 28, 1981—244 NLRB 202

On petition to enforce Board Order

Before LIVELY and JONES, Circuit Judges, and GILMORE, District Judge*

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NATHANIEL R. JONES, Circuit Judge. The Board petitions for enforcement of its Order that Allen's I.G.A. Foodliner (Allen's) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (3), by discharging an employee for his union activity. The Board also found that Allen's violated Section 8(a)(1) of the Act by announcing improved benefits in order to undermine a union and by sponsoring and participating in the circulation of a petition among employees withdrawing support from a union 244 NLRB No. 25. For the reasons set forth below, we grant enforcement.

EMPLOYEE DISCHARGE

Allen's, a Kentucky corporation, operates retail grocery establishments in Morehead, Kentucky. In the fall of 1976, the United Food and Commercial Workers International Union, Local 227 (the Union) began an organizational campaign among Allen's employees. Lowell Ray Adkins became actively involved in the Union's organizational campaign. He distributed union authorization cards and solicited employees to join the Union. An election was held on January 20, 1977, which the Union lost. Based upon the Union's objections to the election, a second election was ordered.

During the period between the two elections, Adkins assisted Union officials by arranging and participating in organizational meetings and visits. At a meeting of the meat and produce department employees, store manager Hub Moore stated that Allen's had "kept quiet long enough," and announced a new benefit plan. Adkins inquired from the floor whether the plan was similar to a company benefit plan in Louisville. Moore replied that the plans were similar, at least as to time-and-a-half for overtime pay. Adkins challenged Moore's statement, asserting that the Louisville plan called for double overtime pay, and produced a copy of the Louisville plan to support his assertion. On other occasions, Moore accused Adkins of "spreading lies" by telling employees he could get them improved wages and benefits; charged Adkins with having "more control over the employees" than Moore did; asked Adkins why he supported the Union; and, told Adkins that he (Moore) had "people in the store" that would tell Moore anything he wanted to know and "anything that was happening."

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A second election was held on August 12, 1977. After the Union's victory had been announced, Moore angrily stated to Adkins and two other employees, "Well, I guess you all think you won. Well, you didn't win. You lost."

Moore continued to harass Adkins about his union involvement. Moore told Adkins that he would fire Adkins if he caught him "talking union on the job or on company property." Moore admonished Adkins for "costing the people of the store money" and told him that Allen's had a plan that would improve benefits for the employees, but that it couldn't be put into effect at this time "because of the [Union] problem" they had. Moore be-rated Adkins for a pro-union slogan written on the restroom wall, and told him he wanted it stopped.

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*Honorable Horace W. Gilmore, District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Approximately two weeks after the second election, Moore discharged night manager Billy Snipes. Moore told Snipes that he (Moore) had been instructed to fire Snipes if he was "for the Union." Moore then interrogated Snipes concerning a converation Snipes had had with Adkins a few days earlier. Moore offered Snipes a second chance provided he realized that there were "certain people you can talk to at work here." Moore also told Snipes to "stay away from the boys in produce and around back." Snipes refused and was fired.[1]

Several months after the second election, Adkins was elected shop steward and a member of the Union's negotiating committee. Moore told Adkins about a shop steward in Louisville that Moore had "thrown out of his office more times than he could count." Moore also told Adkins that the company had "finally" made the Louisville shop steward an assistant manager, and that he became the "best" assistant manager they had ever had. On April 7, 1978, Moore notified Adkins that he was being laid off "due to lack of business" and because he "rated below" his fellow employees.

It is well settled that an employer is prohibited from discharging an employee because of his union activities. *NLRB v. Gissel Packing Co., Inc.* 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969); *Vic Tanney Intern. Inc. v. NLRB,* 622 F.2d 237 (6th Cir. 1980). The Board determined that Allen's discharged Adkins in violation of the Act. In this appeal Allen's asserts that Adkins was discharged because of a "business retrenchment" and because of his poor performance. Substantial evidence supports the Board's finding that Allen's proffered reasons for Adkins' discharge were pretextual. Although a subsequent increase in business necessitated the hiring of several new employees and the promotion of others from part time to full time, Adkins was never recalled. Allen's announcement of an increased wage and benefit plan are inconsistent with an economic retrenchment. Additionally, by Allen's own admission, Adkins was a "good" and "dependable" worker for eight of his nine years. Only within the year proceeding Adkins' discharge did Allen's begin to find fault with Adkins' attitude. Consequently, we hold that substantial evidence supports the Board's determination that Adkins' union activities were the sole reason for his discharge. *Wright Line,* 251 NLRB 150 (1980).

BENEFIT PLAN/EMPLOYEE PETITION

It is a violation of Section 8(a)(1) of the Act for an employer to sponsor and participate in the circulation of a petition among employees withdrawing support from a union. There are "few more specific methods of interfering with employees' rights freely to choose or not to choose a bargaining representative than to have each summoned to the office of the employer and there to be asked to sign a prepared statement withdrawing from the Union." *NLRB v. H. W. Elson Bottling Co.,* 379 F.2d 223, 225 (6th Cir. 1967).

The granting or withholding of benefits in order to discharge union activity is proscribed by Section 8(a)(1) of the Act. In *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409, 84 S.Ct. 457, 459, 11 L.Ed.2d 435 (1964), the Supreme Court stated: "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Applying these principles, we hold that substantial evidence supports the Board's finding that Allen's violated Section 8(a)(1) of the Act by sponsoring and participating in the circulation of the petition among employees withdrawing support from the Union and by announcing improved benefits in order to undermine the Union.

In May 1978, employee Ivan Connolly approached at least two other employees with a petition which stated, in effect, that "we, the employees of Allen's IGA, do not wish to have the Amalgamated Meat Cutters represent us." Neither employee wished to sign the petition immediately although several other employees had signed the petition. Employee Paula Henderson sought the advice of assistant manager Harold Chapman. He told her that it would be "wise" to sign the petition and she did. The other employee, Donna Withrow, was called to assistant manager Wavell DeHart's office to explain her reasons for not signing. She replied that she wished to remain uninvolved and would wait until after a scheduled store meeting before making up her mind. DeHart said it would be "better" if she signed at once, whereupon she did sign.

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[1] Snipes' discharge is not an issue in this appeal.

The day after the DeHart-Withrow incident, store owner Hubert Allen held a meeting for Allen's employees. He announced the institution of a profit-sharing plan for employees and a raise in their wages. Allen apologized for not instituting these changes sooner, explaining that if he had, he "could have gotten into trouble." Allen stated he was glad it was "all over now" and the company and its employees would be "one big, happy family again."

Allen's sole contention concerning its sponsoring of the anti-union petition and announcement of benefits is a procedural one: that the allegations as to the Board's findings are barred by Section 10(b) of the Act. Section 10(b) of the Act states, in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power to issue * * * a complaint stating the charges in that respect * * * provided, that no complaint shall issue based upon any unfair labor practices occurring more than six months prior to the filing of the charge with the Board.

Allen's sponsored the anti-union petition and announced increased benefits in May of 1978. The *original charge* filed by the Union on July 10, 1978 did not specifically rely on Allen's anti-union petition and announcement of benefits. It only alleged that Allen's violated Section 8(a)(1) of the Act by discharging employees and "by other acts." Nor did the Board's *original complaint* allege that Allen's anti-union petition and announcement of increased benefits violated the Act. However, on February 2, 1979, two weeks before the administrative hearing, an *amended complaint* issued by the Board specifically alleged that Allen's anti-union petition and announcement of increased benefits contravened Section 8(a)(1) of the Act. Thus, Allen's argues that the findings of 8(a)(1) violations are not pursuant to a charge filed with the Board. We disagree.

As was aptly stated in *NLRB v. Central Power & Light Co.*, 425 F.2d 1318 (5th Cir. 1970):

> The charge is thus not intended to be a detailed pleading or to specify the issues ultimately to be raised before the [Administrative Law Judge]; the Board's complaint serves that function. All that the requirement is really concerned about is that the instigation of an investigation and complaint proceed under a formal charge made by the party aggrieved and not from the Board's own initiative. Accordingly, general allegations such as
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> that the employer "by other acts and conduct * * * interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act," * * * are legally sufficient to cause inclusion of other acts if they are sufficiently related to the specific acts alleged. And sufficient relation has generally been found between acts that are part of the same course of conduct, such as a single compaign against a union.

Id. at 1320 (citations and footnotes omitted). *Accord, NLRB v. Bin-Dicator Co.*, 356 F.2d 210, 214 (6th Cir. 1966). In this case, the Union's charge was legally sufficient to include Allen's sponsorship of the anti-union petition and its announcement of benefits. Both of these were part of Allen's single course of conduct to undermine the union and as such they were sufficiently "related to" Adkins contemporaneous discharge to be raised by the union's charge.[2] Absent this relationship between the particular acts and "other acts" alleged in a charge, a party's allegations must be pled with factual detail and specificity.

Accordingly, the Board's order in ENFORCED.

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[2] The Union's charge was made within six months of the time violations took place, as required by Section 10(b) of the Act.

Nissin Foods (USA) Company, Inc. v. NLRB

515 F. Supp. 1154 (E.D. Penn.), May 29, 1981

On petition for injunctive relief

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TROUTMAN, District Judge: THE COURT: Good morning. Because this is an emergency matter requiring immediate attention, we shall dispose of it from the bench without the niceties of what sometimes is called a formal opinion.

The plaintiff, engaged in the business of food producing, seeks injunctive relief, namely, a temporary restraining order staying an administrative hearing to be held May 26, 1981, pending resolution of the issues here presented. Plaintiff contends that the defendant National Labor Relations Board, NLRB, is prosecuting unfair labor practices against plaintiff notwithstanding the fact that an administrative assistant has asserted that several of the cases upon which the labor complaint is based are without merit.

The Regional Director of the NLRB filed unfair labor practices against plaintiff as a result of a representation election held in June, 1980. The union had filed and subsequently withdrew objections to the election in Sepbember of 1980. The union also filed a series of unfair labor practice charges against the plaintiff upon which the Regional Director of the NLRB acted. The administrative hearing scheduled for May 26, 1981, will determine the representation and unfair labor practice issues.

Plaintiff fears that, absent grant of the requested relief, it will be prevented from receiving a full and fair administrative hearing and will, as a result suffer substantial economic harm. Plaintiff contends that litigation of the case, in light of the alleged admission that some of the charges lack merit, violates the National Labor Relations Act, 29 U.S.C., Section 151 et seq., as well as 29 C.F.R., Code of Federal Regulations, No. 101.8. Plaintiff further complains that defendants have refused and continue to refuse to permit NLRB employees to testify and/or produce documents essential to the plaintiff's defense at the administrative hearing. Plaintiff considers this withholding of information violative of its right of due process under the Fifth Amendment. Plaintiff asks this Court to decide which of the charges have merit, if any, and to order production of documents deemed necessary by plaintiff for a fair administrative hearing.

Preliminarily, defendants question the power of this Court to hear plaintiff's compliant. The action of the NLRB regarding representation and unfair labor practice claims cannot be challenged in an independent suit in federal district court unless the Board violates a clear statutory mandate. See *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), or the plaintiff asserts the deprivation of a constitutional right which is not obviosuly frivolous. *Fay v. Douds,* 172 F.2d 720 (Second Circuit 1949). Thus, plaintiff relies not wholly, of course, but heavily upon *Leedom v. Kyne* and *Fay v. Douds.*

Interestingly, *Fay v. Douds* has been criticized or questioned and at least not followed in various cases and under various situations. We here call attention to the case of *Grutka v. Barbour,* 549 F.2d 5 (Seventh Circuit), *cert. denied,* 431 U.S. 908, 97 S.Ct. 1706, 52 L.Ed. 2d 394 (1977); *Amalgamated Meat Cutters v. Allen,* 423 F.2d 267 (Eighth Circuit 1970), *Greensboro Hosiery Mills, Inc. v. Johnston,* 377 F.2d 28 (Fourth Circuit 1967); *Boire v. Miami Herald Publishing Company,* 343 F.2d 17 (Fifth Circuit), *cert. denied,* 382 U.S. 824, 86 S.Ct. 56, 15 L.Ed.2d 70 (1965); *Utica Mutual Insurance Co. v. Vincent,* 375 F.2d 129 (Second Circuit), *cert. denied,* 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967). Also, see *NLRB v. Interstate Dress Carriers, Inc.,* 610 F.2d 99 (Third Circuit 1979).

The plaintiff, attempting to fit the circumstances of this case into the latter mold, claims that defendants are prosecuting plaintiff for pursuing the issues involved in this case with knowledge that some or all of the charges lack merit in violation of the National Labor Relations Act and the regulations issued thereunder. Defendants' failure to supply plaintiff with requested information, argues plaintiff, will result in the deprivation of plaintiff's property rights in violation of the Fifth Amendment by expos-

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ing the plaintiff to substantial fines, penalties, fees, costs and expenses.

As the plaintiff logically contends, the situation is not unlike that existing in *NLRB vs. Capitol Fish Company,* 48 LRRM, 3067 (Fifth Circuit 1961). Now, in that case, Capitol Fish Company case, the respondent contended that the findings of the examiner were not supported by substantial evidence. That case involved a petition by the National Labor Relations Board for enforcement of its order. There the moving party contended that it had been denied the right to introduce material evidence based upon the contention that the general counsel's refusal to permit the attorney who investigated the case to testify and the trial examiner's quashing of the subpoena issued to the attorney constituted a violation of due process. There, the report shows, that "At the outset of the hearing the respondent moved that the hearing be posponed 'until such time as the General Counsel grants permission for Mr. Miller to testify.' The trial examiner denied the motion on the ground that the general counsel had already denied the request. The investigating attorney was present and represented the general counsel at the hearing. Another Board attorney moved to quash the subpoena on the grounds that 'the permission to testify had been denied and the material is irrelevant anyway.' The trial examiner granted the motion and revoked the subpoena."

"The unrebutted testimony of one Robert Poole, who voluntarily left Capitol Fish Company for a better paying job, supported the respondent's contention that the investigating attorney's testimony would have an important bearing on the credibility of all of the witnesses who testified against Capitol Fish."

The court there noted in remanding the record for further proceedings as follows: "The record indicates that the trial examiner did not consider whether the General Counsel was right or wrong in refusing to allow the investigating attorney to testify."

Now, in Capitol Fish, the court was asked to look back and determine whether due process had been afforded the plaintiff. Here we are asked to look forward and assume that due process will be denied.

Notwithstanding grave doubts concerning the continuing vitality of the Fay exception, as reflected in the cases cited above, and notwithstanding some doubts as to plaintiff's characterization of the process due it under the Fifth Amendment, the Court will assume jurisdiction for the purpose of this hearing and, in order to expedite consideration of this matter, will excuse the so-called exhaustion requirement.

To obtain preliminary injunctive relief, the plaintiff must demonstrate, one, that irreparable injury will occur if relief is not granted until a final adjudication on the merits can be made; two, that there is a reasonable probability of success on the merits; three, that the possibility of harm to the nonmoving party, as well as to any other interested party, will be minimal; and, four, that harm to the public, when relevant, will not be likely. See *Continental Groups, Inc. v. Amoco Chemical Corp.*, 614 F.2d 351 (Third Circuit 1980). *Accord, Kennecott v. Smith Corp.*, 637 F.2d 181 (Third Circuit 1980), *Fitzgerald v. Mountain Laurel Racing Corp.*, 607 F.2d 589 (Third Circuit 1979).

To prove "irreparable injury" plaintiff must show an "imminent threat" rather than the mere "possibility of remote future injury." Again, see *Continental Group, Inc. v. Amoco.* And also see generally *Perkins v. Wagner,* 513 F.Supp. 904 No. 81-484 (E.D.Pa. 1981); and *Kocker Coal Co. v. Marshall,* 497 F.Supp. 73 (E.D.Pa. 1980).

Thus, as stated, the burden in this proceeding rests upon the plaintiff to show irreparable injury, and this must be in the nature of an imminent threat as opposed to a possibility of remote injury in the future.

We conclude on the basis of the pleadings filed, there having been no testimony produced, that the plaintiff has failed to meet this burden. Plaintiff asserts or finds "irreparable harm" in that it may be prevented from receiving a full and fair administrative hearing, that it may be de-

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nied an adequate administrative remedy and suffers "substantial economic harm" by loss of goodwill, may suffer a temporary plant shutdown during the hearing, loss of sales, loss of profit and suffer legal costs and expenses. Plaintiff also fears, and understandably asserts, that defendants' refusal to permit employees to testify and to produce documentary evidence will irreparably harm plaintiff for the reason that plaintiff has no means of obtaining this information.

Clearly, the economic harm which the plaintiff asserts, however substantial, will not support the issuance and the granting of injunctive relief such as is sought in the case. See *Oburn v. Shapp,* 521 F.2d 142 (Third Circuit 1975); nor will litigation expenses or substantial and unrecoupable costs justify the grant of such extraordinary relief. See *Renegotiation Board v. Banercroft Clothing Co.*, 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974). Likewise, and most importantly, internal appellate procedures within the Board framework, as well as opportunity for review by the Court of Appeals, will provide and should provide the plaintiff with adequate remedies for any deprivation or violations of its right to a full and fair administrative hearing.

Accordingly, we find and conclude that plaintiff has failed to demonstrate irreparable harm. This finding alone suffices to warrant denial of the requested injunctive relief. See *Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture,* 469 F.2d 1387 (Third Circuit 1972).

An appropriate order will therefore be entered denying the injunctive relief. This conclusion renders moot the remainder of plaintiff's claims given an immediate hearing as scheduled, and the complaint will accordingly be dismissed *sua sponte.* See *Bryson v. Brand Insulators, Inc.,* 621 F.2d 556 (Third Circuit 1980).

In reaching our conclusion, we assume that the plaintiff will pursue its contentions before an impartial Administrative Law Judge with the vigor and the vitality evident in these emergency proceedings before this Court in which event the administrative abuses alleged will surely surface and become the subject of correction and appropriate remedy either by the Administrative Law Judge or the appellate court. Further intrusion by this Court into the administrative and appellate procedures mandated by Congress is not warranted. An appropriate order will therefore be entered.

And finally, I desire to express our appreciation to counsel for their sacrifice in giving us this, the first day of a long holiday weekend, to accommodate the disposition of this emergency hearing. Thank you very much, gentlemen, and unless there is something further, court is adjourned.

(Whereupon, at 10:37 a.m. court was adjourned.)

ON MOTION FOR RECONSIDERATION

THE COURT: Let the record show that the plaintiff has again presented its position in support of its motion for reconsideration. This has been done in this emergency hearing in the absence of defense counsel, and we have, as we have advised plaintiff's counsel, reached a ruling in the case which, after telephone conversation with defense counsel, indicates no need for their appearance either today, if that were possible, and it is not, or on a later date.

Although the Court, within the confines of its schedule could indeed hear the matter further next week, there seems to be no need to further postpone it. Rather it appears to the Court that the plaintiffs are indeed entitled to an early decision by this Court so that the plaintiff may exercise its remedies either before the NLRB or before the Circuit Court of Appeals or both. Accordingly, we shall, as we did on Saturday, dispose of the motion for reconsideration by way of this bench opinion, and we shall at this time rule directly and specifically on the question of jurisdiction.

As to jurisdiction, the Court on Saturday assumed jurisdiction and then did dispose of the case on the basis of other questions involved. Today, we shall reach the issue of jurisdiction as well as other matters.

Now, as we previously noted in our bench opinion on Saturday, the action of the NLRB cannot be challenged in an independent suit in federal district court unless the Board violated a clear statutory mandate. *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), or the plaintiff asserts the deprivation of a constitutional right which is not obviously frivolous. *Fay v. Douds,* 172 F.2d 720 (2d Cir. 1949).

To invoke the jurisdiction of this Court, plaintiff must, therefore, show that the Board "clearly breached the bounds of its proper authority as a matter of law." *Machinery, Scrap Iron, etc. Employees Local 714 v. Madden,* 343 F.2d 497 (7th Cir. 1965), *cert. denied,* 382 U.S. 822, 86 S.Ct. 53, 15 L.Ed.2d 69 (1966), or plaintiff must show that the Board patently disregarded the bounds of its statutory jurisdiction. *Grutka v. Barbour,* 549 F.2d 5 (7th Cir.) *cert. denied,* 431 U.S. 908, 97 S.Ct. 1706, 52 L.Ed.2d 394 (1977).

In the case at bar, the plaintiff originally alleged that, without the requested relief, it would be prevented from receiving a full and fair administrative hearing and would suffer substantial economic harm. Plaintiff contended that the prosecution of this case, in light of the alleged admission that some of the charges lacked merit, violated the National Labor Relations Act, 29 U.S.C. 151 et seq., as well as 29 C.F.R. 101.8. Plaintiff also complained that defendant's refusal to permit NLRB employees to testify and/or produce documents essential to plaintiff's defense at the administrative hearing constituted a violation of rights secured by the Due Process Clause of the Fifth Amendment.

Today, after one day of hearing before the Administrative Law Judge, which hearing is presently on-going, plaintiff further argues that the Administrative Law Judge has ruled that he lacks power to overrule general counsel of the NLRB, and he, therefore, revoked the subpoenas in question, that he refused to consider or even read the plaintiff's motion for a pretrial ruling concerning the supposedly meritless charges to which Hoeber, H-o-e-b-e-r, adverted, and that plaintiff cannot sue the NLRB for abuse of process because of the Federal Tort Claims Act, and hence, they suffer irreparable harm.

These additional contentions do not, in our judgment, warrant an exercise of jurisdiction permitted by the narrow exception created by *Leedom v. Kyne.*

Alternatively, under the *Fay* doctrine, plaintiff could establish jurisdiction by alleging the deprivation of a constitutional right which is not obviously frivolous. However, the *Fay* doctrine never gained wide or strong support among the circuit courts. See, for example, *Grutka v. Barbour,* supra, *Amalgamated Meat Cutters v. Allen,* 423 F.2d 267 (8th Cir. 1970); *Greensboro Hoisery Mills, Inc. v. Johnston,* 377 F.2d 28 (4th Cir. 1967); *Boire v. Miami Herald Publishing Co.,* 343 F.2d 17 (5th Cir.); *cert. denied,* 382 U.S. 824, 86 S.Ct. 56, 15 L.Ed.2d 70 (1965). In fact, even the Second Circuit Court of Appeals, which originally promulgated the *Fay* doctrine has now questioned its vitality. See *Utica Mutual Insurance Co. v. Vincent,* 375 F.2d 129 (2d Cir.); *cert. denied,* 389 U.S. 839, 88 S.Ct. 63, 19 L.Ed.2d 102 (1967).

In the Third Circuit, the Court of Appeals does not appear to have ever adopted this rule, particularly where, as here, the employer, the party seeking to invoke the court's jurisdiction, can bring to the attention of the appellate court all the alleged procedure irregularities of which it complains. See *NLRB v. Interstate Dress Carriers, Inc.,* 610 F.2d 98 (3rd Cir. 1978).

In light of these considerations and legal principles, exercise of jurisdiction by this Court under these circumstances would be inappropriate. Moreover, even if we had assumed jurisdiction previously, that is, in connection with Friday and Saturday's proceedings, plaintiff has not demonstrated any intervening events justifying or warranting reconsideration of the order denying the requested relief.

As we explained in our bench opinion on Saturday, neither the economic harm which plaintiff fears nor the substantial and unrecoupable costs expended will support the issuance of an injunction. Here we call attention to the case of *Borden, Inc. v. Federal Trade Commission,* 495 F.2d 785 (7th Cir. 1974), where at page 789 the court, in discussing this issue, used the following very strong language: "Finally, the district court properly recognized that Borden's claim of irreparable injury based upon the cost and inconvenience of defending itself in administrative proceedings is not alone sufficient to justify judicial intervention in the administrative process."

Citing *Myers v. Bethlehem Corporation,* 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638, and *Renegotiation Board v. Bannercroft Clothing Co.,* 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123, both of which were cited in our bench opinion on Saturday. The Court further expressly reaffirms the rule of *Myers* stating that—and we quote—"Mere litigation expense, even substantial and unrecoupable costs, does not constitute irreparable injury." Furthermore, the internal appellate procedures within the Board framework and the opportunity for review by the Court of Appeals provide plaintiff, under the law, with what has been described as an adequate remedy at law.

Accordingly, we find and conclude that the Court lacks jurisdiction and, therefore, plaintiff's motion for reconsideration of the order entered May 26 1981, will be denied.

Today, the following order will be entered: AND NOW, this 28th day of May 1981, plaintiff's motion for reconsideration is denied, and plaintiff's complain is dismissed for lack of jurisdiction.

If there is nothing further, court will be adjourned.

(Whereupon, at 3:41 p.m. court was adjourned.)

NLRB v. Savin Business Machines Corporation

649 F.2d 89 (1st Cir.), May 29, 1981–242 NLRB 435

On petition to enforce Board Order

Before Coffin Chief Judge, Bownes Circuit Judge, Wyzanski, District Judge*

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*Of the District of Massachusetts, sitting by designation.

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Coffin, Chief Judge: The National Labor Relations Board petitions for enforcement of its order directing the respondent, Savin Business Machines Corporation, to reinstate with back pay its former employee, Stuart Portner. The Board adopted the findings of the Administrative Law Judge and held that Savin had discharged Portner because of his union organizing activity in violation of §§ 8(a)(1) & (3) of the National Relations Act. Because this decision is supported by substantial evidence on the record as a whole, we will enforce the order as modified.

The undisputed facts cover a relatively short compass. Portner was actively engaged in soliciting authorization cards for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America several months before his discharge. Portner's job responsibilities were to service and repair business machines sold or leased to Savin customers, usually at the customer's place of business. In terms of technical proficiency, Portner was acknowledged by the company to be not merely good, but excellent. Supervisor

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Pena testified that Portner "was probably the most technically competent person I have ever met." Several months before his discharge, Portner received a letter of commendation from Savin's corporate president and a cash prize for his suggestion for improving a company product, the third such suggestion of Portner's accepted by the company. Despite these signs of success, Portner was dissatisfied with working conditions at Savin. He expressed his discontent to other employees and sometimes protested his job assignments. In particular, Portner frequently failed to comply with the company's dress code, notwithstanding promises of improvement.

Beyond these facts, the company's version of events departs radically from that advanced by the General Counsel and adopted by the ALJ. The company maintains that it discharged Portner for an accumulation of offenses and misdeeds, in themselves minor, which, when taken together, demonstrated a "bad attitude" and insubordination. The company's position is that it was willing to tolerate Portner's shortcomings because of his technical excellence during its earlier, leaner years, but that by 1977 the Boston office's outlook had improved, and its staff of technicians had increased to the point where Portner's expertise became expendable. The final straw, according to the company, came on December 14, 1977 when Portner called the office to report that his car was disabled and he could not make his service calls. Portner had called earlier in the morning to notify the office dispatcher that he was trying to have the car repaired. Service technicians are required to provide their own transportation on service calls. The second time Portner called, supervisor Pena spoke with him and asked that he come to the company's Brighton facility, Portner replied that he could not obtain transportation and an argument ensued. Pena could not remember the argument in any detail, except that it generally concerned Portner's inability to get transportation and lasted 20–30 minutes. Pena ended the conversation by discharging Portner.

The company does not rely on this incident alone, but on the combined effect of this and several other preceding infractions of company rules. Several company witnesses testified to customer complaints about Portner's dress and "attitude", although no written record was made of them. The company also relies on an incident occurring sometime in September or October 1977 when supervisor Pena observed Portner apparently stealing switches from a company parts room. Once again no written record was made of the event. Plant manager Raffa testified that he would have fired Portner for this, but he felt that the evidence was insufficient. Finally, the company asserts that Portner "moonlighted" by accepting pay directly from customers for after-hours work. Portner, according to the company, charged two customers directly after he had been denied permission to do so. The company denies any knowledge that Portner was engaged in organizational activity.

The General Counsel presented testimony by Portner, credited by the ALJ, that on or about August 17, 1977, supervisor Pena had observed Portner distributing union authorization cards in the company parking lot [1] and later that same day had threatened Portner with loss of his job if he continued "making trouble" and "leading a revolution". Thereafter, in late August or early September, employee Mendes testified that supervisor Pena told him and several other technicians that "a union wouldn't do anybody any good" and asked the rhetorical question "what [is] Mr. Portner * * * trying to prove by starting a union here"? In September, after the union organizing campaign had fizzled out, Portner testified that he began receiving "bogus calls"—service calls to a location where there was no repair work to be done. Before his union activi-

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[1] We fail to understand the significance of the discrepancy asserted by the company between Portner's testimony that Pena saw *him* in the parking lot and the ALJ's summary statement that Portner saw *Pena*. Obviously, Portner watched Pena watch him. Moreover, the ALJ's "version", if different at all, was more favorable to the company than Portner's.

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ties, Portner testified that he received one or two such calls a week; afterwards he received as many as four in one day. "Bogus calls" waste time and make the technician appear less productive. Portner testified that when he questioned a dispatcher about the problem, the dispatcher replied that the calls had been placed in his assignment box by supervisor Pena.

This evidence was sufficient to establish a prima facie case of anti-union motivation for Portner's discharge. *NLRB v. Eastern Smelting & Ref'g Corp.*, 598 F.2d 666 (1st Cir. 1979). Portner's credited testimony, corroborated in important part by that of Mendes, showed that the company's supervisors knew of Portner's union activity, warned him to stop it, and, when that failed, attempted to harass him and possibly to lay a foundation for his discharge. The prima facie showing shifts the focus of inquiry to the company's proferred legitimate business justification for the discharge. *Id.*, 589 F.2d at 671.

The General Counsel's evidence in rebuttal cocentrated on the events leading up to the telephone conversation during which Portner was discharged, thus meeting the company's theory that this apparently minor incident was in fact the crowning blow of a long-standing pattern of misbehavior. As to the customer complaints, company dispatcher Johnston testified that customers complained about other technicians as well. Johnston also testified that Portner was given an average of 7 to 8 assignments daily, or between 1,750 and 2,000 annually in a fifty-week work year. Of this number, company witnesses could recall only three instances where customers had complained about Portner and in none of those instances was Portner warned or disciplined in any way. Nor was Portner disciplined after his alleged theft of parts from the company supply store. Supervisor Pena testified that when he found Portner in the parts room, a "restricted area", and demanded an explanation, Portner replied that he was picking up switches to repair a customer's equipment. Employee Mendes testified that it was common practice for technicians to sign out parts on their own when no supervisory personnel were present. As to Portner's alleged "moonlighting", there is no dispute that the company permits such "moonlighting" with prior approval. Portner testified that he was given explicit approval; the company witnesses denied this. The ALJ resolved the credibility dispute in favor of Portner. Finally, there is also no dispute that Portner had been a sloppy dresser during his entire eight year tenure with the company and that the company had never pressed him beyond his periodic assurances that he would try to improve his appearance.

Based on this evidence the ALJ concluded that Portner's misdeeds took on importance only after his discharge. On this view, even assuming as true the company's version of the discharge incident, the ALJ decided that Portner's inability to satisfy Pena's demand that he find alternate transportation on this single occasion could not have been the true reason for his discharge. He therefore concluded that "but for " Portner's union activities, he would not have been discharged. We find the ALJ's finding of pretext to be supported by substantial evidence. The ALJ was entitled to discredit the company's story that despite its mounting frustration with Portner's performance, it never once disciplined him or even placed a reprimand in his personnel file for any of his alleged acts of misconduct. Particularly damning in this regard is the company's policy, stated in its Branch Office Procedure manual:

> "Whenever unsatisfactory performance or behavior occurs, the supervisor or manager should deal with the situation promptly, constructively and in a tactful manner in order to: * * * d. Assure that documentation is available to support management's position in the event of discrimination or labor claim charges."

The company's principal objection to the ALJ's decision is his crediting of employee Mendes' testimony going to the General Counsel's prima facie showing of improper motivation. This contention is not without some force. Mendes admitted to being a

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friend of Portner's and to having been denied a wage increase by the company shortly before a Board agent took his statement. He showed some sign of bias in Portner's favor by failing to recall on cross-examination that Portner sometimes dressed in jeans. Mendes' testimony regarding supervisor Pena's anti-union remarks was contradicted by company employees Larner and Dubeau as well as by Pena.

The ALJ noted this credibility conflict and expressly decided in favor of Mendes' version. The reasons given for this determination were that Mendes appeared to be a candid and forthright witness, Mendes testified against the respondent's interest while still employed (the same was not true for Larner, Dubeau, and Pena, also currently employed) and Mendes would not likely have fabricated the incident based on his friendship with Portner by placing two other technicians, still employed, at the site of the conversation. Within the bounds of reason, it is the ALJ's judgment, not ours, that is controlling on issues of credibility. *See, e.g., NLRB v. Yale Mfg. Co.*, 356 F.2d 69, 72 74 (1st Cir. 1966). Mere numerical superiority of witnesses, or the possibility of bias is not sufficient to put the question beyond the realm of reasonable dispute. We see no basis to upset the ALJ's credibility determination in this instance.[2]

We have considered the company's other contentions and, with one exception, find them to be without merit. The ALJ properly could deny the company's motion to reopen the record to admit, on the issue of Portner's credibility, evidence that Portner had participated in a robbery at the company almost a year *after* his discharge. To the extent this evidence was at all relevant to credibility, the ALJ was not bound to open the record on that issue alone. *NLRB v. Jacob E. Decker and Sons*, 569 F.2d 357, 365 (5th Cir. 1978). We note, as did the Board, that the company's allegations, if true, would obviously have a great bearing on Portner's right to reinstatement and back pay and may yet be introduced on those issues at the compliance stage of these proceedings.

The company's contention that the broad cease and desist order entered against it is not supported by the evidence is sound. All union activity ceased several months before Portner's discharge, apparently by voluntary choice of the employees. There is no evidence of continuing organizational activities at Savin or that Savin has engaged in broad scale unlawful activity. Accordingly we will modify the order and notice of the Board by eliminating the catch-all paragraph 1(b) of the order and substituting the form of notice proposed by the ALJ for that entered by the Board. *See, e.g., NLRB v. Beth Israel Hospital*, 554 F.2d 477, 483 (1st Cir. 1977), *aff'd*, 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978).

As so modified, the order will be enforced.

NLRB v. First Termite Control Co., Inc.

646 F.2d 424 (9th Cir.), May 29, 1981—247 NLRB 684

On petition to enforce Board Order

Before PREGERSON, ALARCON, NELSON, Circuit Judges

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ALARCON, Circuit Judge: The National Labor Relations Board (NLRB) has applied for enforcement of its order requiring First Termite Control Co. (Termite) to cease and desist in unfair labor practices. The NLRB failed to establish the juridictional requirement of interstate commerce by admissible evidence. We must deny the enforcement order.

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[2] Nor will we disturb the ALJ's acceptance of Portner's version of his conversation with Pena based in part on demeanor evidence and in part on a transcript of a surreptitious tape recording of the conversation prepared by Portner. The policy argument in favor of banning such recorded evidence of collective bargaining—its inhibiting effect on free bargaining discourse, *see Carpenter Sprinkler Corp., v. NLRB*, 605 F.2d 60, 66 (2d Cir. 1979)—is greatly diminished, if applicable at all, in the context of a single employee-supervisor conversation. The Board is entrusted with wide discretion in evidentiary decisions. *Id.* It is not required to apply automatically the rules of evidence applicable in the federal courts. 29 U.S.C. § 160(b). We think that under the circumstances present here it was not error for the ALJ to admit the tape and transcript for the limited purpose of verifying credibility. Although the transcript was less than a model of clarity, we note that the company was offered the opportunity during a continuance of the hearing to inspect the tape for authenticity and to compare it with the transcript for accuracy.

FACTS

Termite, an Oakland, California, company, provides termite and pest control services to private residences. Five percent of Termite's customers are individual home owners who directly contact the company. The remaining 95 percent of Termite's business comes from real estate agents who contact Termite on behalf of their clients.

The specifics of the unfair labor practices alleged here are irrelevant to our disposition. It is sufficient to note that unfair labor practice proceedings were instituted by the NLRB. In a hearing before an administrative law judge (ALJ), it was found that Termite violated § 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), by discharging a number of employees for engaging in protected concerted activity. The ALJ issued an order requiring Termite to cease and desist from unfair labor practices. The order also required Termite to offer the discharged employees full and immediate reinstatement in their former jobs, or in substantially equivalent jobs if those jobs no longer existed. The Board affirmed.

Termite contends that the enforcement order should be denied because: (1) the evidence used to establish the jurisdictional requisite of interstate commerce was improperly admitted; (2) the retail business standard was improperly applied to Termite; and (3) the order requiring Termite to offer reinstatement was improper. Our disposition of the first issue makes it unnecessary for us to reach the other two issues.

ADMISSIBILITY OF EVIDENCE

Under the NLRA, the NLRB has jurisdiction over all cases "affecting commerce." 29 U.S.C. § 160(a). To satisfy this statutory standard, it must be shown that the business in question generates an amount of interstate commerce that rises above the level of "de minimis." *NLRB v. Fainblatt,* 306 U.S. 601, 607, 59 S.Ct. 668, 672, 83 L.Ed. 1014 (1939).

To establish the necessary amount of interstate commerce, the NLRB introduced the following evidence: From May 1978 through May 1979, Termite bought approximately $20,000 worth of Douglas Fir Lumber from Economy Lumber Co. (Economy), a California company. During that period, Economy purchased over $1 million of Douglas Fir lumber. The NLRB introduced a freight bill to prove that a substantial amount of the lumber purchased by Economy came from outside California.[1] The bill showed that a shipment of lumber delivered to Economy in California originated in the State of Washington.

The freight bill was prepared by Southern Pacific Railroad. The custodian of records for Southern Pacific, however, was not called as a witness. Instead, the NLRB called Economy's bookkeeper as a witness. The bookkeeper testified that she had received the freight bill, and that she had paid it. No other witnesses were called to support the admission of the freight bill.

Termite objected to the introduction of the freight bill on grounds of hearsay. The ALJ overruled the objection, and held that the freight bill was admissible under the business records exception to the hearsay rule. Fed.R.Evid. 803(6).[2]

Rule 803(6) provides that: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness" are not excluded by the hearsay prohibition.

It cannot be contested that the challenged statement is in fact hearsay. The NLRB sought to introduce a writing that stated lumber came from Washington to California in order to prove the truth of that statement. See Fed.R.Evid. 801(c). The statement would, however, be properly admissible if it fell within the 803(6) exception.

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[1] The parties entered into a stipulation by which much of the above information was admitted. Termite, however, did not stipulate to the existence of an interstate commerce nexus.

[2] 29 U.S.C. § 160(b) provides that "so far as practicable [proceedings before the NLRB shall] be conducted in accordance with the rules of evidence applicable in the district courts of the United States * * *." *See* 29 CFR §§ 101.10(a), 102.39 (1980). The parties do not contend that the use of the rules of evidence was not practicable in this case.

Termite contends that the requirements of Rule 803(6) were not met because the authenticating witness was an employee of Economy, and not of Southern Pacific, the entity that prepared the challenged record. Thus, the witness had no knowledge of the circumstances under which the records were prepared. Termite claims that 803(6) is not satisfied unless the witness has knowledge of both the making and keeping of the records sought to be introduced. Moreover, Termite contends that the witness must be able to testify that the record was made and kept in the ordinary course of the business' activity. In essence, Termite contends that Economy's bookkeeper did not satisfy the "custodian of records or other qualified witness" criterion of 803(6).

The NLRB responds that under 803(6) it is not necessary that the witness have knowledge of the preparation of the record. It is sufficient if the records "have all the indicia of trustworthiness that the federal rules rquire for the admission of hearsay evidence." (Citing *United States v. Ullrich,* 580 F.2d 765 (5th Cir. 1978).)

A traditional explanation for the exclusion of hearsay evidence is that it deprives the opposing party of the opportunity for cross-examination. The declarant is not present and thus cannot be cross-examined. On the other hand, the witness who is present and testifying to the hearsay does not have any personal knowledge of the hearsay on which testimony is sought, and therefore cannot be cross-examined in a meaningful manner. *See* 4 J. Weinstein &

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M. Berger, Weinstein's Evidence ¶ 800[01] at 10–11.[3]

Despite the inability to cross-examine, a business records exception to the hearsay rule has been incorporated into Anglo-American law for a substantial period.[4] The modern theory behind this exception is that business records have a special indicia of reliability. *See* Fed.R.Evid. 803, Notes of Advisory Committee on Proposed Rules:

> The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."

The provision in the rule that requires that the records be supported by "the testimony of the custodian or other qualified witness" insures the presence of some individual at trial who can testify to the methods of keeping the information. If the witness is not knowledgeable as to the manner in which the records are made and kept, he or she cannot be subjected to meaningful cross-examination. Without cross-examination on the keeping of the records, the trier of fact would have no rational basis on which to evaluate the accuracy of the record, and therefore the trustworthiness of the evidence. Thus, "[t]he testimony of the custodian or other qualified witness who can explain the record-keeping of his organization is ordinarily essential." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(6)[02] at 151–52.[5]

The bookkeeper from Economy had no knowledge of how Southern Pacific's records were made or maintained. She testified that she received a freight bill from Southern Pacific for a shipment of lumber and that she made payment on the bill. At best the freight bill seemed to corroborate her testimony that she paid for a shipment of lumber. The freight bill, however, was offered to prove the lumber was shipped from Washington to California. The record is briefly quoted below:

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[3] Cross-examination is "a 'Vital feature' of the Anglo-American system. Certainly cross-examination sheds light on the witness perception, memory and narration. It can expose inconsistencies, incompletenesses, and inaccuracies in his testimony." 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 800[01] at 10–11. *See also* 5 J. Wigmore, Wigmore on Evidence § 1367 at 32 (cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth").

[4] Beginning in the 1600's a practice developed in England by which the "shop books" of tradesmen and craftsmen were admissible as evidence of debts. The rules prohibited a party from being a witness. This rule, therefore, developed as a necessity, as well as a rule of convenience, being the only way to prove debts. Abuses in this rule led to a number of statutory limitations.

In the 1700's an alternate, but broader, doctrine developed in English common law courts. This rule after some expansion, permitted use of all entries made by a person, since deceased, if made in the ordinary course of business.

The rule developed somewhat unevenly in America. By the 1800's however, an American equivalent to the English regular business entries exception began to emerge. Rule 803(6) simply represents a later, more relaxed, codification of the English rules. *See generally* J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 803(6)[01]; 5 Wigmore on Evidence, Evidence §§ 1517–1518 (4th Ed.1974).

[5] That the drafters of the rule intended to require that the introducing witness have knowlege of the making, keeping and maintaining of the documents is clearly established by the Notes of the Committee on the Judiciary, Senate Report No. 93–1277. Note to paragraph (6). "A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer print-out, upon a report from the company's computer programer or *one who has knowledge of the particular record system* * * *." (emphasis added)

> Q: [by Termite's counsel]: For those purposes, that is for Economy's purposes of determining whether or not the bill has been paid. It's of no interest to Economy, is it, where this document says the shipment had orginated?
>
> **428**
>
> A: No.
>
> Q: That's of total indifference to you?
>
> A: No.
>
> Q: So when you're concerned about the accuracy of the document, it's only insofar as it relates to the amount on there and the particular shipment it relates to, is that right?
>
> A: That's right.
>
> Q: So whether or not there's an error on the origination point, would not make any difference to you, is that correct?
>
> A: I don't understand what you're—
>
> Q: Okay.
>
> This particular document says, Washington. You don't check on that to see if that's correct, do you?
>
> A: No, no. The lumber is milled, if it says Washington, the lumber is milled in Washington as is set forth on the train [sic].
>
> Q: Let me ask you this. That's the assumption you make from the document itself, is that right?
>
> A: Well, this is the assumption that we're getting from our broker, that it's coming from a certain original point.
>
> * * * * *
>
> Q: So for Economy Lumber's record keeping purposes, this bill of lading is important to you insofar as it states a dollar amount?
>
> A: That's right.
>
> * * * * *
>
> Q: You don't know when this bill of lading is prepared, do you?
>
> A: No, I don't.
>
> * * * * *
>
> JUDGE WELLS: Does the amount [of the freight bill] vary in terms of where it comes from?
>
> A: I don't know. I really couldn't—I couldn't answer that.
>
> Q: [by NLRB counsel]: So you can't know if the same amount of weight shipped from Washington would cost the same as shipped from say Sacramento?
>
> A: I—I couldn't answer that. All I know is there's a set rate the Southern Pacific has for freight.

It is clear from the foregoing that the witness from Economy had no knowledge as to how the records were prepared nor any knowledge as to the manner in which factual information was placed in the records kept by Southern Pacific. Moreover, the record indicates no reason for the witness to be interested in the accuracy of the records as far as they refer to the place of origin of the lumber.

The NLRB contends, nonetheless, that *United States v. Pfeiffer,* 539 F.2d 668, 671 (8th Cir. 1976), *United States v. Flom,* 558 F.2d 1179, 1182 (5th Cir. 1977), and *United States v. Ullrich,* 580 F.2d 765 (5th Cir. 1978), would permit the admission of the challenged freight bills. These cases are factually distinguishable.

In *United States* v. *Pfeiffer* the prosecution introduced records prepared by a common carrier through the testimony of an employee of the shipper. The Eighth Circuit held this was proper:

> According to [the employee-witness] these invoices were delivery receipts which were prepared from the [shipper's] bill of lading by the common carrier taking the shipment away from the * * * plant. He stated that the carriers got paid on those freight bills, so they had to be correct in the weight and number of pieces, the freight charges, and the bill of lading number shown on that document * * *. [The shipper] relied on these records prepared by other companies. Although [the employee-witness] had no actual knowledge about the circumstances surrounding their preparation, he was familiar with these shipping invoices and the same delivery slips were checked by [the employee-witness] against [the shipper's] bills of lading for accuracy and proper freight payments. [The employee-wit-

ness] was familiar with all of these procedures and the records demonstrate a circumstantial guarantee of trustworthiness.

539 F.2d at 671.

In contrast to the employee-witness in *Pfeiffer*, the witness in the present case

was unable to demonstrate any familiarity with the procedures used by Southern Pacific in making the records, had not checked the records for accuracy, and did not rely on the information in the records as to the lumber's place of origin.

In *United States v. Flom*, the prosecution introduced invoices prepared by one company through the testimony of an employee of a second company, in whose files the records were found. In a cursory manner, the Fifth Circuit approved this practice, noting that "[a]lthough the usual case involves an employee of the preparing business laying the necessary foundation under 803(6), the law is clear that under circumstances which demonstrate trustworthiness it is not necessary that the one who kept the record, or even had supervision over their preparation, testify * * *." 588 F.2d at 1182.

The Fifth Circuit unfortunately did not delineate the circumstances which illustrated trustworthiness. The record before us does not contain any circumstances that would demonstrate trustworthiness as to the place of origin of the shipment of lumber. There is simply no testimony regarding the preparation of these records.

In *United States v. Ullrich*, the prosecution introduced records to prove the identity of an automobile through to testimony of an employee of an automobile dealership. The records were prepared by an automobile manufacturer and a credit agency, and sent to the dealership. The Fifth Circuit held that their introduction was proper. "Although these documents were furnished originally from other sources, [the employee-witness] testified that they were kept in the regular course of the dealership's business. In effect, they were integrated into the records of the dealership and were used by it." 580 F.2d at 771.

The *Ullrich* court also noted the existence of mechanisms in the record keeping system that insured accuracy, testified to by the employee-witness. In the instant case, there was no testimony to indicate Economy relied on the information in the records relating to the origin of the lumber. Moreover, there was no evidence of mechanisms that would insure accuracy.

The NLRB also relies on *United States v. Olivo*, 278 F.2d 415 (3d Cir. 1960), a case arising under the since repealed Business Records Act. This reliance is unjustified. In *Olivo*, the offered records were prepared by the Illinois branch of a company, and introduced by the testimony of an employee of the New Jersey branch of the same company. In contrast, in the instant case, the business records of one entity, Southern Pacific, were introduced through the testimony of an employee of a second entity, Economy. This is obviously distinguishable from the single entity involved in *Olivo*.

We are not called upon here to determine whether the reasoning employed by the other circuits in deciding the above cases is sound. It is sufficient to note that none of the above cases provides a basis for holding that Economy's bookkeeper satisfied 803(6)'s requirement that business records be supported by the testimony of the custodian of records or other qualified witness. In the cases cited by the NLRB, the businesses in whose files the records were located had a substantial interest in the accuracy of the portion of the records at issue. In contrast, Economy was indifferent as to the origin of this lumber, and had not interest in the accuracy of that portion of the freight bill.[6]

Economy's bookkeeper is not the custodian of records or other qualified witness,

as required by 803(6). Southern Pacific's records are inadmissible hearsay. Thus, the jurisdictional requirement of interstate commerce has not been established. We must deny enforcement of the NLRB's order.

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[6] The Ninth Circuit has not before had occasion to interpret the need under Rule 803(6) to have as a witness an employee of the business that made the records. Under the old Business Records Act (28 U.S.C. § 1732 (1958)) (superseded), this Court discussed the exclusion of certain documents as not being business records within the meaning of the old business records exception. This Court stated that the records "were not made in the regular course of the business of the company in whose files they were found—a showing which must be made to give application to the Business Records Act", and thus noted that the documents were excludable. *Phillips v. United States*, 356 F.2d 297, 307 (9th Cir. 1965), *cert. denied, sub nom. Walker v. United States*, 384 U.S. 952, 86 S.Ct. 1573, 16 L.Ed.2d 548 (1966). The continued validity of the *Phillips* rationale under Rule 803(6) is unclear.

Termite further contends that enforcement of the NLRB's order must be denied because the "retail enterprise" standard was improperly applied and because it has already offered reinstatement to the employees in question. Our refusal to order enforcement on the jurisdiction question renders these issues moot.

The application for an enforcement order in DENIED.

NLRB v. Southern California Edison Company

646 F.2d 1352 (9th Cir.), June 1, 1981—243 NLRB 372

On petition to enforce Board Order

Before MARKEY,* Chief Judge, WALLACE and SKOPIL, Circuit Judges

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SKOPIL, Circuit Judge: The National Labor Relations Board ("the Board") seeks enforcement of its order, 243 NLRB No. 62 (1979), holding that Southern California Edison Company ("SCE") violated sections 8(a)(1) and (3) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151 et seq., by threatening to discipline employees who honored a lawful picket line established by another union representing SCE employees, and by disciplining an employee who refused to cross a lawful picket line at a customer's place of business. The Board rejected SCE's primary defense that the union waived the employees' right to engage in sympathy strikes by accepting a no-strike pledge in the collective bargaining agreement.

We must decide whether the Board's interpretation of the Act to protect employees who refuse to cross lawful picket lines is reasonably defensible. If such action is protected, we must determine whether the Board permissibly concluded that the protection was not waived by the parties' collective bargaining contract. If the protection was not waived, we must examine the Board's finding that SCE did not have legitimate business justifications for its actions.

FACTS

SCE is a public utility engaged in transmitting and selling electric power in California and Nevada. It serves millions of customers including several hundred thousand commercial and industrial establishments.

At the time of the alleged violations, SCE employed 13,318 people. The intervenor in this case, Local 47, International Brotherhood of Electrical Workers ("IBEW" or "the union") represented 6,754 employees. Local 246, Utility Workers Union of America ("UWUA") represented 1,265. SCE has had successive collective bargaining agreements with IBEW since 1945, and with UWUA since 1947.

A. Collective Bargaining History.

The first contract between IBEW and SCE was entered into in 1945 and provided *inter alia:*

> ARTICLE I
>
> RECOGNITION
>
> * * * * *
>
> B. The Company agrees to recognize the rights of employees as set forth in Section 7 of the National Labor Relations Act * * *.
>
> ARTICLE II
>
> CONTINUITY OF SERVICE TO THE PUBLIC
>
> A. It is recognized that the Company is engaged in rendering a public service and is under the duty to the public of operating and maintaining its services subject to the rules, regulations, and orders of the California State Railroad Commission, and, therefore, nothing contained in this agreement shall be construed to conflict or be inconsistent or incompatible with such rules, regulations, and orders.
>
> B. Neither the Union nor its officers or agents while this contract is in effect shall call or engage in, sanction or assist in a strike against or any slow-down or stoppage, in whole or in part, of the work or operations of the Company, and while this agreement is in effect the Company shall not cause or permit any lockout of employees.

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*The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

* * * * *

ARTICLE IV

GRIEVANCE PROCEDURE

A. In the event any grievance arises concerning a claim by an employee or a group of employees or the union that any of the terms of this Agreement have been violated, or any other grievance relating to rates of pay, wages, hours of employment, or other conditions of employment, such matters shall be adjusted according to the following [grievance] procedure:

* * * * *

ARTICLE V

ARBITRATION

A. It is agreed that only grievances involving the interpretation or application of this Agreement may be submitted to arbitration * * *.

* * * * *

B. If the contention is made that the grievance is not a proper one for arbitration as defined in Section A of this Article V, said question of jurisdiction shall be determined by the [Arbitration] Board.

* * * * *

ARTICLE VI

MANAGEMENT PREROGATIVES

A. The Company has and will retain the right and power to manage the plant and direct the working forces, including the right to hire, to suspend, or discharge for just cause, to promote, demote, and transfer its employees, subject to the provisions of this Agreement. Any claim that the Company has exercised such right and power contrary to the provisions of the Agreement may be taken as a grievance * * *.

* * * * *

ARTICLE VIII

WAIVERS

The Waiver of any breach or condition of this Agreement by either party does not constitute a precedent for any further waiver of such breach or condition.

The union's proposals in the 1948 negotiations led to the following modifications of the collective bargaining agreement:

ARTICLE I

RECOGNITION

* * * * *

B. The Company agrees to recognize the rights of employees as set forth in Section 7 of the National Labor Relations Act * * *. The Company or the Union will not interfere with, restrain or coerce the employees in the exercise of their rights as set forth in the National Labor Relations Act or any amendments thereto.

ARTICLE II

CONTINUITY OF SERVICE TO THE PUBLIC

A. It is agreed that there shall be no strike, slowdown, or lockout until all methods provided for the settlement of disputes in this agreement have been fully utilized, and further, that the parties shall have exhausted the remedies provided under the Labor-Management Relations Act.

Following a strike by IBEW in 1953, the union and SCE entered into a strike settlement agreement that provided *inter alia:*

PREAMBLE

The Company is a public service agency charged under the laws of the United States of America, of the State of Nevada and of the State of California with the duty of maintaining electric service under public regulations of its activities and of its rates. The Company is engaged in a public service requiring continuous operation, and the recognition of such obligation of continuous service during the term of this Agreement is imposed upon both the Company and the Union. The obligation and the duty of the Company and its working forces to maintain continuous electric service, insofar as possible within human limitations, is a basic con-

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> dition of the Company's franchises and rights under law.
>
> Inherent in the relationship established between the Company and its employees is the obligation on the part of the Company to deal justly and fairly with its employees; and on the part of the employees, to cooperate with their fellow employees and with the Company, in the performance of said public service obligation, and in the preservation of the good name and the good will of the property and the Company requisite thereto.

The Preamble because part of the collective bargaining agreement. The agreement has remained materially unchanged and was in effect at the time of the alleged unfair labor practices.

B. Unsuccessful Union Bargaining Proposals.

During the 1947 contract negotiations the union unsuccessfully proposed that the following be added to Article II, paragraph B:

> B. Employees covered by this agreement shall not be required to pass picket lines in the performance of their duties.

During the 1970 contract negotiations, the Union proposed that the following paragraph be added to Article I:

> No employee shall be required to cross a picket line that is sanctioned by the AFL-CIO Central Labor Council. Employees who exercise their right not to cross a picket line may be assigned to other work. SCE opposed the change on the ground that it would interfere with its continuous service commitment imposed by various regulatory agencies. SCE noted that it had been able to work out picket line problems with the union. The union withdrew the proposal.

In 1972 the union again sought to add a provision to Article I that "no employee shall be required to cross a picket line that is sanctioned by the AFL-CIO Central Labor Council". The union acknowledged SCE's prior cooperation, but expressed concern over instances where supervisors forced unwilling employees to cross picket lines. SCE again cited the obligation imposed on it by regulatory agencies. Discussion moved to other proposals. The union did not submit line clauses in later negotiations.

C. Picket Line Grievance History.

Over the last 20 years SCE has required employees to cross picket lines under threat of discharge. In some instances SCE has made accommodations by rescheduling, deferring, or reassigning work, or obtaining permission to cross from the striking union. SCE apparently did not require its employees to cross a picket line when there was a threat of physical harm.

The union has filed grievances over the company's forcing employees to cross picket lines of stranger unions. Two were filed in 1969. Both were denied. SCE did not rely on the no-strike clause. The union dropped both grievances short of arbitration.

Seven such grievances were filed in 1971. In each instance, employees unwillingly crossed picket lines to perform work. SCE denied six, alleging that "timely installation" was necessary to the customer. SCE denied the other grievance on the ground that contractual and legal obligations precluded delay in the work. SCE did not rely on the no-strike clause. The union did not pursue the grievances to arbitration.

Two such grievances were filed in 1978. They led to the disputes in this case and are detailed below. For the first time SCE relied on the no-strike clause to deny the grievances.

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D. The 1978 UWUA Strike.

In 1978, in anticipation of a strike by UWUA, IBEW claimed that the Act gives employees the right to honor a lawful picket line, and that the right was reaffirmed by Article I, paragraph B of the collective bargaining agreement. SCE notified the union that it strongly disagreed. It stated in part that "refusal to cross a picket line not only would directly violate [Article II] of the Contract, but could lead to disciplinary action in addition to temporary or permanent replacement." It issued supervisors' instructions to read to nonstriking employees, which warned that "[r]efusal to cross [the picket line] could lead to disciplinary action and could *also* lead to your permanent replacement * * *." The union notified its members that it could not tell them whether to cross, but would support the individual's decision.

One IBEW member filed a grievance after the UWUA strike ended, alleging that he was forced to cross the picket line under threat of disciplinary actin. The union relied on Article I, paragraph B in support of the grievance. SCE denied the grievance, relying on the no-strike provision.

E. The Blum Suspension.

Gary Blum has been employed by SCE since 1969. At the time of the alleged unfair labor practice, he was a polyphase testman represented by IBEW. His duties included testing and servicing SCE wiring and installing meters in the field and on customer premises.

On May 4, 1977 Blum was assigned to service a malfunctioning polyphase meter and to change a magnetic tape recorder cartridge on the premises of Freightliner Corporation. The tape records data for SCE to measure power load to satisfy a time-of-day power study ordered by the California Public Utilities Commission. The data is solely for SCE's experimental use and does not benefit Freightliner. The cartridge contains enough tape for 33 days. It had been operating for 30 days.

At the beginning of the May 4 shift, Blum notified his supervisor that he was unwilling to cross a picket line at Freightliner. Blum noted that another SCE employee was willing to cross the picket line and perform the duties. The supervisor met Blum later that morning. Blum again refused to cross the picket line. He completed his other assignment. The supervisor arranged with Freightliner personnel for Blum to cross the picket line. Later that day Blum was informed of the arrangement and that other SCE employees had crossed the line without incident. Blum said he had never crossed a union picket line and again refused to do so. The supervisor told Blum that there were no other work assignments for him and that he could go home.

Blum attempted to contact his union representative. The supervisor asked Blum to decide immediately whether or not to cross the picket line so that a replacement worker could be assigned. Blum refused to cross, left work and for the remainder of that day and the next was considered absent without pay. Another employee was assigned Blum's responsibilities at Freightliner. The work was completed without incident.

On May 5, Blum sent the following telegram to SCE:

> I was available yesterday, and I continue to be available to perform all duties which do not require crossing a picket line. I will perform duties at location [sic] where a picket line exists if I do not have to cross that line. Please advise me when I should report for work.

On May 8, Blum met with various supervisors and with a union representative to discuss the situation. SCE suspended Blum for five working days under a policy providing for suspension when an employee refuses to perform regularly assigned duties.

Blum filed a grievance alleging that SCE violated Article I, paragraph B of the bargaining agreement. SCE denied the grievance on the basis of the no-strike clause.

PROCEEDINGS BELOW

The General Counsel charged that SCE violated section 8(a)(1) of the Act by threatening employees with disciplinary action if they refused to cross the UWUA picket line and sections 8(a)(1) and (3) by suspending Blum. The charges were consolidated and heard by an Administrative Law Judge ("ALJ").

The ALJ rejected SCE's arguments that the matter should be deferred to the grievance-arbitration procedure and that the union had waived the employees' right to honor stranger picket lines.

With some modifications the Board adopted the ALJ's findings. The Board directed SCE to cease and desist from unfair labor practices and from interfering with its employees' statutory rights. Affirmatively, the order required SCE to expunge its records of reference to Blum's refusal to work, to make Blum whole for lost wages, and to post appropriate notices.

ISSUES

(1) Whether the Board properly concluded that employees have a statutory right to honor picket lines.

(2) Whether the Board permissibly concluded that the union did not waive employees' rights to honor stranger picket lines at the employer's

place of business or at a customer's place of business.

(3) Whether the Board permissibly concluded that SCE did not have a proper business necessity defense to justify either the threatened discipline or the suspension of Blum.

STANDARDS OF REVIEW

We must enforce the Board's order if the Board correctly applied the law and if its findings of fact are supported by substantial evidence in the record viewed as a whole. *E.g., Los Angeles Marine Hardware Co. v. NLRB,* 602 F.2d 1302, 1305 (9th Cir. 1979). The Board's interpretation of the Act is subject to judicial review, but must be upheld if reasonably defensible. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979); *NLRB v. Iron Workers,* 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978).

The Board's responsibility may require it to interpret contract terms to enforce the Act. *NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 428–29, 87 S.Ct. 559, 563–64, 17 L.Ed.2d 486 (1967). If the Board's interpretation is reasonable and not inconsistent with the Act's policies, it is entitled to deference from the courts. *E.g., NLRB v. Gould, Inc.,* 638 F.2d 159, 164 (10th Cir. 1980); *W–I Canteen Service, Inc., v. NLRB,* 606 F.2d 738, 747 (7th Cir. 1979); *NLRB v. C.K. Smith,* 569 F.2d 162, 167 (1st Cir. 1977), *cert. denied,* 436 U.S. 957, 98 S.Ct. 3070, 57 L.Ed.2d 1122 (1978); *News Union of Baltimore v. NLRB,* 393 F.2d 673, 678 (D.C.Cir.1968).

DISCUSSION

I. Protected Activity.

Section 7 of the Act provides that employees "shall have the right to * * * assist labor organizations, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." 29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." 29 U.S.C. § 158(a)(1).

A. Honoring the UWUA Picket Line.

It is undisputed that the right to strike is protected by section 7. *E.g., NLRB v. Allis-Chambers Mfg. Co.,* 388 U.S. 175, 181, 87 S.Ct. 2001, 2007, 18 L.Ed.2d 1123 (1967); *NLRB v. Erie Resistor Corp.,*

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373 U.S. 221, 233, 83 S.Ct. 1139, 1148, 10 L.Ed.2d 308(1965). It is also undisputed that section 7 protects employees who engage in sympathy strikes in support of a lawful primary strike by a sister union of the same employer.[1] *E.g., Delaware Coca-Cola Bottling Co. v. General Teamster Local* 326, 624 F.2d 1182 (3d Cir. 1980); *W–I Canteen Service, Inc. supra,* 606 F.2d 738. Hence, the members of IBEW employed by SEC had the right to honor the UWUA picket line.

B. Honoring the Freightliner Picket Line.

SCE challenges the Board's extension of protection to Blum's refusal to cross a lawful picket line to perform assigned work at a customer's place of business. SCE contends that such employees lack a direct economic interest in the primary dispute and therefore may lack the necessary "mutuality." *See C.K Smith & Co., supra,* 569 F.2d at 165 n.1. SCE argues that Blum's refusal to cross the Freightliner picket line was not protected by section 7 because there was no mutuality of purpose or aid, since the refusal did not affect Freightliner. The ALJ found that the tape which Blum was assigned to change was solely for the experimental use of SCE and did not assist Freightliner in the performance of its operations. The ALJ did not mention any benefit to Freightliner from Blum's other duty of servicing a malfunctioning polyphase meter.

The Board has interpreted the Act to protect employees who honor a picket line at a customer's place of business. *E.g., Redwing Carriers, Inc.*, 137 NLRB 1545 (1962), *mod'g* 130 NLRB 1208 (1961), *enf'd sub nom. Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C.Cir.1963), *cert. denied*, 377 U.S. 905, 84 S.Ct. 1165, 12 L.Ed.2d 176 (1964). The Board has concluded that whether the employees' refusal to cross constituted an economic detriment to the struck employer is not determinative of whether the refusal is protected. Other appellate courts have upheld the board's position. *E.g., NLRB v. Alamo express, Inc.*, 430 F.2d 1032 (5th cir.), *cert. denied*, 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1970); *Teamsters Local 657 v. NLRB*, 429 F.2d 204 (D.C.Cir.1970); *NLRB v. Rockaway News Supply Co.*, 197 F.2d 111 (2d Cir. 1951), *aff'd on other grounds*, 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832 (1953). This circuit has not decided the question.[2]

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[1] This point is not determined by the proviso to section 8(b)(4) which states: "[N]othing [herein] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a [lawful] strike * * *." 29 U.S.C. §158(b)(4). That such activity is not unlawful does not necessarily mean that it is protected. The proviso appears to allow parties to a collective bargaining agreement to decide whether to protect such activity. *NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 80, 73 S.Ct. 519, 524, 97 L.Ed. 832 (1953). *See, e.g., Kellogg Co. v. NLRB,* 457 F.2d 519, 523 (6th Cir.), *cert. denied,* 409 U.S. 850, 93 S.Ct. 58, 34 L.Ed.2d 92 (1972). *But see Rockaway News Supply Co., supra,* 345 U.S. at 81–82, 73 S.Ct. at 525 (Black, J., dissenting); *Truck Drivers Local 413 v. NLRB,* 334 F.2d 539 (D.C.Cir.), *cert. denied,* 379 U.S. 916, 85 S.Ct. 264, 13 L.Ed.2d 186 (1964) (picket line clause protects employees who refuse to cross a lawful picket line at the premises of another employer). No definitive interpretation of the proviso has been advanced. *See* Axelrod, *The Statutory Right to Respect a Picket Line,* 83 Dick.L.Rev. 617, 627–29 (1979).

An integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective. "It cannot be denied that respect for the integrity of the picket line may well be the source of strength of the whole collective bargaining process in which every union member has a legitimate and protected economic interest." *NLRB v. Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir.), *cert. denied*, 404 U.S. 826, 92 S.Ct. 96, 30 L.Ed.2d 55 (1971). Employees who honor a primary picket line in effect join the strike. *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 908 (9th Cir. 1953). Such activity is assistance to a labor organization for "mutual aid or protection." The sympathetic strikers "know that by their action each one of them assures himself * * * of the support of the one whom they are then helping; and the solidarity so established is 'mutual aid' in the most literal sense." *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 644, 668–69, 87 S.Ct. 1278, 1280–81, 18 L.Ed.2d 389 (1967). Although reciprocity may be indirect, respect for another union's picket line leads to a stronger labor movement. *See Peter Cailler Kohler Swiss Chocolates Co., Inc. v. NLRB*, 130 F.2d 503, 505–06 (2d Cir. 1942).

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Activities for "mutual aid or protection" within the meaning of section 7 are not limited to those within the employer-employee relationship or those aimed at changing terms and conditions of employment. Section 7 protects employees' concerted lobbying for changes in national policy regarding job security. *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1384–85 (9th Cir. 1976).

The Act protects employees who "engage in otherwise proper concerted activities in support of employees of employers other than their own." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564, 98 S.Ct. 2505, 2511, 57 L.Ed.2d 428 (1978) (footnote omitted). At some point, however, "the relationship [to employee interests] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 568, 98 S.Ct. at 2513. It is the Board's responsibility in the first instance to decide whether such activity is protected. *Id., Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945).

The Board's interpretation of the Act to protect an employee who honors a lawful picket line at a customer's place of business is reasonably defensible. *Ford Motor Co., supra*, 441 U.S. at 497, 99 S.Ct. at 1849. We must uphold the Board's determination that Blum's refusal to cross the Freightliner picket line was protected activity.

II. Waiver

SCE contends that the union waived, by collective bargaining, the employees' right to engage in sympathy strikes. A waiver would preclude an unfair labor practice finding, since SCE has the right to discipline employees who violate the contract. SCE relies on the no-strike provision, the Preamble, and the parties' collective bargaining and grievance histories. We must determine whether the Board's interpretation of the contract is permissible.

The right to strike may be waived by the collective bargaining agreement. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). The right to engage in sympathy strikes may also be waived. *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80, 73 S.Ct. 519, 524, 97 L.Ed. 832 (1953). *See also Delaware Coca-Cola Bot-*

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[2] In *NLRB v. Swain & Morris Construction Co.*, 431 F.2d 861 (9th Cir. 1970), this court assumed, without deciding, that an employee's refusal to cross a picket line at an employer other than his own is protected activity. The employer did not argue below that the refusal to cross was unprotected, and the court declined to address it for the first time on appeal.

tling Co., supra, 624 F.2d at 1184; *W–I Canteen Service, Inc., supra,* 606 F.2d at 743.

The Board requires that a waiver must generally be "clear and unmistakable".[3] *See, e. g., Delaware Coca-Cola Bottling Co., supra; C. K. Smith & Co, supra,* 569 F.2d at 162. Waiver may be found in unequivocal extrinsic evidence bearing on ambiguous contract language. *Operating Engineers, Local 18 (Davis-McKee, Inc.),* 238 NLRB 58 (1978). Alternatively, a waiver may be implied by a binding arbitration clause. Even in the case of an express no-strike clause, the waiver of the right to strike is generally coterminous with the scope of the arbitration clause. *See Garry-Hobart Water Corp.*

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v. NLRB, 511 F.2d 284 (7th Cir.), *cert. denied,* 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed.2d 252 (1975). The Board found no clear and unmistakable waiver, notwithstanding the union's unsuccessful contract proposals expressly recognizing the right to engage in sympathy activity. It determined that the no-strike provision of the contract was implicitly tied to the arbitration clause and therefore limited to arbitrable disputes.

To determine whether the union has waived the right to engage in sympathy strikes the Board analyzes the language of the collective bargaining agreement and the factual circumstances of the labor controversy.[4] *See W–I Canteen Service, supra,* 606 F.2d at 743; *Iowa Beef Processors v. Amalgamated Meat Cutters,* 597 F.2d 1138, 1144 (8th Cir.), *cert. denied,* 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979). The Board views the contract as a whole and in light of the law relating to it when last ratified prior to the incidents at issue. *Mastro Plastics Corp., supra,* 350 U.S. at 279, 76 S.Ct. at 356.

A. Clear and Unmistakable Waiver in the Contract.

A contract need not explicitly prohibit sympathy strikes to show intent to waive the right to engage in such activity. *E. g., Delaware Coca-Cola Bottling Co., supra,* 624 F.2d at 1185 n.1; *W–I Canteen Service, supra,* 606 F.2d at 745. We must review the Board's construction of the contract as a whole and of the surrounding evidence of the parties' intent.

The contract's broad prohibition on the right to strike is not necessarily a clear and unmistakable waiver of the right to engage in sympathy strikes. *E. g., Delaware Coca-Cola Bottling Co., supra* at 1185; *C. K. Smith & Co., supra,* 569 F.2d at 167. Broad no-strike clauses coupled with other indicia of intent to waive the right to engage in sympathy strikes have been held to be an effective waiver. *E. g., W–I Canteen Service, Inc., supra; Montana-Dakota Utilities Co. v. NLRB,* 455 F.2d 1088 (8th Cir. 1972). The contract does not mention sympathy strikes, nor does it contain a picket line clause. *See, W–I Canteen Service, supra; Iowa Beef Processors, supra,* 597 F.2d at 1144 (contracts containing picket line clauses).

1. Preamble

Article II, containing the broad no-strike provision, is entitled "Continuity of Service to the Public". The Preamble acknowledges SCE's role as a public utility required to render continuous service. SCE contends that the Preamble and the no-strike clause together constitute the necessary clear and unmistakable waiver of the right to engage in sympathy strikes. The Board found otherwise.

The parties' acknowledgement of SCE's role and obligation as a public utility does not necessarily constitute a waiver of section 7 rights. Section 7 applies to public utilities. 93 Cong.Rec. 3835 (1947); *Division 1287, Amalgamated Association of Street, Electric Railway & Motor Coach Employee v. Missouri,* 374 U.S. 74, 82, 83 S.Ct. 1657, 1662, 10 L.Ed.2d 763 (1963). The Board's conclusion that the Preamble and the no-strike provision do not together constitute a clear and unmistakable waiver of the right to engage in sympathy strikes is reasonable and not inconsistent with the Act's policies. We must uphold it.[5]

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[3] This requirement originally applied to waivers of the right to strike over unfiar labor practices, *e. g., Mastro Plastics Corp., supra,* 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309, but has since been applied to sympathy activity.

[4] The parties dispute the propriety of using extrinsic evidence to interpret the contract provisions. The ALJ found sufficient ambiguity to resort to collateral evidence. *See News Union of Baltimore, supra,* 393 F.2d at 678.

[5] *Amcar Div., ACF Indus. v. NLRB,* 641 F.2d 561, 106 LRRM 2518 (8th Cir. 1981) and *Montana-Dakota Util. Co., supra,* 455 F.2d 1088 are distinguishable. In the former, the court held, without considering the standard of review, that the contract waived the right to honor a stranger picket line. In that case, there was a broad no-strike clause, and strong evidence that the union believed that the contract waived the right. 106 LRRM at 2523–24. *See also St. Regis Paper Co.,* 253 NLRB No. 162, 106 LRRM 1207 (Jan. 9, 1981). In *Montana-Dakota,* the court also held that the right to honor a stranger picket line was waived. The contract in that

Continued

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2. Bargaining History

SCE contends that the union, in attempting to insert a picket line clause, sought more then confirmation of the right to engage in sympathy strikes. SCE argues that these attempts show that the union understood the right to have been waived, and sought to regain it.

A union does not necessarily waive a right by failing to negotiate a contractural confirmation. *Timken Roller Bearing Co. v. NLRB,* 325 F.2d 746, 750–51 (6th Cir.), *cert. denied,* 376 U.S. 971, 84 S.Ct. 1135, 12 L.Ed2d 85 (1964). Silence in the bargaining agreement cannot be considered to be a waiver even in light of the bargaining history. *Id.* at 751. The failure to obtain a contractual confirmation of a right is evidence of wavier, *e. g., Rockaway News Suply Co., supra,* 345 U.S. at 80, 73 S.Ct. at 524, only if it shows that the union thought the right had been waived by other provisions of the contract and sought to regain the right. *See, e. g., W-I Canteen Service, Inc., supra,* 606 F.2d at 745 (picket line clause delineated the boundaries of the waiver expressed in the no-strike clause).

The Board adopted the findings of the ALJ that the union's failure to obtain contractual recognition of the right did not constitute a waiver. The ALJ concluded that the proposed picket line clause was never linked with the no-strike provision so as to modify the no-strike obligation. She found that SCE never suggested in the negotiations that a refusal to cross a picket line was prohibited by the no-strike clause.

The union stated that the proposed picket line clause was intended to clarify its rights and to end the possibility of confusion among supervisors as to crossing picket lines. The Board concluded that the union was not seeking to regain rights it believed were waived. It held that the union's attempt to amend the collective bargaining agreement was not unequivocal evidence of waiver. Because the Board's conclusion is reasonable and not inconsistent with the Act's policies, we must uphold it.[6]

3. Other Indicia of Waiver

SCE argues that four other factors show a waiver: (1) the statement in the parties' 1953 strike settlement agreement that their mutual service obligation "is of the essence of the contract of employment * * *"; (2) the management prerogatives clause expressly reserving SCE's right to discipline employees; (3) the company's practice of requiring employees to cross picket lines to perform essential services; and (4) the grievance history, showing that SCE consistently denied grievances by employees threatened with discharge for refusing to cross a picket line.

When viewed in light of the parties' bargaining, grievance, and strike histories, these factors support an inference that the union waived the right to engage in sympathy strikes.[7] This inference is in-

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sufficient, however, to overcome the deference due the Board's interpretation of collective bargaining agreements, *Gould, Inc., supra,* 638 F.2d at 164; *C. K. Smith & Co., supra* 569 F.2d at 167; *Newspaper Production Co. v. NLRB,* 503 F.2d 821, 830 (5th Cir. 1974). Deference is due the Board's interpretation of labor contracts because such contracts are different in nature and scope from ordinary commercial contracts. The labor contract is closely bound up with labor-management experience, as well as with the negotiating traditions of the industry and the particular parties. *See Syufy Enterprises v. Northern California State Ass'n of IATSE Locals,* 631 F.2d 124, 125–26 (9th Cir. 1980). As such, labor contract interpretation falls within the area of the Board's special expertise. In comparing the inferences suggested by SCE with the required deference due the Board, we conclude the inferences are insufficient in this case of overcome the required deference.

B. Waiver by Operation of the Arbitration Clause.

1. No-strike and Abritation Clauses: Coterminous Application

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case contained an express picket line clause, and the obligation to provide continuous service was expressly tied to the no-strike clause. None of these factors are present in the instant case.

[6] We decline to address the General Counsel's argument that the scope of the picket line clause proposed by the union went beyond a mere contractual confimation of a statutory right. There is no indication that the Board relied on this theory in rejecting SCE's argument that the union's failure to gain express recognition was a waiver.

[7] We reject the General Counsel's suggestion that the no-strike language addressed only only union-sponsored activity and left individual employees free to engage in strike activity. *See Allis-Chalmers Mfg. Co. supra* 388 U.S. at 180, 87 S.Ct. at 2006 (1967); *Kellogg Co., supra,* 457 F.2d at 523–24 (waiver of the right to honor strange picket lines binds all members of the bargaining unit).

SCE correctly contends that the right to engage in sympathy strikes may be waived by operation of an arbitration clause. An express or implied no-strike obligation is the *quid pro quo* for an employer's undertaking to submit grievance disputes to arbitration. *Boys Markets, Inc., v. Retail Clerks Local 770,* 398 U.S. 235, 248, 90 S.Ct. 1583, 1591, 26 L.Ed.2d 199 (1970).

Absent explicit expression to the contrary, the agreement to arbitrate and the obligation not to strike are coterminous. *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 382, 94 S.Ct. 629, 638, 38 L.Ed.2d 583 (1974). The no-strike obligation is limited to disputes over arbitrable issues. *E. g., Gould Inc., supra,* 638 F.2d at 164–65; *Delaware Coca-Cola Bottling Co., supra,* 624 F.2d at 1187. A sympathy striker's refusal to cross a stranger picket line does not violate a general no-strike clause. Because the underlying dispute is between a secondary employer and its union, the dispute is not subject to the abritration provisions of the sympathetic striker's collective bargaining agreement.[8] *E. g., Gary-Hobart Water Corp.,* 511 F.2d at 288.

In the instant case, the parties negotiated a broad no-strike clause. The arbitration clause provides that only "grievances involving the interpretation or application of this Agreement may be submitted to abritration." The Board concluded from this evidence that the clauses were coextensive. The arbitration clause did not prohibit Blum's sympathy strike because the underlying dispute at Freightliner was not arbitrable.

SEC argues that the no-strike clause is broader than the arbitration clause because the former expressly requires exhaustion of legal remedies under the Act. The ALJ concluded that the effect of this provision is unclear.

The provision is ambiguous. It could be interpreted to prohibit strikes until legal remedies provided by the Act are exhausted. Alternatively, the provision may simply commit employees to seek judicial assistance where the company refused to arbitrate or to comply with an arbitral award. The Board concluded that the provision did not reveal a clear intent to create a functionally independent no-strike clause. Because the Board's conclusion is reasonable and not inconsistent with the Act's policies, we must uphold it.

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2. Arbitrability of the Scope of the Arbitration Clause.

Even assuming coterminous application, SCE argues that Blum was obligated not to strike until the scope of the arbitration clause was arbitrated. SCE contends that whether a sympathy strike violated the agreement was itself arbitrable. The collective bargaining agreement specifies that the scope of the arbitration clause is itself arbitrable.

The applicability of a no-strike clause to a sympathy strike is subject to arbitration. Yet the arbitrability of the scope of a no-strike clause must be distinguished from the arbitrability of the underlying dispute. The dispute underlying a primary strike is not arbitrable between the sympathy strikers and their employer. A sympathy strike can not, therefore, be enjoined pending arbitration of the scope of a no-strike clause. An agreement to arbitrate disputes does not necessarily imply a promise to refrain from sympathy strikes pending arbitration. *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 407–08 & n.10, 96 S.Ct. 3141, 3147–48 & n.10 49 L.Ed.2d 1022 (1976).

The Board did not infer from the no-strike and arbitration clause, and the parties' bargaining and grievance history, that the union waived the right to engage in sympathetic activity. Given the deference due the Board's interpretation of a collective bargaining agreement and the surrounding circumstances, we cannot overturn the Board's decision.

III. Business Justification

Employee's right to engage in protected activity must be balanced against the employer's legitimate and substantial business interests. *E.g., Overnite Transportation Co.,* 154 NLRB 1271 (1965), *See generally NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614 (1967); *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33–34, 87 S.Ct. 1792, 1797–1798, 18 L.Ed.2d 1027 (1967). It is the primary responsibility of the Board "to strike the proper balance between the asserted business justifications and the invasion of employees rights in light of the Act and its policy." *Great*

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[8] Parties to a collective bargaining agreement can create functionally independent no-strike and arbitration clauses. *E. g., W–I Canteen Service, supra,* 606 F.2d at 744. The evidence of such an intent here is insufficient to overcome the Board's finding to the contrary. In the absence of such evidence, the "quid pro quo theory underlying coterminous interpretation applies where there is an express no-strike clause in the contract" *Delaware Coca-Cola Bottling Co., supra,* 624 F.2d at 1186.

Dane Trailers, supra, 388 U.S. at 33–34, 87 S.Ct. at 1797–1798.

The employer has the right to attempt to run its business despite sympathy strike activity. It may treat an employee who honors a lawful picket line at its place of business as an economic striker, subject to permanent replacement. It need not articulate a legitimate business necessity for doing so. *Gary-Hobart Water Corp.,* 210 NLRB 742 (1974), *enf'd,* 511 F.2d 284 (7th Cir. 1975). When the refusal to cross a stranger picket line results in only partial work stoppage, the employer must demonstrate a legitimate business justification for replacing an employee. *Redwing Carriers, Inc., supra,* 137 NLRB 1545.

A. Threats of Discipline.

The Board held that SCE's threat to replace employees who honored UWUA picket lines was lawful, but that SCE's threat to discipline such employee was not. SCE argues that its threat of discipline was lawful since it was not carried out.

The Act prohibits an employer from acting to intimidate and coerce employees not to engage in protected activities. *E.g., NLRB v. Gulf-Wandes Corp.,* 595 F.2d 1074, 1080 (5th Cir. 1979); *NLRB v. Albion Corp.,* 593 F.2d 936, 939 (10th Cir. 1979); *Swearingen Aviation Corp. v. NLRB,* 568 F.2d 458, 461 (5th Cir. 1978). Section 8(a)(1) protects employees who engage in lawful union activity from even the edle threat of retaliation. *Albion Corp., supra,* at 939. The Board's conclusion that SCE violated section 8(a)(1) by threatening to displine employees if they honored UWUA's picket line is a reasonably defensible interpretation of the Act, and must be unheld.

B. Blum's Replacement and Suspension.

In instances of partial work stoppage, the company may replace an employ-

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ee only if it acts to preserve the efficient operations of its business. *See Redwing Carriers, Inc., supra,* 137 NLRB 1545. Once the employer had demonstrated a legitimate business reason, the burden shifts to the General Counsel to establish that the primary motivation for the employer's action was to penalize the employee for engaging in protected activity. *See NLRB v. Swain & Morris Construction Co.,* 431 F.2d 861, 862 (9th Cir. 1970) *See also NLRB v. William S. Carroll, Inc.,* 578 F.2d 1, 4 (1st Cir. 1978).

SCE argues that Blum's replacement and suspension were necessary to preserve the efficeint operation of the company. The Board found that the replacement and suspension had no legitimate business justification.

1. Replacement.

We are unable to find substantial evidence in the record supporting the Board's finding that SCE lacked a legitimate business justification for replacing Blum. There was evidence that the tape Blum was assigned to replace would shortly expire and that SCE had an important interest in the repair of the polyphase meter. Although the situation may not yet have become an emergency, SCE was allowed to replace Blum to maintain reasonable, normal business operations.

2. Suspension.

There is substantial evidence in the record supporting the Board's finding that no business necessity required SCE to treat Blum as absent without pay on May 5 and to suspend him the following week. There is evidence that SCE relied on the no-strike provision of the contract to justify the disciplinary action, rather than on business necessity.

CONCLUSION

Honoring a sister picket line at one's employer's place of business and respecting a picket line at a customer's location are activities protected by section 7 of the Act. Although the protection can be waived by contract, the language and evidence bearing on the parties' intent in this case are insufficient to overcome the deference due the Board's determination that there was no waiver. The Board's conclusion that SCE violated the Act by threatening to discipline employees who honored a sister union picket line is reasonably defensible. The Board's finding that SCE lacked a business justification for disciplining an employee for honoring a stranger picket line at a customer's place of business is supported by substantial evidence. There is not substantial evidence supporting the Board's finding that SCE violated the Act by replacing the employee who refused to cross a picket line to perform work on a customer's premises.

The Board's order will be enforced as modified.

MARKEY, United States Customs and Patent Judge, dissenting: Convinced that the inference of waiver is so inescapable as to overcome deference admittedly due broad interpretations, I respectfully dissent. *See Amcar Division, ACF v. National Labor Relations Board,* 641 F.2d 561 (8th Cir. 1981), 33 Daily Labor Report, D-1

Aeronca, Inc. v. NLRB

650 F.2d 501 (4th Cir.), June 4, 1981—253 NLRB 261

On petition to review Board Order

Before HAYNSWORTH, Senior Circuit Judge, ERVIN, Circuit Judge, and RAMSEY*, District Judge

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HAYNSWORTH, Senior Circuit Judge: Aeronca, Inc. petitions for review and the Board cross-applies for enforcement of the Board's order and finding that the company violated § 8(a)(1) and (5) of the Act by unilaterally discontinuing its practice of giving its employees Christmas turkeys. Because we find that the union waived the company's duty to bargain about discontinuance of the turkey bonus, we deny enforcement of the Board's order.

Since at least 1952 the company had maintained a practice of giving each employee, including managers and supervisors, a Christmas turkey. The practice continued after the union was certified in 1974 as the exclusive bargaining representative of the company's production and maintenance employees.

The parties' first collective bargaining agreement included a broad zipper clause [1] and an arbitration clause.

At the beginning of negotiations for the 1976 collective bargaining agreement, the union submitted a 72-page contract proposal. The union proposed the addition of a maintenance-of-benefits provision [2] and a corresponding modification of the zipper clause. The company objected to the length of the proposal, and union representatives subsequently caucused to reduce its length. The turkey bonus was mentioned during that caucus, but the union decided to drop the maintenance-of-benefits provision because the employees had regularly received the turkeys. In the protracted negotiations that followed, the turkey bonus was never mentioned, and without discussion the zipper clause was carried over verbatim from the prior contract and the proposed maintenance-of-benefits provision was not included.

In December 1976 poor financial conditions prompted the company to institute a general austerity program. As part of that program, the company decided to discontinue the turkey bonus. When the employees were not given turkeys on Christmas 1977, the union filed a grievance. The company did not consider the turkey bonus a grievable matter, but submitted to arbitration when the union filed the present unfair labor practice charge and the Board's regional director informed the company that a complaint would issue if the company refused to arbitrate.

After a hearing the arbitrator denied the union's turkey bonus grievance. The Board then proceeded on the General Counsel's complaint. It concluded that the arbitra-

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tor's decision did not meet the standards of the *Spielberg* [3] doctrine and thus did not warrant deference. On the merits, the Board concluded that the union had not waived its right to bargain over the discontinuance of the turkey bonus.

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*Honorable Norman P. Ramsey, United States District Judge for the District of Maryland sitting by designation.

[1] The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

[2] The provision stated that "any and all benefits that the employees and/or Union are now receiving which are not specified in this Agreement shall continue during the term of this Agreement.

[3] *Spielberg Manufacturing Co.*, ,112 NLRB 1080 (1955).

We need not decided whether the Board abused its discretion in declining to defer to the arbitrator's decision, because the Board's decision on the merits is inconsitent with our holding in *NLRB v. Southern Materials Co.,* 447 F.2d 15 (4th Cir. 1971). It is sought to distinguish this case from *Southern Materials* and the relevant Board precedents[4] on the ground that Aeronca continued the Christmas turkey bonuses after having entered the first agreement with the union. We find this an insufficient basis for not following our earlier precedent. The first contract did not obligate the employer to give the Christmas turkeys, and the negotiations leading up to the second one clearly indicate a union abandonment of any attempt to make giving of the turkeys obligatory.

Enforcement of the Board's order is denied.

ENFORCEMENT DENIED.

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[4] *Bancroft Whitney Co.,* 214 NLRB 57 (1974); *Radioear Corp.,* 199 NLRB 1161 (1974).

NLRB v. Ortiz Funeral Home Corp.

651 F.2d 136 (2d Cir.), June 8, 1981; rehearing denied October 5, 1981; certiorari denied 455 U.S. 946—250 NLRB 730

On petition to enforce Board Order

Before VAN GRAAFEILAND and KEARSE, Circuit Judges, and BRAMWELL, District Judge*

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VAN GRAAFEILAND, Circuit Judge: This is a petition to enforce an order of the NLRB which held that respondent, Ortiz Funeral Home Corp., had violated section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by:

> (1) refusing on and after March 28, 1978 to recognize and bargain with Local 1034, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (The Union), for new contract covering all unit employees;
>
> (2) failing to apply the previous contract to all unit employees between September 23, 1977 and its expiration on March 21, 1978, and by failing thereafter to continue to maintain the wages, hours, terms and conditions of employment established pursuant to that contract.

For reasons hereafter discussed, the petition for enforcement is granted.

Respondent operates a funeral business with ten chapels in the New York City metropolitan area. In 1975, following an organizational strike and unfair labor practice charges, an informal settlement agreement was reached between respondent and the Union and approved by the Board's regional Director. Pursuant to this agreement, respondent agreed to recognize and bargain with the Union as the exclusive representative of the employees in the following unit:

> (A)ttendants, floorpeople, receptionists, interpreters and porters but excluding licensed embalmers, undertakers, drivers, managers, office clerical employees, bookkeepers, guards, watchmen and supervisors as defined in the Act.

Thereafter, respondent and the Union could not agree whether employees whose duties included clerical work, driving, or guarding, in addition to receiving visitors, were properly included as "receptionists" in the bargaining unit. because of this dispute, respondent refused to sign a collective bargaining contract incorporating the unit definition contained in the settlement agreement until ordered to do so by the Board. *See* 225 NLRB 1342 (1976). The Board found that "the parties reached an oral binding agreement on all material aspects of a collective-bargaining contract" and that the arbitration clause of the agreement was designed to resolve any uncertainty as to membership in the bargaining unit. *Id.* at 1345. The Board concluded that the unit, described as above quoted, was an appropriate unit for the purpose of collective bargaining, and held that respondent was guilty of an unfair labor practice for refusing to sign it. *Id.* this Court enforced the order without opinion on May 6, 1977, *see* 559 F.2d 1204 (2d Cir. 1977),

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following which a written contract, effective for a three-year period ending on March 21, 1978 was signed.[1]

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*Of the Eastern District of New York, sitting by designation.

[1] The contract provided in part:

Continued

The contract contained provisions for a union shop, checkoff of union dues, and employer payments to welfare, severance and retirement funds. Respondent applied these provisions only on behalf of the small number of employees whom it considered to be in the bargaining unit. In August 1977, after conducting an audit of respondent's payroll records, the Union concluded that respondent was failing to make contributions as provided in the contract. Discussion on the issue proved fruitless, and the Union invoked the contractual arbitration process.

The arbitrator was asked to determine whether respondent had violated the contract by failing to maintain a checkoff of union dues and to make payments to welfare, severance and retirement funds on behalf of the employees whose membership in the Union was disputed. On November 10, 1978 the arbitrator ruled that the contract required respondent to make contributions on behalf of all the disputed employees except one "secretary-bookkeeper". On April 19, 1979 the New York State Supreme Court vacated the arbitrator's award on the ground that the arbitrator had exceeded his powers by reclassifying employees. The Appellate Division, First Department, reversed and reinstated the award. *See Adelstein v. Ortiz Funeral Home Corp.*, 75 App. Div.2d 529, 426 N.Y.S.2d 768 (180). On February 17, 1981 the Court of Appeals affirmed without opinion. *Adelstein v. Ortiz Funeral Home Corp.*, 52 N.Y.2d 997, 438 N.Y.S.2d 80, 419 N.E.2d 1079 (N.Y.1981).

While the arbitration under the old contract was pending, the parties met in March 1978 to discuss a new one. However, their continuing disagreement regarding the composition of the bargaining unit precluded any progress toward consummation of a contract. Respondent submitted a list of its employees with their purported job classifications, asserting that only three of them were unit employees. The Union stated that it represented approximately twenty employees on the list.

On March 23, 1978, the Union filed an unfair labor practice charge alleging that respondent refused to bargain for a new contract. The complaint issued by the Board on May 9, 1978 described the beginning unit as it was described in the expired contract and in the Board's 1976 order. It alleged that respondent had failed and refused to negotiate with the unit thus described for the new three-year contract until the Union produced proof that it was the majority representative of the employees in the unit.

Not content with the unit description contained in the contract, the Administrative Law Judge redefined the unit and ordered respondent to cease and desist from refusing to recognize and bargain with the Union as the representative of the following unit:

> All employees at Respondent's main office and facility and at it branch locations, including receptionists, receptionist-porters, office clerks, office managers and office clerk-drivers, but excluding licensed funeral directors, secretary-bookkeepers and drivers normally and regularly engaged in the performance of such functions, and excluding supervisors as defined in Section 2(11) of the Act.

The Administrative Law Judge said that he had revised the definition of the unit "to reflect the Company's most recent job classifications." He also stated:

> As the complaint alleges an unlawful refusal to bargain only since on or about March 28, 1978, I have not provided any remedy for the Company's failure to apply the terms of the expired contract to the unit employees.

Despite these statements by the Administrative Law Judge, the Board held that

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respondent's refusal to bargain on a new contract was simply a continuation of respondent's refusal to apply the expired collective-bargaining agreement "to those same employees." The Board found the respondent had violated section 8(a)(5) and (1) by failing to apply the expired contract to all unit employees between September 23, 1977[2] and the contract's expiration date, March 21, 1978, and by failing thereafter to continue to maintain the wages, hours, and terms and conditions of employment es-

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Excluded from the coverage of this Agreement are licensed embalmers, undertakers, drivers, managers, office clerical employees, bookkeepers, guards, watchman [sic] and supervisors as defined in the Labor Management Relations Act of 1947 as amended, hereinafter referred to as the "Act."

[2] Because of limitations contained in section 10(b) of the Act, 29 U.S.C. §160(b), the complaint of unfair labor practices is limited to the six-month period prior to the filing of the charge with the Board, which occurred in this case on March 23, 1978.

tablished pursuant to the contract. It ordered respondent to make the various payments to the employees and the Union which the terms of the contract required.

DISCUSSION

Our task in passing upon the Board's petition has not been lightened by the manner in which the Board itself has handled the lengthy dispute between the parties.

Although it was apparent at the time respondent and the Union entered into their 1976 settlement agreement that they disagreed sharply as to the makeup of the bargaining unit, the Board ordered them to execute a collective-bargaining contract with the dispute unsettled. The Board said that any uncertainty as to which employees were in the unit was a matter "which the contract's grievance-arbitration machinery is designed to resolve." Thereafter, the Union followed what it must have considered to be the Board's suggestion and demanded arbitration of the parties' differences arising out of the 1975–78 contract. Because negotiations for a new contract were entered into prior to the arbitrator's decision, the Union also filed an unfair labor practice charge which was based upon respondent's refusal to accede to the Union's definition of the unit and to bargain accordingly. The Administrative Law Judge confined his order to the charges made in the complaint. Instead of limiting it remedy in a similar manner, the Board went back to the expired contract and found respondent guilty of unfair labor practices arising out of respondent's allegedly erroneous interpretation of the unit membership provided for in that contract. Neither the Administrative Law Judge nor the Board deferred to the arbitration award.[3]

The Board found that "the issue of [sic] whether Respondent violated Section 8(a)(5) and (1) by failing to apply the provisions of the collective-bargaining agreement before its expiration, and thereafter by failing to continue to maintain the wages, hours, and terms and conditions of employment established pursuant to that agreement, was closely connected to the subject matter of the complaint and has been fully litigated." We disagree.

The original bargaining unit in this case was set up by agreement between the parties. As bargaining history, it was not conclusive upon the Board in determining what was an appropriate unit for subsequent contract negotiations. *Westinghouse Electric Corp.*, 118 NLRB 1043, 1047 (1957). In making an independent determination of a proper bargaining unit, the Board may exercise reasonable discretion pursuant to section 9(b) of the National Labor Relations Act, 29 U.S.C. §159(b). *See NLRB v. Sunrise Lumber & Trim Corp.*, 241 F.2d 620, 624 (2d Cir.), *cert. denied*, 355 U.S. 818, 78 S.Ct. 22, 2 L.Ed.2d 34 (1957); *NLRB v. Libbey-Owens-Ford Glass Co.*, 241 F.2d 831, 834–36 (4th Cir. 1957).

With respect to the agreed-upon unit, however, the Board was not making an independent determination of unit membership; it was constructing a contract. *NLRB v. Joclin Manufacturing Co.*, 314 F.2d 627, 633 (2d Cir. 1963). The question was one of contract interpretation that should have been governed by the intention of the parties. *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 365 (2d Cir. 1966); *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172, 182 (6th Cir.), *cert. denied*, 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967). Although, in determining that intent, the Board was not confined to the four corners of the contract, *International Union of Electrical, Radio & Machine Workers v. NLRB*, 418 F.2d 1191, 1201 (D.C. Cir. 1969), the Board could not alter the unit that had been agreed upon and approved. *Tidewater Oil Co. v. NLRB, supra*, 358 F.2d at 365.

We have examined very carefully the opinions of the Administrative Law Judge and the Board and find no discussion whatever of the parties' intentions. The Administrative Law Judge treated the settlement agreement as the equivalent of a certification following a Board-conducted election, and followed general Board standards in determining unit composition. He informed counsel at the hearing that he was unwilling to "get into the negotiation that led up to the choice of the particular [contract] words" and stated in his decision that he had not taken into consideration the arbitration testimony of respondent's president concerning his version of the 1975 negotiations. The Board apparently accepted the reasoning of the Administrative Law Judge.

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[3] At the time of the Board's decision, there was still uncertainty as to whether the New York Court of Appeals would affirm the Appellate Division's reinstatement of the arbitrator's award.

If the Board's order had to stand on its own merits, we would be inclined to deny enforcement and remand for a hearing on the issue of intent. However, with regard to this issue, there is one point on which there has never been any disagreement between the respondent and the Union. By the terms of their original settlement stipulation, they agreed to submit their disputes to arbitration. The parties clearly intended to be bound by the arbitrator's decision and have consistently expressed their willingness to be so bound. We need not decide whether, in view of the Board's 1976 order, it also should have deferred to the arbitrator's determination. *See Douglas Aircraft Co. v. NLRB,* 609 F.2d 352 (9th Cir. 1979). If the Board had done so, it would have complied with the parties' intentions and reached the same result that it did. We see no reason, therefore, to reject that result because we are troubled by the manner in which it was reached.

The Board's petition for enforcement of its order is granted.

NLRB v. Nevis Industries, Inc. d/b/a Fresno Townehouse

647 F.2d 905 (9th Cir.), June 8, 1981—246 NLRB 1053

On petition to review Board Order

Before SKOPIL and FARRIS, Circuit Judges, and BELLONI,* District Judge

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SKOPIL, Circuit Judge: Nevis Industries, Inc. ("Nevis") petitions for review of a decision of the National Labor Relations Board ("the Board"), 246 NLRB No. 167, 103 LRRM 1035 (1979). The Board cross-applies for enforcement of its order.

FACTS

In April 1977 Nevis acquired the Fresno Townehouse hotel. Prior to the acquisition, the Townehouse's engineering employees were represented by Stationary Engineers, Local 39, ("Local 39"). The other service employees were represented by Motel Service Employees, Local 62 ("Local 62").

Nevis did not retain the engineers, including the supervisor, Brewer. Nevis refused to bargain with Local 39 regarding employment of the engineers. Nevis retained most of its other employees. It allegedly conditioned retention of one employee, Alford, on his resignation from Local 39. Nevis allegedly attempted to persuade the employees represented by Local 62 to withdraw from that union.

PROCEEDINGS BELOW

The Administrative Law Judge ("ALJ") concluded that Nevis violated section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), by attempting to convince its service employees to withdraw from Local 62, and by conditioning Alford's retention on resignation from Local 39. The ALJ held that Nevis violated section 8(a)(1) by refusing to retain Chief Engineer Brewer, and sections 8(a)(1) and (3) by refusing to retain the four engineers because they were members of Local 39. The ALJ held that Nevis violated section 8(a)(5) by refusing to bargain with Local 39.

The Board affirmed the ALJ's findings and conclusions. Two members of the Board dissented, and one member concurred specially, in the conclusion that Nevis violated section 8(a)(1) by refusing to retain Chief Engineer Brewer.

The Board issued a cease and desist order. It affirmatively directed Nevis to make the engineers whole for lost wages, to offer them immediate reinstatement, and to bargain with Local 39.

ISSUES

1. Does substantial evidence support the Board's finding that Nevis violated section 8(a)(1) by interfering with the rights of the employees it retained?
2. Did the Board apply the correct legal standard, and does substantial evidence support its finding that Nevis violated sections 8(a)(1) and (3) by refusing to retain the engineers because they were union members, and to avoid an obligation to bargain with Local 39?
3. Did the Board apply the correct legal standard in determining that Nevis violated section 8(a)(1) by refusing to retain Chief Engineer Brewer?

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*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

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4. Did the Board apply the correct legal standard, and does substantial evidence support its finding that Nevis violated sections 8(a)(1) and (5) by refusing to bargain with Local 39?

DISCUSSION

I. Standard of Review.

We must enforce the Board's order if the Board correctly applied the law, and if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole. *E. g., NLRB v. Big Bear Supermarkets No. 3,* No. 79-7100, ——— F.2d ———, at ——— (9th Cir.), *cert. denied,* ——— U.S. ———, 101 S.Ct 318, 66 L.Ed.2d 147 (1980). The Board's interpretation of the Act is entitled to considerable deference. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979); *NLRB v. International Harvester Co.,* 618 F.2d 85, 87 (9th Cir. 1980). The Board's findings must be enforced if supported by substantial evidence, even if this court might reach a different conclusion based on the same evidence. *Stephens Institute v. NLRB,* 620 F.2d 720, 726 (9th Cir.), *cert. denied,* ——— U.S. ———, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980). This court must not limit its consideration to supporting evidence while excluding contradictory evidence. *Stephenson v. NLRB,* 614 F.2D 1210, 1214 (9th Cir. 1980).

II. Interference With Retained Employees.

The Board held that Nevis violated section 8(a)(1) by interfering with the section 7, 29 U.S.C. § 157, rights of the employees it retained.

A. *The Service Employees*

The Board found that Snider, the manager of the Townehouse, and a subordinate told the banquet waitresses that the Townehouse was going to be non-union. They promised greater benefits than the union had offered. After the takeover, Snider urged the maids to withdraw from Local 62, and threatened to discharge maids who joined Local 62's picket line. The Board held that these acts violated section 8(a)(1).

Nevis does not contest the Board's holding as to these acts. This constitutes a waiver. *Riverside Press, Inc. v. NLRB,* 415 F.2d 281, 284–85 (5th Cir. 1969), *cert. denied,* 397 U.S. 912, 90 S.Ct. 915, 25 L.Ed 2d 94 (1970).

B. *The Retention of Alford*

The Board found that Nevis conditioned retention of one employee, Alford, on his resignation from Local 39. Nevis contends that this finding is not supported by substantial evidence on the record as a whole. We disagree.

Snider encouraged Alford to resign from Local 39. He originally suggested that Alford resign, after checking with his lawyer as to its feasibility. Snider loaned Alford the company car to deliver his letter of resignation to Local 39.

Snider had, on other occasions, made statements consistent with conditioning retention on resignation from the Union. He told Alford at a later date that he would not hire any of the picketing engineers. He threatened the maids with discharge if they joined the strike by Local 62, and circulated a petition of resignation from Local 62, which the maids were to sign.

Snider denied that he conditioned Alford's retention on resignation from Local 39. The ALJ discredited his testimony. We will not overturn decisions as to credibility unless shown to be incorrect by a clear preponderance of the evidence. *NLRB v. Max Factor & Co.,* No. 79-7118, ——— F.2d ——— at ——— (9th Cir. September 9, 1980); *NLRB v. Inland Empire Meat Co.,* 611 F.2d 1235, 1238 (9th Cir. 1979).

There is substantial evidence on the record viewed as a whole supporting the finding that Nevis violated section 8(a)(1) by conditioning retention of Alford on his resignation from Local 39.

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III. Refusal to Retain the Engineers.

The Board held that Nevis violated sections 8(a)(1) and (3) by refusing to retain the engineers because they were members of Local 39, and to avoid incurring a duty to bargain with the union. Nevis contends that the Board applied an incorrect legal standard in determining the motive underlying the decision not to retain the engineers, and that there is not substantial evidence supporting the finding of a unlawful motive.

A. *The Standard Governing Unlawful Terminations*

To establish an unfair labor practice, the General Counsel must show an unlawful motivation either to discourage union membership or to interfere with the exercise of protected rights. *Ad Art, Inc. v. NLRB*, 645 F.2d 669, at 678 nn.9–10 (9th Cir. 1980).

Where a discharge is motivated both by legitimate business considerations and protected activity, this court requires the General Counsel to show that the protected union activity was the dominant or moving cause behind the discharge. *Ad Art, Inc., supra* at 1285–86; *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341–42 (9th Cir. 1980); *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977). Other circuits have employed different standards. *See Western Exterminator Co., supra* at 1118 n.3 (citing cases); *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB No. 150, 105 LRRM 1169, 1170–72 (1980) (same).

The Board has recently changed the procedural requirements in mixed motivation cases. It held that the General Counsel has the initial burden of showing that protected conduct was "a motivating factor" in the decision to discharge an employee. The burden then shifts to the employer to show that it would have discharged the employee absent participation in protected activity. *Wright Line*, 105 LRRM at 1175.

The Board is not disqualified from altering its rules. When it does so, we must still review its decision for rationality and consistency with the Act, and not construe the statute *de novo*. *NLRB v. Local 103, International Association of Iron Workers*, 434 U.S. 335, 350–51, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978). *See also Ford Motor Co.*, 441 U.S. at 497, 99 S.Ct. at 1849. The rule articulated by the Board in *Wright Line* is a reasonably defensible interpretation of the Act, and is entitled to acceptance by this court. *Ford Motor Co., supra*

The *Wright Line* rule is consistent with the legislative history of the Act, which reveals an intent to require the employer to show that an employee was discharged for cause. 93 Cong.Rec. 6678 (1947) (remarks of Sen. Taft), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, at 1595 (1947). *See also NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967). It is also consistent with the reality that the employer has the best access to proof of motivation. *Great Dane Trailers, Inc., supra.* The new rule strikes an acceptable balance between protection of employees' rights and preservation of employers' right to discharge employees for valid business reasons. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229, 83 S.Ct. 1139, 1145, 10 L.Ed.2d 308 (1963).

B. *The Finding of Unlawful Motivation*

The Board found that the General Counsel carried its burden of showing that anti-union animus was a motivating factor in the decision not to retain the engineers. The Board found that Nevis failed to show that it would have acted as it did absent the protected conduct. Nevis contends that these findings are not supported by substantial evidence on the record viewed as a whole. We disagree.

There was credible testimony that Snider intended to fire enough employees to avoid incurring a duty to bargain. He discussed firing particular strong union members. Some of those individuals were not reemployed. At one meeting Snider stated that the hotel was to be non-union and that he was letting the entire engineering crew go.

Shortly after midnight on April 11, 1977, Snider abruptly told the engineers that they would not be allowed to work and that he was going to run a non-union operation. Snider claimed that he had a crew standing by to assume the engineers' duties. In fact, he had hired only one person, who was completely unfamiliar with the hotel's heating and air conditioning system. At the time of the dismissals, the air conditioning was malfunctioning, and the outside temperature was becoming quite hot. There was a great need for a least one experienced engineer to correct the malfunction in the air conditioning system. Snider did not discuss employment with any of the engineers.

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Snider testified that he based his decision not to employ the engineers primarily on their poor work attitude. He had obtained unfavorable reports on two of them from the leasing agent and other unnamed persons, none of whom testified. Snider also testified that he had received good reports regarding the work of two of the engineers. Snider later added that watch engineers were unnecessary and were overpaid, but that he did not base his decision on those factors. He did not discuss wages with any of the engineers. He told one of them that he could not hire him because of "technicalities," which he was not a liberty to reveal.

The Board was justified in concluding that the justifications asserted by Snider were pretextual. Where the employers' asserted justification is shifting and unreliable, its case is weakened, and the conclusion that the true reason was for union activity is correspondingly strengthened. *NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 235 (8th Cir. 1966); *NLRB v. Georgia Rug Mill*, 308 F.2d 89, 91 (5th Cir. 1962)

IV. The Refusal to Retain Chief Engineer Brewer.

The Board held that Nevis violated section 8(a)(1) by refusing to retain Chief Engineer Brewer. Nevis contends that the Board applied an incorrect legal standard in reaching its conclusion.

The Act excludes supervisiors from the definition of "employee." 29 U.S.C. § 152(3). The Act does not protect supervisors who engage in activity which, if engaged in by a non-supervisory employee, would be protected. *Florida Power & Light Co. v. IBEW, Local 641*, 417 U.S. 790, 806–08, 94 S.Ct. 2737, 2745–46, 41 L.Ed.2d 477 (1974). An employer has the right to insist on the loyalty of its supervisors. *Id.*

There are limited exceptions to the rule that employer conduct towards supervisors does not violate the Act. These exceptions protect employees' right "to have the privileges secured by the Act vindicated through the administrative procedures of the Board." *NLRB v. Southland Paint Co.*, 394 F.2d 717, 721 (5th Cir. 1968). The exceptions have been construed narrowly. *NLRB V. Southern Plasma Corp.*, 626 F.2d 1287, 1294 (5th Cir. 1980).

Courts have found a violation of section 8(a)(1) and ordered reinstatement of supervisors in three basic situations. *Southern Plasma Corp., supra* at 1294–95. The first is where a supervisor is disciplined for refusing to commit an unfair labor practice. *Belcher Towing Co. v. NLRB*, 614 F.2d 88, 91–92 (5th Cir. 1980); *Gerry's Cash Markets, Inc. v. NLRB*, 602 F.2d 1021, 1022–23 (1st Cir. 1979); *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204, 206–08 (8th Cir. 1977). The second is where a supervisor is disciplined for testifying before the Board. *King Radio Corp. v. NLRB*, 398 F.2d 14, 21–22 (10th Cir. 1968); *Southland Paint Co.*, 394 F.2d at 721; *Oil City Brass Works v. NLRB*, 357 F.2d 466, 470–71 (5th Cir. 1966). The Third is where a supervisor who hired his own crew was descharged as a pretext for terminating his pro-union Crew. *Pioneer Drilling Co. v. NLRB*, 391 F.2d 961, 963 (10th Cir. 1968).

In these cases resintatement was ordered only to remedy harm done to rank and file employees. *Berry Schools. v. NLRB*, 627 F.2d 692, 698–99 (5th Cir. 1980). *See also NLRB v. Local 962, Pulp & Paper Workers*, 498 F.2d 26, 28–29 (9th Cir. 1974), *enforced on petiton after remand*, 510 F.2d 1364 (9th Cir. 1975). Reinstatement is not warranted merely because employees are put in fear of losing their jobs and thereby restrained from exercising their section 7 rights. *Berry Schools, supra. But see King Radio Corp.*, 398 F.2d at 22 (dicta). No court has held that a series of terminations of both supervisors and employees, without more, justifies reinstatement of the supervisors.

In the instant case the Board ordered Nevis to reinstate Brewer because his discharge was motivated by a desire to stifle employees' exercise of section 7 rights and was part of an overall scheme to achieve that result. *DRW Corp.*, 248 NLRB No. 95, 103 LRRM 1506, 1509 (1980); *Production Stamping, Inc.*, 239 NLRB No. 176, 100 LRRM 1141 (1979). The Board claims that in such cases "employees cannot be expected to perceive the distinction between the employer's right to prohibit union activity among supervisors and their right to engage freely in such activity themselves." *DRW Corp.*, 103 LRRM at 1508. Reinstatement of Brewer was required "to fully dissipate this coercive effect." *Id.*

Congress has expressly chosen not to protect pro-union activities of supervisors. Reinstating a supervisor whenever discipline might have a coercive effect on employees would tend to override the express will of Congress. *E. g., Southern Plasma Corp.*, 626 F.2d at 1295 & n.8.

Reinstatement may be necessary where there is no other way to dissipate the coercive effect of an employer's actions. Discipline of a supervisor used as a conduit for disciplining employees might be such a case. *See Pioneer Drilling Co.*, 391 F.2d at 963. In this case the coercive effect on employees can be eliminated by ordering reinstatement of the employees themselves.

Even granting considerable deference to the Board's interpretation of the Act, its order to reinstate Brewer is inconsistent with the statute.

V. The Requirement that Nevis Bargain with Local 39.

The Board presumed that Local 39 would have represented a majority of the engineers but for Nevis' unlawful refusal to retain them. *See Kallman v. NLRB,* 640 F.2d 1094 (9th Cir. 1981); *K. B. & J. Young's Supermarkets, Inc. v. NLRB,* 377 F.2d 463, 465 (9th Cir.), *cert. denied,* 389 U.S. 841, 88 S.Ct. 71, 19 L.Ed.2d 105 (1967); *NLRB v. Houston Distribution Services, Inc.,* 573, F.2d 260, 267 (5th Cir.), *cert. denied,* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 705 (1978). Nevis claims that the presumption was rebutted by evidence that the engineers would not have accepted jobs for the wages Nevis offered.

Had Nevis not unlawfully refused to retain the engineers, they would have comprised a majority of the bargaining unit. Nevis would have been required to bargain with their representative, Local 39. *NLRB v. Burns International Security Service,* 406 U.S. 272, 281, 92 S.Ct. 1571, 1579, 32 L.Ed.2d 61 (1972). *See also Kallman, supra.* Nevis would not have been bound to the terms of the prior collective bargaining agreement. It could negotiate for lower wages. *Id.* at 287–88, 92 S.Ct. at 1582. It could not unilaterally set lower wages. *NLRB v. Edjo, Inc.,* 631 F.2d 604, 606–08 (9th Cir. 1980). The Board's order directs Nevis to bargain with Local 39 as Nevis would have been required, absent its unlawful refusal to retain the engineers.

CONCLUSION

Nevis does not contest that it committed unfair practices by interfering with the service employees it retained. There is substantial evidence on the record viewed as a whole supporting the Board's findings that Nevis conditioned Alford's retention on resignation from Local 39 and refused to retain the four engineers because of anti-union animus. The Board applied the wrong legal standard in holding that Nevis violated section 8(a)(1) by refusing to retain Supervisor Brewer. The Board did not err in ordering Nevis to bargain with Local 39.

The Board's order is ENFORCED except as to the refusal to retain Brewer. The petition for review is DENIED except as to Brewer.

NLRB v. Circle A & W Products, Company

647 F.2d 924 (9th Cir.), June 8, 1981; rehearing denied August 18, 1981; certiorari denied November 16, 1981—243 NLRB 434

On petition to enforce Board Order

Before KENNEDY, PREGERSON and POOLE, Circuit Judges

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KENNEDY, Circuit Judge: In this case, a union disclaimed representation of a bargaining unit during the existing term of a collective bargaining agreement with the employer. While the collective bargaining agreement with the first union was still extant, the employees selected a new union as their collective bargaining agent in an election supervised by the National Labor Relations Board (Board). The employer refused to bargain with the new union, claiming a right to stand upon the existing collective bargaining agreement until it expired. The employer's position was based on an elaboration of the Board's contract bar rule, discussed more fully below. The Board cited the employer for refusal to bargain, rejected the contract bar defense, and ruled that the employer had committed an unfair labor practice. The Board now petitions for enforcement of its order directing the employer to bargain. We grant enforcement.

In more detail, the background of the dispute is as follows: Circle A & W Products Co. (Circle A & W) manufactures electrical equipment in Portland, Oregon. Since 1962, it has engaged in a series of collective bargaining agreements with International Brotherhood of Electrical Workers Local 49 (Local 49), the most recent of which commenced on January 1, 1977, and was due to expire three years later. Following the filing of a union deauthorization petition, an election was held on March 30, 1977. A majority of employees voted to withdraw the authority of Local 49 to require union membership as a condition of employ-

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ment. After this election, Local 49 continued to abide by the terms of the collective bargaining agreement. In the succeeding year, however, the union's efforts to reinstate the union security clause resulted in another election to decide the issue. Shortly before the election, Local 49 notified the employees of its intention to disclaim representation in the event the union security clause failed to gain majority approval. Once again, the employees voted against compulsory union membership, and as a consequence, Local 49 formally disclaimed in writing its representational interest in Circle A & W's employees on April 28, 1978.

In an attempt to challenge the disclaimer, Circle A & W filed unfair labor practice charges against Local 49, alleging a failure and refusal to bargain collectively as well as the restraint and coercion of its employees in the exercise of their section 7 rights in violation of sections 8(b)(1)(A) and 8(b)(3) of the National Labor Relations act (Act), as amended 29 U.S.C. §§ 158(b)(1)(A) and 158(b)(3) (1976). Two days later, the Regional Director dismissed these charges, and the subsequent appeal to the Office of Appeals was denied.

In the interim, Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 206) had filed a petition to represent those Circle A & W employees previously represented by Local 49. At the representation hearing held on May 17, 1978, Circle A &W contended that, because a valid collective bargaining agreement with Local 49 existed, Local 206's petition must be rejected, citing the Board's contract bar rule. *East Mfg. Corp.*, 242 N.L.R.B. No. 5 (1979); *Mack Truck, Inc.*, 209 N.L.R.B. 1003 (1974); *Gate City Optical Co.*, 175 N.L.R.B. 1059 (1969); *Aircraft Turbine Service, Inc.*, 173 N.L.R.B. 709 (1968). Relying on Local 49's disclaimer of interest in representing the unit, the Regional Director found no contract bar present and, accordingly, directed that an election be held.

Based on the rejection of its contract bar defense, along with some procedural objections, Circle A & W requested a review of the Regional Director's decision, which the Board summarily denied on the ground that no substantial issues were raised. In the subsequent election, Local 206 was chosen to represent the unit and was promptly certified by the Board. Circle A & W then refused to commence collective bargaining with Local 206, resulting in an unfair labor practice charge filed by the union. The Regional Director this time issued a complaint. The Board, ruling on the general counsel's motion for summary judgment, found Circle A & W's actions violative of sections 8(a)(5) and (1) of the Act. The Board's order directs the company to cease and desist from engaging in the unfair labor practice and requires it to bargain with Local 206.

Circle A & W contends that under the Board's own precedents, employees are permitted to designate a new bargaining agent contrary to the terms of an existing collective bargaining agreement only if representation by the original union is wholly impracticable, such as in cases where there is a union schism, *Oregon Macaroni Co.*, 124 N.L.R.B. 1001, 1004 (1959); *Hershey Chocolate Corp.*, 121 N.L.R.B. 901, 906–12 (1958), *enf't denied on other grounds*, 297 F.2d 286 (3d Cir. 1961), or where the union is defunct, *Bennett Stove Co.*, 139 N.L.R.B. 1422, 1423 (1962); *Hershey Chocolate, supra.* There is logic to that position, and we agree with the employer that the foregoing cases do not square precisely with the Board's subsequent decision in *American Sunroof Corp.-West Coast, Inc.*, 243 N.L.R.B. No. 172 (1979). There, as in this case, due to a dispute over a union security clause, a new bargaining agent was selected and the Board required the employer to bargain, thereby rejecting a defense based on the contract bar rule without explicitly recognizing the important policy to protect the employer by preserving the stability of a collective bargaining agreement. We agree with the respondent employer that employees are not free to avoid a contract by electing a new bargaining representative for any reason at all.[1]

The Board's contract bar rule is designed in recognition of the importance of preserving stability in collective bargaining agreements. *East Mfg. Corp.*, 242 N.L.R.B. No. 5 (1979). Simply stated, the rule holds that an existing collective bargaining agreement not exceeding three years will bar a petition for redetermination of representation in most instances. *Bob's Big Boy Family Restraurants v. NLRB*, 625 F.2d 850 (9th Cir. 1980). The rule does not find its source in the express language of the statute, nor is it judicially compelled. Rather, the Board has formulated the rule and thus has the principal discretion to waive or apply it in order to effectuate its policy underpinning. *Local 1545, United Brotherhood of Carpenters and Joiners v. Vincent*, 286 F.2d 127, 130–31 (2d Cir. 1960) (Friendly, J.) *Leedom v. Local 108, International Brotherhood of Electrical Workers*, 278 F.2d 237, 241–43 (D.C. Cir. 1960). The Board discretion must not run counter to other policies of the Act, however, and we think certain guidelines are required in applying the rule.

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[1] While somewhat opaque, the decision in *American Sunroof* may be justified on the ground that the Board explicitly found no collusion or attempt to avoid the terms of the collective bargaining agreement by the employees or the disclaiming union. 243 N.L.R.B. No. 172, at 5.

The policy of preserving industrial stability is of sufficient importance that the Board is required to implement the contract bar rule to protect the employer's rights as well as those of the employees. Accordingly, neither a union nor its members may rely on a severance of their relations as a grounds for designating a new representative if a substantial motive underlying that rift is to avoid the terms of an existing collective bargaining agreement. It may be appropriate, if not required, moreover, for the Board to make an inference or presumption of a prohibited purpose to avoid the terms of a bargaining agreement if the reason for a union's disclaimer is insignificant, minor, or contrary to the policies of the Act. In such cases, the employer may not be required to recognize a new bargaining agent within the period to which the contract bar rule is applicable.[2]

On the other hand, the Board is also required to implement the policy of the Act to ensure that employees secure fair, adequate and effective representation by their designated collective bargaining agent. There will be circumstances, in addition to schism or union defunctness, in which a change in representation is necessary in order to implement that policy. Where the objectives of contract stability and adequate employee representation conflict, the Board must exercise its discretion to reach an appropriate balance, but it must give explicit recognition to both sides of this balance.

While the Board's ajudication of this dispute was not entirely satisfactory under these principles, we nevertheless rule that its order must be enforced. Circle A & W did not allege that the union disclaimer or the employees' petition for a new election was a pretext for avoiding the terms of the collective bargaining agreement. The employer did not allege collusion between the parties for this purpose. The employer, finally, did not allege that avoidance of the collective bargaining agreement was a significant motivation of either the union or the employees. To the contrary, it stated that the dispute over the union security clause was the sole reason for changing bargaining agents. The employees did not object that the union had violated their section 7 rights in making this demand, and we think it a fair inference that there was a legitimate disagreement between the employees and their union on a fundamental matter of policy, rather than an attempt to avoid the terms of the contract with the company.

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In these circumstances, Circle A & W was required to bargain with Local 206. The various procedural objections raised by the employer are without merit.

The petition is granted and the order is enforced.

Pregerson, Circuit Judge (dissenting): I respectfully dissent. I agree with the majority that the Board's adjudication of this dispute was not entirely satisfactory because the Board failed to articulate the basis for its conclusion that the contract-bar rule does not apply here. Unlike the majority, however, I would not draw the inferences necessary to support the Board's decision. Rather, I would remand the matter to the Board for an explanation of the basis of its decision not to apply the contract-bar rule.

As the majority correctly points out, the Board's longstanding interpretation of the contract-bar rule does not square precisely with the Board's most recent contract-bar decision. *American Sunroof Corp.-West Coast, Inc.*, 243 NLRB No. 172 (1979). Up until the *American Sunroof* decision, it appeared that a valid disclaimer of representational interest by a union was insufficient, standing alone, to suspend the contract-bar rule. Instead, under the formulation set forth in *East Manufacturing Corp.*,

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[2] A union might conceivably disclaim further representation of an employee unit for other improper purposes, and failure to apply the contract bar rule in such a situation could amount to an abuse of the Board's discretion. Such facts are not presently before the court and hence call for no ruling at this time.

242 NLRB No. 5 (1979), a valid disclaimer merely prompted the Board to examine the policies underlying the rule. In deciding whether to impose a contract bar, the Board would strike a balance between the need to preserve industrial stability and the need to protect the employees' right to a reasonable opportunity to change their bargaining representative. Balancing these important policy considerations was paramount in deciding whether to direct an election or to enforce the contract-bar rule.

In *American Sunroof*, however, the Board appeared to adopt, implicitly, a new interpretation of the contract-bar rule. In *American Sunroof*, without balancing the two competing policies, the Board suspended the contract-bar rule because of a valid disclaimer of interest by an incumbent union. Thus, the current effectiveness of the contract-bar rule is questionable.

The majority opinion does not dispel this uncertainty. The majority succinctly states the policies relevant under pre-*American Sunroof* decisional law and endorses their consideration by the Board. Yet the majority then appears to validate the suspension of the contract-bar rule on the sole ground that Local 49's disclaimer was valid. I am uncertain whether the majority is deciding that a valid disclaimer alone effectively suspends the contract-bar rule or whether the competing policies must still be considered. To avoid creating further confusion, I would grant the Board an opportunity to clarify its position. We have in the past recognized and deferred to the Board's expertise in these matters before rendering an opinion and I see no reason to depart from that policy now.

Generally we do not substitute our rationale for the rationale provided by the Board in its decisions. *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233, 249–50, 92 S.Ct. 898, 907–08, 31 L.Ed.2d. 170 (1972); *Bob's Big Boy Family Restaurants v. NLRB*, 625 F.2d 850 (9th Cir. 1980). Because the Board did not explain its decision to suspend the contract-bar rule, I think it appropriate to remand the matter to afford the Board an opportunity to explain the underlying rationale of its decision.

Daniel Silverman, Reg. Dir. v. Major League Baseball Player Relations Committee, Inc.

516 F. Supp. 588 (S.D.N.Y.), June 10, 1981

On action for temporary injunction

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WERKER, District Judge: This is an acti brought by petitioner, the Regional Director of t Second Region of the National Labor Relatio Board for and on behalf of the National Labor R lations Board (the "Board") seeking temporary i junctive relief pursuant to Section 10(j) of the N tional Labor Relations Act, as amended (t "Act"), 29 U.S.C. § 160(j), pending the final disp sition of matters presently before the Board. R spondents in this action are the Major Leag Baseball Player Relations Committee, Inc ("PRC") and twenty-four of its constituent membe clubs. A hearing on petitioner's application w held on June 3 and 4, 1981. The Major Leagu Baseball Players Association (the "Player Associa tion") was granted leave to participate at the hear ing in support of petitioner. All parties were af forded full opportunity to be heard, to present evi dence bearing on the issues and to argue on th evidence and the law. After duly considering al the evidence and arguments presented, the petition for injunctive relief is denied.

FACTS

Since 1966 the Major League baseball players have been represented by the Players Association. During this time the respondent PRC has been the exclusive collective bargaining agent of twenty-six Major League clubs.[1] The Board of Directors of the PRC is empowered to formulate labor relations policy for the clubs and direct all negotiations with the Players Association.[2]

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C. Raymond Grebey, Director of Player Relations of PRC, has been designated by the PRC Board as the official spokesman for the PRC in all collective bargaining matters. To assist the PRC Board of Directors in dealing with the Players Association, the Board has designated a bargaining team, which includes Mr. Grebey, to conduct all negotiations.[3]

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[1] The PRC is a multi-employer bargaining unit composed of the twenty-four respondent American Major League baseball clubs as well as two Canadian-based clubs, the Montreal Baseball Club, Ltd. and the Toronto Blue Jays Baseball Club. Petitioner is not seeking injunctive relief against the two Canadian clubs.

[2] The Members of the PRC Board Directors are: Charles Feeney, (President of the National League), Leland MacPhail (President of the American League), Joseph Burke (Executive Vice-President and General Manager of Kansas City Royals), Edmund Fitzgerald (Chairman of Milwaukee Brewers), Daniel Galbreath (President of Pittsburgh Pirates), Clark Griffith (Executive Vice President of Minnesota Twins), Robert Howsam (Executive Vice Chairman of Cincinnati Reds) and John McHale (President and Chief Executive Officer of Montreal Expos).

The Players Association and the PRC bargain to establish an agreement on pensions, allowances and a variety of rules governing players' employment. Except as to a base salary, under the various agreements negotiated by the parties, the Players Association has waived its right to bargain with the PRC about individual player salaries. Thus, above a minimum salary, the subject has been left to each individual player to negotiate with his club.

Prior to 1975, when a Major League baseball player's employement contract expired, he was precluded from negotiating for employment with any other team except his own. In December 1975, as the result of grievances filed by the Players Association on behalf of John Messersmith and David McNally, an arbitrator found that Major League clubs could not reserve a player for more than one year ("option year") past the expiration of his contract. A player who completes the option year without signing a renewal contract with his team becomes a "free agent" who is able to negotiate with other clubs.[4]

In 1976 the Players Association and the PRC entered into a collective bargaining agreement, effective January 1, 1976 through December 31, 1979, which provided, *inter alia,* for "free agency" as established by the Messersmith-McNally decision. Pursuant to this agreement, however, a player was required to serve six years in the Major Leagues before becoming a "free agent." The agreement also provided for "compensation"[5] in the form of an amateur player draft choice to each club which lost a "free agent" player selected by more than two clubs for negotiation rights. After four years of experimenting with this new system, the Players Association and the PRC commenced negotiations for a new collective bargaining agreement on November 11, 1979.

On January 16, 1980, the PRC presented a proposal which recognized the difference in quality, as measured by skill and ability, among the various players choosing to become "free agents." Under this proposal, as finally offered on May 12, 1980, a team losing a "free agent" selected by less than four clubs will not be afforded replacement player "compensation." If a player is selected for negotiation rights by four to seven clubs, the club signing a contract with the player must compensate the player's former club with an amateur draft choice, as before.[6] However, if a player is selected by eight or more clubs, and meets certain minimum performance standards,[7] the signing club must compensate the former club with not only an amateur draft choice, but also a professional player of the former club's choice from a list of unprotected players under contract with the signing club. In this third category, the player is referred to as a "ranking free agent" or "premium" player. Each club may retain 40 players under the contract. Depending upon the performance level of the "free agent" signed, the signing term may protect from 15 to 18 of its 40 players.[8]

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The Players Association adamantly opposed this proposal as having a negative impact on player salaries. Since the proposal requires a club signing a "ranking free agent" to give up a professional player as well as an amateur draft choice, the Association predicts that the number of clubs willing to bid for a "premium" player and the salaries they would offer would be limited by the knowledge that they would be required to forfeit a player of perhaps comparable quality. Correspondingly, the player's present club could then offer him less to insure his remaining with the team.

As negotiations progressed, various matters were being resolved, but it became apparent that the issue of additional replacement player "compensation" was a significant impediment to settlement.

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[3] The PRC bargaining team consists of Mr. C. Raymond Grebey, and the two League Presidents, Mr. Charles Feeney and Mr. Leland MacPhail.

[4] *Professional Baseball Clubs,* 66 Labor Arbitration Reports 101 (1975). This new concept in baseball was affirmed by the courts in *Kansas City Royals v. Major League Baseball Players Association,* 409 F.Supp. 233 (W.D.Mo.), aff'd, 532 F.2d 615 (8th Cir. 1976).

[5] One wonders what William Safire might do with the language concept that "compensation" in athletic terms means the exchange of bodies.

[6] An amateur draft choice is a high school or college player.

[7] This "free player" must rank in the upper ⅓ or ½ of certain performance categories, and be drafted within a specified number of rounds.

[8] In addition to the proposal for replacement player "compensation," the clubs also sought to require the Players Association to bargain directly about players' salaries by establishing salary ranges for players with less than six years of Major League service. Changes were also sought in the procedure by which the salaries of some players may be established by arbitration. During the negotiations, the clubs withdrew both these proposals.

Unable to reach agreement on the PRC's proposal, a strike deadline was established for May 23, 1980. On the eve of that deadline, the PRC and the Players Association entered into a collective bargaining agreement ("basic agreement"), effective January 1, 1980 through December 31, 1983, establishing the terms and conditions of employment of Major League baseball players. As part of that agreement, a joint study committee was appointed to consider the unresolved matter of replacement player "compensation" for a club which loses a "free agent." The committee was to report to the PRC and the Players Association no later than January 1, 1981.

On December 8, 1980, Bowie Kuhn, Commissioner of Baseball, delivered a speech at the Annual Convention of Professional Baseball. Commenting on the financial difficulties facing the industry, Commissioner Kuhn expressed concern about escalating player salaries brought about by "free agency." He cited the companion problem of "compensation" as a threat to competitive balance in baseball and thus expressed a concern about adequate replacement talent for the loss of a "free agent." Sounding a clarion call to owners and players alike to recognize the need to correct the system of "free agency" which has given rise to these problems, he predicted further financial loss without cooperation between the two groups.

Meanwhile, the joint study committee met on several occasions between August 7, 1980 and January 22, 1981. At one of the meetings, Marvin Miller, the Executive Director of the Players Association, referring to the press reports of Commissioner Kuhn's statements at the Annual Baseball Convention on December 8, 1980, asserted that the clubs' "compensation" proposal was motivated by financial concerns and by a desire to reduce player salaries. Mr. Grebey rebutted these statements and clearly stated that reduction of player salaries was not a goal of the clubs' proposal and that no question of the clubs' ability to pay was relevant or was being raised on behalf of the clubs.

Failing to agree on a joint report, separate reports were issued by the PRC on February 17, 1981 and by the Players Association on February 19, 1981. The players' position, as reflected in its report, is that the additional compensation for a "ranking free agent" diminishes that "free agent's bargaining position with the new team by the value of the player that the signing club expects to lose. The clubs repeated their position in the report submitted by its members, stating that its current approach is not designed to attack the subject of player salaries.

This impasse ended round one of negotiations over the PRC's proposal and set the stage for round two as provided for in Article XVIII, Section D(2) of the basic agreement:

> *Negotiations.* Subsequent to receiving the report of the study committee, the parties shall promptly meet to commence negotiations on the subject of the study. If the parties are unable to reach agreement on the matter of player selection rights as compensation to a Club which loses a free agent player after receiving the report of the study committee and by February 15, 1981, the Clubs may thereafter but before February 20, 1981 unilaterally adopt and put into effect as part of the Basic Agreement the proposal on this matter * * * [see attachment 9] or a variation not less favorable to the Players Association. In the event the Clubs put such proposal into effect unilaterally, the Players Association may reopen the Basic Agreement with respect to the player selection rights provision put into effect by the Clubs and strike with respect thereto. The Player Association may reopen the Basic Agreement with respect to the player selection rights provision put into effect by the Clubs and strike with respect thereto. The Player Association shall give the Clubs notice of such reopening by March 1, 1981 and in such notice shall indicate the date on which it will strike, which date shall not be later than June 1, 1981. In the event the Players Association does not so strike, there shall be no further strike on this subject during the term of the Basic Agreement, provided, however, that the Players Association may, prior to March 1, 1981, offer to waive the right to strike described above and may request the Clubs to agree to a substitute right to strike in 1982 on a date not later than June 1, with no obligation on the part of the Clubs to accept such request.

On February 19, 1981, the parties having failed to reach an agreement on the "compensation" issue, the clubs invoked their option under the basic agreement and unilaterally adopted as part of that agreement their last proposal on the issue. On

February 26, 1981, the Players Association likewise exercised one of its options under the agreement, reopening the basic agreement on the unresolved issue and setting a strike deadline of May 29, 1981.[9] As a result of this reopener, the second round of negotiations began.

By letter of February 27, 1981, the Players Association requested the PRC to provide certain financial information for all member clubs. The Players Association premised the appropriateness of its request on Commissioner Kuhn's December 1980 speech which the Association interpreted as an affirmation of its belief that the "compensation" proposal was motivated by financial concerns.

Mr. Miller explained that the requested financial data was "necesary for the Players Association to properly discharge its duties and responsibilities * * * as the exclusive collective bargaining representative of all major league players, for purposes of preparation for and conduct of the ongoing negotiations."

On March 13, 1981, the PRC, through Mr. Grebey, refused to comply with the Association's request, repeating the PRC's position that its bargaining stance regarding "compensation" was not based on "economic incapacity or inability." By letters of April 7 and 20, 1981, the Players Association sought reconsideration of the PRC's decision not to comply with its request. Specifically, the Association focused on the sharp increase in player salaries since the 1976 agreement.[10]

Noting a causal relationship between the "free agency" provisions of that agreement and the escalation of player salaries,[11] the Association challenged the PRC to deny that its proposal is "designed to negatively impact upon the salaries of free agent players."

Grebey responded by letter of April 24, 1981, and again refused to comply with the Association's request. First, he noted the Association's failure to seek disclosure of club financial data until it exercised its option to reopen the basic agreement, more than sixteen months after the commencement of negotiations on the issue of player "compensation." Grebey further stated that the PRC had "never advanced the position nor taken refuge in argumentation which either directly or indirectly claims an inability to pay as a defense for [its] position in collective bargaining." Rather, the objective of the PRC in proposing the plan for "compensation," explained Mr. Grebey, "is to enhance player balance between clubs losing a quality free agent over the long term by providing replacement personnel that will: (1) compensate for the loss of a player; (2) compensate for the general inability of clubs to overcome this added turnover on a club roster through additions from the Minor Leagues; and (3) provide equity balance in compensation, reflecting the different levels of skill and ability of players who chose to become free agents as evidenced by our experience of the past four years."

Meanwhile, during this second round of negotiations, various statements by club owners appeared in the media. These statements all reflect an expression of concern about the financial well-being of the baseball industry and/or the level of player salaries. Specifically, in an article appearing in *The Sporting News* on March 21, 1981, Ruly Carpenter, President of the Philadelphia Phillies, stated that "salaries have basically gotten to ridiculous proportions." Ray A. Kroc, Chairman of the Board of the San Diego Padres, made a statement which was quoted in *The Sporting News* magazine dated May 21, 1981, warning the players not to strike because there is a limit to the salaries they can be paid. He is also quoted as saying that only three or four clubs out of twelve in the National League are still making money.

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[9] The strike deadline was subsequently extended by stipulation of the parties on May 28, 1981, the date petitioner instituted this action. Pursuant to that stipulation the parties agreed that the Players Association's right to strike is extended to 48 hours following this Court's ruling on the petition presently before it. The parties also agreed that the Players Association will not commence a strike until at least 24 hours after the Court's ruling.

[10] Commenting on public resentment of high salaries in sports, an article appearing in *Sports Illustrated*, June 1, 1981, contained the following quote at 90:

> "There was a time when the League stood for integrity and fair dealing. Today it stands for dollars and cents. Once it looked to the elevation of the game and an honest exhibition of the sport; today its eyes are on the turnstile. Men have come into the business for no other motive than to exploit it for every dollar in sight."

That statement is from a "manifesto" issued in 1889 by the Brotherhood of Ball Players. The issuance of the "manifesto" was a prelude to the formation of a players' league. Dissatisfied, among other things, with the imposition of salary limits set by the owners, the Players League was formed for the 1890 season as an alternative to striking.

[11] The average Major League Baseball player's salary has risen from approximately $52,300 per year in 1976 to $196,500 in 1981.

On March 21, 1981, Toronto Blue Jays President, Peter Bavasi, predicted in a radio interview that the rise in salaries as a result of "free agency" would force the clubs into bankruptcy if the situation were not corrected. He further commented that cooperation from the players regarding the "compensation" proposal would be helpful in restraining clubs from expending large sums on "free agents" since they would have to give up a promising player as a price for signing a "premium" player.

On April 7, 1981, during a television interview, Ted Turner, President of the Atlanta Braves, similarly voiced concern about the financial state of the baseball industry due to salaries, as did Joseph Burke, in his capacity as Executive Vice President of the Kansas City Royals. Burke linked the rise in salaries to "free agency."[12]

Believing that the PRC's bargaining position on the issue of player "compensation" was based at least in part on the financial difficulties of certain member clubs, on May 7, 1981, the Players Association filed an unfair labor practice charge with the Board alleging respondents' failure to bargain in good faith by refusing to comply with the Players Association's request for financial disclosure in violation of Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5).

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Following investigation and pursuant to Section 10(b) of the Act, 29 U.S.C. § 160(b), the Board filed a complaint charging respondents with violating Sections 8(a)(1) and (5) of the Act. A hearing on this complaint before an administrative law judge of the Board is scheduled to commence on June 15, 1981.

The temporary injunctive relief sought by petitioner requires respondents to rescind their February 19, 1981, action by which they exercised their right under the 1980 basic agreement and unilaterally implemented their bargaining proposal regarding "compensation." This relief, if granted, would thus preclude the Players Association, under the terms of the basic agreement, from commencing a strike. Petitioner argues that if its request for relief is not granted, the Players Association and the baseball player-employees it represents will be forced to strike within forty-eight hours after this Court rules, or be bound through the end of 1983 by the PRC's proposal. Petitioner emphasizes that obvious irreparable harm to the players, owners and fans would flow from a decision by the Players Association to strike.

The Association contends that if petitioner should prevail in the proceedings presently before the administrative law judge, the Board would be unable to adequately remedy the PRC's alleged unfair labor practice by ordering the clubs to disclose the financial information which the Association seeks, since the Board cannot undo the effects of a strike which would ensue as a result of the denial of petitioner's instant request for relief.

Respondents vigorously oppose petitioner's application as a tactic by the Players Association to avoid the consequences of a contract freely bargained for and entered into by it.

DISCUSSION

To obtain a Section 10(j) injunction, petitioner must satisfy a two-fold test. First, this Court must find that there is reasonable cause to believe that an unfair labor practice has been committed. Second, the Court must determine whether the requested relief is just and proper. *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1030 (2d Cir. 1980); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980), *see Morio v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980). Regarding issues of fact, petitioner "should be given the benefit of the doubt," and with respect to questions of law, "the Board's view should be sustained unless the court is convinced that it is wrong." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1051; *See Danielson v. International Organization of Masters*, 521 F.2d 747, 751 (2d Cir. 1975); *Danielson v. Joint Board*, 494 F.2d 1230, 1245 (2d Cir. 1974).

Unfair Labor Practice Claim

Section 7 of the Act provides that "[e]mployees shall have the right to * * * bargain collectively through representatives of their own choosing * * *." 29 U.S.C. § 157. Section 8(a)(5) of the Act implements this right by making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." 29 U.S.C. § 158(a)(5). Section 8(d) defines collective bargaining as, *inter alia,* "the mutual obligation of the employer and the representative of his employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment * * * ." 29 U.S.C. § 158(d).

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[12] Although Joseph Burke is also a member of the Board of Directors of the PRC, his remarks quoted in the *Kansas City Star* were not made in that capacity.

Information concerning subjects at issue in bargaining is presumed to be necessary and relevant to negotiations, and employers and unions alike must provide such information when requested in the course of bargaining. *N.L.R.B. v. General Electric Co.,* 418 F.2d 736, 753 (2d Cir. 1969), *cert. denied,* 397 U.S. 965, 90 S.Ct. 965, 25 L.Ed.2d 257 (1970); *N.L.R.B. v. Jacobs Manufacturing Co.,* 196 F.2d 680 (2d Cir. 1952).

Since the Players Association exercised its option under the 1980 basic agreement on February 26, 1981, and reopened negotiations with regard to the PRC's compensation" proposal, collective bargaining has been limited to one issue: the level of "compensation" to be paid to a club when a former player of the club, upon the expiration of his employment contract becomes a "free agent" and contracts with another club for employment.

The Board alleges in its petition that the public statements by club owners regarding claims of financial difficulties created a reasonable belief on the part of the Players Association that respondents' bargaining position during this second round of negotiations was based, "at least in part, on the present or prospective financial difficulties of certain of Respondents' member clubs." Although Marvin Miller has expressed some doubt as to club owners' inability to pay rising player salaries, he nevertheless takes the position that the Players Association must have the financial information it requests if it is to fulfill its duty of fair representation. If deprived of that information, the Association claims that it must blindly decide whether to press its demands and risk the loss of jobs for its members if the clubs cannot survive under the "compensation" terms proposed by the Association, or to recede from its position and accept the PRC's proposal without verifying owners' claims of financial distress caused by "free agency." Thus, the Association brought an unfair labor practice charge against the PRC for its failure to disclose the requested financial data after the clubs allegedly put into issue their inability to pay.

In *N.L.R.B. v. Truitt Manufacturing Co.,* 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956), the Supreme Court laid to rest the question of whether an employer, bound by the National Labor Relations Act to bargain in good faith, could claim that it was financially unable to pay higher wages and then refuse a union's request to produce financial data to substantiate the claim. Holding that such conduct supported a finding of failure to bargain in good faith, in violation of Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), the Court explained:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

Id. at 152–53, 76 S.Ct. at 755–756.

However, *Truitt's* progeny have held that an employer is required to disclose its financial condition only when the employer claims an inability to pay, however phrased, *during the course of bargaining. E.g. Western Massachusetts Electric Co. v. N.L.R.B.,* 573 F.2d 101 (1st Cir. 1978); *Pressman v. N.L.R.B.,* 538 F.2d 496 (2d Cir. 1976).

Petitioner admits that at no time during bargaining sessions have respondents made a claim of inability to pay. Nevertheless, petitioner urges the Court to find that public statements made by several club owners as well as the Commissioner of Baseball about the financial condition of the industry are sufficient to support a finding of reasonable cause to believe that respondents have injected the inability to pay into the negotations.

The cases cited by petitioner in support of its position are simply inapposite. In each case, inability to pay was put in issue at the bargaining table. Thus, no consideration of extrinsic events was necessary or relied upon in determining under *Truitt,* whether an employer raised the issue of inability to pay at the bargaining table. *E. g., Latimer Bros.,* 242 N.L.R.B. 50 (1979); *Teleprompter Corp.,* 227 N.L.R.B. 705 (1977), *enf'd,* 570 F.2d 4 (1st Cir. 1977); *C-B Buick, Inc.,* 206 N.L.R.B. 6 (1973), *modified,* 506 F.2d 1086 (3d Cir. 1974); *Goodyear*

Aerospace, 204 N.L.R.B. 831 (1973), *enf. denied on other grounds,* 497 F.2d 747 (6th Cir. 1974); *Globe Gear Co.,* 189 N.L.R.B. 422 (1971), *enf'd,* 451 F.2d 1348 (6th Cir. 1971).

Thus, Petitioner concedes, as it must, that the Board and courts have never found that an employer has injected financial condition into negotiations, absent statements or con-

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duct by the employer at the bargaining table. Nevertheless, it urges this Court to find, on the basis of statements by Commissioner Kuhn and various owners, that the financial issue has become relevant to the negotiations regarding "compensation" because of the unique nature of collective bargaining in baseball. Mindful that this Court must be "hospitable" to the views of the Regional Director, however novel, *Danielson v. Joint Board,* 494 F.2d at 1244–45, I am nevertheless convinced that the Board's position is wrong, and thus will not "defer to the statutory construction urged by [it]." *Danielson v. International Organization of Masters,* 521 F.2d at 751.

It is the PRC Board of Directors which is charged with the *exclusive* authority to formulate the collective bargaining position of the clubs and to negotiate agreements with the Players Association. Indeed, Grebey, the official spokesman for the PRC in collective bargaining matters, has consistently denied that the clubs' financial status is at issue in the current negotiations.

Commissioner Kuhn's remarks in December 1980 at the convention cannot be imputed to the PRC as a statement of its bargaining position. First, petitioner's attempt to establish an agency relationship between the Commissioner and the PRC is unavailing. As Commissioner of Baseball, Kuhn presides at the regular joint meetings of the Major Leagues, but does not request nor preside at special meetings called by the PRC. Moreover, while Kuhn is responsible for disciplining players who may then file grievances against him in his capacity as Commissioner, he has likewise ordered the clubs to cease certain action when the interests of baseball warranted his intercession, as when he directed the clubs to open their training camps in the spring of 1976.

There can be little doubt that there is a correlation between "free agency" and the rise in player salaries. Commissioner Kuhn addressed this problem and expressed his concern about the high salaries negotiated between individual players and clubs. During his 1980 speech at the clubs' convention, he also voiced concern for a companion problem, and called for cooperation between the players and owners in combating the threat to competitive balance. He expressed optimism that a solution would be found by the joint study committee that was then considering the "compensation" issue. Fairly read, I cannot find that the Commissioner's speech supports the proposition that the clubs' bargaining position on the replacement player "compensation" proposal is motivated by financial inability.

Indeed, viewing the companion problem of player "compensation" as a separate issue, Commissioner Kuhn made a statement appearing in *The Sporting News* on January 24, 1981 that he did "not believe that 'compensation' as proposed by the clubs would have any effect on salaries or certainly not more than a marginal effect at most."

In a multi-employer bargaining unit as large and publicly visible as the Major League Baseball Clubs, it is inevitable that extraneous statements will be made by individuals affiliated in some way with the group which are inconsistent with the official position of the unit. This only underscores the necessity, recognized by the PRC, for centralized bargaining responsibility and authority. Clearly, individual expressions of opinion cannot serve to bind the entire bargaining unit in the absence of authority to speak for the groups. *See Anderson Pharmacy,* 187 N.L.R.B. 301, 302 n.10 (1970).

Petitioner and the Association strain to emphasize the uniqueness of collective bargaining in the baseball industry to avoid the consequences of the established labor law regarding the inability to pay. However, this Court cannot accept "collective bargaining through the press" as a basis for a 10(j) injunction.

The Act has provided for collective bargaining between the parties through their authorized representatives. If this Court were to find that the several public statements by club officials and the Commissioner were sufficient to support a finding that the PRC and its negotiating team view the respondents' "compensation" proposal as re-

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lated to the financial condition of the clubs, it would do violence to the intent and purpose of the Act which limits the jurisdiction of this Court. *See McLeod v. General Electric Co.*, 366 F.2d 847, 849–50 (2d Cir. 1966), *vacated as moot*, 385 U.S. 533, 87 S.Ct. 637, 17 L.Ed.2d 588 (1967).

To accept petitioner's argument would permit disgruntled employers in a multiemployer unit who disagreed with the negotiation policies of their representatives to force negotiation issues into the courts, thereby "conducting labor management relations by way of an injunction," *id.* at 850, a result clearly contrary to the purpose of the Act. The Players Association and the PRC entered into a valid contract on May 23, 1980. As part of that contract they agreed that if the parties were unable to reach an agreement on the "compensation" issue, the PRC could implement its proposal, thereby triggering one of the Players Association's options, that is, to reopen the agreement on that issue and set a strike deadline of no later than June 1, 1981. This Court will not alter the terms of this contract, for which the parties freely bargained, by delaying implementation of the proposal and a possible strike on the basis of a tortured reading of the law regarding inability to pay.

Thus, I cannot find that the comments by several club officials and the Commissioner, relied upon by petitioner, are statements of policy on behalf of the PRC which would support a claim of inability to pay.

Moreover, the issue of salary, above a minimum rate, is not a subject of collective bargaining between the Players Association and the PRC. Rather, individual players negotiate independently with the clubs as to their salary. Indeed, it is the high player salaries which have resulted from the negotiation of individual contracts by players and clubs which Commissioner Kuhn addressed in his 1980 speech. Noting that player salaries are increasing at a more rapid rate than revenues, he opined that bargaining of individual contracts has led to this problem. He called upon players and owners to cooperate in this regard to arrest the trend and avoid loss to all, including the fans who will be required to pay higher ticket prices.

The evidence adduced at the hearing is insufficient to support a finding that the replacement player "compensation" proposal implemented by the PRC presents economic issues. Rather, the proposal is addressed to the inequities which flowed from the "compensation" for "free agents" as provided for in the 1976 agreement. Specifically, the proposal implemented by the PRC in February 1981, recognized the difference in skill and ability among "free agents" by the type of compensation provided to a club losing the player. In addition, the proposal is designed to more adequately assist the clubs in replacing players lost in the "free agent" draft. Under the 1976 agreement, clubs were unable to replace lost players through the Minor League and amateur systems within a meaningful time period, if at all.

Finally, I find an insufficient basis for the Board's assertion that the Players Association has a reasonable and rational belief in the clubs' inability to pay in view of its delay in requesting financial data for more than one year after the "compensation" proposal was first introduced by respondents.

As early as 1975 there were reports about club financial losses. In response to these reports, Miller characterized the claims as "phony." In 1977, again in response to reports of financial loss, Miller stated that the clubs had been making that claim for years. In January 1979, Miller claimed that the concern about the escalation of salaries was ill-founded since Major League clubs pay players a smaller proportion of income than most other industries. Tr. 56–60. A few days following the Commissioner's speech in December 1980, Miller likewise commented on the credibility of statements regarding alleged club losses by focusing on the rise in capital gains over the preceding five years. Tr. 63. Indeed, as recently as March or April of this year, Miller predicted that the clubs would refuse to produce the requested financial data because they were not losing money. Tr. 64.

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Despite the presentation of a "compensation" proposal in January 1980 and Miller's apparent knowledge for several years of the losses claimed by club owners, the Players Association first requested financial information from the clubs on February 27, 1981. This delayed request coupled with Miller's expressed opinion that the clubs were not losing money leads to the inescapable conclusion that the proceedings brought before the Board, resulting in the instant action, was not a sincere effort to obtain access to the clubs' financial records, but rather a bargaining tactic by the Association to prevent the implementation of the PRC's proposal.

The court is mindful that a strike may result from its denial of petitioner's request for a 10(j) injunction. Indeed, the industry has suffered a strike in the past. Nevertheless, in struggling with a temptation and even compulsion to prevent a strike in the public interest, I am bound by the law. The possibility of a strike, although a fact of life in labor relations, offers no occasion for this Court to distort the principles of law and equity. The resolution of the "compensation" issue is left to the parties through the negotiation process.

CONCLUSION

In accordance with the foregoing, I find there is no reasonable cause to believe that an unfair labor practice has been committed by respondents. The petition is therefore dismissed.

PLAY BALL!!!

SO ORDERED.

NLRB v. Lloyd A. Fry Roofing Company, Inc. of Delaware

651 F. 2d 442 (6th Cir.), June 10, 1981—237 NLRB 1005

On petition to enforce Board Order

Before MARTIN and JONES, Circuit Judges, and REED, District Judge[*]

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NATHANIEL R. JONES, Circuit Judge: The National Labor Relations Board (the Board) petitions for enforcement of its order that the Lloyd A. Fry Roofing Company (Fry) violated section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 *et seq.* by constructively discharging an employee because be filed complaints respecting the safety of Fry's equipment. For the reasons set forth below, we grant enforcement.

I.

Fry is a multistate manufacturer and distributor of asphalt roofing products. At its Medina, Ohio plant, Fry employs approximately 25 production workers, and four over-the-road (OTR) truck drivers who are not represented by a union. On May 21, 1975, Carl Bauer, Fry's office manager at Medina, hired James L. Varney as an OTR driver. Because Varney was a close personal friend, Bauer waived Fry's established policy requiring two years experience as an OTR driver. In December of 1975, Varney was laid off for lack of work. Although Varney had been reprimanded for improperly securing loads and had one accident, Fry recalled Varney in January 1976.

In November 1975, Fry entered into a one-year truck leasing agreement with Joban Leasing Company. Immediately thereafter, each of the OTR drivers complained to numerous Fry officials about the safety of Joban's trucks. Varney also questioned James Beliles, Joban's owner, about the condition if its trucks. In response, Beliles threatened to "see to it that Varney was fired."

As a result of the OTR drivers' complaints on January 13, 1976, plant manager Dorsch convened a meeting with Beliles and OTR drivers James Wade and Varney to seek a solution to the truck maintenance problems. Varney complained of the condition of the trucks and compared them unfavorably with Fry's prior equipment. Wade agree. Beliles promised that new equip-

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ment would be provided in the spring. Dorsch stated that no driver need operate an unsafe vehicle, but that they would have to continue to use Joban's trucks. Belies agreed to make repairs provided the complaints were in writing. As a consequence, Dorsch instituted an "Equipment Complaint Report" to be completed by the OTR drivers after each trip. After the meeting, Beliles again threatened Varney to "see to it that he is fired."

The Equipment Complaint Report proved ineffective. Beliles ignored Equipment Complaint Reports listing defective lights, faulty transmissions, faulty steering wheels, maladjusted or inoperative brakes, and broken speedometers. On one occasion, Beliles tore up several forms. At Varney's instigation, Dorsch was told of Beliles's disregard for the Equipment Complaint Report.

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[*] The Honorable Scott Reed, District Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

In addition to filing Equipment Complaint Reports, Varney used the "Driver Vehicle Condition Report" on the back of the daily log form required by regulations of the Federal Highway Administration to note mechanical problems with Joban's trucks. Driver Vehicle Condition Reports provide for certification by the mechanic that the defect, has been repaired before further use of the vehicle. Though Varney submitted several such reports, the required repairs were not made.

Varney also asked Dorsch to have Joban's trucks inspected by the Ohio Public Utilities Commission or by the Federal Highway Administration. Varney agreed to stop complaining if the trucks were inspected. Dorsch refused.

In early March 1976, three of the four OTR drivers complained orally to Dorsch about Joban's trucks. Varney threatened not to drive the trucks unless they were fixed. Shortly thereafter, an OTR driver quit because he was tired of driving Joban's trucks. On April 14, Varney was assigned to deliver a load in Pennsylvania. Joban's mechanic told Varney that the truck had new brakes. During Varney's trip, the brakes on the truck failed and he had a three-vehicle accident. In a telephone conversation with office manager Bauer, an emergency road service mechanic stated that the brakes were defective. Bauer and Dorsch told Varney that the accident was not his fault.

The day after the accident, Beliles called Dorsch and threatened to " pull all of his equipment out unless they get rid of Varney." On April 19, Dorsch convened another meeting. Varney complained about the condition of Joban's trucks. Beliles accused Varney of deliberately abusing Joban's trucks. Beliles reiterated his oft-repeated threat that Varney be fired. Dorsch "refused," but gave Varney an "ultimatum." Dorsch then presented to Varney for his signature a statement, already prepared, putting him on probation for six months.[1] Dorsch read the statement aloud. Bauer advised Varney that if he signed it he would be admitting to the violations set forth in it. Varney refused to sign. Dorsch told Varney to sign the statement or be terminated. After the meeting Bauer conferred privately with Varney and told **445** him that he would be foolish to sign the statement. Varney again refused to sign the statement and was fired.

Varney filed an unfair labor practice charge with the Board alleging that he was discharged for exercising rights protected by section 7 of the Act. After a hearing, an Administrative Law Judge held that Varney's participation in meetings convened by Fry, use of the Equipment Maintenance Report, and efforts to enforce compliance with governmental safety regulations were related to a common concern of all OTR drivers. As a consequence, the ALJ held that Varney was engaged in protected concerted activities within the meaning of section 7 of the Act.[2]

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[1] This statement is as follows:

STATEMENT

I, James I. Varney, Hereby acknowledge that, effective April 19, 1976, I shall begin a *driver's probationary period* of six months with the Medina Plant of Lloyd A. Fry Roofing Company of Delaware, Inc. During the period April 19, 1976 through October 19, 1976, I fully understand that I will be subject to the closest scrutiny by plant management, and plant employees and agents, of my driving ability (speeding (sic) tickets, accidents, breakdowns) and my treatment of the Equipment provided me by my plant management. In addition, I understand that I will be judged on my ability to take loads out of the plant at the time scheduled by plant management. I will also be judged on my ability to deliver these loads at the time promised. My treatment of customers and their employees will be scrutinized. The time required for me to return to the plant and be ready for another trip will be monitored. The condition of my returned empty trailer with regard to its convenient re-loading by the plant shipping department will be reported to plant management. I shall *promptly* report, *in writing*, all equipment deficiencies to the agents of our leasing company, who are responsible for vehicle maintenance. I understand that these same agents will report to my plant management all equipment defects *not* reported by me, or reported by me late, causing a scheduled trip to be delayed. I completely understand that I am subject to immediate dismissal by plant management during my probation period.

X......................
Signature James L. Varney
X......................
Date of Signature
X......................
Witness

Copy:
R.W. Manges—Ass't MGR. (West)
G.O. Galloway—Ass't MGR. (East)
M.S. Queen—Plant Supt.
W.E. Barnes—Ass't Supt.
C.W. Bauer—Office Mgr.
V.C. Spires—Trans. Clerk
E. Bailey—Foreman
J.M. Myers—Foreman
R.R. Streck—Shipping Clerk
D.A. Triplett—Ass't Shipper
E.L. Chapman—Pers. Clerk
J. Beliles—Joban Leasing, Inc.
D. Biddle—Joban Leasing, Inc.
R.L. Lantz—Senior Driver
D. Mathers—Fry Driver
E. Miller—Fry Driver
J.L. Varney—Fry Driver
J.R. Dorsch—Plant MGR.

The ALJ concluded that Varney was subjected to "excessively harsh and unwarranted probationary status" because of his concerted activity respecting the safety of Joban's trucks. Fry's proffered justification that Varney was discharged because he failed to tie down cargo, was tardy in deliveries, had poor customer relations, and drove carelessly were found to be pretextual.

II.

Section 7 of the Act provides that "employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutal aid or protection." 29 U.S.C. § 157. Employees may engage in concerted activities protected by section 7 regardless of whether the employees are members of a union. *Vic Tanny International, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980).

An individual employee's complaint is "concerted" if it is related to group action for the mutal aid or protection of other employees. *Signal Oil & Gas Co. v. NLRB*, 390 F.2d 338, 342–43 (9th Cir. 1968). Either the individual employee "is in fact acting on behalf of, or as a representative of, other employees," *NLRB v. Guernsey-Muskingum Electric Cooperative, Inc.*, 28 F.2d 8, 12–13 (6th Cir. 1960), or his claim "must be made with the object of inducing or preparing for group action," *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979). It is not necessary that the individual employee be appointed or nominated by other employees to represent their interests.

Protests of wages, hours other working conditions and the presentation of job-related grievances are for the mutal aid and protection of employees. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962); *Vic Tanny, supra*, 622 F.2d at 241; *NLRB v. Elias Brothers Restaurants*, 496 F.2d 1165 (6th Cir. 1974). Additionally, an employee's presentation if job-related grievances aimed at achieving employer compliance with governmental regulations affecting working conditions is for the mutal aid and protection of employees. *Socony Mobil Oil Co. v. NLRB*, 357 F.2d 662 (2d Cir. 1966). *Alleluia Cushion Co.*, 221 NLRB No. 999 (1975). Applying these principles, we hold that Varney was engaged in concerted activity protected by section 7 of the Act.

Varney was engaged in numerous discussions with other OTR drivers regarding their personal safety, which was a major issue at Fry. Varney expressed his concern to Fry's management that Joban's trucks were unsafe. Varney articulated his and the other drivers' concerns at meetings between the OTR drivers and Fry's management. Varney's continued use of the Equipment Complaint Report and the Federal Highway Administration's Driver Vehicle Condition Report to eliminate safety hazards on Joban's trucks was for the mutual aid or protection of other employees. His attempt to enforce federal safety and state inspection regulations is protected concerted activity. Such regulations are intended to provide *all* employees with a safe job environment and the means to protect themselves against job hazards.

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III.

Section 8(a)(1) of the Act makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of * * *" their section 7 rights. 29 U.S.C. § 158(a)(1). In this Circuit, if a discharge is motivated "in part" by an employee's protected concerted activities the discharge violates section 8(a)(1) of the Act. *Vic Tanny, supra*, 622 F.2d at 241; *NLRB v. Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO*, 570 F.2d 586, 590 (6th Cir. 1978). *Elias Brothers Restaurants, supra*, 496 F.2d at 1167. *But see*, *NLRB v. Ogle Protection Service*, 375 F.2d 497 (6th Cir.) *cert. denied*, 389 U.S. 843 (1967). In *Wright Line*, 251 NLRB No. 150 (1980), the Board has reexamined its use of the "in part" test in light of the decision in *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed2d 471 (1979). The Supreme Court in *Mt. Healthy* fashioned a "test of causation which distinguishes between a result caused by [protected concerted activity] and one not caused." 429 U.S. at 286, 97 S.Ct. at 575. The Court reasoned that "[t]he [section 7 right of an employee] is sufficiently vindicated if such and employee is placed in no worse a position than if he had not engaged in the conduct," *Id.* at 285–86, 97 S.Ct. at 575. *Wright Line* adopts a test of causation parallel to that set forth in *Mt. Healthy:*

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[2] Additionally, the ALJ held that the agreement between Fry and the OTR drivers to institute the "Equipment Complaint Reports" was analogous to a limited collective bargaining agreement which the OTR drivers were entitled to enforce. Because of our resolution of the other issues on appeal, we do not reach this issue.

> The general counsel establishes a *prima facie* case that protected concerted activity was a "motivating factor" in the employer's decision; then, the burden shifts to the employer's decision; then, the burden shifts to the employer to prove that the same action would have taken place in the absence of the protected concerted activity.

251 NLRB at 20. Applying these principles to this case, we hold that the facts compel the conclusion that Varney would not have been discharged *but for* his protected activity.

It is beyond peradventure that Varney was constructively discharged on April 19. Beliles vigorously opposed Varney's concerted activity to improve Joban's equipment. He told Dorsch that Varney's April 14 accident was "the last straw." Though Dorsch stated Varney was not at fault for the accident, Dorsch adopted Beliles' opposition to Varney's concerted efforts by requiring him to sign a probationary statement which suggested that Varney was guilty of its detailed provisions.

Fry claims that Varney was discharged because of his careless driving, tardy departures and deliveries, treatment of customers and abuse of Joban's equipment. However, substantial evidence supports the Board's findings that Fry has failed to demonstrate that it would have discharged Varney in the absence of his engaging in protected concerted activities.

Varney had only one accident prior to his accident on April 14, which Dorsch admitted was not Varney's fault. He received two tickets for traffic violations in the summer of 1975, but Fry took no action at that time. Most of the truck breakdowns were due to equipment failures. Tardy departures and deliveries were related to equipment defects. There is no evidence that Varney abused Joban's trucks. A customer once reported that a young driver wearing cowboy boots was rude. Through Dorsch testified that he concluded Varney was the driver in question, the ALJ specifically discredited Dorsch's testimony.

Varney was repeatedly reprimanded because he failed to properly stack and tie down the loading pallets and temporary plywood sides of the flat bed trucks after making a delivery. However, after each reprimand, Varney would comply with the proper procedures. Additionally, the ALJ held that nothing unusual occurred immediately preceding April 19 to make Varney's conduct a crucial matter. Consequently, Varney's disregard for the condition of his truck after making deliveries was not, standing alone, a crucial matter for which he would have been discharged.

Accordingly, the Board's order is ENFORCED.

NLRB v. Amber Delivery Service, Inc.

651 F.2d 57 (1st Cir.), June 11, 1981—250 NLRB 63

On petition to enforce Board Order

Before BOWNES and BREYER, Circuit Judges and WYZANSKI, Senior District Judge*

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BREYER, Circuit Judge: In a decision and order dated June 24, 1980, the National Labor Relations Board ruled that respondent Amber Delivery Service, Inc. (Amber) had committed several unfair labor practices in violation of section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) (1970). Specifically, the Board found that Amber had (1) impermissibly interrogated and solicited help from employees in an effort to forestall union organizing activities; (2) imposed one-day suspensions on three employees in retaliation for their union activities; and (3) instituted changes in working conditions in an unlawful attempt to convert its employees to independent contractors and thereby deprive them of their statutory right to union representation. Underlying these findings was the Board's preliminary determination that Amber's "employees' in fact enjoyed such status—rather than that of "independent contractors"—and thus were entitled to the Act's protection. Upon concluding that the unfair practices were indicative of a pervasive and ongoing anti-union animus on the part of Amber, the Board ruled that a fair election was unlikely and that a bargaining order was necessary. It now petitions for enforcement of its order. We affirm the Board's findings of various unfair labor practices but vacate the bargaining order, finding Amber's actions insufficiently coercive to warrant this extraordinary mandate.

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*Of the District of Massachusetts, sitting by designation.

I.

Background

Amber operates a package-delivery service, concentrated in the Boston area, which specializes in same-day pickup and delivery. During the relevant period, it employed sixteen to eighteen drivers, of whom approximately half worked as "call" drivers and half as "distribution" drivers. The call drivers were essentially free-floating; they picked up packages at designated locations and delivered them to others in accordance with customer orders typically received over a two-way radio from the company dispatcher. The distribution drivers, by contrast, each serviced a specific geographic area, making a daily delivery to customers within that area of packages that had earlier been deposited at Amber's terminal. Both groups of drivers were paid a commission equal to one-third of their daily gross revenues.

In the fall of 1976, Amber decided to convert all of its drivers to owner-operator status, reasoning that such a change would boost productivity and increase profits for company and driver alike. Three steps were required of each driver: (1) purchase of his own vehicle; (2) acquisition of contract carrier authority from the Massachusetts Department of Public Utilities; and (3) execution of a contract carrier agreement with the company. Commissions were increased to fifty percent for call drivers and up to sixty-five percent for distribution drivers depending upon the area served. Amber's president initially designated March 31, 1977 as the deadline for conversion, warning that all who failed to comply would be discharged. By that date, all but five or six drivers were fully converted. Because these remaining drivers claimed to be temporarily unable, rather than entirely unwilling, to undertake the conversion, the deadline was extended. However on June 15, 1977, the four remaining holdouts were discharged[1] and the conversion to owner-operator status was complete.

In mid-April of that year, two drivers—apparently disgruntled with this change in status and with a recently implemented twenty percent reduction in rates (and thus commissions)—contacted a representative of the local teamsters union.[2] Each of them signed a union authorization card designating the union as his "sole and exclusive representative for the purposes of collective bargaining" with Amber, and they each solicited and obtained, over the next several weeks, signed authorization cards from other drivers. On May 11, the union filed a petition with the Board's regional office requesting an election in any employee unit consisting of Amber's drivers and warehousemen. A representation hearing was held several weeks later devoted primarily to whether the drivers—in their new role as owner-operators—constituted employees or independent contracts. This determination was necessitated by section 2(3) of the Act, which specifically excludes from the definition of "employee"—and thus from statutory coverage—any "individual having the status of an independent contractor." 29 U.S.C. § 152(3) (1970). While the regional director's decision was pending, the union on June 20 called a strike at Amber's facility to protest the dismissal of the four drivers who had not converted to owner-operator status. On July 29, the regional director issued his decision, finding that the drivers were employees and directing that an election be held in a unit consisting of "all-distributor and call deliverymen."[3]

Thereafter, in a rather confusing maneuver described in greater detail below, Amber on August 9 moved for reconsideration by the regional director, representing that various "modifications" had been made in the drivers' working conditions, which were sufficient to convert the drivers to independent contractors. On August 26, the regional director vacated his Decision and Direction of Election and reopened the hearing to receive additional evidence "with respect to purported changes made by the Employer in its relationship with its owner-operators." A hearing was conducted on September 1 and 30. On October 12, the union filed the unfair labor practice charges at issue here, challenging the propriety of these "modifications" as well as other actions earlier undertaken by Amber. The regional director has held the representation proceeding in abeyance pending resolution of these charges.

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[1] An unfair labor practice charge contesting these dismissals was filed on June 16, 1977 but dismissed one month later by the regional director, who concluded that the discharges were "in accordance with economically motivated plans."

[2] Teamsters Local 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] More specifically, the unit included "[a]ll distributor and call deliverymen of the Employer at its Malden, Massachusettts facility, excluding part-time warehousemen, office clerical employees, professional employees, guards and supervisors as defined in the Act."

II.

The Drivers' Status Before August 9

We must first decide whether the Board correctly held that, prior to August 9, Amber's drivers were employees and not independent contractors. It is well-established that general principles of agency law govern the distinction between employee and independent contractor for purposes of the Act. *E. g., NLRB v. United Ins. Co.,* 390. U.S. 254, 256, 88 S.Ct. 988, 989, 19 L.Ed.2d 1083 (1968); *Seven-Up Bottling Co. v. NLRB,* 506 F.2d 596, 597 (1st Cir. 1974). The House Report on the legislation specifically excluding "independent contractor" from the definition of "employee" outlined this distinction as follows:

> "Employees work for wages or salary under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.

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H.R.Rep.No.245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 309 (1948). Thus the Board, in applying the common law test of independence, has looked to the right of control: whether the putative employer has the right to control not only the results sought but also the means by which those results are achieved. *E. g., Merchants Home Delivery Service, Inc. v. NLRB,* 580 F.2d 966, 973 (9th Cir. 1978); *Seven-Up Bottling Co. v. NLRB,* 506 *F.2d at 597–98; News Syndicate Co.,* 164 N.L.R.B. 422, 423 (1967). It has also looked to the risk of loss and opportunity for profit and to the degree of "proprietary" interest in, for example, a route or a dealership. *E. g., Brown v. NLRB,* 462 F.2d 699, 705 (9th Cir.), *cert. denied,* 409 U.S. 1008, 93 S.Ct.441, 34 L.Ed.2d 301 (1972); *EL Mundo, Inc.,* 167 N.L.R.B. 760, 761 (1967); R. Gorman, Basic Text on Law 30 (1976). The determination of "independence", however, ultimately depends upon an asseassment of "all of the incidents of the relationship * * * with no one factor being decisive." *NLRB v. United Ins. Co.,* 390 U.S. at 258, 88 S.Ct. at 991; *see* Restatement (Second) of Agency § 220 (1957). Our task on review is to ascertain whether the Board's evaluation of such factors is "supported by substantial evidence when viewed in light of the entire record, including the evidence opposed to the Board's position." *Seven-Up Bottling Co. v NLRB,* 506 F.2d at 600. So long as the Board's position represents a "choice between two fairly conflicting views," it should be enforced even if this court "would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951), quoted in *NLRB v. United Ins. Co.,* 390 U.S. at 260, 88 S.Ct. at 991.

We shall first examine the status of the owner-operators immediately prior to the August 9 changes in their working conditions. As in all but the rarest of cases, there are pertinent factors that cut in both directions. The drivers' ownership of their respective vehicles and the financial obligations attending such arrangement are of course suggestive of independent contractor status; they show that the drivers have invested capital as well as labor in their enterprise, and that they have more than their labor skills alone to sell to others who might hire them. Each owner-operator purchased his vehicle without assistance from Amber. All expenses connected with its operation—including fuel, repairs, taxes and insurance—are borne by the driver. All risks associated with the truck also fall on the owner's shoulders; by contract, he must indemnify Amber for any personal injury claims stemming from the operation of his vehicle, and he is responsible for any damage to freight in his possession. The absence of any guarantee of a minimum daily income or volume of deliveries poses an additional risk to each owner. Compensation is on a commission rather than hourly basis, and the company makes no deductions for unemployment, workmen's compensation, or social security insurance or for income taxes. The drivers receive no holiday or vacation pay. The fact of ownership and the attendant financial arrangements also afford each driver some opportunity for enterpreneurial enterprise, since each reduction in operating costs will provide a corresponding increase in his profit. Each driver in his discretion can decide not to work on any particular day—a freedom that further links his compensation to his personal initiative and effort. Additional indicia of independent contractor status derive from other facets of the drivers' working relationship with Amber. Each driver is free to hire assistants. Each can unilaterally and immediately terminate his contract carrier agreement with Amber by providing written or oral notice—as can the company. Finally, the respective carrier agreements signed by the drivers each explicitly state: "Nothing in this Agreement shall be in any way constured to constitute the [driver], or any of his agents, or employees, as an employee or representative of the Company."

Other factors, however, strongly militate in favor of an employer-employee relationship between Amber and its drivers.

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Through a variety of rules, requests and retained powers, Amber exercises, or is capable of exercising, substantial control over the manner in which the drivers perform their deliveries. Each distribution driver services a specific geographic area assigned by the company and, while Amber is free to reassign service areas at any time, the driver is prohibited from expanding or restricting his territorial coverage without permission. Amber not only discusses with the driver any special demands of customers along his delivery route but also specifies the sequence in which deliveries are to be made.[4] Each distribution driver must load his vehicle at night or in the early morning, must report to work no later than 8:00 a. m. (or call in by that time if intending not to work), and is requested to phone the company every two hours during the day in case a pickup or delivery has been ordered in his area. The daily workload of each call driver, or course, is determined largely by the company dispatcher, who transmits customer orders by radio as they are received. Call drivers need not appear at the terminal in the morning but must report their location to the dispatcher by 8:00 a. m. Other requirements and requests evidencing Amber's control apply to both groups of drivers equally. All freight loads assigned by the company must be accepted and must be delivered promptly. Each driver, for the duration of his contractual relationship with Amber, is prohibited from using his vehicle to provide any type of related service elsewhere. The company provides training and orientation programs which the drivers are invited to attend and conducts safety meetings at which attendance is mandatory. Each driver must wear a uniform with the company insignia and must paint his vehicle in the company colors;[5] Amber bears half of the cost of uniforms and the entire cost of painting. A permanent or detachable sign bearing Amber's insignia must also be place on each vehicle. The carrier agreement requires each driver to carry liability and cargo insurance for the company's protection. Finally, any driver is subject to termination for poor performance or as a result of external causes.

Apart from the question of Amber's supervisory powers with respect to the means of physical performance, there are several additional indicia of employee status. The drivers possess no proprietary interest in their respective delivery routes. All customers "belong" not to the drivers but to Amber. They negotiate their rates directly with, and make payments directly to, Amber; the drivers play no role in rate negotiations and handle no money except for an occasional C.O.D. delivery. In addition, the drivers not only receive frequent assistance with loading from Amber employees but occasionally assist other drivers with the loading work—receiving an hourly wage from the company for such effort. Finally, any driver whose contract with Amber is for any reason terminated is prohibited, for the next six months, from providing any type of delivery services to Amber's customers.

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[4] *See* note 5 *infra.*

[5] It must be noted that, at the representation hearing, there was no evidence presented that the uniform and truck-painting rules were mandatory or that the company dictated the sequence of deliveries for all distribution drivers. Evidence of these requirements derives solely from Amber's subsequent admissions, contained in its motion for reconsideration and in its answer to the unfair labor practices complaint, that as of August 9 such practices were no longer observed. Absent these representations, these subsidiary findings of the ALJ would have been unsupported by substantial evidence. In light of Amber's admissions, we need not decide whether the absence of these elements would have been sufficient to convert the employees to independent contractors.

We believe that the Board could reasonably conclude that these various indicia of employee status outweigh those factors suggesting otherwise. Although the nature of the inquiry here—mandating an assessment of all facets of the working relationship—militates against ready comparisons of other cases, we note that a finding of employee status was upheld in closely related circumstances in *NLRB v. Warner*, 587 F.2d 896, 899–901 (8th Cir. 1978). Moreover, the instant situation would appear to

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present a stronger case for such a finding than that involved in *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974), in which we determined that the distributor-salesmen of the bottling company constituted employees. The circumstances there were closely analogous except that the distributors were generally free to follow their own schedule; received as compensation the difference between the price paid to the company and that charged to customers; were free to set customer prices (although they generally adhered to the company's suggested price list); were responsibile for collecting payments from customers; and possessed (but had never exercised) the freedom to deliver noncompeting products. In contrast to *Seven-Up Bottling* and other salesmen-distributor cases in which the drivers are at liberty to set customer prices and pursue additional customer accounts, *see, e. g., Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 449–50 (2d Cir. 1975); *Frito-Lay, Inc. v. NLRB*, 385 F.2d 180, 185, 187 (7th Cir. 1967), the drivers here have scant opportunity for realizing additional profits through the exercise of entrepreneurial skill. By setting customer rates, and by regulating the volume of deliveries of each driver through the assignment of geographic areas and the use of a dispatcher, Amber effectively controls the two primary determinants of a driver's income. Moreover, each driver is prohibited from changing his assigned service area and from participating in a competing delivery service during the term of his contract. These constraints provide minimal play for entrepreneurial initiative and minimize the extent to which ownership of the truck gives its driver entrepreneurial independence.

A review of analogous cases also serves to underscore the extensive control exercised by Amber over the manner of physical performance. Six factors are particularly noteworthy in this regard: the drivers must report in by 8:00 in the morning, *compare NLRB v. A. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979); *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d at 974; they cannot refuse assigned loads, *compare NLRB v. A. Duie Pyle, Inc.*, 606 F.2d at 385; *Associated Gen. Contractors of Calif., Inc. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); Amber specifies the sequence of deliveries for all distribution drivers, *compare Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d at 974; Amber can reassign or modify geographic areas for any reason, *see NLRB v. Warner*, 587 F.2d at 901; the drivers are prohibited from working for a competing delivery service, *compare NLRB v. A. Duie Pyle, Inc.*, 606 F.2d at 385; *Associated Gen. Contractors of Calif., Inc. v. NLRB*, 564 F.2d at 280; *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975); and Amber is free to terminate at will its agreement with any driver, *see Seven-Up Bottling Co. v. NLRB*, 506 F.2d at 599.[6] It is also significant that, before the conversion to owner-operator status had been completed, many of these requirements and other working conditions applied equally to the owner-operators and to those drivers who were concededly company employees. *See NLRB v. Warner*, 587 F.2d at 901. Moreover, in contrast to *Merchants Home Delivery Service, Inc., v. NLRB*, 580 F.2d at 974–75, each of the drivers here operates individually rather than as a corporation or partnership.

Finally, we note that the functions performed by the drivers demand little skill, *see* Restatement (Second) of Agency §202(2)(d) (1957), and constitute a regular and essential part of the company's business operations. *See id.* § 220(2)(h); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d at 600. In these circumstances,[7] whether or not we would have reached the same conclusion as an original matter,[8] we find that the Board's judgment represents at minimum "a choice between two fairly conflicting views." *NLRB v. United Ins. Co.*, 390 U.S. at 260, 88 S.Ct. at 991 *quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

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[6] Amber's contention that each of these constraints is necessary to ensure prompt and efficient delivery services is beside the point; the relevant inquiry here is not limited to those indicia of control that can be considered unessential.

[7] That each driver expressly disclaimed the status of employee in his contract with Amber—although relevant as evidence of "an assumption of control by the one and submission to control by the one and submission to control by the other," Restatement (Second) of Agency § 220, comment m, at 492 (1957)—is by no means dispositive. *See, e. g., NLRB v. A. Duie Pyle, Inc.*, 606 F.2d at 385 n.3; *Lorenz Schneider Co. v. NLRB*, 517 F.2d at 449.

III.

The Effect of the August 9 Changes

We must next consider whether Amber's efforts to change the employees' status after August 9 succeeded in making them independent contractors and whether these efforts constituted an unfair labor practice. The Board found that Amber on August 9 instituted a series of changes in working conditions, having the general effect of increasing the drivers' discretion over their daily routines. Specifically, the drivers were (1) given the right to refuse loads and to terminate bilaterally their contracts with the company; (2) given the right to report for work at their discretion; (3) given discretion as to route selection within a geographic area; (4) no longer required to wear company colors; (5) no longer assisted by company warehouse employees in loading their vehicles (6) no longer required or permitted to report their hours to the company in the same manner as other employees; and (7) no longer required to attend Amber's safety meetings.[9] The Board determined that these changes were motivated by a desire on Amber's part to thwart the drivers' organizing activities and therefore violated § 8(a)(3) and (1) of the Act. For this reason, the Board not only refused to consider the changes in its examination of the employee/independent contractor issue but also ordered them rescinded.

It is clear that Amber is free, in the sincere and justifiable exercise of business judgment unrelated to its employees' union activity, to convert its workers to independent contractors notwithstanding that such action has the incidental effect of excluding these persons from the Act's coverage. It is equally clear, however, that Amber is not at liberty to effect such a conversion, or attempt to do so, as an artifice or device for depriving its employees of their statutory right to union representation. "The conversion of employees to independent contractor status is an unfair labor practice when motivated by anti-union animus." *United Dairy Farmers Co-op. Assoc. v. NLRB*, 633 F.2d 1054, 1063 (3d Cir. 1980). *Accord, e.g., Tonkin Corp. of Calif v. NLRB*, 420 F.2d 495, 498 (9th Cir. 1969); *General Teamsters*

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[8] In *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), the Supreme Court determined in roughly analogous circumstances that owner-operators working for a trucking company constituted independent contractors for purposes of the Social Security Act. Briefly, the drivers there were obligated by contract to haul exclusively for the company; they were required to furnish their own trucks and all necessary equipment and labor, to pay all operating expenses, to furnish fire, theft and collision insurance, and to indemnify the company for any loss caused to it by their actions; they were paid a commission based on a percentage of the tariff charged to customers; company dispatchers issued orders for the truckers' movements although not as to the routes to be followed; and the contract was terminable at any time by either party. The Court concluded:

> [W]here the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors * * *. These driver-owners are small businessmen * * *. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

Id. at 719, 67 S.Ct. at 1471. That the Court reached this result is particularly significant in that it applied a more expansive definition of the term "employee" than that applicable here. Relying on its decision in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), the Court rejected "technical concepts" of agency law as the test for employee status and inquired instead whether the drivers should be included within the statutory scheme in light of the legislation's purposes and as a matter of "economic reality." 331 U.S. at 713, 67 S.Ct. at 1468. Congress, in subsequently amending the National Labor Relations Act to exempt "independent contractors" from coverage, specifically intended to overturn *Hearst* and to substitute the narrower principles of agency law as the governing test of employee status. *E. g., NLRB v. United Ins. Co.*, 390 U.S. at 256, 88 S.Ct. at 989; *Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 879 n.47, 880 (D.C. Cir. 1978).

Various courts have relied on the *Silk* decision in support of a finding that owner-operator drivers constitute independent contractors. *See, e. g., NLRB v. A. Duie Pyle, Inc.*, 606 F.2d at 387–88; *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d at 975–76. While *Silk* might have persuaded us to reach such a result as an initial matter, it does not compel reversal of the Board's contrary finding here. Not only do several factual distinctions exist, but the result in *Silk* might well have been different—in light of the applicable scope of review—had the Court been reviewing a Board finding that the drivers constituted employees.

[9] These findings correspond to allegations contained in the union's unfair labor practices complaint that were specifically admitted by Amber in its answer. Although of no great concern, we note that these findings diverge slightly from the "modifications" which Amber earlier listed—and "represent[ed] ha[d] been implemented"—in its motion for reconsideration. Amber made no mention there of any changes in the drivers' right to refuse loads or in their duty to report their time. Conversely, Amber in its motion did represent that the drivers had been given discretion as to when to load their vehicles and were no longer paid an hourly wage for occasionally assisting other drivers with loading; these additional changes were not included in the union's complaint or in the Board's findings.

Chauffeurs & Helpers Local 782 v. NLRB, 373 F.2d 661, 662 (D.C. Cir.), *cert. denied,* 389 U.S. 837, 88 S.Ct. 54, 19 L.Ed.2d 100 (1967); *NLRB v. Kelly & Picerne, Inc.,* 298 F.2d 895, 898 (1st Cir. 1962). *Cf. Textile Workers Union v. Darlington Manuf. Co.,* 380 U.S. 263, 275, 85 S.Ct. 994, 1002, 13 L.Ed.2d 827 (1965) (partial closing of business constitutes unfair labor practice if motivated by purpose to chill unionism in any of employer's remaining plants).[10] Were changes for this sort of reason permissible, an employer might forestall union organizing simply by announcing that, if its employees organize, it will convert them into independent contractors—thus leaving them, should the threat prove effective, with the worst of both worlds. "The critical fact," as this court remarked in *NLRB v. Kelly & Picerne, Inc.,* "is the underlying motive for the respondent's change of business practice." 298 F.2d at 898.

We find substantial evidence for the Board's finding that Amber instituted the August 9 changes not for legitimate business reasons but for the purpose of forestalling the drivers' union activities. At the unfair labor practices hearing, Amber's president sought to characterize these changes as a continuation of the lawful decision, reached prior to the advent of union activity, to convert the drivers to owner-operators. But, the Board found that the conversion to owner-operator status had been completed in June, at which time no further changes were contemplated; as discussed below, Amber makes no attempt on appeal to justify the changes in terms of business reasons. Rather, we find that Amber's action was undertaken in response to—and in an effort to reverse—the regional director's Decision and Direction of Election issued just eleven days earlier. Amber admitted as much in its motive for reconsideration, stating that "[b]ased upon the Decision and Direction of Election rendered on July 29, 1977, the Employer has made certain modifications in its relationship with its owner-operators so that they will be viewed as independent contractors by the Board * * *." Even more illustrative are comments voiced by Amber's predecessor counsel at the reopened representation hearing, as follows:

> [I]t is the Company's intention to make its owner-operators independent contractors as far as this office, the Regional Office, is concerned. And if there is a ruling by the Regional Director that these people, our owner-operators, are
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> employees, we will make changes—additional changes—until they become independent contractors as far as the Regional Director is concerned. It's unfortunate that there's no way that the Regional Director of this office can advise a company what steps have to be taken in order to make "employees" independent contractors. But this has been the intent of this employer from day one, prior to the filing of the petition; and this is still the intent of the company.

These statements plainly belie any suggestion that Amber's actions represented an exercise of business judgment divorced from union considerations.

Amber responds, not by attempting to justify the August 9 changes, but by asserting that no changes in fact occurred. It explains that the motion for reconsideration constituted a "representational strategy" devised solely as a means of responding to many alleged factual inaccuracies in the regional director's decision. That is to say, Amber believed that these "changes" described circumstances that—contrary to the regional director's findings—were in existence before August 9. Amber essentially argued: "All right, if you say these circumstances did not exist before August 9, they do now because we have 'changed' our working conditions to incorporate them." Although now acknowledged to have been "clearly ill-advised," this action nonetheless must be viewed, Amber claims, as a "good" reason for its claim that changes were made—a reason unrelated to overt discrimination against union activity.

We agree that several of the regional director's factual findings were otherwise unsupported, *see* note 5 *supra*; the record also reveals that many others hinged on credibility determinations largely adverse to Amber. But while the company may have had grounds for complaint concerning the regional director's findings of fact, making representations that it believed were inaccurate to the regional director was a less than appropriate means of voicing them. We thus have some difficulty with Amber's characterization of its actions as a "good" reason for the changes. In any event, as Amber now concedes, it is "stuck" with its admissions that theses various changes were in fact implemented. Given the absence of any proffered business justifications for the changes, and considerating the other evidence discussed above and the other unfair labor practices discussed below, we concur in the Board's finding that Amber's actions on August 9 violated the Act.

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[10] In the course of discussing an illegal "runaway shop," whereby an employer for antiunion reasons closes a plant and transfers its work to a new or existing plant in another locality, the Court in *Darlington* noted: "An analogous problem is presented where a department is closed for antiunion reasons but the work is continued by independent contractors." 380 U.S. at 272 n.16, 85 S.Ct. at 1001, *citing, inter alia, NLRB v. Kelly & Picerne, Inc.,* 298 F.2d 895 (1st Cir. 1962).

IV.

The § 8(a)(1) Allegations

We turn next to the alleged "employee coercion" violations.[11] As noted above, the union's petition was filed with the regional director on May 11, 1977 and received by Arthur Brussard, the company president, on May 13. On the following Monday, May 16, Brussard called a meeting of drivers at 8:00 a.m. to ascertain what problems had prompted the filing of the petition. Some twelve to fourteen drivers attended. Various problems, including the conversion to owner-operator status and the reduction in customer rates, were discussed. Brussard make no promises or threats to the assembled drivers, but expressed disappointment that their grievances could not have been handled internally and voiced the hope that a union would be unnecessary. Immediately following the meeting, Brussard approached three drivers, named Pitcher, Marra and Griffin, individually and, without requesting any specific action, inquired whether—or indicated that he would appreciate it if—they could "help him out" in any way. These three drivers had earlier been

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identified by Clifford Fales, the company dispatcher, as among the parties chiefly responsible for the petition.

The drivers, assembling later that day, compiled and then submitted to Brussard a list of grievances. Brussard called the drivers into his office on May 18 and, in a brief meeting, rejected their demands across the board; he commented that, once the conversion to owner-operator status was completed, the drivers would no longer be employees and their demands would be irrelevant. At approximately 5:00 that afternoon, Brussard called Pitcher to his office and asked him what he thought of the meeting and why none of the drivers had responded. Brussard also remarked that if the election petition were "pulled" before the hearing the company would save $700 in legal fees. Although this last statement was directed to the terminal manager who was also present, Pitcher testified that he felt it was meant for his ears.

On May 23, a meeting was held between Brussard, Griffin and another driver named Sawyer in the latter's apartment. Brussard had requested the meeting in order to "straighten things out." Under discussion was the possibility of the union withdrawing the petition in return for the company redressing the cited grievances. Brussard specifically requested Griffin and Sawyer to pull the petition. They replied that they might be able to persuade the other drivers to do so if their grievances were met. Brussard promised to attempt to meet at least some of their demands.

The Board concluded that the company violated § 8(a)(1) by interrogating Pitcher on May 18 and by soliciting Pitcher, Marra and Griffin on May 16, Pitcher on May 18, and Griffin and Sawyer on May 23 to withdraw support from the union.[12] With one exception, we agree that these actions constitute cognizable—if for the most part borderline—violations of the Act. A finding by the Board of coercive interrogation, based as it must be on an assessment of the entire factual context in which the questioning occurred, *see, e.g., NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 806 (1st Cir. 1964), is one in which we typically defer to agency judgment. *See, e.g., NLRB v. Otis Hosp.*, 545 F.2d 252, 256 (1st Cir. 1976); *Corriveau & Routhier Cement Block, Inc. v. NLRB*, 410 F.2d 347, 349 (1st Cir. 1969). Here, the questioning of Pitcher, a known union supporter, was conducted by the company president in his office with one other supervisor present, and occurred on the same day as a drivers' meeting in the midst of a union organizing campaign. Brussard's queries bore no relation to Pitcher's individual activities, but rather were designed to elicit information about the drivers' union sympathies and their reaction to actions of the company. Although such questioning is not *per se* unlawful, *see, e.g., NLRB v. Douglas Division, Scott & Fetzer Co.,* 570 F.2d 742, 745 (8th Cir. 1978), we find sufficient factors here not to disturb the Board's finding that it was unlawfully coercive under the circumstances. *See, e.g., NLRB v. Otis Hosp.,* 545 F.2d at 256–57.

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[11] Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *." 29 U.S.C. § 158(a)(1)(1970). Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." *Id.* § 157

[12] No impropriety was found in the general meeting conducted by Brussard on May 16.

Like the interrogation of Pitcher, Brussard's actions in soliciting the "help" of Pitcher, Marra and Griffin involved isolated and fleeting conversations containing no obvious threat of retaliation or promise of benefits. Nonetheless, we cannot fault the Board's determination that such conduct violated the Act in that it was to some degree coercive and "calculated to erode employee support for the union." *NLRB v. Deutsch Co.,* 445 F.2d 902, 906 (9th Cir. 1971), *cert. denied,* 405 U.S. 988, 92 S.Ct. 1248, 31 L.Ed2d 454 (1972); *accord, General Motors Acceptance Corp. v. NLRB,* 476 F.2d 850, 855 (1st Cir. 1973); *Amalgamated Clothing Workers v. NLRB,* 4[illegible]4 F.2d 818, 824 (D.C. Cir. 1970). Admittedly, the solicitations here did not rival in severity the employers' actions at issue in the cited cases—involving the distribution of, and solicitation of signatures for, form letters expressly disavowing union membership. But even a single oblique remark can be considered unduly coercive in appropriate circumstances. *Com-*

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pare NLRB v. Pilgrim Foods, Inc., 591 F.2d 110, 114 (1st Cir. 1978), with *NLRB v. Rich's of Plymouth, Inc.,* 578 F.2d 880, 884–85 (1st Cir. 1978). Brussard's inquiries here reasonably could have been interpreted as requests for repudiation of the election petition. Coming as they did from the company president on directed as they were in one-on-one encounters to recognized union sympathizers in a relatively small workforce, these requests can properly be considered violative of the Act. Brussard's comments on May 23, particularly his explicit request that the petition be withdrawn, were obviously even less appropriate. That Griffin and Sawyer may have actively sought—and even initiated—the negotiations with Brussard is unimportant; Amber "was not relieved from its obligations because the employees asked that they be disregarded." *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 687, 64 S.Ct. 830, 834, 88 L.Ed. 1007 (1944); *see, e.g., NLRB v. Pilgrim Foods, Inc.,* 591 F.2d at 116. We disagree, however, that Brussard violated the Act on May 18 by remarking to a third person, in the presence of Pitcher, that withdrawing the petition would save $700 in legal fees. The record provides no grounds for imputing a coercive undertone to this fleeting and undoubtedly accurate comment.

V.

The § 8(a)(3) Allegation

We next take up the allegation of antiunion discriminatory behavior.[13] On June 3, 1977, call drivers Pitcher, Marra, Griffin, Sawyer and Nicotra reported for work between 7:45 and 8:00 a.m. After loading their vehicles, and in accordance with their customary practice, they visited a diner located approximately one mile from Amber's terminal. For the length of their coffee-break, the drivers were off the air and unable to receive transmissions from Fales, the company dispatcher.[14] Fales testified that, upon receiving several new customer orders, he became concerned about his inability to contact the drivers and suggested to Brussard that they might be at the diner. At approximately 8:30, Brussard drove to the diner and observed all five drivers inside. But rather than speaking with them, he immediately returned to the terminal and instructed Fales to note the time when radio contact was established. When he did succeed in reaching the drivers, beginning at approximately 9:00, Fales made no mention of their diner visit or of his attempts to contact them. At noon that day, Tom Manning, the terminal manager, recommended to Fales that the drivers be suspended. In letters dated June 6, Manning imposed one-day suspensions without pay on Pitcher, Marra and Griffin "for

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[13] Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." 29 U.S.C. § 158(a)(3) (1970).

[14] The ALJ made no finding as to the length of time spent in the diner. Brussard and Fales testified that they were off the air for approximately one hour, but Pitcher, Marra and Griffin each stated they made their customary ten to twenty-five minute stop.

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going off the air for a 45 minute period * * * without notifying the Dispatcher." Sawyer and Nicotra, being owner-operators, were not considered employees and thus not disciplined. The Board concluded that these suspensions were motivated by antiunion animus rather than business concerns and thus were violative of § 8(a)(3) of the Act. Amber, emphasizing the time-sensitive nature of its delivery service, protests that the suspensions were both business-related and appropriate to the offense.

In a dual motive case such as this, the initial inquiry is whether the Board has made a *prima facie* showing that a "significant improper motivation" underlay the one-day suspensions. *See Statler Indus., Inc. v. NLRB*, 644 F.2d 902, at 906 (1st Cir. 1981); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). Such a showing can rest either on independent evidence of antiunion animus or on the circumstances surrounding the suspensions themselves. *Id.* at 670. Here, we find the former sufficient to satisfy the Board's initial burden. Amber not only had general knowledge of union activity, *see, e. g., NLRB v. South Shore Hosp.*, 571 F.2d 677, 682 (1st Cir. 1978), but was specifically aware that Pitcher, Marra and Griffin were among the principal union activists. Upon receipt of the election petition, Fales identified these individuals to Brussard as among the parties responsible therefor. And, that Brussard subsequently approached these very three to solicit help underscores his recognition of their key roles in the union campaign. In addition, evidence of improper motivation derives from the various § 8(a)(1) violations discussed above, particularly since they were directed against the same individuals as here. Although not conclusive proof that the suspensions were similarly unlawful, *see, e. g., NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d at 806, these violations warrant a strong inference of union hostility on the part of Amber. Finally, the timing of the suspensions is important. The decision to discipline these drivers was made three days after the hearing on the representation petition commenced[15] by which time Brussard had undoubtedly realized that his solicitations of these individuals less than three weeks earlier had been futile. We think these factors suffice to establish a "significant improper motivation" for the suspensions.

The burden therefore shifts to Amber "to prove that it had a good reason, sufficient in itself, to produce" the suspensions. *Statler Indus., Inc. v. NLRB*, at 905, *quoting NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d at 671. This shift does not impose an overall burden upon Amber of proving itself "innocent" of violating the statute. Rather, Amber must simply come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation. This it has failed to do. Recognizing the inherent demands of the delivery business, we agree with Amber as a general matter that the drivers' conduct here was of a sort that might reasonably warrant disciplinary action. We cannot agree, however, that Amber has demonstrated that such conduct was the reason for the suspensions in this case, to the point where the inference of unlawful activity (drawn from the evidence of improper motive) is overcome (or, strictly speaking, counterbalanced). Brussard himself conceded that the company not only had knowledge of, but acquiesced in, the drivers' practice of stopping for coffee in the morning. He stated that although the drivers had been warned[16] about "dallying," it was "fine" if they "wanted to grab a quick cup of coffee." He also acknowledged that no driver ever before had been suspended for being off the air. In an attempt to depict this incident as an unusual and serious occurrence, Amber contended at the hearing that it encountered problems making deliveries and satisfying customer requests as a result of the driver's actions. But no evidence was introduced that business was lost, the customer complaints were received, or that deliveries were missed or even delayed. And, as the ALJ noted, Brussard's failure to address the drivers a the diner and his request that Fales record the time when contact was established might reasonably be viewed as evidencing "a greater concern for documenting the delay than for expediting pick up and delivery." For these reasons, we think the Board was justified in rejecting Amber's cited justification for the suspensions and in finding a violation of § 8(a)(3).

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[15] The hearing was conducted on two days, Tuesday, May 31 and the following Monday, June 6. Amber decided on Friday, June 3 to suspend the drivers and notified them of this action the next Monday.

[16] Pitcher, Marra and Griffin each testified, contrary to Brussard's statement, that they had never been warned about stopping for coffee or being off the air. The ALJ failed to resolve this dispute.

VI.

The Propriety of the Bargaining Order

Finally, we turn to the relief that the Board ordered. Stressing Amber's "an-

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tipathy to the collective-bargaining process," the Board concluded that the unfair labor practices had undermined employee free choice to the extent that a free election was unlikely. Consequently, after finding that a majority of the employees had signed valid authorization cards,[17] the Board affirmed the issuance of a bargaining order as a necessary means of protecting employee sentiment. Although fully cognizant of the deference normally accorded to the Board's expertise in fashioning remedies, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32, 89 S.Ct. 1918, 1939, 23 L.Ed.2d 547 (1960); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d at 120, on this point we differ.

The interrogation and the various acts of solicitation constituted borderline violations having minimal impact on the election process. Brussard made no threat of reprisal and exerted no direct coercion at any time. His only unambiguous requests and promises were voiced at the May 23 meeting to individuals who—far from being intimidated—actively sought and possibly initiated the negotiations. Moreover, Pitcher, at whom Brussard's actions seemed principally directed, is no longer in Amber's employ.[18] The one-day suspensions, of course, were not borderline violations of the Act. And, as the Board notes, the fact that they occurred at the height of the union campaign undoubtedly magnified their coercive effect, particularly given the small size of the employee unit. *See, e.g., Ann Lee Sportswear, Inc. v. NLRB*, 543 F.2d 739, 744 (10th Cir. 1976). Nonetheless, these actions were neither severe nor permanent. And again, Pitcher, one of the three drivers suspended, is no longer an employee. In *Pilgrim Foods*, we vacated a bargaining order involving an eight-member employee unit notwithstanding that the employer had unlawfully cancelled a scheduled wage increase, solicited and promised to remedy grievances, threatened reprisals, and discharged an employee. 591 F.2d at 114–20. The one-day suspensions at issue here plainly provide less warrant for this "extreme" remedy. *NLRB v. Matouk Indus., Inc.*, 582 F.2d 125, 130 (1st Cir. 1980).

In justifying its order, the Board places principal reliance on the August 9 changes in working conditions and the statements made by Amber's former counsel in connection therewith. However, we fail to see how these actions have irrevocably tainted the election machinery. Admittedly, Amber's attempt to counteract the regional director's finding of employee status evidenced a hostility toward the union.[19] But the record makes clear that Amber hit upon this device, not because it was out to "get" the union "at all costs," but rather because it mistakenly believed that these changes (or at least the alleging of these changes) provided a lawful method of demonstrating that the employees did not qualify for union status. Now that it is plain that they do so qualify, we see no reason in the record for believing that Amber's past conduct, or its likely future conduct as evidenced by its past actions, would prevent an election from properly manifesting the uncoerced will of the majority. The Board points to

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the promise of future action voiced by Amber's counsel as evidence that the unfair labor practices are likely to recur. Given the unusual candor of these comments, arguably the more supportable inference is that Amber, or at least its counsel, failed to appreciate the unlawfulness of the proposed changes. We do not see how these statements, examined in the context of the entire record, evidence an intention of Amber's part to disobey the subsequently imposed cease and desist order. Even if they can be considered an accurate reflection of Amber's frame of mind at that time, counsel's comments neither mentioned nor implied future retaliation or other coercive measures. Nor does an expressed intent to seek to change the status of employees to bring them out from under the Act obviously or necessarily imply an intent to interfere later with their subjective freedom of choice. In these circumstances, we think the holding of a fair election—which constitutes the "preferred" method of determining a bargaining unit's representative, *NLRB v. Gissel Packing Co.*, 395 U.S. at 602, 89 S.Ct. at 1934—remains a viable option.

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[17] The Board found that, as of May 11 when the election petition was filed, nine of the seventeen drivers then employed by Amber had signed valid authorization cards designating the union as their collective-bargaining representative. Amber advances several challenges to this finding of majority status, which we reject.

[18] Pitcher was one of the four drivers lawfully discharged on June 15 for failing to convert to owner-operator status. It should be noted that the discharge of these drivers dissipated the union's card-based majority status. Although this fact does not preclude issuance of a bargaining order. *see, e. g., United Dairy Farmers Co-op. Assoc. v. NLRB*, F.2d at 1069, it is a relevant factor bearing on the propriety of such an order, *see, e. g., NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 214, 216 (2d Cir. 1980); *Chromalloy Mining & Minerals Alaska Div. v. NLRB*, 620 F.2d 1120, 1132–33 (5th Cir. 1980), and it reinforces the conclusion we reach here.

[19] Dislike of unions, of course, "is not uncommon among employers." *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d at 670. It should also be noted that Amber had good reason for its initial lack of enthusiasm for the union campaign. As is evident from our discussion of this issue, Amber reasonably could have believed that the unlawful change to owner-operator status had also worked a conversion of its drivers to independent contractors.

Enforced in part and vacated in part.

Big Y Foods, Inc. v. NLRB

651 F.2d 40 (1st Cir.), June 11, 1981—251 NLRB 869

On petition to review and set aside Board Order

Before Coffin, Chief Judge, Bownes, Circuit Judge, and Wyzanski, Senior District Judge*

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Wyzanski, Senior District Judge: This case is before the Court on a petition to review and set aside an order of the National Labor Relations Board ("NLRB") based upon alleged violations of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-68, directing the petitioner, Big Y Foods, Inc. ("the Company") to bargain with the Amalgamated Meat Cutters, Food Handlers and Affiliated Workers of North America, Local Union 33, a/w Amalgamated Meat Cutters and Butcher Workers of North America AFL-CIO ("Meat Cutters") which was certified, following an election, as the representatives of meat department employees in 11 of the Company's stores. The Board had cross-petitioned for enforcement of its decision and order.

The Company contends that the order is invalid because a unit of employees in the meat departments of the Company's 11 stores does not constitute an appropriate bargaining unit within the meaning of Section 9(b) of the Act.

The proceedings before the NLRB began when on August 16, 1971 the Retail Store Employees Union, Local 1459, Retail Clerks International Association, AFL-CIO ("Retail Clerks") filed in Case 1-RC-11708 a petition seeking to represent an overall unit of grocery and meat department employees at the Company's 11 unrepresented stores. On August 16, 1976 the Meat Cutters filed in Case 1-RC-14664 a petition seeking to represent a unit limited to the Company's meat department employees at the same 11 unrepresented stores. On September 22, 1976 the NLRB's Regional Director ordered a consolidation of the two cases. Thereafter, he held a hearing at which there was evidence to the following effect.

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The Company, a Massachusetts corporation, operates in Western Massachusetts a chain of 16 supermarkets for the retail sale of meats, groceries, and other food products.

Before the petitions were filed with the NLRB none of the employees in 11 of those stores had been represented for collective bargaining. There are employed in those 11 stores 850 to 1,000 persons, of whom 72 are the so-called "meat department employees" involved in this case. That group breaks down into 11 head meat cutters, 8 meat cutters, 18 apprentice meat cutters, and 35 meat wrappers and clerks.

In 5 of the Company's stores not covered by the petitions the employees in all departments have been for 10 years covered by collective bargains between their representative, Meat Cutters Union, and the Company.

The Company is centrally operated. The administrative activities of all 16 stores and their records are handled exclusively at the central office. Virtually every major management decision concerning the stores—including labor relations policies, advertising, merchandising, pricing, physical layout of the stores, hours of operation, hiring, wage scales, promotions, discipline and transfers—are under the direct control and supervision of the personnel in the central office. That office employs specialists for each department who not only coordiate purchasing, but also regularly visit the stores in order to supervise merchandising and, in general, oversee the operation of the various departments. In this latter respect, these specialists work in conjunction with the store managers.

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*Of the District of Massachusetts, sitting by designation.

All the employees in the 11 unrepresented stores receive the same fringe benefits such as leave time, holidays and insurance. Seniority for layoff purposes and benefit levels is based on service in all departments. Working hours for all employees are the same.

All the foregoing policies and procedures apply to employees in the meat department of the 11 stores as well as to other employees.

The meat department in each store is the only department that has a formal apprenticeship program. Under it, employees a number of whom began as meat clerks, are trained as meat cutters primarily by on-the-job training. Substantially higher wages are paid to meat cutters than to meat clerks.

Meat *cutters* are not trained to work in other departments, are never transferred temporarily or permanently to other departments, and have little contact with employees of other departments.

Meat *clerks* may be transferred to serve permanently or temporarily in other departments. When in the meat department, they work in close association with meat cutters; they clean equipment used in the meat department, process some meat, wrap meat, receive customers' requests for special cuts, supply new product to cutters, and stock meat in display cases. When transferred to other departments, meat clerks are associated with and do work similar to clerks regularly employed in those departments.

Not only may meat clerks serve either permanently or temporarily in other departments, but clerks from other departments may serve permanently or temporarily in the meat department. Each transfer which is in excess of 30 days is called "permanent"; transfers for shorter periods of service are called "temporary."

In the year 1974 there were permanent transfers *from* the meat department of 5 persons (of whom one, Lowell, had earlier in the year been transferred from the delicatessen department) and *to* the meat department of 41 persons. In the year 1975 there

were permanent transfers *from* the meat department of 5 persons and *to* the meat department of 41 persons. In the year 1976 up to September 25, there were permanent transfers *from* the meat department of 25 persons (of whom some had earlier been transferred from other departments to the meat department) and *to* the meat department of 22 persons (of whom some had earlier been transferred from the meat department to other departments). See Exs. 6, 7, and 8.

With respect to temporary transfers, Ex. 9 shows that there were in 1976 up to August 16, 1976 1,353 interdepartmental interchanges between the meat department and other departments. Interchanges occurred almost every week. Some of the transfers were for only a few hours.

After taking the foregoing evidence, the Regional Director transferred the case to the Board.

On September 29, 1978 the Board issued its Decision and Direction of Elections. It did not purport finally to exercise its powers under § 9(b) of the Act.[1] Instead, it found that for purposes of collective bargaining, "the meat department employees at the Employer's 11 unrepresented stores * * * *may* constitute *an* appropriate unit" (emphasis added) and "a storewide unit, including the meat department, *would* also be appropriate" (emphasis added) (A. 8–9, fourth paragraph). The decision then directed the creation of two voting groups: Unit A, including all meat department employees in the 11 stores who "shall vote whether they desire to be represented by Meat Cutters, Retail Clerks, or no union"; and Unit B, including all other employees in the 11 stores who "shall vote whether or not they desire to be represented by Retail Clerks." (A.14) The only other now relevant direction by the Board provided that: "If the majority of the employees in voting group A select Meat Cutters, they shall be deemed to have indicated their desire to constitute a separate bargaining unit, and the Regional Director shall issue a certification of representative for such group, which the Board under the circumstances finds to be an appropriate unit for collective bargaining." (A.14)

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[1] The NLRB recited in its September 29, 1978 decision "* * * we make no final unit determination at this time, but we shall first ascertain the desires of the employees as expressed in the elections directed below." (A.9)

On November 3, 1978, the Retail Clerks, reciting that they and the Meat Cutters "have reached agreement on a merger," filed a motion to amend the Direction of Elections, requesting that its name be withdrawn from the ballot in Unit A and that separate elections be conducted in the two units. The Company filed an objection to the motion. On December 29, 1978, the Board issued an Order and Amended Direction of Elections granting the Retail Clerks' motion to withdraw from the ballot. Thereafter, on January 23, 1979, the Retail Clerks requested that its petition in Case 1-RC-11708 be withdrawn entirely.

On January 26, 1979, a secret ballot election in Unit A was conducted pursuant to the Board's Order. The Union won the election by a vote of 34 to 30, with 2 challenged ballots. On February 1, 1979, the Regional Director issued an order severing cases and permitting withdrawal of the Retail Clerks' petition with prejudice, thus eliminating the election in Unit B.

On January 2, 1980, the Board issued its Decision and Certification of Representative certifying the Union as the collective bargaining representative of the Company's meat department employees.

Following its certification, the Union requested that the Company commence collective bargaining, but the Company refused. Thereafter, the Union filed an unfair labor practice charge and, on March 26, 1980, the Board's Regional Director issued a complaint alleging that the Company had refused to bargain in violation of Section 8(a)(5) and (1) of the Act. In its answer, the Company admitted its refusal to bargain, but challenged the validity of the Board's certification on the ground that the bargaining unit was inappropriate. On April 28, 1980, the General Counsel moved for

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summary judgment. On August 28, 1980, the Board granted the General Counsel's motion for summary judgment, found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union after it had been certified as the bargaining agent in an appropriate unit, and ordered the Company to cease and desist from engaging in the unfair labor practice found and to bargain with the Union upon request.

The Company petitions this court to set aside the Board's August 28, 1980 order on the ground that the Board's January 2, 1980 certification determining that the appropriate unit for collective bargaining consisted of the employees in the meat department of the Company's 11 unrepresented stores was arbitrary, capricious, an abuse of discretion, and lacking in substantial evidentiary support and that therefore the Board's August 28, 1980 order is invalid.

1. The NLRB's authority to determine the appropriate unit rests on § 9(b) of the Act, 29 U.S.C. § 159(b) which provides that:

> "The Board shall decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." (Emphasis added.)

With respect to § 9(b)[2], the Supreme Court in *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 491–492, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947) held that:

> "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end."

A court may set aside an NLRB § 9(b) determination only if the Board has not disclosed the basis of its determination,[3] or the determination is not supported by substantial evidence,[4] or the determination is in violation of the Act,[5] or some other statute or the Constitution, or is arbitrary or unreasonable.[6]

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[2] *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947) interpreted § 9(b) as originally enacted by the Act of July 5, 1935, 49 Stat. 453. That interpretation applies to § 9(b) as amended. *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers,* 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382 (1976).

[3] *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 443–444, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965).

[4] *South Prairie Constr. Co. v. Local 627,* 425 U.S. 800, 803, 96 S.Ct. 1842, 1843, 48 L.Ed.2d 382 (1976).

[5] *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 170–172, 92 S.Ct. 383, 393–394, 30 L.Ed.2d 341 (1971).

2. The Company contends that "the mechanical application of an invalid legal 'presumption' was used to determine the unit in question."

We reject the contention.

In no sense did the NLRB proceed mechanically. Adhering to the principle set forth in *Mock Road Super Duper, Inc.*, 156 NLRB 983, 984 (1966) [order enforced in *NLRB v. Mock Road Super Duper, Inc.*, 393 F.2d 432 (6th Cir. 1968)] that "as in other industries, the determination of the appropriate unit in the retail food industry must rest upon analysis of all the relevant factors,"—the NLRB in its September 29, 1978 decision considered[7] each of the factors relevant to the determination of an appropriate unit in this case.

Nonetheless, the Company is correct in charging that the NLRB used a "presumption" to determine the unit question. After setting forth some factors favorable to an overall or storeswide unit, the Board stated:

> Nothwithstanding these factors which would appear to militate in favor of an overall employee unit, it is well settled that a separate meat department unit is pesumptively appropriate. (See e. g., *Quality Markets, Inc.*, 129 NLRB 904 (1960); *Hy-Vee Food Stores, Inc.*, 176 NLRB 54, 60 (1969), and cases cited therein.) In order to determine whether the presumption survives or is *rebutted* on a particular set of facts, a number of factors must be considered. (A. 6). (parenthetical material appears in the original text as a footnote; emphasis added.)

After considering further factors, the NLRB made the following finding:

> In consideration of the foregoing, we find that the Employer has failed to *rebut* the *presumptive* appropriateness of a meat department unit. We find, therefore, that the meat department employees at the Employer's unrepresented stores, including the head meatcutters, meatcutters, apprentice meatcutters, and meat clerks and wrappers, may constitute an appropriate unit for the purposes of collective bargaining. (A. 8), (footnotes omitted; emphasis added.)

Those quotations show that the NLRB applied a presumption under which an NLRB finding that a meat department exists in a multi-department retail food store justifies a determination that the meat department is an appropriate unit unless an opponent proves that in the particular circumstances it is not an appropriate unit. This presumption is a substantive, not a procedural, presumption such as is set forth in F. Rules Ev. 301; it is a rebuttable, not a conclusive, or, as is sometimes said, e.g. in *NLRB v. St. Francis Hospital of Lynwood,* 601 F.2d 404, 414 (9th Cir. 1979), a *per se* presumption; unless rebutted, it leads from a proved fact or set of facts directly to an administrative determination,[8] and not merely to a presumed fact intermediate to a final decision, such as the presumptions involved in *Leary v. United States,* 395 U.S. 6, 32–54, 89 S.Ct. 1532, 1546–1557, 23 L.Ed.2d 57 (1969). It does no more than to shift the burden of proof. *NLRB v. Baptist Hospital, Inc.,* 442 U.S. 773, 781, 99 S.Ct. 2598, 2603, 61 L.Ed.2d 251 (1979).

This presumption is subject to judicial review "for consistency with the Act, and for rationality." *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370; *NLRB v. Baptist Hospital Inc., supra,* 442 U.S. 787, 99 S.Ct. 2606.

The Act vests in the NLRB extraordinarily broad discretionary powers to decide the appropriate unit. See *Packard Motor Car Co. v. NLRB, supra.* The only pertinent limitation is the § 9(b) statutory direction to the NLRB to make a decision

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[6] *Ibid.; Packard Motor Car Co. v. NLRB, supra; Banco Credito y Ahorro Ponceno v. NLRB,* 390 F.2d 110, 112 (1st Cir. 1968), *cert. den.,* 393 U.S. 832, 89 S.Ct. 101, 21 L.Ed.2d 102 (1968); *NLRB v. Mock Road Super Duper, Inc.,* 393 F.2d 432, 434 (6th Cir. 1968).

[7] The text of the NLRB's September 29, 1978 decision shows that in determining that the meat department was an appropriate unit, the Board considered that the Company's entire chain is centrally operated, that its personnel policies are centrally developed and administered, that all employees receive the same fringe benefits, that only the meat department has a formal apprenticeship program, that meat cutters and apprentice meat cutters receive higher wages than clerks, that meat cutters are never permanently or temporarily transferred out of the meat department and have almost no contract with employees of other departments, that the work of meat clerks is closely integrated with the work of meat cutters, that permanent transfers of meat clerks to other areas of the store are relatively infrequent, and that it is not uncommon for a meat department clerk who had been transferred to be reassigned, and that there was no bargaining history involving the employees of the 11 stores.

[8] Under Professor J.R. Thayer's classification originally made in a pamphlet on the The Presumption of Innocence and now available in 2 Bouvier's Law Dictionary (1914) 2679, the presumption in the case at bar is a presumption of the third type, that is, one "where a fact or set of facts makes out a case which shall stand until overthrown by a specific quantity of evidence * * * "

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"in *each* case." *NLRB v. St. Francis Hospital, supra; Long Island College Hospital v. NLRB,* 566 F.2d 833, 840–41 (2nd Cir. 1977), *cert. den.,* 435 U.S. 996, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978); *Memorial Hospital of Roxborough v. NLRB,* 545 F.2d 351, 360–362 (3rd Cir. 1976). It has been held that that statutory direction invalidates a conclusive presumption because it precludes the NLRB from making a determination based upon the unique circumstances of a particular group of employees. *NLRB v. St. Francis Hospital, supra.* But that statutory direction does not invalidate a rebuttable presumption which has no such preclusive effect.

"The validity of a presumption depends upon the rationality between what is proved and what is inferred." *Republic Aviation Corp v. NLBR,* 324 U.S. 793, 804–805, 65 S.Ct. 982, 988–989, 89 L.Ed. 1372; *Beth Israel Hospital v. NLRB, supra,* 437 U.S. 511, 98 S.Ct. 2478; *NLRB v. Baptist Hospital, Inc., supra,* 442 U.S. 787, 99 S.Ct. 2606. Where an NLRB presumption reflects the Board's experience in similar cases, it is likely to be rational. *Republic Aviation Corp., v. NLRB, supra.*

The reasonableness of a presumption may be proved by matters other than the testimonial evidence in the case in which the presumption is used. *Leary v. United States,* 395 U.S. 6, 32–34, 89 S.Ct. 1532, 1546–1547, 23 L.Ed.2d 57 (1969); *NLRB v. Metropolitan Life. Co., supra;*[9] *Memorial Hosipital of Roxborough v. NLRB, supra,* 357.

The reasonableness of this presumption is demonstrated both by the two cases—*Quality Markets, Inc. and HY-Vee Food Stores, Inc.,* both *supra*—which the NLRB cited as the basis of its presumtion—and by myriad cases to the same effect—all revealing "the emerging bargaining trend in the retail food industry generally, whereby grocery employees and meat department employees are represented in separate units."[10] *R.N. Market, Inc.,* 190 NLRB 292 (1971).

NLRB v. Purity Food Stores, Inc., 376 F.2d 497, 501 (1st Cir. 1967) upon which the Company relies for its statement that the presumption in the case at bar is "invalid" is plainly distinguishable. Judge Woodbury, in holding that the NLRB had not articulated substantial reasons for its determination of an appropriate unit, said that "a simple declaration that single store units are considered 'presumptively appropriate' adds nothing" to the NLRB's decision. If we assume that in *Purity Foods* the NLRB did invoke a presumption that a single store unit was an appropriate unit, the NLRB failed to show that there were supporting facts in our outside the record which made the presumption reasonable. Indeed, Judge Woodbury stated that the only relevant case indicated that the single store was not an appropriate unit.

3. The Company contends that the Board was unreasonable in not giving any

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weight to the over 10-year successful bargaining history between the Company and the Meat Cutters as representative of the employees in the 5 stores not involved in these proceedings. The NLRB in its September 29, 1978 opinion gave the obviously correct answer to that contention: what the Company and the Meat Cutters did with respect to employees in 5 stores acquired from Growers Outlet is not part of the bargaining history of the employees in the instant case.

4. The Company places great emphasis on its contention that the NLRB has minimized the importance of the transfer of employees from and to the meat department. For the following reasons we reject that contention.

The significance of the transfers is to be measured against the framework of the pleadings. The

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[9] *NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 443, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965) held that "In articulating the 'basis for its order,' the Board is free to refer 'to other decisions or its general policies laid down in its rules and its annual reports." *Id.* at 443 n.6; 85 S.Ct. at 1062.

[10] Before its September 29, 1978 decision, the NLRB had had a large number of cases involving meat departments in multi-department stores. The overwhelming majority of those cases resulted in a determination that the meat department was, within the meaning of § 9(b), "the unit appropriate." See, e.g., *Quality Markets, Inc.,* 129 NLRB 904, 905 (1960); *Mock Road Super Duper, Inc.,* 156 NLRB 983 (1966) [order enforced in *NLRB v. Mock Road Super Duper, Inc.,* 393 F.2d 432 (6th Cir. 1968)]; *Priced-Less Discount Foods, Inc., d/b/a Payless,* 157 NLRB 1143 (1966); *The Great Atlantic & Pacific Tea Co., Inc.,* 162 NLRB 1182 (1967); *Allied Super Markets, Inc.,* 167 NLRB 361 (1967); *Big Y Suppermarkets,* 161 NLRB 1263, 1268 (1966); *Hy-Vee Food Stores, Inc.,* 176 NLRB 54, 60 (1960) [order enforced in *Hy-Vee Food Stores, Inc. v. NLRB,* 426 F.2d 763 (8th Cir. 1970)]) "the Board has traditionally held separate meat departments to be appropriate units"); *Primrose Super Market of Malden, Inc.,* 178 NLRB 566 (1969); *R.N. Market, Inc.,* 190 NLRB 292 (1971); *C & E Stores, Inc.,* 229 NLRB 1250 (1977) ("The Board has normally found appropriate a unit of grocery employees excluding meat department employees.")

NLRB had before it petitions seeking a determination as to only an alternative between a unit composed of all meat department employees and a unit composed of all employees in all 11 stores; no one proposed that meat clerks should be a separate unit.

In that framework, the majority of the meat department consisted of meat cutters who were never transferred temporarily or permanently. There was no evidence as to what percentage of the individuals regularly employed as meat clerks was transferred out of the meat department temporarily or permanently.[11] There was no evidence as to what percentage of a transferred meat clerk's time annually was spent away from the meat department. There was no evidence that any transferred meat clerk failed to return to the meat department. There were corresponding gaps in the evidence with respect to individuals regularly employed in other departments who were transferred to the meat departments. Thus the evidence as to the transfers came down to a showing that a substantial number of meat clerks spent part of their time in other departments and a substantial number of clerks from other departments spent part of their time in the meat department.

If the NLRB's finding that the "interchange between meat clerks and personnel in the other four areas of the stores * * * is minimal at best and generally occurs on an emergency basis" had meant that there was only a small number of people involved, the finding would be false, especially in light of 1,353 temporary transfers in the first 7½ months of 1976. However, the finding was made in a context in which the NLRB was looking at the effect of temporary transfers upon the meat clerks, not upon the employer. With respect to meat clerks, there were many reasons why the NLRB was justified in finding that the temporary transfers were of minimal significance: the relevant exhibit, Ex. 9, showed nothing more than that to meet emergencies an uncounted number of meat clerk's had been transferred in an uncounted number of transfers for an uncounted percentage of each transferred meat clerk's annual working time; there was no proof that any transferred meat clerk remained out of the meat department; it was not at once apparent how many meat clerks were involved in the transfers; more important, it was not indicated how many of the persons regularly employed as meat clerks in the meat department were never transferred; and there was a corresponding want of clear proof as to the number and percentage of clerks from other departments who were transferred to the meat department. So far as it appears, only a fringe element of meat clerks was involved in the transfers, and that fringe element of meat clerks had no roots in other departments. Nor was it shown that a large percentage of clerks from other departments had contact with meat clerks.

The Company cannot rightly claim that the NLRB failed to give full and fair consideration to the magnitude of the transfers as viewed from the employer's angle. Aware that the Company saw the transfers as indicative of managerial integration of the 11 stores, the NLRB in its September 29, 1978 decision recited that: "The record indicates that interdepartmental transfers, both temporary and permanent, occur and that certain meat department personnel have been involved in these transfers." The NLRB then explicitly ruled that that was one of the "factors" which would "appear to militate in favor of an overall employee unit." (A.5)

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It was not unreasonable for the NLRB in determining the appropriate unit to give greater weight to the views of employees—whether meat cutters or meat clerks or both—than to the views of the employer as to the importance of the transfers. Particularly in light of the § 9(b) declaration that the NLRB is to "decide each case * * * in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act," the Board is entitled to give greater weight to the employees' than to the employer's view of the appropriate boundaries of the unit.[12] Nothing that we held or said in *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 931 (1st Cir. 1965) is to the contrary. There we merely indicated that "We believe, also, that there should be *some minimum* consideration given to the employer's side of the picture, the feasibility, and disruptive effects of piecemeal unionization." (Emphasis added.)

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[11] The figures with respect to "permanent" transfers show only how many individuals were transferred but do not show how many were not. The figures as to temporary transfers do not even make clear how many individuals were transferred.

[12] In *NLRB v. The Western and Southern Life Ins. Co.*, 391 F.2d 119, 123 (3 Cir. 1968), it was held

> "* * * that the overriding policy of the Act is in favor of the interest in employees to be represented by a representative of their own choosing for the purposes of collective bargaining, and the Board was entitled to give their interest greater weight than that accorded to the employer in bargaining with the largest, and presumably most convenient possible unit * * *."

This principle was followed in *Michigan Hospital Service Corp. v. NLRB* 472 F.2d 293-296 (6th Cir. 1972).

We conclude that the NLRB was not unreasonable in not having given greater weight to the Company's view of the transfers of employees between the meat department and other departments.[13] Whether we ourselves would have done so is wholly irrelevant; all that we as a reviewing court are authorized to consider is whether the administrative agency failed to give fair and reasonable consideration to the relevant factors; the weight assigned by the agency to each factor it has fairly considered is a matter for it to determine. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464-465, 95 L.Ed. 456 (1951); *Vermont Yankee Nuclear Power v. NRDC*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433 (1980).

5. The NLRB was not arbitrary in not applying in the instant case its holding in *Pueblo International, Inc. d/b/a Pueblo and Local 568, Amalgamated Meat Cutters and Butcher Workmen of Puerto Rico, AFL-CIO*, 203 NLRB 629, 83 LRRM 1154 (1973). In that case the critical fact—wholly absent from the instant case—was that the employees there involved had a history of collective bargaining as part of an established multi-department unit.

6. The Company's contention that § 9(c)(5) has a bearing on this case has no merit inasmuch as "the extent to which the employees had been organized" was not one of the factors which the NLRB considered in making its determination. Whatever may have been the agreements between the Meat Cutters union and the Retail Clerks union, the NLRB did not take them into account in deciding that the Meat Department was the appropriate unit.

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Petition of Big Y Foods, Inc. denied.
Petition of NLRB granted.

NLRB v. Sheraton Puerto Rico Corp., d/b/a Puerto Rico Sheraton Hotel

651 F.2d 49 (1st Cir.), June 11, 1981—248 NLRB 867

On petition to enforce Board Order

Before COFFIN, Chief Judge, CAMPBELL and BREYER, Circuit Judges

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BREYER, Circuit Judge: This case is before the court upon the application of the National Labor Relations Board for enforcement of its April 1, 1980 order issued against Sheraton Puerto Rico Corp.[1] The Board found that Sheraton violated section 8(a)(1) of the National Labor Relations Act by discharging four employees, two of whom Sheraton claimed were supervisors, for signing a letter to the president of Sheraton protesting working conditions at the Puerto Rico Sheraton Hotel under General Manager Arnold Orenstein and requesting Orenstein's dismissal. The text of the letter is reprinted in full in Appendix A to this opinion. The Board also found that Sheraton violated section 8(a)(1) by discharging seven supervisory or managerial employees for their participation in the letter where the discharges tended to interfere with employees' rights under sec-

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tion 7.[2] The Board's order requires Sheraton to cease and desist from the unfair labor practices found and from interfering with employees' statutory rights. The Board's order also requires Sheraton to reinstate and make whole the 11 discharged individuals and to post an appropriate notice. Because we find a lack of substantial evidence that sending the letter was activity protected by section 7, we deny enforcement of the Board's order.

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[13] *Yaohan of California, Inc.*, 252 NLRB, No. 50, 105 LRRM 1592 (1980) and *Ashcraft's Market*, 246 NLRB No. 68, 102 LRRM 1592 (1979) upon which the Company relies do not show that the NLRB acted unreasonably in the instant case. In those cases the limited functions of the meat cutters, the absence of an apprentice program, and adequate proof of how an extensive interchange of meat department and other employees affected the percentage of a meat clerk's time spent out of the meat department constituted special circumstances not present here. The factual differences in the cases justified the NLRB in reaching different determinations of the appropriate unit.

[1] 248 N.L.R.B. 113 (1980).

[2] The Board also found that Sheraton violated section 7 by coercively interrogating and threatening to discharge employees and by discriminatorily denying access to the hotel's public areas to dischargees.

I.

The facts of this case are essentially undisputed. In August 1974 Arnold Orenstein was appointed general manager of the Puerto Rico Sheraton. At the time the hotel was failing and had an accumulated loss of over $11 million. By 1977, the hotel was reporting an annual profit of over $1 million. Yet there was discord among the managerial staff. In March 1977, several supervisory employees met, discussed two recently circulated anonymous letters hostile to Mr. Orenstein, and decided to draft an open letter, criticizing him, that would be sent to his superiors in Boston. After consulting an attorney, they formed a steering committee with themselves as members. The committee was composed of:

Ramon Castro	Credit Manager
Armando Gutierrez	Executive Assistant Manager
Rodrigo Rodrigues	Banquet Sales Representative
Fofito Vasquez	position unidentified in the record [3]

They then drafted the March 25 letter—printed in Appendix A—with the help of two more supervisory employees:

Angel Gutierrez	Guest Service Manager
Joan Rodriguez	Reservations Manager

On March 25, at a meeting at Fofito Vasquez's house, the committee met with various supervisory and non-union, non-supervisory employees seeking signatures. Ultimately, they obtained 22 signatures; 4 were written at the bottom of the last page of the letter; and 18 were written on a blank piece of paper attached to the letter. The signed copies were sent on March 29 to the president of the Sheraton Hotel Corporation and three other chain executives.

The letter itself, as a reading of it will verify, starts by listing eight factors apart from Mr. Orenstein's work that helped the hotel become profitable. It then lists eight problems: (1) inadequate communication between Mr. Orenstein and the hotel staff, "communication being the basis of a sound, strong management", (2) "innovations for better management" are discouraged, (3) an insufficient number of staff meetings, (4) Mr. Orenstein's "closed door policy", (5) "promotions, salary scales and working conditions * * * includ[ing] company car, expense account, room and board" which discriminate against employees with Spanish surnames, (6) cost control that is too stringent, to the point where one must have Mr. Orenstein's approval "for rubber bands or pencils", (7) persons in key positions being given responsibility without adequate authority, (8) an inadequate plan for selling the hotel's services to the public. The letter concludes by suggesting that Mr. Orenstein be replaced.

When Mr. Orenstein heard about the letter, he called in those who had signed it, determined to his satisfaction that many of the employees did not know of (or would not stand by) its contents, and fired those that did for "insubordination", by which term he says he meant their failure to come to him before writing to his superiors. In addition to the five supervisors previously mentioned, he fired two other supervisory employees:

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Francisco Acevedo Padilla	Guest Service Manager
Amos Langer	Head Waiter

two persons whom the hotel claims were supervisors but the Administrative Law Judge found were not:

Victor Pena	Food Clerk
Edgardo Pena	Engineering Supervisor

and two secretaries:

Bonnie Salvador
Carmen Bermudez.

A few days after these discharges, which took place around April 11, Mr. Orenstein sent a memorandum to all employees, discussing the "events of last week where several supervisory people were dismissed." In the memorandum he likened himself to a ship's captain faced with a mutiny and made clear he expected those with similar complaints in the future to come to him before writing to the firm's president. (The text of this memorandum is set out in Appendix B.)

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[3] Fofito Vasquez is not an alleged discriminatee. The only information about him in the record is that he was discharged at approximately the same time the eleven alleged discriminatees were discharged for threatening to "kill" Orenstein, a threat he made while brandishing a pipe in a dispute with Personnel Director Mario Perez.

On the basis of these facts, the two documents, and very little other testimony, the Administrative Law Judge found that bettering employee working conditions was a significant object of the March 25 letter, that the writing and sending of the letter was "legitimate concerted activity by employees for mutual aid and protection" protected by section 7 of the National Labor Relations Act, and that discharging the supervisors would discourage ordinary employees from engaging in legitimate concerted activity. The Board accepted the Administrative Law Judge's findings and ordered reinstatement of the seven superivsory, and four ordinary, employees.

II.

Before determining whether the Board's findings are adequately supported and within the bounds of the law, we note that the essential problem of this case stems from the fact that most of those concerned are supervisors. We therefore must begin with the Taft-Hartley Act, a specific determination by Congress to reverse the NLRB's (and the Supreme Court's) holding that supervisors might fall within the Labor Act's protections. *See Packard Motor Car Co v. NLRB,* 330 U.S. 485, 67 S. Ct. 789, 91 L.Ed. 1040 (1947). That Act amended the National Labor Relations Act's difinition of "employee" to exclude "any individual employed as a supervisor", 61 Stat. 137, 29 U.S.C. § 152(3). It defined "supervisor" broadly, 61 Stat. 138, 29 U.S.C. § 152(11), and it added that employers could not be forced to deem "supervisors" to be "employees" for the "purpose of any law * * * related to collective bargaining", 61 Stat. 151, 29 U.S.C. § 164(a). The House Report on the amendments stated that "Management, like labor, must have faithful agents", adding that "no * * * employer * * * need have as his agent one * * * whom for *any* reason, he does not trust". H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947). (Emphasis in original.) And, the Senate Report spoke of the employer's need for "undivided loyalty". S.Rep. No. 105, 80th Cong., 1st Sess. 5 (1947). The Supreme Court has held that these amendments excluded supervisors from the protections of the Act "because supervisors were management obliged to be loyal to their employer's interests. * * *" *Beasley v. Food Fair of North Carolina,* 416 U.S.653,659-60, 94 S. Ct. 2023, 2026, 40 L.Ed.2d 443 (1973); *see also Florida Power & Light v. Electrical Workers,* 417 U.S. 790, 806, 94 S.Ct. 2737, 2745, 4 L.Ed. 477 (1974). Thus, the Board is without power to protect concerted activities of supervisors (at least where they are related to legitimate supervisory activities). And, as this court pointed out in *Abilities and Goodwill, Inc. v. NLRB,* 612 F.2d 6 (lst Cir. 1979), when non-supervisory employees engage in activity directly related to the retention of supervisors or to supervisory activities, the Board must proceed with caution.

In *Abilities and Goodwill* we held that a one-week (non-supervisory) employee "sick-out" was not protected when it was engaged in to protest the firing of a supervisor—despite the preparation by the employees of a "report" that (to some extent) sought to relate their actions to their working conditions. We looked at all the circumstances—including the reasonableness of the means of protest, the extent to which the supervisor had daily, or direct, contact with employees and their working conditions, and the origin of the dispute that led to the supervisor's dicharge—before concluding that the employee action was not "in fact a protest over the actual conditions of the employment". *Abilities and Goodwill, Inc. v. NLRB,* 612 F.2d at 9. In *Puerto Rico Food Products Corp. v. NLRB,* 619 F.2d 153 (1st Cir. 1980), we reversed an NLRB holding that non-supervisory employees could stop work on an assembly line to demand an explanation of why their supervisor had just been fired. We held that the means of protest about such matters must not only be reasonable but also directly related to their actual conditions of employment. We noted that employees were more legitimately concerned with low-level, than with high-level supervisors, but that the impact of such supervisors on working conditions must be special, or at least "distinct from the effect which supervisors usually have on employees", and that the critical issue was that of "the employee's subjective state of mind". *Id.* at 156-57.

Given the legal standards set forth in these prior cases, the Board order at issue here must be denied enforcement, for there is not substantial evidence in the record that the protest at issue here—reasonable as it was in respect to means—concerned the actual conditions of non-supervisory employment. That is to say, there is no evidence of impact on non-supervisory employees over and above that likely to exist whenever managers dispute about managerial activities. Although a few workers joined their supervisors in signing the letter, the record suggests that this was a protest of supervisors, by supervisors, and about supervisors.

First, those who originated the March 25 letter were supervisors. Those who assisted them in drafting it were supervisors. Non-supervisory employees were called in and asked to sign it only after it was completed. This would be a different case had non-supervisory employees written the letter, participated significantly in its drafting, or even had the drafting taken place after consultations with them, for any such facts would have provided evidence that this was an *employee,* rather than a supervisor's protest.

Second, the letter itself had only one object: the removal of Mr. Orenstein as the hotel's general manager. Mr Orenstein was not a "low-level foreman or supervisor who deals directly with the employees", *cf. Abilities and Goodwill, Inc. v. NLRB,* 612 F.2d at 8, but, rather, the highest ranking officer at the hotel. Thus, management's interests in securing his loyalty, and maintaining his authority are unusually strong, while the interest in extending the National Labor Relations Act's protection to concerted employee activity related to his tenure of office is correspondingly weak (at least absent a distinct showing of a particular harmful effect on employee working conditions as preceived by employees).

Third, the complaints contained in the letter are almost exclusively managerial. They are complaints of lower level managerial staff about higher level managers. The list, taken at face value, particularly in light of its origin, describes inadequate managerial communication; lack of managerial innovation; insufficient management meetings; inaccessibility of the manager; discriminatory salaries, perquisites, promotions, cost controls; inadequate authority for subordinate managers; and a poor marketing plan. Even when the letter speaks of "promotions, salary scales and working conditions", it immediately uses as examples "company car, expense account, room and board". At least the first two of these do not sound as if they concern the ordinary worker. The occasional use of the words "working conditions" and the fact that some of the words used *could* refer to ordinary workers as well as managers is not enough to transform a letter that is managerial in tone and content into a letter that deals with the direct concerns of the average worker.

Fourth, the record testimony does not lead one to reread the letter as more "worker oriented" than it appears. To the contrary, the four non-supervisory employees who testified said nothing at all about concern with *their* working conditions. Rather, they spoke of the matter as being one "of principle", or they claimed that the letter was "self-explanatory". Nothing that they said supports the notion that the protest involved was primarily, or even in significant part, one of non-supervisory workers, or that the non-supervisory employee signators interpreted the letter, in whole or in part, as protesting their employment conditions.

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Fifth, of the employees discharged, seven were managers, two were arguably supervisors, and only two were undisputedly non-supervisory employees. Orenstein testified without contradiction that he did not fire any employees whom he believed had signed the March 25 letter because they thought they were *protesting working conditions.* He fired only those whose motive, in his view, was his own removal as general manager.

The Administrative Law Judge, whose views the Board adopted, based his conclusion that a significant "object of the March 25 letter was the betterment of working conditions of employees" upon three pieces of evidence: (1) the text of the letter itself; (2) the testimony of three supervisors; and (3) Mr. Orenstein's April 20th memorandum indicating that the letter writers' concerns should have been directed to him and not to President James. The first of these has been discussed and is set out in Appendix A. A review of the testimony of the three supervisors, with one exception, reveals that they were concerned with *their* working conditions, not those of non-supervisory workers. The one exception is testimony of Reservations Manager Joan Rodriguez to the effect that she spoke to Mr. Orenstein about employee complaints and morale, that Mr. Orenstein's managerial methods made life unusually difficult for secretaries and that many employees had to work longer hours than the personnel director worked. In the context of two volumes of testimony including that of four non-supervisory employees, these few words simply do not seem sufficient to comprise substantial evidence—particularly when the four non-supervisory employees who testified did not directly relate the protest to their working conditions. The third piece of evidence—the letter or memorandum of April 20—is set out in Appendix B. That memorandum confirms, rather than refutes, the view that the dispute was essentially managerial and supervisory.

The facts reveal here a case very different from *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983 (7th Cir.), *cert. denied*, 335 U.S. 845, 69 S.Ct. 68, 93 L.Ed. 395 (1948) and from *NLRB v. Guernsey-Muskingum Elec. Co-op., Inc.*, 285 F.2d 8 (6th Cir. 1960), in both of which, courts allowed the NLRB to protect conduct related to the selection of a supervisor. In both *Phoenix Mutual* and *Guernsey-Muskingum* the employees' means of protest were reasonable—the writing of letters and the voicing of complaints (as the means used here were reasonable). In both cases, however, the deciding courts made clear that the protest at issue was one that originated with, and was conducted by, *non*-supervisory employees for reasons directly related to their own (*non*-supervisory) conditions of work. In the first of these cases insurance agents initiated a letter related to the choosing of a cashier. In the second, a group of laborers complained about the way in which their new foreman dealt with them on the job. Neither of those cases presents a dispute originated by, and primarily involving, supervisors, and both of them involved protests more directly related to ordinary employee working conditions than that at issue here.

Of course, every dispute over managerial employees involves working conditions to some degree; after all, the jobs of many managers in large part involve creating and maintaining such conditions. Yet, we have previously held that there must be a somewhat more direct relationship than this to the concerns of ordinary workers before concerted action aimed at the choice of managers enjoys the Act's protection. *See, e.g., Puerto Rico Food Products Corp. v. NLRB*, 619 F.2d at 155. Moreover, it was Congress' clear intent to place those disputes that are *primarily* among managers in the hands of management to resolve. This cannot be done if supervisors are allowed to immunize their own protest activities simply by adding a few sympathetic non-supervisory employees to their protesting group.

Finally, we do not believe that Mr. Orenstein's post-discharge memorandum converted his actions into a generalized threat against non-supervisory employee protests. The memorandum (set out in Appendix B) suggests to us that Mr. Orenstein believed (and made clear to others) that he was faced with a "revolt of the managers". While we recognize an obligation to defer to the Board's expertise in this area, *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975), we nonetheless are unable to find any reasons in the record for casting the memorandum in a more "anti-employee" light than an ordinary reading of it would indicate. (The record, if anything, suggests the contrary.) Indeed, the Board's finding that, on this record, the supervisors must be reinstated to avoid injury to non-supervisory employees does not suggest to us that there is more of an anti-employee nature here than meets the eye, but, rather, like the thirteenth chime of the clock, casts doubt on that which went before.

Because we cannot find record support for the view that this case involves more than a dispute among managerial employees into which several non-supervisory employees were drawn,

Enforcement of the Board's order is denied.

APPENDIX A

March 25, 1977

Mr. Howard P. James
Chairman and President
The Sheraton Corporation
470 Atlantic Avenue
Boston, Mass. 02210

Dear Mr. James:

The purpose of this letter is to inform you about the reality of the working conditions at the Puerto Rico Sheraton.

It is a known factor that our hotel has been losing money. This has been a situation that we all have tried very hard to change. During the past year our losing ratio has been greatly reduced.

This has, besides hard work, come about because of the following:

A. The beginning of the American economic recovery.

B. An unprecedented cold winter this year in the continental United States.

C. Unstable conditions in Jamaica.

D. Massive advertisement campaign by the Puerto Rican Tourist Development Co.

E. Worldwide marketing exposure on T.V. via satellite sponsored by major local commercial and industrial firms.

F. An already noticeable improvement in our laborer's attitude toward the tourist, due in part to sad memories of the past economic recession.

G. Main office efforts to increase better working conditions.

H. Our individual efforts and experience based on our deep sense of pride and responsibility towards our hotel, our Island and our families.

If all these causes are not taken into consideration when you study our financial statements, you could arrive at the wrong conclusion that our losing ratio could not have been reduced even more, or to the really tremendously wrong conclusion that, the reduction of the losing ratio was due to the efficiency or expertise of the present manager of the hotel or further that a peaceful working relationship has been existing between him and the hotel staff.

The following is a non all inclusive list of serious problem areas existing and caused exclusively by the lack of knowledge, tact and professionalism of Mr. Arnold M. Orenstein, whom we think is to be held accountable for the present and worse to come precarious working conditions.

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A. Lack of bilateral communication between the manager and the hotel staff; communication being the basis of a sound, strong management. The expressions of ideas, suggestions or complaints are answered by "if you do not like it, leave".

B. Innovations for better management are all but prohibited.

C. Staff meetings are seldom called and have become monologues where discussion is not accepted and the information from the manager has to be numbly and most of all silently received.

D. The executive or manager's office is run on a closed door policy. An appointment is mandatory unless you are called for a scolding session.

E. The promotions, salary scales and working conditions to include: company car, expense account, room and board, among others, that have so far been established clearly represents that they are discriminatory against employees, with Spanish surnames. So far corrective measures have not been sought but could, should this situation worsen.

F. The principle of controlling expenses in the hotel is sui generis. A request of rubber bands or even pencils is supposedly more efficiently controlled by the need of the general manager's approval. On the other hand up to a couple of months ago we had the most glorified chief engineer this hotel has ever afforded. This person not only was grossly overpaid but also, as you probably know by now, did not perform for what could be considered, the best interest of the hotel. This reminds us of the "Pennywise and Dollar foolish" theory.

G. Most of the key positions, except top management, are overloaded with responsibilities yet these individual's performances have been impaired because commensurate authority has not flowed downwards.

H. The marketing plan of this hotel, it's nowhere to be seen or found, it rests on one person's mind. The General Manager has stated that "He does not believe in it and after all it is not important". Here we have Hit & Miss management; which at best, shows his almost total lack of concern for the Corporation's policies, procedures and authority.

We, the undersigned, feel, that this enumeration which is based strictly on professional and business points clearly shows that something has to be done by you immediately if we are to work united for the betterment of our institution, and more, if this institution is to survive. The avoidance of what could have been determined or classified as personality problems or individual complaints is not to be constituted as a showing of their non-existence.

We sincerely hope that we have expressed our feelings, worries and fears. We feel, further, that if we have all been able to reduce our losing ratio working under these poor human relations conditions that have, and are still prevailing, our chances for business improvement are infinite if the General Manager is substituted for someone who could bring up everybody's morale and esprit de corps.

Good Human Relations go hand in hand with Productivity and Profitability. They are your insurance policy for a good working organization which we all want and deserve.

Hoping that this letter receives the importance it deserves.

We remain

APPENDIX B

MEMORANDUM

April 20, 1977

FROM: Arnold M. Orenstein
TO: All Employees

Many of you are aware of the events of last week when several supervisory people were dismissed.

So that you will be aware of what has happened I will briefly review the events:

1—In early March an unsigned letter was sent form the hotel to the President of the Sheraton demanding that I be removed from the hotel and threatening that if it wasn't done by March 31st there would be "a big problem at the hotel," as well as "*big trouble* for me."

I had a good idea of who sent the letter and by certain actions the group of people behind the first letter felt they had to send another letter. This time they signed it.

2—In this second letter they claimed that they didn't like the way the hotel was run and implied that they could do it better and that I must be removed. They claimed that the hotel was doing better for various reasons and that it had nothing to do with my being here.

I do *not* claim to be the best hotel manager in the world. I do want you to know that when I arrived here for the last months of 1974 the hotel was in terrible condition and finished the year with a loss of 3¼ million dollars. Guests would choose Sheraton as a last choice when there was no space elsewhere, the hotel was in disrepair, the casino was closed and many employees lost their jobs. In early 1975 the Sheraton Corporation saw no improvement in business and expenses and they decided to try to sell the hotel or close it, but in the meantime to cut all possible losses. Many people were laid off, the Zanzibar closed, the Alhambra closed and all advertising was stopped.

The only thing we continued to do was write and call personal contacts here and in the States who could assist in giving us business. We were very fortunate in getting the Skylark Charter program for early 1976 plus the Chevrolet group for late 1975 and March 1976.

This forecast of high occupancy and reduced losses made Sheraton decide to keep the hotel open after they bought the property in 1975. By June 1976 the company saw that our losses were cut substantially. We had gotten lots of winter and spring business, the Stake Penthouse had opened and was a great success. The only reason we were allowed to open the Stake Penthouse was that we needed more than a coffee shop for the winter, and it cost very little to set up the restaurant. The plan was to close it if it lost money. Fortunately it was well accepted by tourists and the local community.

Plans to sell or close the hotel were dropped when the company saw that we would end 1976 with only a $½ million loss, a contract for Skylark again in 1977, plus other business.

We had plans to lease the casino so that we would have an additional attraction for guests so they wouldn't check out and go elsewhere. These plans fell through, but after much arguing with our friends in heaven (the President of Sheraton and his staff), we convinced them to allow us to run the casino which is now an attraction helping us to entertain our guests and bring in revenue.

In all probability, barring wars, hurricanes, and other Acts of God we will make a small profit this year. More employees are working and the future of the hotel is looking brighter. This is important to you, the people who have worked hard, given good service and cooperated wherever you had to.

Fortunately the service employees of the hotel are more aware of what they have to do to put rice and beans on their families tables than certain other people here who felt they were more privileged than others. They felt they could do as they pleased for their own personal benefit, and even their own personal entertainment in violation of house rules and policy. They didn't like the controls and reporting procedures and because I established these procedures they didn't like me!!

Whenever I have tried to do in this hotel has been for the good of the hotel. I have lived in Puerto Rico for 11 years and don't plan to leave. The 11 years is longer than most of the ringleaders of this group have lived here!!

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A hotel is like a ship. There is only one captain. If some of the crew creates a mutiny they have to be eliminated before the ship sinks. You can also compare this to cancer. If someone has it you operate on it before the patient dies.

Many of you, especially the delegates, have never hesitated to come here and personally ask for favors. Even some of those who were discharged were accorded favors which we did not have to do. The door still remains open to you.

One last comment, * * * you have heard that there were 22 employees discharged. That is *not* correct. There were several people tricked into signing the letter. They were given blank paper to sign and were told it was a petition to request a meeting with me to discuss improved benefits for non-union employees. They did not know what they were signing and after we determined who these people were we did not discharge them. There were a few people who were discharged because of signing who I really am unable to determine what their complaint was.

In any case these people did not see fit to come to me with their complaint but rather wrote to our President to demand my removal. This constitutes insubordination and is just cause for dismissal.

There is no need to go into further details but just to point out how juvenile all of this was one of these people was heard to make threatening remarks against my son and against me.

I will look forward to your continued support and understanding as well as to good future business. Thank you.

AMO/ggc

Spring City Knitting Company v. NLRB

647 F.2d 1011 (9th Cir.), June 12, 1981—249 NLRB 212

On petition to review Board Order

Before ANDERSON, FLECTCHER and FERGUSON, Circuit Judges

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J. BLAINE ANDERSON, Circuit Judge: Spring City Knitting Company (Spring City) petitions for review of an order of the National Labor Relations Board (the Board) directing it to bargain with the intervenor here, the International Ladies' Garment Workers' Union (the Union), as the exclusive bargaining representative of a bargaining unit consisting of all production and maintenance employees and shipping and receiving employees at Spring City's Flagstaff, Arizona plant. The Board cross-petitions for enforcement of the order. We affirm and enforce the Board's order.

I. *BACKGROUND*

Spring City Knitting Co., a subsidiary of Cluett-Peabody and Co., Inc., operates a Western Division which consists of a main plant located at Glendale, Arizona, and two smaller "satellite" plants located at Flagstaff, Arizona, and Deming, New Mexico. Spring City manufactures men's and boys' underwear. Each of the Western Division plants performs substantially similar operations. The Glendale plant employees approximately 700 workers, while Flagstaff employs approximately 150 workers. The issues raised by Spring City's petition relate only to the Glendale and Flagstaff plants.

On May 3, 1979, the Union formally petitioned the Board for certification as the exclusive bargaining representative of all production and maintenance employees at the Glendale plant. On May 9, the Union filed a petition for certification as representative of a separate unit consisting of all production and maintenance employees at Flagstaff. The petitions were consolidated and a hearing was conducted on May 18 and 23. On June 6, the Regional Director issued a decision directing elections at Glendale and Flagstaff as separate units. In finding that each plant constituted a separate appropriate bargaining unit, the Regional Director relied mainly upon evidence which indicated that the local plant managers exercised "significant autonomy" over their respective facilities, evidence which failed to indicate significant employee interchange between the two plants, and the geographical separation between the plants. Spring City petitioned for review of the Regional Director's decision, a request which the Board denied on June 27 as raising no substantial issues warranting review. Such a denial constitutes affirmance under Board regulations. 29 C.F.R. § 102.67(f).

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On June 28, 1979, a representation election was held at Flagstaff in which the Union received a majority of the votes cast. Spring City filed an objection to the election based upon certain alleged misrepresentations made by the Union prior to the election, and upon certain allegedly coercive campaign tactics practiced by the Union. On August 10, the Regional Director overruled Spring City's objections and certified the Union as the Flagstaff plant bargaining representative. Spring City requested Board review of Spring City's objections, again on the ground that the company had raised "no substantial issues warranting review."

Following certification, the Union requested Spring City to bargain collectively. Spring City refused the request, and the Union responded with the filing of an unfair practice charge. the Regional Director issued a complaint on January 2, 1980, alleging that Spring City had committed an unfair labor practice by refusing to bargain with the Union. In its answer, Spring City admitted that it had refused to bargain, but raised as affirmative defenses the Regional Director's allegedly erroneous bargaining unit determination, and also the Director's overruling of its election objections without a hearing. After the matter was formally transferred to a Board panel, the Board granted on May 1, 1980, the General Counsel's motion for summary judgment on the ground that both the unit determination and the election objections had been raised and rejected in earlier proceedings. Accordingly, the Board ordered Spring City to cease and desist from refusing to bargain collectively with the union as the Flagstaff representative, affirmatively ordered it to so bargain, and directed that appropriate notices be posted. Spring City's timely petition for review followed.[1]

Spring City raises two issues in its petition: the appropriateness of the initial unit determination, and the Union's alleged election misconduct. Further facts will be developed in the course of the opinion.

II. *APPROPRIATE BARGAINING UNIT*

Our review of a Board determination that a particular bargaining unit is appropriate is narrowly circumscribed. Definition of an appropriate bargaining unit is a matter committed to Board discretion, *see* § 9(b), National Labor Relations Act of 1947, 29 U.S.C. § 159(b), and a bargaining unit determination should not be overturned unless the Board has abused its discretion. *See e.g., N.L.R.B. v. J.C. Penney Co., Inc., Store No. 29-9,* 620 F.2d 718 (9th Cir. 1980); *N.L.R.B. v. Retail Clerks Local 588,* 587 F.2d 984 (9th Cir. 1978). The Board is not required to select the most appropriate bargaining unit so long as the unit chosen is within the range of units appropriate under the circumstances. *N.L.R.B. v. J.C. Penney Co., supra.* The present case involves the question whether a unit consisting of a single plant or a multiple plant unit should be designated. In making such a determination, the list of factors which the Board ordinarily considers includes:

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[1] Both the Regional Director's unit determination and certification of representative decisions are properly before us. Subject to certain narrow exceptions not relevant here, a Board decision on certification is not subject to judicial review on the employer's behalf except as a defense to a subsequent unfair labor practice charge based upon the employer's refusal to bargain with a certified bargaining representative. *See, e.g., Boire v. Greyhound Corp.,* 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964); *N.L.R.B. v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979).

> "* * * functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, lack of employee interchange, geographical distance."

N.L.R.B. v. Sunset House, 415 F.2d 545, 548 (9th Cir. 1968). There is a presumption that a single plant is an appropriate bargaining unit. *N.L.R.B. v. Lerner Stores Corp.,* 506 F.2d 706 (9th Cir. 1974). We find in this case that the Regional Director's reliance primarily on the last three elements of this analysis was proper and that his findings were supported by substantial evidence.

The evidence presented at the unit determination hearing consisted mainly of testimony given by Spring City Western Division President Allan Riley and certain documentary evidence. Riley's testimony painted a picture of the Western Division as a centralized unit whose production and personnel "brain" is located at the Glendale plant. Production control is implemented from Glendale. Division-side finance, data processing, and accounting records are maintained at Glendale. Riley sets the annual budget for all three plants, and also sets inventory controls for each. Local plant managers may not deviate from their respective budgets without Riley's approval. The evidence also indicated a high degree of functional integration between Glendale and Flagstaff. Riley described in some detail the production operations performed at each plant. It is clear from the evidence that few functional differences exist. The Flagstaff plant is substantially similar to Glendale in terms of production methods, employee skill requirements, and finished products, the primary difference being that Flagstaff is run on a considerably smaller scale.

The record is also clear that formulation and implementation of labor relations and personnel policies takes place mainly at Glendale under Riley's supervision. All full-time employees within the division enjoy practically identical fringe benefits, including *inter alia* paid vacations, health insurance, life insurance, eight paid holidays annually, and a variety of smaller amenities. Compensation for employees of various skill classifications is uniform throughout the division. Personnel decisions such as promotions, transfers, layoffs, and recalls are made by Riley personally. All payroll processing takes place at Glendale, and all employee time records are maintained there. Manpower quotas for each plant are established by Glendale. Overtime requests must be approved by Rilely. None of the local plant managers may deviate from these division-wide policies without approval from someone at Glendale, usually Riley.

The local plant managers are subject to a certain degree of direct oversight from Glendale on all phases of plant operation. Riley testified that he personally travels to Flagstaff "once a month" to check on the plant, while other supervisory personnel from Glendale go to Flagstaff every two or three weeks "on the average." Various types of telecommunications also keep Flagstaff in touch with Glendale on an everyday basis. There is a "constant" exchange of production information between the plants.

It was also clear from the evidence, however, that the local plant managers are not totally bereft of discretion in personnel matters. The local managers have the authority to hire and discharge within the manpower quotas established at Glendale. Plant managers may also "effectively" recommend promotions and merit increases, although none is final without Riley's approval.

Sping City introduced an exhibit at the hearing (Exhibit #7) which listed by name a number of employees who had transferred from one plant to another within the division from 1973 until the date of the hearing. While Riley pointed out that the list did not include all employees who had transferred during that time period, he did describe the exhibit as an "extensive" example of employee interchange within the Western Division. In the absence of something more concrete, we must treat Exhibit #7 as fairly approximating the frequency of inter-plant transfers during the six-year period from 1973 until 1979. The exhibit lists 21 employees who were transferred on a temporary basis, in most cases for not longer than a few days, during that period. Of these 21, Riley identified eight as "supervisors." While we are not prepared to adjudicate the supervisory status of each within the meaning of federal labor law, we take Riley's comments on each as an indication that those eight employees would likely not be included

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in the bargaining unit.[2] Of the remaining 13 who were either not described as "supervisors" or whose supervisory status at the time of the transfers was not clear to Riley, 6 were involved solely in transfers between Glendale and Deming.[3] Thus, only seven of the listed temporary transfers involving persons not clearly outside of the proposed bargaining unit involved a move between Flagstaff and Glendale, the longest of which was only a week in duration.[4] Of the 11 permanent transfers listed, seven were not within the requested bargaining unit.[5] Of the four permanent transfers by employees who apparently would be included within the bargaining unit, one was a Deming to Glendale transfer. Thus, Spring City produced evidence of only three permanent transfers within its proposed two-plant bargaining unit over the six-year period immediately proceding the hearing.

The frequency of employee interchange is a critical factor in determining whether employees who work in different plants share a "community of interest" sufficient to justify their inclusion in a single bargaining unit. We have in past cases cited a relatively low degree of actual employee interchange among different plants as a strong indication that there is no collective "community of interests" among a proposed multi-plant bargaining unit. *See Victoria Station, Inc. v. N.L.R.B.*, 586 F.2d 672 (9th Cir. 1978) (8% yearly transfer rate among seven San Francisco Bay Area restaurants); *N.L.R.B. v. Lerner Stores Corp., supra* (10% interchange among seven chain stores); *N.L.R.B. v. Sunset House, supra* (no interchange at all). The Regional Director's finding that no significant interchange took place within the Western Division is supported by the record.

Spring City has argued that the Regional Director erred by attributing too much authority to the Flagstaff plant manager. The evidence, however, showed that the local plant manager has the authority to hire and discharge employees. Spring City cites decisions in which insufficient local autonomy has been held to overcome the presumption that a single-plant unit is appropriate. *See N.L.R.B. v. Solis Theatre Corp.*, 403 F.2d 381 (2d Cir. 1968); *N.L.R.B. v. Davis Cafeteria, Inc.*, 396 F.2d 18 (5th Cir. 1968); *N.L.R.B. v. Purity Food Stores, Inc.*, 376 F.2d 497 (1st Cir.), *cert denied*, 389 U.S. 959, 88 S.Ct. 337, 19 L.Ed.2d 368 (1967); *N.L.R.B. v. Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895 (7th Cir. 1966). In only one of these cases, however, *N.L.R.B. v. Frisch's Big Boy Ill-Mar, Inc.*, did the authority of the local manager extend to hiring and discharge decisions. The geographical proximity of the various plants involved in *Frisch's Big Boy* serves to adequately distinguish that case from the present dispute. The plants involved here are approximately 140 miles apart.

The balancing of salient factors which we achieved in *Victoria Station, In. v. N.L.R.B., supra*, serves as a example here. We there held that a Board determination that a single restaurant constituted an appropriate bargaining unit instead of the employer's proposed seven restaurant unit was not arbitrary, capricious, or unsupported by the evidence. A combination of low employee interchange among the restaurants, significant local managerial autonomy, and a "wide" geographic dispersion over the Bay Area was held sufficient to justify the Board's decision.

In the present case, while the degree of local control over labor relations is apparently not as great as in *Victoria Station*, neither is it so inconsequential as to require a multiple plant unit. The Flagstaff manager does exercise a degree of control over collective bargaining subjects. The degree of employee interchange is even lower than in *Victoria Station*, while the geographic dispersion of the plants is much wider. When we consider the additional factor of a lack of collective bargaining history, we must conclude that a rational basis existed for the Regional Director's decision, and that it was neither arbitrary nor capricious. The unit chosen was appropriate.[6]

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[2] Riley identified Roy Carson, John Dennis, Jerry Fredericksen, Lacy Parker, Gene Rios, Gary Vandever, Bill Carlton, and Luther Dill as "supervisors" at the time of their respective transfers. Riley wasn't sure whether Jim Jackson, Lina Lopez or Elsa Pagotto were supervisors at the time of their transfers. Giving Spring City the benefit of the doubt, we do not include those three in the list of supervisors transferred.

[3] Lina Lopez, Elsa Pagotto, Armida Delgado, Irene Orth, Harry Hampson, and Marie Rivera are all listed as employees based in Glendale who spent short periods of time working in Deming.

[4] Jim Jackson, Virginia Romo and Wanda Richie each spent a few days in Flagstaff as instructors. Richie had recently been named a supervisor at the time of the hearing, but apparently had not been so designated during her three-day stint at Flagstaff in 1973. Clyde Brandt spent a week in Flagstaff in 1974 for maintenance purposes. The status of Dee Vandever, who spent two days in Flagstaff in 1975, was unknown to Riley. Connie Castillo spent two days in Flagstaff in 1975 as an instructor. Vida Posey was in Flagstaff for two days in connection with a retail outlet selling Spring City products.

[5] Salomon Castillo, Jr., Herb Nation, and Susan Nation were described by Riley as "supervisors." Bill Romo, Cletus Hicks, James Barrier, and Arvel Wyant are listed as "mechanics," a classification expressly excluded from the bargaining unit.

III. *UNION ELECTION MISCONDUCT*

Following the Union's victory, Spring City filed an objection to the election based upon two allegations of Union misconduct in the course of the election campaign. Spring City challenged several misrepresentations which appeared in Union campaign literature circulated eight days prior to the election, and also claimed that the actions of Union organizers during the campaign interfered with, restrained and coerced Spring City employees in the exercise of rights guaranteed by § 7 of the National Labor Relations Act, 29 U.S.C. § 157. The Regional Director denied Spring City's objections without a hearing. Spring City here alleges as error not only the denial of the substance of its charges, but also the denial without a hearing.

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In reviewing the Regional Director's overruling of election objections which charge union misconduct, we are guided by principles well-established in cases far too numerous to cite in detail. The Board enjoys a wide discretion in conducting and supervising representation elections. *Summa Corp., v. N.L.R.B.*, 625 F.2d 293 (9th Cir. 1980); *N.L.R.B. v. Masonic Home of California*, 624 F.2d 88 (9th Cir. 1980). We apply the abuse of discretion standard to Board denials of evidentiary hearings on election objections. *N.L.R.B. v. Miramar of California, Inc.*, 601 F.2d 422 (9th Cir. 1979). In order to obtain a hearing on post-election objections, a party must make a prima facie showing of facts that present "substantial and material factual issues" which, if true, would constitute grounds for the Board to set aside the election. *N.L.R.B. v. Masonic Homes, supra.* In order for an election to be overturned, the objecting party must present evidence of proscribed conduct which prevented the employees from freely registering their choice of a bargaining representative. *Hecla Mining Co. N.L.R.B.*, 564 F.2d 309, 314 (9th Cir. 1977).

A. Union misrepresentations

On June 19, 1979, eight full days prior to the representation election on June 28, the Union distributed a handbill at the Flagstaff facility which charged, in essence, that an earlier announcement by Spring City that it would be closing its Deming, New Mexico facility was false and that management had made the announcement for the sole purpose of intimidating the employees into voting against union representation at Flagstaff. The handbill asserted that Spring City had earlier attempted the same sort of scare tactic at its Georgia plants and had failed. The Regional Director overruled Spring City's objection because the eight-day interval between publication of the handbill and the election gave the company a sufficient amount of time to respond to any portion of the handbill which it considered inaccurate.

Contrary to Spring City's assertions before this court, the presence or absence of an opportunity to respond is a factor which the Regional Director may properly take into account in determining whether to overturn a representation election on the basis of alleged campaign misrepresentations. An election is set aside due to misrepresentations " 'only where one party has misrepresented material facts, the other had no opportunity to reply, and the resulting distorted presentation significantly impaired the election process.' " *Heavenly Valley Ski Area v. N.L.R.B.*, 552 F.2d 269, 272 (9th Cir. 1977),

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[6] Spring City has also raised the issue of the allegedly improper issuance of a large number of subpoenas to Spring City employees by counsel for the Union to compel attendance at the unit determination hearing. According to Spring City, Union counsel conceded during a hearing recess that he did not intend to call any of the subpoenaed witnesses and that they had been subpoenaed for "propaganda" purposes. When on the record, he backed off somewhat and stated that while he did not *presently* intend to call any of the witnesses, it might become necessary to do so in order to rebut Riley's testimony. He justified the large number of subpoenas on the ground that representation from each of Spring City's many production departments was necessary. The hearing officer denied Spring City's motion to revoke the subpoenas.

Spring City claims that the Union's alleged abuse of process constituted "prejudicial error." We do not see how the mere presence of a large number of employees could prejudice the outcome of the unit determination hearing in any significant fashion. We must comment, however, on what we perceive as an egregious abuse of the subpoena power if indeed the employees were summoned for the sole purpose of "propaganda" on the Union's behalf. Since counsel's remarks do not appear on the record, we cannot determine whether his "propaganda" purpose has been established. The hearing officer accepted counsel's alternative explanation. We condemn any misuse of legal process, and caution that the type of misuse alleged here by Spring City should be regarded as a gross breach of professional ethics. Spring City complains that it has suffered economic injury as the result of the Union's action because many of the subpoenaed employees were away from their work stations during the hearing. We cannot express strongly enough our disapproval of the misuse of the legal system as a subtle "weapon" in labor conflicts. The role of the federal labor law is to discourage industrial strife, and all who come before the Board or this court are bound to respect that role, not to engage in conduct which flagrantly subverts it.

quoting N.L.R.B. v. G.K. Turner Associates, 457 F.2d 484 (9th Cir. 1972). *See also N.L.R.B. v. Masonic Homes of California, supra.* We have recently upheld denial of an evidentiary hearing where the employer made no attempt to dispel alleged misstatements made by union officials eight days prior to a representation election, and the employer presented no evidence that the vote of any employee was actually affected by the misrepresentation. *N.L.R.B. v. Calco-Imports-Exports,* 621 F.2d 1029 (9th Cir. 1980). Spring City's contention that it lacked a meaningful opportunity to respond is without merit.

Another factor not cited by the Regional Director supports the decision. The alleged misrepresentations related to a matter of company policy, and not a matter of union policy. We have held that in such cases the objecting employer should present evidence that the employees were likely to "accept uncritically" the union's assertion. *El Monte Tool & Die Casting, Inc. v. N.L.R.B.,* 633 F.2d 160 (9th Cir. 1980). We conclude that the Regional Director did not err in overruling Spring City's first objection without an evidentiary hearing.

B. *Coercive Union conduct*

Spring City alleged several specific instances of Union conduct during the election campaign which it claims were sufficient to warrant an evidentiary hearing on its charge of Union coercion. A subsequent investigation by the Regional Director uncovered other potentially coercive acts. The Regional Director nonetheless overruled Spring City's second objection. We review briefly the evidence reflected by the record.

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An affidavit by Dorothy LeFountain, an office clerk at Flagstaff, related an incident which occured sometime in mid-April, 1979. LeFountain observed two men, one of whom wore a jacket bearing the Union insignia, enter the plant during working hours and begin inspecting employee time cards. The two men ignored LeFountain's request that they leave, until other male employees intervened. LeFountain was not sure whether cutting room employees could overhear the conversation. LeFountain was not a member of the proposed bargaining unit.

A pair of affidavits by employee Josie Vasquez, a member of the bargaining unit, related a series of attempts by union adherents to persuade her to vote for the union. Three weeks prior to the election, employees Maria Hamet and Leonora Rivas came to her home, accompanied by a Union organizer. The organizer allegedly charged the company with "cheating" the employees, and told Vasquez that the Union could get the company to pay vacation time and sick leave. After a discussion with the organizer, Vasquez accepted a proffered authorization card and some union literature, but immediately threw both in the trash in the presence of the organizer. On June 23, another employee told Vasquez that the company had "lied" about the Deming closing, but the subject was dropped at Vasquez' request. On June 26, Hamet again came to Vasquez' home and attempted to enlist the aid of her husband and her brother in recruiting her to the Union cause. On June 28, the day of the election, Vasquez was greeted by the same Union representative, who told her that she "had" to take a card that was offered. When Vasquez refused the card, the organizer's male companion told Vasquez to "cool it." Vasquez also stated that every day during the week immediately before the election, someone would place union literature at her work station.

An affidavit by Fern Luna, a quality control supervisor at Flagstaff, stated that on June 27 she observed through a glass door several Union organizers who were handing out campaign literature to employees leaving the plant at the close of the work day. Luna observed one man whom she believed to be a Union organizer hold a camera up to his eye as if he were taking pictures of everyone who was leaving the plant. She also observed at about the same time one Union organizer attempt to hand literature to a female employee who ignored the organizer. Rather than give up, the organizer persisted and began walking backwards in front of the employee, blocking her path when she attempted to pass. The organizer did not relent until the employee crossed the street.

Rick Jones, a cutting room supervisor, stated that on June 26 he observed several Union organizers passing out literature at the end of the shift. The resulting congestion forced the departing employees to exist four or five abreast. One female organizer had a camera in her hand and made several motions as if to take pictures of the employees. Jones stuck his head out the door and asked the organizers to step back to the public driveway and off company property. While the organizers complied, Jones reported that they almost immediately returned to their original position five to six feet away from the exit doors. Fifteen minutes later, an employee approached Jones and asked if Jones could get "those damned people" away from the door. Jones related that on five or six different occasions that week he asked the organizers to step back, and that each time they would resume their original positions after he left.

Salomon, Castillo, Flagstaff plant manager, described in general terms the pattern of literature distribution. Begining approximately two months before the election, anywhere from two to five organizers would position themselves on company property approximately six feet in front of

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the doorway. The organizers at first appeared approximately twice a week. As election time grew nearer, the organizers showed up on an almost daily basis. Sometimes the delay in leaving the plant would last up to five minutes because of the congestion resulting from the organizer's activities. Castillo also asked the organizers to step back a few feet to the public driveway on several occasions, only to have his request ignored after he left. On June 24, as he was leaving the plant with two company officials, Castillo was "sarcastically" asked by one of the female organizers if she was on company property. Apparently, some unit employees were near enough to have overhead the organizer's comments. The affidavit of Josie Vasquez corroborates Castillo's observation of considerable congestion and delay caused by literature distribution.

Irene Espino, a sewing room supervisor at Flagstaff, related that an employee approached her approximately two weeks prior to the election and asked if she could leave via the rear entrance so as to avoid the organizers and their literature. Espino replied that she could not because the rear entrance was reserved for truck loading only. No other employee complained to Espino.

Spring City argues that these affidavits raise substantial and material issues of fact regarding Union coercion of employees. Spring City contends that the acts described individually and collectively demonstrate coercive action on the part of the Union. According to Spring City, the Union's distribution methods were more serious than a simple trespass. Spring City cites the instances wherein certain employees complained of the Union's activities, and the incident wherein one employee's path was blocked as she walked from the plant to the street as evidence of the coercive impact which the Union campaign tactics carried. Spring City also cities a number of other incidents, including the taking of employee pictures as they left, and further points to the Union's misuse of its subpoena power. We have considered the record and each of the incidents, and find no merit to Spring City's contentions.

An objecting party who claims that campaign tactics in a representation election were so coercive as to require overturning the election faces a heavy burden. The question is "whether the coercive conduct so influenced potential voters that a free choice by employees was impossible." *N.L.R.B. v. Masonic Homes of California, supra,* 624 F.2d at 90. The critical element which is lacking in Spring City's presentation is evidence that any employee felt so coerced by the Union's activities that he or she was unable to exercise a free choice at the polls.

None of the activities alleged was so inherently intimidating that we are free to presume coercive effect. The record reflects an election campaign marked by Union conduct which was uniformly aggressive, sometimes overbearing, and occasionally obnoxious. The Union's tactics did not, however, involve any violence, threat of violence, or vandalism. No overt threat of reprisal appears in the record, and we find no subtle threats implied. This is not a case such as *N.L.R.B. v. Masonic Homes, supra,* wherein employee fears of union reprisal appeared in the record, nor a case such as *N.L.R.B. v. Hale Manufacturing,* 602 F.2d 244 (2d Cir. 1979), wherein, on the day of the election, an act of violence was directed toward an employee who had made remarks disparaging the union. That many of the employees at Spring City found the Union's tactics distasteful and irritating is clear. The recorded, however, is devoid of any indication of intimidation. The only affidavit authored by a unit employee, that of Josie Vasquez, discloses no feeling of coercion. While the taking of employee photographs might in some instances rise to an implied threat of reprisal, we see no evidence here to support such a conclusion. In sum, we find that none of the individual incidents appearing in this record would have justified overturning the election.[7]

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We also reject Spring City's argument that the Union's disregard of its requests to stay off company property demonstrated to the employees the company's inability to stand up to the Union. No evidence suggests that any employee so viewed the incidents. Also, Spring City offers no explanation why it was powerless to stop the Union from trespressing. There is similarly no merit to Spring City's contention that the alleged misuse of subpoenas at the unit determination hearing also put the company in a bad light in front of the employees.

Finally, we reject Spring City's argument that the cumulative impact of each of the incidents alleged requires us to find improper coercion. We heed the admonition of *Melrose-Wakefield Hospital Assn. v. N.L.R.B.,* 615 F.2d 563 (1st Cir. 1980) that "totality" arguments in this context should be approached cautiously. The First Circuit requires "detailed evidence of the pattern the activity formed and its influence on the election." *Id.* at 570. There certainly was no such detailed showing here. We decline to hold that the aggregation of the Union's legal, if not entirely ethical, activities indicated any degree of employee coercion.

We hold that the Regional Director did not abuse his discretion in overruling Spring City's objections without an evidentiary hearing.

IV. *CONCLUSION*

The Board acted properly in certifying the Union as the Flagstaff bargaining representative, and in ordering Spring City to bargain with the Union. The record discloses no abuse of discretion. We deny Spring City's petition to deny enforcement, and grant the Board's petition to enforce.

NLRB v. Colony Printing and Labeling, Inc.

651 F.2d 502 (7th Cir.), June 15, 1981—249 NLRB 223

On petition to enforce Board Order

Before SWYGERT and COMMINGS, Circuit Judges, and JAMESON, Senior District Judge*

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SWYGERT, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order finding respondent Colony Printing and Labeling,

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Inc. in violation of section 8(a)(1) of the National Labor Relations Act, *as amended,* 29 U.S.C. § 158(a)(1). Because we conclude that substantial evidence supports the Board's conclusions, we grant enforcement.

I

In reponse to an organizational campaign initiated by the Muncie Printing and Graphic Communications Union No. 126, the Company sent a letter to its employees which read in pertinent part:

> * * * If you sign your name to a union card, you give up the right to talk to us about your hours, your work, your working conditions, your pay, and *everything* else concerning your future and continued employment. If anyone tries to cause you any trouble at your work, or puts you under any kind of pressure to join a union, you should let the company know of it immediately, and we will promptly stop this illegal and immoral practice.
>
> * * * * *
>
> * * * Do not sign if you want to continue to speak for yourself, and be your own person.
>
> * * * * *
>
> * * * When you sign, you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job. * * *
>
> * * * * *
>
> Don't be fooled into signing misleading union cards. It is said that when you sign such a card, no one other than a Union Representative, or a representative of the National Labor Relations Board will ever see this card. This is not the

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[7] We do not find support in the record for Spring City's assertion that the Union "repeatedly" promised that certain benefits would result from it becoming the plant's bargaining representative. Only the Vasquez affidavit reflects the oral promise of such benefits. There is no evidence that any Union organizer made promises to other employees.

*The Honorable William J. Jameson, United States Senior District Judge for the District of Montana, is sitting by designation.

> truth. In many instances, the signed card is disclosed to the company by the union, the NLRB, or both of them. Be careful about what you sign—don't sign ANYTHING unless you KNOW what you are signing and what it might mean to you, your family, or your fellow employees.

(emphasis in original) That letter provided the basis for the Union's charge. The General Counsel of the NLRB issued a complaint against the Company, and both the General Counsel and the Company filed motions for summary judgment. The Board transferred the proceeding to itself and granted the General Counsel's motion finding that the Company had violated section 8(a)(1) by threatening its employees with the loss of their right to speak directly with management about the terms and conditions of employment; by requesting employees to report efforts of union supporters to persuade them to sign authorization cards; and by threatening employees that the Company would discover the identity of card signers and take reprisals against them.

II

This court has previously held that threatening employees with the loss of their right to speak directly with management if they choose to have a union represent them in collective bargaining is a violation of section 8(a)(1). *NLRB v. Graber Mfg. Co.*, 382 F.2d 990 (7th Cir. 1967); *accord, Tipton Electric Co. v. NLRB*, 621 F.2d 890 (8th Cir. 1980). Section 9(a) explicitly provides that the selection of a collective bargaining representative does not preclude employees from presenting grievances directly to their employers so long as the bargaining representative is given the opportunity to be present. Here the Company stated that signing a union card meant giving up

> the right to talk to us about your hours, your work, your working conditions, your pay and *everything* else concerning your future and continued employment.
>
> * * * * *
>
> * * * Do not sign if you want to continue to speak for yourself, and be your own person. * * *

(emphasis in original) We hold that the Board did not err in finding that language to be a violation.

Next the Board found that the Company had violated section 8(a)(1) by urging employees to report anyone who "tries to cause you any trouble at your work, or puts

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you under any kind of pressure to join a union. * * *" In *Lutheran Hospital of Milwaukee, Inc. v. NLRB*, 564 F.2d 208, 211 (7th Cir. 1977), vacated on other grounds, 438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 1145 (1978), this court enforced a Board order because we

> agree[d] with the administrative law judge that the letter * * * invited employees to report the names of union organizers to the director. The letter in no way distinguished between organizing activities that are statutorily protected and conduct that is illegal in asking employees to report cases of "pestering or pressure to join." It would have been reasonable for an employee who received the letter to draw the inference that any organizational activity on behalf of the union would be reported to the director and that the identified participants in the organizational campaign would be punished.

The letter at issue here also fails to distinguish between coercive conduct and lawful organizing activity. It urges employees to report anyone who "puts you under any kind of pressure. * * *" We thus uphold the Board's finding. *Accord, Bank of St. Louis v. NLRB*, 456 F.2d 1234, 1235 (8th Cir. 1972); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1159–61 (5th Cir. 1977).

Third, the Board determined that the Company violated section 8(a)(1) by threatening to discover the identity of union card signers and take reprisals against them. The disputed paragraph read:

> Don't be fooled into signing misleading union cards. It is said that when you sign such a card, no one other than a Union representative, or a representative of the National Labor Relations Board will ever see this card. This is not the truth. In many instances, the signed card is disclosed to the company by the union, the NLRB, or both of them. Be careful about what you sign—don't sign ANYTHING unless you KNOW what you are signing and what it might mean to you, your family, or your fellow employees.

The Company contends that our decision in *NLRB v. Sparton Mfg. Co,* 355 F.2d 523 (7th Cir. 1966), and the Sixth Circuit's decision in *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (6th Cir. 1967), are controlling and preclude enforcement on this issue. We do not agree.

In *NLRB v. Sparton Mfg. Co., supra,* our court considered only the last sentence of the above-quoted paragraph, which in that case was contained in a speech given by the company's general manager. We there concluded that in the absence of any history of antiunion or other coercive conduct by the employer, the Board was unreasonable to rely on that single portion of the speech to find an unlawful threat. The case at bar is distinguishable from *Sparton* because here we are considering the sentence containing the "be careful" message at issue in *Sparton* together with the immediately preceding sentence warning that signed union cards might be disclosed to the company. Taken as a whole, that paragraph could well lead employees to believe that the identity of card signers would probably be disclosed, and that there was a reason such disclosure should be carefully avoided.

Moreover, in our case we have already noted two other parts of the same letter that violate the Act. Thus we cannot say as we did in *Sparton* that the disputed language occurs in the absence of any other illegality.

Although we are not of course bound by the Sixth Circuit's decision in *NLRB v. Hobart Bros. Co., supra,* that case is also distinguishable. The majority in *Hobart* found a likely "legitimate company purpose" in the warning that authorization cards might not be kept secret. There the union had itself initiated the issue of secrecy in its own letter to the employees by promising that the identity of those who signed would not be revealed.

> Like the union's promise of increased economic benefits, its promise of secrecy in signing cards could also be disputed by the company. After initiating this issue in its original message, the union cannot complain if the company seeks to reply thereto.

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1372 F.2d at 205.[1] In our case there is no evidence that the company was responding to any union-initiated claim.

Further, as was the case in *Sparton*, the majority in *Hobart* looked to the surrounding circumstances in order to determine whether the language was threatening. Noting that the Board found nothing more to support its interpretation of the letter and that another alleged unfair labor charge had been rejected by the trial examiner, the majority found the evidence insufficient to support the Board's finding of a violation. Here there were two other violations of the Act in the same letter.

Mindful of the fact that we must assess the disputed language from the employee's point of view, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918 1941–42, 23 L. Ed.2d 547 (1969), we conclude that the Board's interpretation in this case was reasonable. Enforcement is granted in full.

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[1] Judge Edwards, dissenting in *Hobart*, remarked:

> What legitimate company purpose could conceivably be served by its disputing the union's pledge of secrecy of the employee's signature? The Board found, and I think common sense tells us rightly, that the purpose of the company letter was to tell its employees that fear of economic reprisal was a realistic one, and hence, they should "be careful" about what they signed unless they knew what it meant to themselves and their families.

372 F.2d at 308–09.

Florida Steel Corporation v. NLRB

NLRB v. Florida Steel Corporation

648 F.2d 233 (5th Cir.), June 15, 1981

On petition for adjudication in civil contempt

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges, and LYNNE,* District Judge

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KRAVITCH, Circuit Judge: The allegedly unlawful conduct of Florida Steel Corp. [Florida Steel] now before us [1] is the showing of an anti-union videotape. The National Labor Relations Board [the Board] petitioned this court for an adjudication of civil contempt against the company on the ground that the showing violated three previous orders of this court,[2]

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*District Judge of the Northern District of Alabama, sitting by designation.

[1] Florida Steel has a long history of litigation before this court. *See infra.* In an earlier case, we noted that "the controversy has gone on so long between (unions and the company) it reminds one of the legendary feud between the 'Hatfields and the McCoys.'" *N.L.R.B. v. Florida Steel Corp.*, 586 F.2d 436 (5th Cir. 1978).

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prohibiting Florida Steel from, *inter alia,* in any manner interfering with, restraining or coercing employees in the exercise of their rights protected by Section 7 of the National Labor Relations Act in violation of § 8(a)(1).[3] The Special Master appointed by this court to make findings of fact and conclusions of law found that the company's use of certain portions of the videotape violated our previous orders. He recommended that Florida Steel be held in contempt and various remedies be imposed. The Company here challenges the Special Master's conclusions; the Board in turn urges us to impose greater sanctions than those suggested.[4] We conclude that the Special Master correctly found Florida Steel in contempt and that the proposed remedies are sufficient. Hence, we adopt those recommendations.

Florida Steel manufactures, processes and sells steel and steel-related products. It maintains facilities at Tampa, Jacksonville, Miami, Fort Lauderdale, Fort Meyers, Orlando, and Indiantown, Florida; Charlotte and Raleigh, North Carolina; and Aiken, South Carolina.[5] The Steelworkers Union represents employees at the Charlotte and Indiantown plants. The instant controversy arose during that union's organizational campaign at the Tampa facility during which Florida Steel produced and exhibited a videotape designed to "prevent" employees from signing union authorization cards.[6] The film was aimed primarily at

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newly hired hourly employees although salaried and supervisory personnel were to view it as well. To produce the film, the company's Public Relations Manager, Bobbie Willis, hired an independent advertising and public relations firm that had previously done anti-union campaign work for the company. James Hogue, Vice President Industrial Relations, approved the finished product entitled "Look Out for the Cards" and directed that it be distributed to Florida Steel plants to be shown to all current employees and those hired in the future. Only those employees represented by the Steelworkers at Indiantown and Charlotte were excluded from this directive.[7] No active organizing, save minor activity at Jacksonville and Tampa, occurred after the videotape's distribution.

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[2] 221 NLRB 371 (1975), *enf'd,* 534 F.2d 1405 (5th Cir. 1976). In this case, the Board found that the company violated § 8(a)(1) and (3) of the Act by refusing at its Tampa plant to institute its corporate-wide quarterly wage review policy and to grant wage increases thereunder to employees within the proposed bargaining unit covered by the union's election petition.

222 NLRB 955 (1976), *enf'd,* 536 F.2d 1385 (5th Cir. 1976). Here, the Board found that the company violated § 8(a)(1) and (3) of the Act by delaying the regularly scheduled wage increases due its Jacksonville employees because the union had filed a petition for a Board election among these employees. The Board's order, as enforced by this court, required, in addition to its injunction that it refrain from violating § 8(a)(1) *infra,* that the company cease and desist from "withholding pay raises and/or fringe benefits from any of its employees throughout its entire operations corporate-wide because employees have chosen a union to represent them, or because a union has filed a petition for certification to become the bargaining representative for its employees."

224 NLRB 587 (1976), *enf'd,* 552 F.2d 368 (5th Cir. 1977). The Board here found that the company violated § 8(a)(1) and (3) by discharging and refusing to reinstate a Tampa employee because of his union activities and that it additionally violated § 8(a)(1) by coercively interrogating an employee, unlawfully polling employees during the representative election campaign and threatening an employee with loss of work if he voted for the union.

In a fourth case, not heard by this court, Board Case No. 12–CA–6881, Board Approved Settlement Stipulation October 21, 1977 (DS–1002), consent judgment entered March 7, 1978 (5th Cir. No. 78–1370) (Tampa), the Board entered an order, upon the settlement stipulation, requiring the company, *inter alia,* to cease and desist from "engaging or soliciting or employing Wackenhut corporation or any other internal intelligence investigators to engage in the surveillance of and to report on the union activities of its employees [in] any of its corporatewide facilities." The stipulation additionally provided that "this settlement stipulation and ensuing Board Order or Court Decree may be used by the board in any other proceeding before the Board or an appropriate Court to the same extent as an adjudicated decision of the Board enforced by a United States Court.* * *

[3] 29 U.S.C. Sec. 151 *et seq.:* Section 8(a)(1) of the Act (29 U.S.C. Sec. 158(a)(1)) states that it shall be an unfair labor practice "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 (29 U.S.C. Sec. 157), reads in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.* * *"

[4] The Board does not contest the Special Master's conclusions with respect to those portions of the tape it earlier argued violated § 8(a)(1) and which the Special Master found benign.

[5] In addition, Florida Steel maintains several reinforcing and fabricating facilities throughout the Southeast.

[6] The memorandum James Hogue, Vice President for Industrial Relations, sent to Bobbie Willis, Public Relations Manager, defined the videotape's objective:

> To prevent the employee from signing a union authorization card whether he is approached by the professional union organizer or by a fellow employee.* * *
>
> [T]he prime objective is to make the employee apprehensive so that he will ask questions and not readily sign an authorization card whether it is put to him from a fellow employee or from a union organizer.

The Special Master found that two aspects of the videotape violated the earlier orders of this court: 1) the description of comparative wage increases given by the company at a union (Fort Lauderdale) and a non-union (Miami) plant; and 2) a segment suggesting that employees who had signed an attendance roster at a union meeting at the Indiantown facility were later forced to give testimony at a government hearing. The Special Master found that both of these segments violated § 8(a)(1) of the Act in that they contained "threats of reprisal" [8] as a result of union support. We agree.

In reaching these conclusions, the Special Master held that where the Board seeks an adjudication of civil contempt, it must do so by clear and convincing evidence. This is the proper standard of proof. *N.L.R.B. v. Alamo Express, Inc.,* 395 F.2d 481 (5th Cir. 1968). Since this proceeding is in civil, not criminal, contempt, the company's intent is not at issue, only its actual compliance with this court's orders. *N.L.R.B. v. Crown Laundry & Dry Cleaners, Inc.,* 437 F.2d 290 (5th Cir. 1971); *N.L.R.B. v. Lawley,* 182 F.2d 798 (5th Cir. 1950). We need not, therefore address the question of wilfulness.[9] Finally, in reviewing the Special Master's findings of fact, we are bound by the clearly erroneous standard. Fed.R.Civ.P. 53(e)(2); *N.L.R.B. v. J.P. Stevens & Co., Inc., Gulistan Div.,* 538 F.2d 1152 (5th Cir. 1976). Our review of those findings shows that they meet that standard.

The Supreme Court, in *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969), recognized an employer's right to comment on unionism or particular unions provided that such communications do not contain a "threat of reprisal or force or promise of benefit." Any prediction as to the consequences of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Id.* Furthermore, the evaluation of whether a prediction passes muster under the above standard must include consideration not only of the content of the employer's remarks but also the context in which they are made and their cumulative effect. "The question is not only what the employer intended to imply but also what the employees could reasonably have inferred." *N.L.R.B. v. Kaiser Agr. Chem. Div. of Kaiser A&C Corp.,* 473 F.2d 374 (5th Cir. 1973).

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In this light it is appropriate to review the company's past practices that might affect employees' interpretation of the challenged portions of the videotape. Since 1966 it has been the company's practice to conduct periodic wage surveys at each of its facilities and to grant wage increases varying between plants as a result of such surveys. Since 1974 this practice has been an established benefit known of and expected by employees. This and other courts have held unlawful Florida Steel's withholding of such wage increases from those employees who selected union representation. *Florida Steel Corp.,* 220 NLRB 260 (1975), *enf'd,* 543 F.2d 1389 (D.C. Cir. 1976); *Florida Steel Corp.,* 220 NLRB 1201 (1975), *enf'd,* 538 F.2d 324 (4th Cir. 1976); *Florida Steel Corp.,* 221 NLRB 371 (1975), *enf'd,* 534 F.2d 1405 (5th Cir. 1976) (the Tampa case *supra*); *Florida Steel Corp.,* 222 NLRB 955 (1976), *enf'd,* 536 F.2d 1385 (5th Cir. 1976) (the Jacksonville case *supra).*

The segment of the videotape dealing with wage increases described the company's practices at its Fort Lauderdale and Miami plants between 1970 and 1973. In 1970 Fort Lauderdale employees had voted for representation, Miami employees against. The script read:

> At Fort Lauderdale, the Company was required by law to negotiate with the union before making any wage increase. Negotiations continued for 14 months at Fort Lauderdale with no agreement and no wage increase. In Miami, each employee averaged an increase of $500 in wages

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[7] The company also did not air the film to employees at Orient Road, Tampa who had seen anti-union campaign material upon which the videotape was based.

[8] *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

[9] In *Crown Laundry,* writing for this court, Judge Wisdom stated:

> The absence of wilfulness on the part of the Company's top management cannot relieve the Company from civil contempt. The crucial issue in civil contempt proceedings, as distinguished from criminal contempt, is not the employer's state of mind but simply whether the Court's order was in fact violated. *McComb v. Jacksonville Paper Co.,* 1949, 336 U.S. 187 [190], 69 S.Ct. 497[499], 93 L.Ed. 599, 604; *N.L.R.B. v. Lawley,* 5 Cir. 1950, 182 F.2d 798, 800. Since clear and convincing evidence supports the Special Master's conclusion that the Company, through its agent Baxter, has violated the Act and this Court's earlier order, we have no choice but to adjudge the Company in civil contempt.

during the same 14-month period. Even when Fort Lauderdale employees wanted to accept a contract, the union refused because the Company would not agree to withhold union dues from employees' paychecks. After Florida Steel had negotiated with the union for 14 months with no agreement, the employees voted the union out. Then the Company was able to give wage increases without first bargining with the union, just like they had been doing all along in Miami.

A similar set of events were then described as being repeated in 1972. Accompanying the spoken message was a visual display that in capsule form spelled out the harsh effects of unionization:

January 1970

Ft. Lauderdale	*Miami*
Employees voted Yes	Employees voted No
("Yes" flashing on and off)	("No" flashing on and off)
No wage increase	No delay in wage increases
	("No" flashing on and off)

* * * * *

14 M-O-N-T-H-S

* * * * *

Union turns down contract because it did not include "check-off"

March 1971

Ft. Lauderdale	*Miami*
Employees Voted Union OUT	Improved Wages and Benefits

* * * * *

Second Union Election

Ft. Lauderdale	*Miami*
Employees voted Yes	Employees voted No
("Yes" flashing on and off)	("No" flashing on and off)
No wage increase	NO DELAY
	(flashing on and off)

* * * * *

12 M-O-N-T-H-S

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Ft. Lauderdale	*Miami*
Employees voted Yes	Employees voted No
("Yes" flashing on and off)	("No" flashing on and off)
	NO DELAY
No wage increase	(flashing on and off)

* * * * *

Union had only 5 meetings with Florida Steel

* * * * *

June 1973

Union abandons employees

From these facts, and our own viewing of the tape, we agree with the Special Master that "[t]he clear implication of the videotape then is that, but for the Union's unwillingness to agree to the terms of the entire contract package offered by the Company, employees at Fort Lauderdale would have received the wage increases which were given at Miami."

This segment of the videotape also contained the following statement:

> At Fort Lauderdale the Company was required by law to negotiate with the union before making any wage increases.

All parties agree that this sentence figures centrally in our determination of whether this portion of the tape violates our previous orders prohibiting violation of § 8(a)(1). We agree with the Special Master that the videotape's "clear implication" is that the above-quoted statement accurately describes the law. But, as note above, this is not the law: four courts to date have held that Florida Steel may not withhold the periodic pay increases based on its annual surveys to union employees.[10] By implying that it may lawfully do so (or because employees could reasonably infer such from the film), Florida Steel threatened employees to the effect that electing a union would delay or prevent wage increases and other benefits that would otherwise be granted. In three previous cases,[11] we held that Florida Steel may not so threaten its employees; the company has thus acted in contempt of those decrees.

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The second portion of the tape[12] the Special Master found violative of § 8(a)(1) concerns an incident that occurred prior to an election at the Indiantown plant in 1974. Hogue, in a memorandum to Willis, suggested that she develop a part of the tape "around the Indiantown situation where the employee may end up finding himself testifying in court." The finished script read:

> The Sign the Union Card game is full of tricks. These tricks have been pulled on a number of Florida Steel employees. For example, * * * [employees at Indiantown] were induced while attending a union meeting to sign an attendance roster and they ended up with their name on

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[10] Those decrees, two of which were pronounced by this court, may not be collaterally attacked in this contempt proceeding. *Maggio v. Zeitz,* 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed 476 (1948).

[11] *See* note 2 *supra.*

[12] The videotape catechism-style is divided into "lessons." This segment is titled "Lesson 2."

> some kind of a volunteer organizing committee much to their surprise. These employees were told that their signing would not obligate or bind them in any way. It was just a list to record who attended the meeting. So, the union might use *your* name without permission, and if the union does use your name, you might end up having to testify at a public federal government hearing. The point is Don't Sign Anything not a card or an attendance record or anything else, unless you know what it means and what affect it could have on you, your job, and your relationship with the Company. (emphasis and capitalization in original script)

The Special Master found that this segment violated § 8(a)(1) in two respects: it implied that the union had misused the names of employees who had attended the union meeting, despite the fact that the Board, in 1975, had found that no such misuse had occurred, and second, the last sentence's admonition implied that an employee's attending a union meeting, testifying at a public hearing, or signing a union card might bear adversely on his job and his relationship with the company. We agree with the Special Master that these implications constituted a "concealed threat." That conclusion is easily reached with respect to the description of the Indiantown incident based as it was on facts found not to have occurred. With respect to the Special Master's determination regarding the last statement, the seemingly innocent caution that employees refrain from signing anything unless they know its meaning and effects, we turn again to *Gissel.* There, the Supreme Court illuminated some of the factors bearing upon the determination of whether an employer's statement constitutes a threat. Most important in the present context, we believe, is the nature of the relationship between employer and employee, the backdrop against which such statements are made:

> [A]ny balancing of [an employer's rights of free speech and employees' rights to associate freely] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

In our judgment an employee viewing "Look Out for the Cards" might readily conclude from the last line of the above quoted "lesson" that signing a union card—or even an attendance roster at a union meeting—might have adverse consequences upon his job in any of a number of ways including his longevity, grade, salary, and working conditions.[13] Though camouflaged with laudable aphorism, such threats are impermissible.

As a result of these conclusions, the Special Master recommended that Florida Steel be held in civil contempt and proposed a variety of remedies, including: 1) refraining from displaying "Look Out for the Cards" without first expurgating the two segments discussed above; 2) refraining from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights; 3) posting notices of the contempt adjudication; and 4) paying all costs and expenditures of the Board. The Special Master refused, however, to impose extraordinary remedies requested by the Board on the ground that "this is not a case of flagrant violation of the Court's judgments." In particular, he noted that Florida Steel had deleted the segment of the tape concerning wage increases at Miami and Fort Lauderdale in December 1978 after learning that the Board viewed it as impermissible. On appeal, the Board argues that the Special Master's conclusion was erroneous—Florida Steel flagrantly violated the court's orders—and that extraordinary remedies should therefore be imposed.[14]

In adopting this stance, the Board correctly notes that the proper aim of judicial sanctions for civil contempt is "full remedial relief," *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 193, 69 S.Ct.

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[13] The Special Master, in concluding that this segment violated § 8(a)(1), evinced his awareness that the statement in question must be viewed in the context of the tape in its entirety.

> Although the Company might argue that the intent of this segment was merely to insure that employees were fully aware of what they were in fact signing so that their actions would not be taken out of naivete or ignorance, one must ask the question how would a signature on a union document and a subsequent appearance at a government hearing affect the employee's job and relationship with the Company? In the context of an anti-union film, one is compelled to conclude that the intended message is that the job and the relationship would be in jeopardy. An isolated admonition to "be careful what you sign" is not what is presented by the videotape. It is a threat of adverse consequences to an employee who signs an attendance roster whether that threat pertains to the fear of testifying at a hearing or to the fear that the employee may lose his job.

[14] The union, as amicus, strongly urges the same position.

497, 93 L.Ed. 599 (1949), that such sanctions should be "adapted to the particular circumstances of each case," *West Texas Utilities Co., Inc. v. N.L.R.B.*, 206 F.2d 442, 448 (D.C. Cir. 1953), and that the only limitation upon the sanctions imposed is that they be remedial or coercive but not penal, *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir.), *cert. denied*, 384 U.S. 929, 86 S.Ct. 1380, 16 L.Ed.2d 532 (1965). Specifically, it urges this court to impose a prospective fine, union access, and notice distribution.[15]

The Board's essential argument in favor of a prospective fine is first, that such a fine is not an extraordinary remedy (as the Special Master concluded), and second, that it is the remedy that hits the company where it hurts most—the pocketbook—and thus the remedy most likely to be effective.[16] While we agree with the second contention—prospective fines are a strong inducement toward compliance—we disagree with the first: the remedy is extraordinary and should be imposed only where violations have been flagrant and lesser remedies appear likely to fail. Since we agree with the Special Master's finding that "this is not a case of flagrant violation" and we believe that Florida Steel as a result of the remedies recommended by the Special Master will comply with this court's orders, we reject the Board's request.

The Special Master concluded that "flagrant violation" of this court's judgments was not at hand primarily because Florida Steel had corrected that conduct forming the principal basis for his finding of contempt[17] it: had deleted the portion of the videotape discussing wage and benefit practices at Miami and Fort Lauderdale after learning that the Board viewed that segment as impermissible. The only remaining portion of the tape found contumacious was that relating to misuse of employees' names. Hence, he determined extraordinary remedies were not in order and refused to impose prospective fines, union access, and notice distribution.

In support of its claim that prospective fines are "frequently employed by this Court and others," the Board directs us to several cases which in our view do not support this proposition. In *N.L.R.B. v. J.P. Stevens & Co., Inc.*, 563 F.2d 8 (2d Cir. 1977), the court held that strong arguments favored a compliance fine because Stevens had acted in contempt of its orders twice, with more than thirty individual violations.[18] Likewise, in *N.L.R.B. v. Shill Steel Products, Inc.*, 480 F.2d 586 (5th Cir. 1973), we found a prospective fine appropriate where the company had a history of "extreme anti-union activities," *id.* at 594, and we found the challenged conduct a "flagrant attempt to avoid the conseqeunces of an order of this court," *id.* at 596.[19] Hence, we conclude that a prospective fine is an extraordinary remedy, not called for in the instant case.[20]

For like reasons, we conclude that union access and additional notice i.e., mailing and reading aloud the court's order to employees, are not, as the Special Master concluded, necessary to effect full remedial relief. The Board's argument that these are the only ways in which the union can respond to the company's illegal assertions

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[15] The Board requested the following remedies, respectively, regarding union access and notice distribution:

(1) Upon request of any union or unions made within six months from the date hereof, immediately granting to such unions and their representatives reasonable access to the Company's bulletin boards and all places where notices to employees are customarily posted for a period of one year from the date of such request, and afford such unions reasonable access to all non-work areas to communicate with employees in such areas during non-work time. This is not intended to effect or limit access to the Company's premises to which unions may be entitled by law during work-time.

(2) a. Mailing copies of said signed notice and contempt adjudication to each of its employees and providing to the Director of the Twelfth Regional Office of the Board a list of the names and addresses of all employees to whom said documents were mailed, together with proof of mailing; and

b. Convening during working hours all of the Company's employees, reading to its employees the contents of the said Board notice in the presence of a Board representative.* * *

[16] It notes that if a prospective fine is not levied here it may be imposed for future violations only via a criminal contempt proceeding, a far more difficult hurdle.

[17] In pointing to this fact, the Special Master noted that he did so not to denigrate the seriousness of the company's contumacious conduct but to formulate appropriate remedies.

[18] Stevens' violations had already been described as "massive, cynical, and flagrantly contemptuous." The Second Circuit wrote: "There is no need to add any further adjectives to this chorus." 583 F.2d at 25.

[19] The Board also directs our attention to *N.L.R.B. v. Johnson Manufacturing Co. of Lubbock*, 511 F.2d 153 (1975). There, too, we found the company in "flagrant contempt." *Id.* at 154. *Johnson* does not, however, lend support to the Board's argument for a prospective fine of the sort the Board seeks. In *Lubbock* we did not impose a fine conditioned upon future noncompliance but rather a fine conditioned upon the employer's failure to purge himself of contempt by a specified date. The former, the remedy the board requests here, is a harsher sanction in that it allows a fine for conduct not already found violative of the Act. Where a fine is conditioned on compliance with orders based upon a specific finding of contempt, the path the employer must take to avoid such fine is much more clear.

[20] In noting (n.1 *supra*) the long history of litigation Florida Steel has had before this court, we do not contradict this conclusion. The remedy formulated, while not blind to the history of the company's union relations, must be proportionate to the illegal conduct at hand.

in the videotape fails because the posting of the Special Master's recommendations and this court's orders will serve as notice of the falsehoods and threats contained within the tape, and their illegality. Additionally, as the Special Master noted, no employee has viewed the segment of the tape dealing with Miami and Fort Lauderdale wage increases for the past two years. Under these circumstances and in light of our determination that a flagrant violation has not occurred, we conclude that the remedies recommended by the Special Master adequately correct the instant wrongs.

We therefore approve and adopt the Report of the Special Master recommending that Florida Steel be held in contempt. The motion of the Board for adjudication of respondent in civil contempt is thus granted. We direct respondent to purge itself of contempt by compliance with the remedies set forth within the Report and Recommendations of the Special Master.

Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Standard-Coosa Thatcher Carpet Yarn Division, Inc.

516 F. Supp. 1078 (N.D. Ala.), June 16, 1981

On action for informal settlement agreement

GUIN, District Judge: This cause came before the court upon cross-motions of the plaintiff, Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, and the defendant-intervenor, the National Labor Relations Board, for summary judgment, and upon reconsideration of a motion to dismiss by the defendant Standard-Coosa-Thatcher Carpet Yarn Division, Inc. Having considered the pleadings, submissions of counsel, and applicable law, the court is of the opinion that judgment is due the defendants as a matter of law, that there is no genuine issue of material fact, that there is no just reason for delay in issuing a final judgment, and that, therefore defendants' motion should be granted and plaintiff's denied, in conformity with the Memorandum Opinion entered contemporaneously herewith.

Accordingly, it is ORDERED, ADJUDGED and DECREED that defendant-intervenor's motion for summary judgment be and the same hereby is GRANTED; and it is

FURTHER ORDERED that defendant Standard-Coosa-Thatcher's motion to dismiss, upon reconsideration be GRANTED; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and the same hereby is DENIED; and it is

FURTHER ORDERED that final judgment be and the same hereby is GRANTED in favor of the defendant and defendant-intervenor and against the plaintiff, and that the plaintiff shall have and recover nothing of the defendant in this case.

Costs are taxed against the plaintiff.

MEMORANDUM OPINION

GUIN, District Judge: This cause is before the court upon motions by the plaintiff and the defendant-intervenor, the National Labor Relations Board, for summary judgment and upon reconsideration of the defendant Standard-Coosa-Thatcher's motion to dimiss. The National Labor Relations Board was granted leave to intervene by order of this court dated January 18, 1980.

The facts in this case are undisputed. Plaintiff-union and defendant-employer entered into an informal settlement agreement under 29 Code of Federal Regulations § 101.7 on February 5, 1979. The terms of the settlement agreement provided that the employer pay back wages to one employee for alleged discrimination and post a standard National Labor Relations Board notice stating that the employer would repay the back wages and refrain from future activities in violation of the National Labor Relations Act.

The informal settlement agreement provides in pertinent part:

> Refusal to Issue Complaint—In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and *this Agreement shall be between the Charged Party*

> *and the undersigned Regional Dicretor.* A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This
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> Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case. [Emphasis added]

Furthermore, the settlement agreement provides:

> Notification of Compliance—* * * Contingent upon Compliance with the terms and provisions hereof, no further action shall be taken in this case.

Subsequent to the execution of the settlement agreement by both the union and the employer, the agreement was approved on March 1, 1979, by the NLRB Regional Director; this approval is required by 29 C.F.R. § 101.7 and the terms of the agreement itself. On March 26, 1979, the employer notified the Regional Direcetor of the NLRB that it would not honor the settlement agreement, and the Regional Director thereupon withdrew his approval of the agreement on March 27, 1979.

Plaintiff now petitions this court for relief, claiming that the informal settlement agreement, once executed by the parties and approved by the Commissioner, constituted a complete and binding contract. Plaintiff requests the court to grant specific performance of the contract.

Defendant Standard-Coosa-Thatcher and Defendant-intervenor, the National Labor Relations Board, claim that this court has no jurisdiction to hear the complaint, asserting that jurisdiction is preempted by the unfair labor practice proceedings before the National Labor Relations Board. Defendants also claim that the contract was rendered null and void by the action of the Regional Director in rescinding his approval thereof.

Jurisdiction is asserted under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) which provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Plaintiff asserts that under the authority of *Retail Clerks International Association v. Lion Dry Goods, Inc.,* 369 U.S. 17, 82 S.Ct. 541, 7 L.Ed.2d 503 (1962) and *Deaton Truck Line, Inc. v. Local Union 612, etc.,* 314 F.2d 418 (5th Cir. 1962), the settlement agreement was a "contract" within the meaning of Section 301(a), assuming that the settlement agreement is a valid contract.

The plaintiff further claims that jurisdiction of this dispute is not preempted by the doctrine espoused in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), which stated that if an unfair labor practice is "arguably involved", the courts must defer to the administrative expertise of the National Labor Relations Board. In support of his position, the plaintiff cites *Smith v. Evening News Association,* 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962), which carved out an exception to the *Garmon* preemption doctrine for suits brought under Section 301 in which an unfair labor practice is also involved. However, the pertinent language in *Smith v. Evening News Association, infra,* provides:

> In *Lucas Flour* [*Local 174, Teamsters, etc. v. Lucas Flour Co.,* 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593] as well as in *Atkinson* [*v. Sinclair Refining Co.,* 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462] the Court refused to apply the preemption doctrine of the *Garmon* case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice *which also violates a collective bargaining contract* is not displaced by Section 301, but it is not
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> exclusive and does not destroy the jurisdiction of the courts in suits under Section 301.

371 U.S. at 197, 83 S.Ct. at 268–269. [Emphasis added].

The position that the exception to the *Garmon* preemption principle for section 301 which the Court carved out in *Smith* relates only to collective bargaining agreements is restated in *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), which provided:

> We have exempted Section 301 suits from the *Garmon* principle because of the evident Congressional determination that courts should be free to interpret and enforce *collective bargaining agreements* even where that process may involve condemning or permitting conduct arguably subject to the protection or prohibition of the National Labor Relations Act.

403 U.S. at 300, 91 S.Ct. at 1925. [Emphasis added].

The Court in *Motor Coach* rejected the Section 301 suit before it which was based on the implied-in-law contract between a union and an employee. "That is why" concluded the Court, "the principle of *Smith v. Evening News* is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473, 491 (1971).

The plaintiff's arguments, however, without reaching the clarification of *Smith v. Evening News,* that is outlined in *Motor Coach v. Lockridge, infra,* do not appear to be applicable in light of the language and nature of the informal settlement agreement involved in this cause. The settlement agreement in this case is a form agreement that provides, consistent with the policies of the National Labor Relations Board, that the agreement is between the charged party, the employer-company, and the Board. *See* the terms of the agreement as outlined, *infra.* The Fifth Circuit has clearly stated that the National Labor Relations Board may set aside a settlement agreement and reinstitute unfair labor practice charges when the terms of the agreement have been breached. *National Labor Relations Board v. Southeastern Stages, Inc.,* 423 F.2d 878 (5th Cir. 1970). *See also Gulf States Manufacturers, Inc. v. NLRB,* 598 F.2d 896 (5th Cir. 1979). It is undisputed that the charged party (the employer-company) has breached the terms of the agreement in this cause as the employer notified the Regional Director of the National Labor Relations Board on March 26, 1979 that it would not honor the agreement. Thus, it appears that the union cannot even claim that it is a third party beneficiary to the contract because the contract has been validly set aside and is no longer in existence.

Thus, it appears that under the preemption doctrine outlined in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), this court must defer to the administrative expertise of the National Labor Relations Board and, therefore, does not have jurisdiction over this dispute.

Judgment is entered in favor of all defendants upon reconsideration of the motion to dismiss filed by Standard-Coosa-Thatcher and under the authority of *Black Warrior Electric Membership Corporation v. Mississippi Power Co.,* 413 F.2d 1221 (5th Cir. 1969).

An order consistent with this memorandum opinion will be entered contemporaneously herewith.

Arthur Eisenberg, Reg. Dir. v. Wellington Hall Nursing Home, Inc.

Arthur Eisenberg, Reg. Dir. v. Wellington Hall Nursing Home, Inc.

651 F.2d 902 (3d Cir.), June 17, 1981; amended
June 30, 1981

On appeal from D.C.N.J.

Before GIBBONS, HUNTER and GARTH, Circuit Judges

904

GIBBONS, Circuit Judge: This is an appeal by the Regional Director of the Twenty-second Region of the National Labor Relations Board on the Board's behalf from an order of the District Court of the District of New Jersey denying in part a petition, pursuant to section 10(j) of the National Labor Relations act, 29 U.S.C. § 160(j), for a temporary injunction pending Board resolution of unfair labor practice charges.[1] The employer, Wellington Hall

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[1] Section 10(j) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon

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Nursing Home, Inc., cross appeals from the same order to the extent that it granted injunctive relief. On the Board's appeal we reverse and remand for the entry of an order reinstating certain employees. On the employer's cross-appeal we affirm.

I.

Wellington Hall owns and operates a nursing home in Hackensack, New Jersey. On October 1, 1976, Local 1115 Nursing Home & Hospital Employees Union, Division of 1115 Joint Board (the Union) was certified by the Board as the exclusive bargaining representative of approximately 85 of Wellington Hall's service and maintenance employees. The certification did not lead to a mutually satisfactory collective bargaining relationship, and beginning in October 1976 the Union filed a series of unfair labor practice charges alleging refusal to bargain and various forms of retaliations for and threats about employees engaging in protected activity. Several of the Union's charges resulted in unfair labor practice hearings before the Board, and at least two Board orders against Wellington Hall were enforced by this court.[2] One of our judgments, dated December 5, 1979, enforced a Board order that Wellington Hall bargain in good faith with the Union and refrain from interfering with restraining or coercing employees in the exercise of rights protected by section 7 of the Act, 29 U.S.C. § 157. *See Wellington Hall Nursing Home, Inc.*, 240 N.L.R.B. 639 (1979), *enforced, NLRB v. Wellington Hall Nursing Home, Inc.*, No. 79-1415 (3d Cir. Dec. 5, 1979). Additional unfair labor practice charges were made thereafter. Those giving rise to this appeal grow out of the Union's attempt to bargain. On June 9, 1980, the Union initiated a request for a **905** bargaining meeting, offering alternative dates. Wellington Hall indicated these were inconvenient and suggested other dates. While negotiations over a time for a bargaining session were going on, the Union held a meeting of bargaining unit members to discuss demands and designate an employee negotiating committee. A bargaining meeting finally was scheduled for June 25, 1980, but prior to that time several of the employees named by the Union as members of the employee negotiating committee were discharged after June 25. In addition, Wellington Hall discharged other employees who had attended the Union meeting, or solicited employees to attend. On June 24, Wellington Hall cancelled the June 25, scheduled meeting. It also cancelled a subsequently scheduled August 28 meeting. The excuses offered in each instance fail to mitigate the effect of employer resistance, especially in light of the totality of the circumstances. The Union filed unfair labor practice charges with the Board with respect to the employee discharges, and a complaint and notice of hearing issued. The complaint alleges that the employees were discharged because they engaged in, or sought to engage in concerted activities for the purposes of collective bargaining or mutual aid and protection. *Wellington Hall Nursing Home, Inc.*, Case No. 22-CA-10108 (Sept. 5, 1980).

On October 8, 1980, the Regional Director filed in the District Court a petition for an injunction under section 10(j) of the Act, setting forth the appropriate jurisdictional facts, appending a copy of the unfair labor practice complaint about employee discharges pending before the Board, and alleging that he has reasonable cause to believe the unfair labor practices have been committed and are likely to be continued. On the return of an order directing Wellington Hall to show cause why a temporary injunction should not issue the court heard testimony, and on November 18, 1980 it entered the order from which both parties appeal. The court restrained Wellington Hall from discharging employees in the bargaining unit without first giving written notice to the employee, the Union, and the Board. The order gives the Board and the Union five business days to object to any discharge and to request that a disputed discharge be referred to a special master for resolution. Wellington Hall's appeal puts the injunction in issue. The court refused to order reinstatement of the eight employees whose discharge is the subject of the pending Board complaint. The Board appeal seeks a reversal of that refusal. On February 4, 1981 a panel of this court granted the Board's motion for an injunction pending appeal, directing reinstatement of five of the discharged employees.

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shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j).

[2] *NLRB v. Wellington Hall Nursing Home, Inc.*, No. 80-2144 (3d Cir. Oct. 2, 1980); *NLRB v. Wellington Hall Nursing Home, Inc.*, No. 79-1415 (3d Cir. Dec. 5, 1797).

II.

Wellington Hall contends that the district court erred in holding that the regional director had demonstrated his reasonable cause to believe that the elements of an unfair labor practice are present. Thus, it contends, no injunction should have issued. In *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 143 (3d Cir. 1975), we held that reasonable cause to believe a violation of the act has occurred, a standard for injunctive relief originally developed in cases arising under section 10(*l*) of the Act, is also applicable to section 10(j) proceedings. The trial court's determination that this low threshold of proof was met is reviewed by a clearly erroneous standard. *Angie v. Sacks*, 382 F.2d 655 (10th Cir. 1967). The trial court found that the Board had reasonable cause to believe the discharges were motivated by anti-union animus. There is evidence of a history of employer resistance to collective bargaining. Each employee discharged was an active union supporter, and five of the eight who were discharged were designated members of the union-sponsored six employee negotiating committee.[3] Wellington Hall **906** maintains all were discharged for poor work quality, tardiness, and absenteeism. However, many of the problems referred to in its notices of discharge were remote in time or of minimal gravity. Thus the Board could reasonably believe that the notices were records compiled as a basis for discharge from payroll records and time cards long after the fact.

Wellington Hall relies on caselaw dealing with mixed motive discharges, such as *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978). The cases relied on, however, are all cases reviewing final Board action, in which we review for substantial evidence in the record as a whole of the employer's anti-union motivation. In a section 10(j) or 10(*l*) case the court need not, indeed should not, make a finding of employer motivation. It need only find a reasonable cause for belief that there was such a motivation. That standard of proof is fully satisfied on this record.

III.

Although the district court properly held that the Board satisfied the reasonable belief standard for section 10(j) relief, and properly enjoined future retaliatory discharges or intimidations of union supporters, it refused to order reinstatement of the eight discharged employees. In doing so it relied upon the provision in section 10(j), found also in section 10(*l*), that, in the public interest, the court may grant "such temporary relief or restraining order as it deems just and proper." The denial of reinstatement was not predicated on a finding that the Board would be likely, ultimately, to find good cause for the discharge independent of the employees' union activity. Rather the court fashioned a new and unprecedented rule of law that reinstatement pending a board hearing is not a proper section 10(j) remedy. The court advanced two reasons for this rule, neither of which are persuasive.

First, the court noted that when the Board sought temporary injunctive relief it was not required to post an injunction bond. That is so, but the lack of such a requirement reflects a congressional decision that in protecting the public interest the Board must in section 10(*l*) cases, and may in section 10(j) cases, preserve the status quo. Even though enormous economic interests may be at stake, as in *Consolidated Express, Inc. v. New York Shipping Ass'n., Inc.*, 641 F.2d 90 (3d Cir. 1981), *mandamus and prohibition denied*,——U.S.——, 101 S.Ct. 2008, 68 L.Ed.2d 318 (1981), and *Pascarell v. New York Shipping Ass'n. Inc.*, 650 F.2d 19 (3d Cir. 1981), the unavailability of an injunction bond is no reason for permiting a change in status quo which risks giving ongoing effect to what may be an unfair labor practice. Moreover the concern about protecting the employer from the harm from an injunction is in the employee reinstatement context entirely misplaced. The employer will receive the benefit of the reinstated employees' labor in the interim. If there is a serious question about the quality of any employee's future work performance he can be discharged when the question arises. The injunction which was fashioned here with respect to those employees who were not discharged demonstrates that there is ample room for accommodation of management's legitimate need to supervise the workforce.

The court also noted that there was no need for a reinstatement order because the Board, if it found that the discharges were in retaliation for engaging in protected activity, could order reinstatement with back pay. That reasoning, however, misapprehends the purpose of section 10(j) relief. When the Board files an application for such relief it is not acting on

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[3] On February 4, 1981, this court ordered reinstatement of these five employees. The sixth member of the employee negotiating committee was also discharged, but reinstatement is not sought on her behalf.

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behalf of individual employees, but in the public interest. *See Eisenberg v. Hartz Mountain Corp., supra.* That interest is in the integrity of the collective bargaining process. If union supporters are excluded from the bargaining process pending resolution of unfair labor practice charges, the position of the designated bargaining representatives will in all likelihood be substantially undermined. All members of the bargaining unit may be affected by such an erosion of union support. Furthermore, the discharge of "active and open union supporters * * * risk[s] a serious adverse impact on employee interest in unionization." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980). When the Board, faced with an employer's resort to tactics calculated to undermine union support at a critical stage of the bargaining process, seeks section 10(j) relief, the focus of attention should not be on what relief may ultimately be granted to individual employees, but on the likelihood of harm to the bargaining process in the interim.[4]

This is not a case in which the Board tolerated erosion of union support by delaying for a long period after charges were filed before seeking section 10(j) relief. *Cf. Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975), *cert. denied*, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed.2d 385 (1976) (delay is "some evidence that the detrimental effect of the discharges have already taken their toll" such that reinstatement would probably be no more effective than final Board order). *See also Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138 (3d Cir. 1979) (six month time span can make difference in employee attitude). The Board moved promptly to preserve the status quo in an existing bargaining relationship already the subject of a fully litigated bargaining order, following a Board certification of the bargaining representative. The trial court's reasons for refusing to order resinstatment are legally insufficient. In view of the potential for irreparable harm to the designated bargaining representative from the loss of eight union supporters in the small bargaining unit, it was an abuse of the discretion that section 10(j) affords to refuse to order reinstatement. *Brown v. Pacific Telephone and Telegraph Co.*, 218 F.2d 542 (9th Cir. 1954) (as amended in 1955 on denial of rehearing).

IV.

The order appealed from will be affirmed insofar as it granted injunctive relief pending final Board action. It will be reversed insofar as it denied the Board's request for an order requiring reinstatement of eight employees. The order of this court granting injunctive relief pending appeal shall remain in effect until such time as an order consistent with this opinion is entered in the district court.

NLRB v. General Time Corporation

650 F.2d 872 (7th Cir.), June 17, 1981—249 NLRB 1204

On petition to enforce Board Order

Before FAIRCHILD, Chief Judge, and SPRECHER, and WOOD, Circuit Judges

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SPRECHER, Circuit Judge: The National Labor Relations Board has applied to this court for enforcement of its order issued against the Westclox Military Products Division of General Time Corporation ("Company"). The question we must decide is whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Sections 8(a)(1) and (3) of the National Labor Relations Act, ("Act") [1] by deferring payment of vacation pay to striking employees who were members of the United Steelworkers of America AFL–CIO–CLC ("Union").

I

The Company is engaged in the production of military timing devices. The Union has served as the exclusive collective bargaining representative of the Company's production and maintenance employees since 1971.[2]

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[4] Judge Biunno was also concerned that reinstatement might raise "an appearance of prejudging the issue as to any employee." In light of the above analysis, as well as the fact that § 10(j) relief is not premised on a determination of the merits, such concern is unwarranted.

[1] Sections 8(a)(1) and (3), 29 U.S.C. § 158(a)(1) and (3), provide in pertinent part that it is an unfair labor practice for an employer:

Each year, for the last 20 years, the Company has scheduled a plant shutdown and workforce vacation during the last two weeks in July. Since at least 1966, the collective-bargaining agreements between the parties have explicitly set forth that period as the Union members' first two weeks of annual vacation. These collective-bargaining agreements also contained a formula for determining the amount of vacation pay due based on the employees' "straight time" earnings during a portion of the "vacation year," which ran June 1 to May 31. The contracts did not set forth when vacation pay was to be received by Union members in relation to the time of the plant shutdown. Since 1966, however, all of the Company's employees have received vacation pay for the last two weeks in July on the Friday before the Monday that vacation was scheduled to begin.[3]

The most recent collective bargaining agreement ran from June 7, 1976 through June 2, 1979. The parties failed to reach an agreement upon a new collective bargaining agreement, and, consequently, the Union struck on June 3, 1979. The Union remained on strike until August 29, 1979, when a new contract was ratified by the Union membership.

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During the strike, the Company engaged in its normal July shutdown. The plant was shut down from Monday, July 16, through Friday, June 27. The Company paid vacation pay to all non-Union employees on Friday, July 13. Among those receiving such payments on July 13 were skilled craft unit employees represented by the International Association of Machinists ("IAM") who did not cross the Union's picket line.

The Company did not distribute vacation pay to the striking employees on Friday, July 13. Nor did the Company pay vacation pay on other dates thereafter, when requested by the Union. By letter dated July 30, the Company notified the striking empoyees that it was "not quarreling that eligible employees have vacation pay coming" but "[s]ince we do not have a contract the question of when this vacation pay is payable is an unresolved issue." The striking employees did not receive their vacation pay until after August 29, when a new contract was ratified.

The Union instituted this proceeding before the N.L.R.B. in response to the Company's refusal to distribute vacation pay until the new collective bargaining agreement was ratified. The Board found, in agreement with the Administrative Law Judge, that the Company violated Section 8(a)(3) of the Act by deferring the payment of vacation pay of its employees because they were engaged in protected concerted activity. In addition, the Board also found that the refusal to pay vacation pay was a violation of Section 8(a)(1) of the Act.

The Board's order requires the Company to cease and desist from continuing the unfair labor practices and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. The Board's order also requires the Company to make whole, with interest, all striking employees for any loss of wages they may have suffered as a result of the Company's failure to pay them vacation benefits on July 13. The Company must post appropriate notices, and, upon request, must make available to the Board or its agents, for examination and copying, all payroll records, time cards, personnel records and reports, and all other records necessary to analyze and compute the amount of backpay due. We enforce the Board's order.

II

An employer violates Sections 8(a)(1) and (3) of the Act if he unjustifiably denies accrued vacation pay to striking employes. *N.L.R.B. v. Great Dane Trailers, Inc,* 388 U.S. 26, 32, 87 S.Ct. 1792, 1796, 18 L.Ed.2d 1027 (1967); *N.L.R.B.* v. *Knuth Bros.*

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[2] The Union and its predecessor, the International Union of District 50, Allied and Technical Workers of the United States and Canada, with whom the Union merged in 1971, have represented the production and maintenance workers since 1941.

[3] The single exception to this practice occurred during a strike in 1973. The Union struck after the parties failed to agree upon a new contract after the expiration of the previous contract. The strike continued through the traditional July shutdown. At that time, vacation pay was not distributed to Union members until a new contract was ratified. The Union did not file unfair labor practice charges in 1973.

The Company does not argue that the Union's failure to file charges in 1973 estops it from complaining of the Company's actions in 1979. But the Company argues that the withholding of vacation pay during the 1973 strike shows that the Company actions in 1979 were consistent with past practice. We disagree. The traditional practice unquestionably was to distribute vacation pay prior to the July plant shutdown. We can draw no inferences from the practice in 1973, since it was an isolated occurrence and the fairness of the practice was never challenged or decided.

Inc., 584 F.2d 813, 816 (7th Cir. 1978); *Flambeau Plastics Corp. v. N.L.R.B.*, 401 F.2d 128, 135–36 (7th Cir. 1968), *cert. denied*, 393 U.S. 1019, 89 S.Ct. 625, 21 L.Ed.2d 563 (1969). Paying vacation benefits to a group of employees while withholding them from other is "discrimination in its simplest form." *Great Dane*, 388 U.S. at 32, 87 S.Ct. at 1796. Postponement, as well as outright denial, of vacation benefits to striking employees violates the Act. *See Allied Indus. Workers, AFL–CIO Local 289 v. N.L.R.B.*, 476 F.2d 868, 878 (D.C.Cir. 1973).

Thus, an employer is guilty of an unfair labor practice unless it can show that the refusal to grant vacation pay was justified in that it was motivated by legitimate objectives. *Great Dane*, 388 U.S. at 34, 87 S.Ct. at 1797, *System Council T–4 v. N.L.R.B.*, 446 F.2d 815, 819 (7th Cir. 1971), *cert. denied*, 404 U.S. 1059, 92 S.Ct. 740, 30 L.Ed.2d 747 (1972) ("Withholding accrued benefits from strikers is conduct 'inherently destructive' of employee rights and is an unfair labor practice unless the employer can prove a legitimate business purpose") (citations omitted).

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The Company advances several justifications for its refusal to grant vacation pay to striking Union members on July 13. The Company acknowledges that members of the Union had already accrued their entitlement to vacation pay when the collective bargaining agreement expired on June 3, 1979. But the Company argues that it was not obligated to distribute the vacation pay to Union members on July 13, 1979 for two reasons. First, there was no contract in effect, and, therefore, no vacation period specified. Second, the Union had submitted vacation proposals to the Company which could have changed both the amount of vacation pay due in 1979 and the time of the initial two-week vacation period. In short, the Company argues, the vacation period was just another negotiable term in the contract; in the absence of a contract, there could be no contract violation.

We find the Company's argument disingenuous. The right to vacation pay arose from the expired contract, the past practices of the Company, and the actual shutdown and payment of vacation pay to non-Union employees in July, 1979. Neither the expiration of the old contract nor alleged uncertainty as to the terms of the new contract has any bearing on the Company's refusal to pay vacation benefits.

First, even after expiration of a contract, employees' rights to traditional vacation pay do not expire. *Hi-Grade Materials Co.*, 239 NLRB 947, 956 (1978).[4] Even if a new collective bargaining agreement had never been reached, the Union members still would have been entitled to the accrued vacation pay. The contractual provision for vacation pay to accrue in the "vacation year" of June 1, 1978 to May 31, 1979, would be a nullity if a new contract was necessary to distribute the benefits accrued under the expired contract. The vacation period and payment date should be linked to the year in which the pay accrued. That the expired contract did not specify the date of vacation pay is not relevant. The vacation pay date had never been specified in previous contracts. Past practice clearly established the payment date as the Friday before the first Monday of vacation. To condition the receipt of benefits which accrued under the old contract on ratification of a new contract was plainly coercive.

In addition to being coercive, the Company's actions were discriminatory. The Company distributed vacation pay to IAM members, who honored the Union's picket line, and to salaried employees. The Company attempts to justify paying IAM members by pointing to the IAM contract, which specifically mentions the July 16 to July 29, 1979, shutdown. The Company cannot point to a similar contract for salaried employees, but claims that the shutdown period for salaried employees had also been definitely scheduled for that period. But the Company's attempt to distinguish Union employees is unconvincing. We cannot see how the Company can profess uncertainty as to whether the last two weeks in July would have been the Union members' vacation period, when the plant was shut down for all of the salaried and skilled craft employees during that period. This common type of plant-wide shutdown would seem to depend on all employees getting the same vacation period. It would strain common sense to find, as the Company would have us, that the shutdown was merely a bargained-for item, unique to the Union's contract.

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[4] In *Hi-Grade Materials*, the Board found that an employer should have paid employees for a contractually agreed holiday (Labor Day). The Board adopted the Administrative Law Judge's decision, which stated:

> Even if it is assumed, *arguendo*, that the contract was not continued on a day-to-day basis after September 6, payment for holidays was a practice of 10 years' standing, thus it was a condition of employment and the employees were entitled to pay for the holiday.

239 NLRB at 956.

The prohibition against withholding vacation benefits, first enunciated in *Great Dane,* has been applied to factual situations very similar to this one. For example, in *Wallace Metal Products, Inc.,* 244 NLRB No. 10 (1979), the Board found Section 8(a)(1) and (3) violations in an employer's

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failure to distribute accrued vacation pay to striking employees at the time of the usual plant vacation of the first two weeks in July. In *Wallace Metal,* the expired contract stated that the plant would be shut down for two weeks beginning "the first Monday of July of each year." 244 NLRB No. 10 at 15. In this case, the vacation dates had been specified for the three years covered by the contract. In both cases, the contract explicitly setting the shutdown had expired. In *Wallace Metal,* the Board held that accrued vacation pay must be paid at the "usual" time, despite the absence of a current contract specifying the date. We agree, and we see no relevant factual differences between the situation in *Wallace Metal* and the situation here. To conclude that an expired contract that had set a vacation period beginning "the first Monday of July of each year" fixes the vacation date, while a contract that sets a vacation date specifically for each year of the contract—but for the same time each year, the last two weeks of July—does not fix a vacation date would be absurd.

The Company's reliance on *G. C. Murphy,* 207 NLRB 579 (1973) is misplaced. In *Murphy,* the Board held that the employer did not violate Sections 8(a)(1) and (3) by requiring employees who honored a picket line, and thus were not working at the time of their scheduled vacations, to reschedule their vacations. Only those employees who had scheduled their vacations and then were not working when the vacations were to begin were affected. At the close of the strike, the union requested that the employees be given a lump sum vacation payment instead of time off with pay. The employer refused, stating that vacations would be rescheduled after the strike. The employer acted consistently with the existing contract, which required employees to take their vacation benefits in the form of time off with pay and not a lump sum. The Board found that the employer did not commit an unfair labor practice in following the terms of an existing contract where there was no proof of anti-union animus.

The situation in the case before us is different from the situation in *Murphy.* Here, the Company cannot rely on an existing contract to justify its refusal to distribute vacation pay to Union members. Rather, the Company can only rely on the *non-existence* of a contract. As discussed above, we reject this reliance. In addition, unlike the employer in *Murphy,* the Company traditionally shut down the entire plant during the last two weeks in July. The Company followed this tradition in 1979, and it distributed vacation pay to all but striking Union members on the traditional date. Thus, the *Murphy* result offers no assistance to the Company.

Finally, the Company argues that vacation benefits were the subject of pending negotiations and, therefore, it was not bound to pay the accrued benefits on the traditional date. But the Board adopted the Administrative Law Judge's finding that the 1979 vacation benefits were not a subject of negotiations leading to the contract ratified in August, 1979. The Company argues that we should reject the Board's finding. We decline to reject this finding because it is amply supported by substantial evidence in the record as a whole. The record shows that the formula for calculation of vacation pay for the vacation year that ended May 31, 1979, was set by the expired contract. Moreover, the Union's proposals concerning a change in calculation of benefits were withdrawn prior to the strike. Although some testimony was disputed regarding whether the Union discussed taking the two-week vacation and pay after the strike, the ALJ and the Board found that the vacation pay issue never rose to the level of being a major bone of contention between the parties during the course of the strike. The resolution of conflicts in testimony is peculiarly within the domain of the trier of fact. *Electri-Flex Co. v. N.L.R.B.* 570 F.2d 1327, 1331, 1332 (7th Cir.), *cert. denied,* 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 256 (1978). Thus, the Company cannot rely on the collective bargaining process to justify its refusal to distribute accrued vacation pay to striking Union members.

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In summary, we find that neither the expiration of the contract nor the spending negotiations for a new contract can justify the Company's refusal to pay accrued vacation benefits to striking Union members on July 13, 1979, the traditional pay date. The Board properly found violations of Sections 8(a)(1) and (3) of the Act.

III

The Board's remedial order requires the Company to pay interest on the vacation pay that was deferred from July 13 until August 29, 1979. Citing *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), *enf. denied on other grounds*, 322 F.2d 913 (9th Cir. 1963), and *Florida Steel Corp.*, 231 NLRB 651 (1977), the Company argues that interest on vacation pay accrues quarterly; thus, interest could accrue only if vacation benefits had been withheld beyond the quarter which ended September 30, 1979. The Company's interpretation of these cases is erroneous. These cases used quarterly accrual of interest on backpay awards because the amount of backpay due was calculated by offsetting actual quarterly earnings against each quarter of pay lost due to wrongful discharge. These cases do not imply that interest is not due for losses occurring over less than a quarter.

The purpose of allowing interest is to put the wronged employees in the position they would have been but for the unfair labor practice. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941). Interest has been routinely awarded in cases similar to the case before us. See *N.L.R.B. v. Knuth Bros., Inc.*, 229 NLRB 1204, 1206 (1977), *enforced*, 584 F.2d 813 (7th Cir. 1978); *Indiana & Michigan Elec. Co.*, 236 NLRB 986, 991 (1978), *enforced mem.*, 610 F.2d 811 (4th Cir. 1979). Here, the employees should have received vacation pay on July 13, 1979. They did not receive that pay until August 29, 1979. Thus, we find that the Board was well within its remedial authority to charge interest in order to compensate the Union members for the delayed payment.

For the foregoing reasons, we order enforcement of the Board's order.

NLRB v. Antonino Carilli, d/b/a Antonino's Restaurant

648 F.2d 1206 (9th Cir.), June 22, 1981—246 NLRB 833

On petition to enforce Board Order

Before MERRILL, and SCHROEDER, Circuit Judges; and EAST,* District Judge

1208

EAST, District Judge: The National Labor Relations Board (Board) petitions for enforcement of its order against Antonino Carilli, d/b/a Antonino's Restaurant (Antonino's). The Board found that Antonino's engaged in unfair labor practices in violation of Section 8(a)(1)[1] of the National Labor Relations Act (Act) by interrogating an employee about her Union[2] membership suggesting that employees withdraw or resign from the Union, implying to employees that it would be futile to join or support the Union, and by unilaterally implementing a new medical and dental insurance program in order to discourage Union membership.

The Board also found that Antonino's had violated Sections 8(a)(1) and 8(a)(5)[3] of the Act by withdrawing recognition from the Union, refusing to negotiate, and unilaterally terminating certain payments to the employees' health and pension trust funds. The Board's order essentially directs Antonino's to cease and desist from committing

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these and other unfair labor practices, to bargain with the Union upon request, and to pay delinquent contributions to the employees' trust funds.

We note jurisdiction pursuant to Section 10(e)[4] of the Act, and grant enforcement.

FACT

Antonino Carilli and his wife, Jean, operate Antonino's Restaurant in Hayward, California. The Carillis' two sons, Larry and Tom, work respectively as assistant manager and chef. It is admitted that all of the Carilli family are supervisors with the meaning of Section 2(11)[5] of the Act, even though Larry and Tom Carilli were represented by the Union.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] 29 U.S.C. § 158(a)(1).

[2] Hotel, Motel, Restaurant Employees and Bartenders Union, Local 50, affiliated with Hotel and Restaurant Employees and Bartenders International Union.

[3] 29 U.S.C. §§ 158(a)(1), 158(a)(5).

[4] 29 U.S.C § 160(e).

Antonino's first recognized the Union in 1972. Thereafter, Antonino's joined a multi-employer bargaining group, the East Bay Restaurant Association (Association), and subsequently because a party to a 1973–1978 collective bargaining agreement. That agreement has an expiration date of August 6, 1978, subject to timely notice of termination, and contained a provision for reopening for wage negotiations. The agreement also included provisions for employer contributions into separate, jointly-administered trust funds for the administration of programs providing health and pension benefits to covered employees. Antonino's abided by the contract's terms and contributed to the trust funds during the duration of the 1973–1978 contract.

In the Spring of 1977, Antonino's gave timely notice to the Association that it was restricting the Association's authority to bargain on its behalf and that no changes or extensions to the contract were to be negotiated which would bind Antonino's beyond the August 6, 1978 termination date. The Association gave written notice to the Union of Antonino's action and thereafter negotiated a four-year extension of the 1973–1978 agreement, with various modifications concerning wages and benefits.

In June of 1978, Antonino's wrote the Union that it would terminate the collective bargaining agreement when it expired in August of 1978. The Union, apparently operating under the misconception that Antonino's was bound by the four-year extension of the 1973–1978 collective bargaining agreement, rejected Antonino's notice of termination as "untimely and unacceptable."

Prior to this exchange, the Carillis had engaged in some conversations with employees generally concerning the importance of insurance benefits and their relation to Union membership. Antonino's then contacted several insurance brokers concerning the purchase of medical and dental insurance programs for the employees to replace the existing Union-Association program upon expiration of Antonino's contract with the Union. On July 25, 1978, Antonino's authorized an insurance broker to purchase a medical and dental insurance program underwritten by Crown Life Insurance Company which would be effective August 6, 1979. Antonino's also arranged for the insurance broker to meet with the employees and explain the new insurance coverage.

When the collective bargaining agreement expired on August 6, 1978, Antonino's ceased making contributions into the health and pension trust funds. On August 11, 1978, employees Paul Dana Washburn prepared a handwritten decertification showing of interest petition and began circulating it. Over the next two days, Washburn collected 16 signatures on his petition, the last two of which were those of Larry and Tom Carilli. Washburn filed this petition with the Board on August 17, 1978.

On the morning of August 15, 1978, the insurance broker and Larry Carilli met with approximately 15 to 20 employees at the restaurant. Carilli announced to the employees that the restaurant's contract with the Union had terminated and the the restaurant was then "nonunion." He also stated that the employees could leave Antonino's to work in a Union restaurant if they desired but he wanted all employees to

stay on. Carilli also answered some questions generally concerning the employees' future status with the Union. The insurance broker distributed a document comparing insurance benefits under the Crown Life program with those under the 1973–1978 collective bargaining agreement, announced that the employees were covered by the Crown Life program, effective August 6, and told the employees that the new plan provided better benefits than the previous plan.

On August 28, 1978, however, the Union filed an unfair labor practice charge, alleging that Antonino's was refusing to bargain in good faith and that Antonino's was bound by the 1977–1982 extension to the collective bargaining agreement. The Board's regional director refused to issue a complaint on any aspect of the charge except the allegations concerning the unilateral implementation of the new health insurance plan, and rejected the Union's allegation that Antonino's was bound by the 1977–1982 agreement on the grounds that Antonino's had submitted a timely notification limiting the Association's bargaining authority on its behalf.

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[5] 29 U.S.C. § 152(11).

The Regional Director subsequently dismissed the decertification petition, ruling that no question of representation could be raised at that time because a complaint had issued against Antonino's charging that the unilateral replacement of the insurance programs violated Section 8(a)(5).

Over the next three months, the parties exchanged a number of letters and phone calls in which they discussed negotiating for a new contract. On the basis of these communications, the administrative law judge found that Antonino's had refused to engage in collective bargaining with the Union.

In January of 1979, the regional director notified the parties that the dismissal of the decertification petition had been recinded. Shortly thereafter, however, the Union filed a second unfair labor practice charge and again demanded that Antonino's negotiate.

The regional director then notified the parties that the initial decertification petition was tainted by the participation of Antonino's supervisors in the signing of the petition, and that in light of the "numerous and serious" unfair labor practices allegedly committed by Antonino's just prior to the filing of the petition, no question of representation could be raised at that time. The Board affirmed.

The two unfair labor practice charges were consolidated and came to a hearing which resulted in the order which the Board now seeks to enforce.

DISCUSSION

I. *Sufficiency of the Complaint and Applicability of the Statute of Limitations*

Initially we must examine Antonino's contention that the complaint is insufficient and should be dismissed because it does not contain a clear and concise statement of the facts constituting the alleged unfair labor practices, as required by 29 C.F.R. § 102-12(d).

The record discloses that the Union filed two charges, on August 25, 1978 and January 15, 1979. Both charges alleged that Antonino's violated Section 8(a)(1) and 8(a)(5) of the Act, and both specifically allege that during the six months immediately prior to the filing of the charge, Antonino's refused to bargain in good faith with the Union. The charges each stated that "[b]y the above and other acts," Antonino's interfered with, restrained, and coerced employees in their exercise of their Section 7 rights.[6]

Actions before the Board are not subject to the technical pleading requirements of a private lawsuit. *North American Rockwell Corp. v. NLRB,* 389 F.2d 866, 870 (10th Cir. 1968). The charge need not be technically precise so long as it generally informs the party charged of the nature of the alleged violations, and the general allegations in the charge may later be supplemented or amplified by more specific allegations which "relate back" to the date the charge was filed.

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The consolidated complaint in his matter, filed on February 28, 1979, contained specific allegations as to each unfair labor practice found by the Board. Thus Antonino's cannot successfully contend that it had no notice of the charges against it before the hearing. Moreover, the Board may find an unfair labor practice when the issue has been fully and fairly litigated even though no specific charge was made in the original complaint. *Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 728 (9th Cir. 1980); *NLRB v. Olympic Medical Corp.,* 608 F.2d 762, 763 (9th Cir. 1979). Here, Antonino's claims that it was prejudiced because the General Counsel's witnesses had incomplete memories concerning a statement by Larry Carilli at the August 15, 1978 employee meeting to the effect that Antonino's was nonunion. The Board found that this statement violated Section 8(a)(1) and 8(a)(5). The record discloses that the substantially similar testimony of three witnesses supported the finding that Larry Carilli made the statement in question. Antonino's had the opportunity to cross-examine each of these witnesses on this issue, and did in fact cross-examine employee Mary Ingles specifically about the disputed statement. Ingles' testimony was clear and was given particular weight by the administrative law judge (ALJ). We find that the issue was fully and fairly litigated at the hearing and that Antonino's suffered no prejudice as a result of the lack of specificity in the original charge.

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[6] 29 U.S.C. § 157.

Antonino's speculates that because the original complaint contained no allegations concerning the interrogations of employees, solicition of withdrawls and attempts to discourage Union membership, these matters must have first been brought to the Board's attention when the second charge was filed on January 25, 1979. Thus, Antonino's argues, the charges are barred by the Section 10(b)[7] six-month statute of limitations.

We note that even if this argument were accepted, only the charges based on the interrogation of one of the employees would be barred. The other charges upon which the findings of unfair labor practices were based grew out of the August 15, 1978 meeting, which was only five months before the second charge was filed.

But even as the interrogation of the employee, the "by this and other acts" language of the original charge was sufficiently specific because it was amplified by the consolidated complaint, which related back to the date of that charge. *North American Rockwell Corp. v. NLRB*, 389 F.2d at 870. Because we find that the complaint is neither time barred nor fatally lacking in specificity, we turn to an examination of the Board's particular findings of unfair labor practices.

II. *Questioning an Employee About Union Membership*

The Board found that during June or July of 1978, Jean Carilli asked employee Karen Bywater, a member of the Union, how important the employees' medical insurance program was for Bywater and whether she would be a Union member if she worked in a restaurant which offered its employees medical and dental insurance benefits. The Board also found that in June of 1978, Larry Carilli asked Bywater if she would need to be "in the Union" if Antonino's had a better medical and dental insurance program for the employees.

Antonino's attacks Bywater's credibility and contends that the conversations with Larry and Jean Carilli never occurred. The ALJ specifically credited Bywater's testimony. We will not overturn credibility determinations unless a clear preponderance of the evidence shows they are incorrect. *NLRB v. Inland Empire Meet Co.*, 611 F.2d 1235, 1238 (9th Cir. 1980). Here, Antonino's relies upon the fact that under cross-examination Bywater responded negatively when asked if she had had conversations with Larry and Jean Carilli "about the Union." The conversations in question focused primarily on insurance, not the Union, and thus Bywater's answers on cross-examination cannot fairly be understood as contradicting her testimony concerning the conversations with the Carillis. Antonino's has failed to show by a clear preponderance of the evidence that the ALJ's assessment of Bywater's credibility was incorrect.

Antonino's next contends that the questioniong of Bywater was entirely innocuous and was thus protected by Section 8(c)[8] of the Act which "defines and implements the First Amendment right of free speech in the context of labor relations." *N.L.R.B. v. Marine World USA*, 611 F.2d 1274, 1276 (9th Cir. 1980). Section 8(c) permits employers to express any views, arguments or opinions concerning Union representation which contain "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). *NLRB v. Marine World, USA*, 611 F.2d at 1276.

In *Clear Pine Mouldings*, 632 F.2d at 725, this court stated:

> Interrogation of employees concerning union activities is not a per se violation of § 8(a)(1). *NLRB v. Super Toys, Inc.*, 458 F.2d 180, 182 (9th Cir. 1972). The test to determine if a § 8(a)(1) violation has occurred is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their protected § 7 rights. *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977).

In applying this test, we must determine whether the interrogations are " 'associated with express or implied threats or promises, or form part of an overall pattern tending to restrain or coerce employees with regard to their protected activities.' " *NLRB v. Silver Spur Casino*, 623 F.2d 571, 584-85 (9th Cir.), *cert. petition pending*, ——— U.S. ——— , 101 S.Ct. 1973, 68 L.Ed.2d ——— (1980), *quoting*

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[7] 29 U.S.C. § 160(b).

[8] 29 U.S.C. § 158(c)

Amalgamated Meat Cutters, etc., Local No. 364 v. NLRB, 435 F.2d 668, 669 (9th Cir. 1970).

The Board found that the language used by the Carillis in these conversations was reasonably calculated to give Bywater the impression that Antonino's was considering instituting its own superior medical insurance program if the employees would not support the Union. The pattern of subsequent unfair labor practices, discussed below, lend credence to the Board's interpretation. Those practices included unilateral implementation of a new insurance program, withdrawal of recognition from the Union, and encouraging employees to withdraw from the Union.

Although the surface innocuousness of the conversations here involved renders the question a close one, we agree with the Board's conclusion that viewed in their overall context, these conversations contained both promises of benefits for withdrawal of support for the Union and coercive implications that once the benefits were instituted, the employees were expected to either withdraw from the Union or find work elswhere.

These conversations thus did not enjoy the protection of Section 8(c) and ran afoul of Section 8(a)(1).

III. *Suggestions that Employees Withdraw, Resign or Quit Paying Dues to the Union*

The Board found that Antonino's, through Larry Carilli, solicited employees to either withdraw or resign from the Union, and additionally suggested to one employee that she quit paying her Union dues. Antonino's does not dispute that such acts, if committed, would violate Section 8(a)(1), *see, e.g., NLRB v. Triumph Curing Center,* 571 F.2d 462, 470–71 (9th Cir. 1978), but instead contends that the Board has mischaracterized the statements which were in reality innocent and helpful responses to employees' questions, and were, therefore, protected speech.

This court has recently noted that "if there are conflicting interpretations of the facts, and the one adopted by the Board is supported by substantial evidence, the Court may not substitute a different interpretation." *NLRB v. Anchorage Times Publishing Co.,* 637 F.2d 1359, 1363 (9th Cir. 1981).

The Board found that at his August 15, 1978 meeting with the employees, Larry Carilli stated that the restaurant was non-union and that the employees could leave if they wanted to work in a union restaurant. In reaching this conclusion, the Board relied upon the testimony of employees Karen Bywater and Mary Ingles. Bywater testified that Larry Carilli, when asked whether the employees could maintain their Union membership while working in a nonunion restaurant, responded that the employees could withdraw from the Union. According to Ingles, Larry Carilli told the employees that "those of us who wanted to stay here, go ahead and take a withdrawal from the Union." Ingles also testified that a day or two after the August 15th meeting, she informed Larry Carilli that she had requested a "withdrawal card" from the Union, but her request had been denied. Larry Carilli responded that there were "other ways" that Ingles could go about withdrawing from the Union; for example, by resigning or ceasing to pay her dues, but that it was up to her to make her own decision.

The Board concluded that once Antnonino's announced its intent to operate without a union, it was entirely foreseeable that the employees would ask questions concerning their future status vis-v-vis the Union, and that the responses were designed to undermine the Union. This conclusion is buttressed by Antonino's admitted earlier decision to "get rid of the Union." We find that the Board's conclusion is supported by substantial evidence.

IV. *Termination of Payments to Employee Trust Funds and Unilateral Implementation of New Insurance Plans*

The Board found that Antonino's violated Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally terminating its payments to the labor-management health and pension trust funds, and by implementing new medical and dental insurance plans in place of the health trust fund plan.

Antonino's first defends its termination of payments to the labor-management trust funds on the grounds that continued payments would have violated Section 302(c)(5) of the Act.[9] Section

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[9] Section 302 of the Act, 29 U.S.C. § 186, provides in relevant part: § 302(a) It shall be unlawful for any employer * * * to pay, lend, or deliver * * * any money or other thing of value—

Continued

302(c)(5) prohibits payments by employers to employee representatives unless those payments are made pursant to a specific written agreement covering the payments, and such payments are for the exclusive benefit of the employees and their families and dependents. Antonino's argues that the expiration of its collective bargaining agreement with the Union left it without the necessary written agreement, and that it, therefore, could not continue making the payments without incurring criminal liability under Section 302(c)(5).

It is clear from the collective bargaining agreement that the trust fund agreements remained in effect for the other members of the Association who became parties to the 1978–1982 extension to the collective bargaining agreement. There is no dispute that those documents were adequate written agreements under Section 302(c)(5) so long as Antonino's was subject to the collective bargaining agreement and the trust agreements are sufficient to satisfy the requirements of Section 302(c)(5). *Peerless Roofing Co. v. NLRB,* 641 F.2d 734 (9th Cir. 1981).[10] In that case we noted that the collective bargaining agreement survives its expiration date for purposes of marking the status quo as to wages and working conditions. The employer is required to maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse. *Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d at 729. In *Peerless,* we noted that "[i]f the employer's obligation to make trust fund payments were terminated by the expiration of the bargaining agreement, the union would never have an opportunity to bargain over those contributions," at 736, and concluded that such a result would be contrary to the national labor policy as embodied in the Act.

By finding that the expired collective bargaining agreement and the trust agreements here are sufficient to permit continued payments to the trust funds, we do not, as Antonino's contends, hinge criminal liability under Section 302(c)(5) upon the difficult determination of whether impasse has been reached. The collective bargaining and trust agreements here are sufficient to satisfy the requirements of Section 302(c)(5) and to permit continued payments to the trust funds, whether or not the parties have bargained to impasse.

Antonino's next argues that it was free to make unilateral changes in its medical, dental, and pension plans, and to withdraw recognition from the Union because the Union no longer enjoyed the majority support of Antonino's employees.

Voluntary recognition having been accorded the Union in 1972, there is a rebuttable presumption that the Union enjoys majority status. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d 293, 297 (9th Cir. 1978) *cert. denied,* 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 290 (1979); *Sahara-Tahoe Corp. v. NLRB,* 581 F.2d 767, 769–70 (9th Cir. 1978), *cert. denied,* 442 U.S. 917, 99 S.Ct 2837, 61 L.Ed.2d 284 (1979). The employer who seeks to withdraw recognition must rebut this presumption with a clear, cogent and convincing showing of either an actual loss of majority status or objective factors sufficient to support a reasonable good faith doubt of the Union's majority. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d at 297.

Antonino's relies upon a petition signed by 16 of the employees, including Larry and Tom Carilli to establish the Union's loss of majority status. Antonino's, however, offered no independent evidence of the number of employees in the bargaining unit, but instead relies upon a statement in the decertification petition that there were 26. The General Counsel did not offer the decertification petition which was filled out by employee Washburn, into evidence for the purpose of establishing the truth of what it alleged concerning the number of employees in the bargaining unit, and Antonino's made no attempt to show that it was accurate. Under these circumstances, we cannot say that the evidence of loss of majority support was clear, cogent, and convincing.

Antonino's complains, however, that the ALJ prevented it from further litigating the issue of majority status by precluding it from litigating the question of whether the showing of interest petition was adequate to support the decertification petition. The adequacy of a showing of interest petition is an administrative matter which may not be litigated by the parties. *See, NLRB v. J. I. Case Co.,* 201 F.2d 597, 600 (9th Cir. 1953).[11] The mere fact that Antonino's was properly prevented from litigating the adequacy of the showing of interest petition does not mean that it was precluded from litigating the majority status issue, even though certain evidence may have been relevant to both issues. The record reveals that Antonino's simply never offered any evidence as being relevant to

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(2) to any labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer * * *.

* * * * *

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents * * * Provided, That * * * (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer * * *.
29 U.S.C. § 186.

[10] *Accord, Denver Metro Ass'n v. Journeymen Plumbers,* 586 F.2d 1367, 1373 (10th Cir. 1978); *Hinson v. NLRB,* 428 F.2d 133, 139 (8th Cir. 1970).

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the majority status issue, and thus supports the ALJ's statement that he did not prevent Antonino's from litigating that issue.

Further, even if Antonino's had introduced evidence indicating the number of employees in the bargaining unit, its contention that the Union lacked majority status would nonetheless be based upon a showing of interest petition which was not circulated until August 11, 1978. There is no evidence that the Union lacked majority status when Antonino's authorized its insurance broker to purchase a new insurance policy on July 25 which was to become operative on August 6, or when Antonino's ceased making payments to the trust funds on August 6.

Nor does the record support a finding of good faith doubt as to the Union's majority status. Good faith doubt must be evaluated as of the time the refusal to bargain occurs. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d at 301 n.25. Antonino's has not shown that it had any grounds for doubting the Union's majority status at the time the unilateral changes were made.

Antonino's next contends, however, that it was not required to give the Union notice and an opportunity to negotiate about the changes in insurance plans, because to do so would have been futile. This argument is based upon both a July 6, 1978 letter from the Union to Antonino's which erroneously asserted that Antonino's was bound by the 1977–1982 extension to the collective bargaining agreement, and the Union's alleged failure to request negotiations on the insurance issue once it learned of the changes. The Board rejected this contention, noting that Antonino's had expressed its intention to "drop the Union" and institute new insurance programs before the Union expressed its erroneous belief that Antonino's was bound by the 1977–1982 collective bargaining agreement.

The Board found that Antonino's unilateral action was motivated by a desire to undermine the Union, and that Antonino's had never indicated to the Union that it intended to make the insurance policy changes. In addition, the Board found that Antonino's rejected an invitation to meet with the Union and discuss its position. It is clear from the record that Antonino's failure to accord the Union an opportunity to bargain was not motivated by the Union's position, and it is equally clear that the Union's position was not so intransigent as to relieve Antonino's of its obligation to extend an opportunity to negotiate before instituting unilateral changes in mandatory subjects of bargaining.

Finally, Antonino's contends that it had no duty to bargain concerning its unilateral termination of payments to the pension fund. Antonino's relies upon *Seattle First National Bank v. NLRB,* 444 F.2d 30, 32–33 (9th Cir. 1971) in which this court held that in order for a matter to be a mandatory subject of collective bargaining, it must materially or significantly affect the terms or conditions of employment.[12] That case involved a bank's termination of a little used free investment counseling service for its employees. This court found no duty to bargain about the termination of such services, noting that they were of value only to a small number of employees actively trading in securities and were not the type of services traditionally associated with terms and conditions of employment. Further, the termination of the free investment counseling services was part of an overall restructuring of rates which the bank charged its customers, and was, therefore, characterized as a management decision which affected the employees only indirectly.

The Union's pension plan here by contrast is not limited to a small number of employees, and is not the type of matter typically entrusted solely to management discretion. Pension plans are traditionally associated with terms and conditions of employment, and we find that Antonino's vio-

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[11] *Accord, NLRB v. P. A. F. Equipment Co.,* 528 F.2d 286, 287 (10th Cir. 1976); *NLRB v. Air Control Products,* 335 F.2d 245, 250 (5th Cir. 1964).

[12] It is undisputed that the medical and dental plans provided under the labor-management health trust fund are mandatory subjects of bargaining. *See, e.g., Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 729 (9th Cir. 1980).

lated Sections 8(a)(1) and 8(a)(5) by unilaterally terminating its payments to the Union's pension trust fund.

V. *Refusal to Meet and Bargain with the Union*

The Board found that subsequent to the unfair labor practices previously discussed, Antonino's violated Sections 8(a)(1) and 8(a)(5) by refusing to meet and bargain with the Union about a new collective bargaining agreement from November 20, 1978 to January 19, 1979. This finding, which is based upon a series of communications between Antonino's and the Union, is supported by substantial evidence.

Antonino's urges, however, that it was not required to meet and bargain because it had learned [13] that a decertification petition was pending during the period in question. The Board's decision in *Telautograph Corp.*, 199 NLRB 892 (1972), relied upon by Antonino's, held that where a decertification petition has been filed and there is no evidence of previous unfair labor practices which may have caused a decline in Union support, the employer must discontinue bargaining with the Union until the question of representation has been settled by the Board. Antonino's contends that the Telautograph doctrine is applicable here because the Board found that the circulation and filing of the decertification petition were not caused by any actions of Antonino's.[14]

The Board, however, ruled that this defense was unavailable here because Antonino's had committed unfair labor practices designed to undermine the Union which precluded a fair decertification election.

We agree. The underlying issue is whether the employer had a reasonable good faith doubt as to the Union's majority status. "Reasonable doubt as to majority status must only be asserted in good faith and may not be raised in the context of an employer's activities aimed at causing disaffection from the Union." *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d at 730. The fact that the unfair labor practices here did not cause the circulation or filing of the petition is of little moment. No showing was made that a majority of the employees supported decertification before learning of Antonino's previous unfair labor practices and being exposed to Antonino's subsequent unfair labor practices. Because Antonino's by its actions precluded a fair determination of the majority status issue, it cannot now rely on the reasonable good faith doubt defense.

VI. *The Bargaining Order*

Antonino's maintains that the Board abused its discretion by issuing a bargaining order, because the unfair labor practices committed here were not so flagrant as to prevent a fair decertification election, and because a majority of the employees oppose representation by the Union. We disagree.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969), the court held that bargaining orders are not limited to cases involving outrageous and pervasive unfair labor practices, but may be imposed "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." If there is a showing that the Union once had a majority support, and the likelihood of erasing the effect of the unfair labor practices and obtaining a fair election by the use of traditional remedies is light, a bargaining order may be warranted. Because the Board possesses specialized knowledge and expertise, we must accord special respect to its estimates of the effects of the unfair labor

practices on the election process, and to its choice of remedies. *Id.* at 612 n.32, 89 S.Ct. at 1939 n.32.

Here, in addition to giving clear indications to the employees that it intended to operate without a

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[13] Antonino's learned of the existence of the decertification petition on August 12, 1978, after the unilateral exchange of insurance plans, but before the refusal to bargain from November 20, 1978 to January 19, 1979.

[14] Although Antonino's had committed unfair labor practices by withdrawing recognition from the Union, terminating payments to the Union trust funds, and instituting a new insurance plan on August 6, 1978, the employees were not aware of these actions until August 15, about three days after the decertification petition was circulated. The earlier interrogation of employee Bywater did not taint the petition because she did not sign it.

Union and suggesting that the employees either resign from the Union or seek work elsewhere, Antonino's implied that better medical and dental benefits would be available without the Union and actually implemented those benefits. The Board's determination that these acts precluded a fair decertification election is supported by substantial evidence.

Antonino's maintains, however, that a bargaining order is inappropriate here because it will impose a minority Union upon the employees. This contention is based upon a letter written three days after the hearing which expressed opposition to the Union and was purportedly signed by 13 of the 18 employees allegedly in the bargaining unit at that time. The Board denied a motion to reopen the proceedings to permit introduction of the letter.

We find no error in the Board's denial of the motion to reopen. The motion was not filed until more than three months after the letter was written and more than a month after the ALJ had rendered his decision. No excuse is offered for the delay. In addition, there is no allegation that the identity of the employees remaining in the bargaining unit or the identity of the supervisors had changed, and thus there is no evidence that the effects of the unfair labor practices had diminished by the time the letter was written. *See NLRB v. Peninsula Ass'n for Retarded Children and Adults,* 627 F.2d 202 (9th Cir. 1980). Therefore, there is nothing to suggest that an untainted majority of the employees ever expressed opposition to the Union.

This case is distinguishable from *Daisy's Originals, Inc. v. NLRB,* 468 F.2d 493 (5th Cir. 1972), relied upon by Antonino's, which held that a bargaining order was not warranted where the unfair labor practices committed were merely technical violations of the Act which did not dissipate the Union's majority and did not prevent a fair decertification election. Here, the unfair labor practices were more numerous and more serious, and prevented the possibility of a free expression of the employees' choice in a fair decertification election.

VII. *The Repayment Order*

The Board's order requires Antonino's to repay all the payments to the trust funds which have been withheld since August 6, 1978, and to continue such payments until Antonino's negotiates in good faith to a new contract or impasse, unless the Union fails to make a written request within 60 days of the order that Antonino's replace the Crown Life plan with the previous program.

Antonino's complains that because it provided the employees with better medical and dental insurance than was provided under the Union's plan, the repayment order is punitive and is, therefore, an impermissible attempt to effectuate policies other than those of the Act. *See Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964).

We find nothing punitive in this order. The Board's order merely requires that Antonino's repay what it has unlawfully withheld. It was Antonino's which unlawfully chose to incur the additional expense of a private insurance program in its attempt to undermine the Union, and it cannot now complain that it incurred a loss in so doing.

The Board's order is enforced.

ENFORCED.

NLRB v. Chester Valley, Inc.

652 F.2d 263 (2d Cir.), June 22, 1981—251 NLRB 1455

On petition to enforce Board Order

Before FEINBERG, Chief Judge, and LUMBARD and VAN GRAAFEILAND, Circuit Judges

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LUMBARD, Circuit Judge: Before us are two applications for enforcement of orders of the National Labor Relations Board. The order in 80-4236 is based upon alleged unfair labor practices committed in the course of a representational election campaign at Chester Valley, Inc., and in No. 80-4234, upon an unfair labor practice allegedly committed by Chester Valley while proceedings on the initial matter were pending before the Board. We consider each application in turn.

No. 80-4236:

In a Board-ordered election, Chester Valley's employees rejected representation by Local 445 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"). Following the vote, the Union charged that Chester Valley had committed a number of unfair labor practices during the election campaign. The Administrative Law Judge, after conducting hearings, sustained most of the unfair labor practice charges and ordered Chester Valley to bargain with the Union. The Board adopted the ALJ's findings and recommended order, and it now applies for enforcement. Because we find that there was insufficient proof of one of the unfair labor practice charges and because we believe that reversal on that charge precludes enforcement of a bargaining order, we grant enforcement in part and deny enforcement in part.

I.

Chester Valley is a New York corporation engaged in the sale of fuel oil, gasoline, automotive supplies and automotive and oil burner services. Its main facility is in Chester, New York, with other facilities at Vails Gate and Monroe, New York. In the fall of 1978, Mike Monte began discussing with fellow employees the possibility of union representation at Chester Valley. Monte also spoke with the Union. After obtaining signed authorization cards from a majority of employees, the Union filed, on November 1, 1978, a petition for a Board-supervised representation election in a unit consisting of employees at the Vails Gate and Monroe facilities. On November 2, the Union requested recognition and bargaining in a unit of employees at the Chester and Vails Gate facilities.[1] The Company refused to bargain. The election, which resulted in an 18-14 vote against the Union, was held on January 16, 1979.

We summarize the ALJ's findings of fact relating to the unfair labor practices during the election campaign. Gary Jones, who was the Company's bookkeeper and held the title of "Controller," in November of 1978 asked a group of employees at Chester what it would take for them to forget about the Union.[2] Jones was told that things had gone too far for "a simple raise or something like that." Shortly before the election, Jones made a similar request of employee Monte alone. Monte replied that he wanted everything the Union had gotten in other contracts plus a guaranteed job. Before the election Jones called employee Zaccagnino into his office, disparaged the Union's pension plan and stated that he could work out a more advantageous "deal" where Zaccagnino could put in the same forty cents per hour as would go into the Union pension plan into a Company profit sharing plan. Monte subsequently overheard Jones tell Zaccagnino to think seriously about Jones's proposal and that Zaccagnino would wind up "way ahead."

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Also during the campaign, the manager of the Monroe facility, Francis Walters, discussed on many occasions the pros and cons of unionization with the Monroe employees and with employees Monte and Kennybrook, both of whom made frequent deliveries to the Monroe facility. During one such discussion, Walters stated to a group of employees that if the Union won the election, the resulting expenses would force him to cut costs and one method would be to turn the Monroe gasoline facility into a self-service station. In another discussion, Walters stated that if the Union won, company President Krieger would not continue to retain part-time employees. (Many of the Monroe employees worked part-time). Walters also told Monte that unionization would not be good for the Monroe employees, that if he had to, he would turn the facility into a self-service one, that the Company had been very accommodating in granting flexible work hours to the Monroe part-timers, many of whom were high school students, and that, the Union might require physical examinations which would pose a problem for full-time Monroe employee Strobl who had eye trouble. Walters made similar statements about the possibility of going to a self-service operation on other occasions.

On December 22, 1978, Company President Krieger wrote a letter to all employees stating that if the Union "gets in," wages and benefits would be subject to negotiation and could "go up or down." Krieger reminded employees of the Company's flexibility in scheduling work hours, and of other benefits such as discounts on gasoline and repair work, uniforms, and liberal breaktimes. He stated that all the benefits would become negotiable if the Union "gets in."

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[1] Although on November 13, 1978 the Union amended its election petition to include employees at all three facilities, the Union never requested bargaining in the unit.

[2] Jones had previously made a similar request of employee Vogt, but this was found by the ALJ to have occurred prior to the filing of the representation petition.

Approximately one week before the election, Krieger made a speech to all of the employees. He stated that he was hurt that the employees had gone to the Union and that he had always had an "open door" policy. He said that whatever the employees could get from the Union, they could get from him. Krieger also stated that the Union might require employees to take physical examinations and he knew that some employees might have difficulty passing.

Finally, the ALJ found that the Company had granted a wage increase in December of 1978, retroactive to November 25. The Company had previously granted wage increases in Noveber of 1976 and 1977. In a letter to employees announcing the raises, Krieger stated that in past years he had given wage increases in the fall, but this year he had been uncertain, because of the election petition, whether he could grant raises. He stated that, despite advice of counsel that there was some legal risk in granting such increases, he would do so anyway. For the majority of employees, the raise was a flat 7% increase, although others were granted the legally mandated increase in the minimum wage, and one employee—on a commission salary—received no raise.

Based upon these findings, the ALJ held that the Company had violated section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) (1976). First the ALJ held that Controller Jones's statements to employees, constituted promises of benefits to induce abandoment of the Union. The ALJ rejected the Company's argument that it was not answerable for Jones's statements. Jones was the Company "Controller," he supervised office personnel, and was believed by employees to have the authority to advise them as to the Company's wage policies.

Second, the ALJ held that the Company also violated section 8(a)(1) by the veiled threats made by both Walters and Krieger. These threats included 1) references by both Walters and Krieger to physical examination requirements, 2) statements by Walters that if the Union came in, there might be changes in the practice of accommodating part-time employees' work hours, 3) Krieger's statements in his December 22 letter

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mentioning that benefits such as flexible work hours might be bargained away and that the Union might "force" him to discontinue other benefits such as gasoline discounts and liberal breaktimes, and 4) Walters's statements that if unionization occurred, the Monroe facility might become self-service, and that the Company might not be able to afford part-time employees. The ALJ rejected the Company's argument that in making many of these statements Krieger or Walters attributed the possible changes in working conditions to conduct by the Union. The ALJ noted that the Company had the power unilaterally to effect these changes, and that the speakers did not base their predictions on objective facts demonstrating that the changes in conditions would be beyond the Company's control. Thus the ALJ held that the statements could reasonably be said to have had a tendency to interfere with the free exercise of employee rights.[3]

Third, the ALJ found a violation of section 8(a)(1) based upon Krieger's statements in his speech that the Company had an "open door" policy, that if employees came to them in the future he would deal with their problems, and that they could get from him whatever the Union could obtain. The ALJ held that these statements constituted a solicitation of grievances and a promise to remedy them in order to discourage Union representation. The ALJ rejected, as lacking support, the Company's defense that Krieger was merely clarifying a previously established management policy of welcoming and remedying employee grievances.

As to the wage increase, the ALJ held that there was noting illegal in either the timing or retroactivity of the benefits. The raises were in accord with the Company's practice of granting annual wage increases in November and the lateness of the increase and accompanying retroactivity were explained by the Company's good faith doubts concerning the legality of the increases. Action was taken within a reasonable time after receiving competent advice from counsel.

At the close of the hearing, however, the General Counsel had moved to amend the complaint against the Company to include the charge that the wage increases in 1978 were disproportionately large. In its closing statement, having decided to submit no further evidence on the issue, Company counsel argued that the General Counsel had failed to offer sufficient evidence that the wage increase was disproportionately large.

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[3] The ALJ found that on one occasion Walters had directly tied the advent of a self-service operation to increased expenses brought on by unionization, and therefore there was no violation of section 8(a)(1) at that time.

In her opinion, the ALJ granted the General Counsel's motion to amend, and concluded that indeed the wage increase was significantly larger than in prior years. Evidence as to three employees led the ALJ to find that the 1978 7% increase was from 42% to 112% higher than the 1977 increases and from 60% to 100% higher than the 1976 increases. The ALJ stated that, although there was no other evidence of the size of 1976 or 1977 increases, the burden was on the Company to prove that the 1978 increases were "based on the size of the increases were in previous years." Noting that the Company had failed to introduce records as to the other 1976 and 1977 increases, the ALJ drew the inference that November 1978 raises were significantly higher than earlier raises. She rejected the Company's arguments that the General Counsel bore the burden on this point and had obtained Company records by a subpoena, that the Consumer Price Index had increased at a substantially greater rate in 1978 than 1976 or 1977, and that one of the three employees for whom there was evidence had also been granted a raise in May of 1976 of approximately 6.10% and thus had raises of approximately 13.4% over 1976 and 1977.

No violation of section 8(a)(5), 29 U.S.C. § 158(a)(5) (1976) was found because the Union had never requested bargaining in the proper unit of employees in all three facililties.

Based upon the unfair labor practices she had found, the ALJ held that a bargaining order was the appropriate remedy.[4] The ALJ found that the unfair labor practices were "extensive" in that all employees heard Krieger's speech and received his letter and many employees heard the offending statements by Jones and Walters. She noted that the higher wage increases would have a "lingering effect" on those who remained at the Company because the raises would be included in all total paychecks. She thought it likely that these employees would pass along the story of the pre-election increases to any new employees. Therefore, the ALJ reasoned that use of cease-and-desist orders and posting of notices would not be likely to erase the effects of the Company's unfair labor practices and, on balance, a bargaining order would better express the employees' preferences. The Company's obligation to bargain was set retroactively at November 1, 1978, the approximate date on which the unfair labor practices began.

A three-member panel of the Board affirmed the ALJ's rulings, findings and conclusions, and adopted the recommended bargaining order. One member dissented on the issue of wage increases. He took the position that the General Counsel had failed to present sufficient evidence of a disparity between the size of the 1978 increase and those of prior years.

II.

The Company's arguments to set aside the unfair labor practices other than those concerning the wage increase do not require detailed treatment. Regarding the violations based upon statements made by Controller Jones, the Company argues that Jones was not a supervisor nor was he acting as an agent of the Company. As the ALJ found, however, Jones was treated as a member of the management, participated in discussions with Company counsel regarding the organizing campaign, kept the Company records, supervised the office staff and was consulted by employees on payroll matters. Thus there was ample reason to conclude that employees would believe that Jones was speaking as a representative of the employer. The Company's other objections to the unfair labor practice finding based upon Jones's statements challenge the sufficiency of the evidence and the credibility findings of the ALJ, particularly the ALJ's crediting of Zaccagnino's version of his meeting with Jones and her discrediting of Jones's version. We are not persuaded and note in particular our reluctance to interfere with the credibility judgments of an ALJ. *See, e.g., NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976), quoting *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952).

As for the implicit threats found by the ALJ in statements made by Walters, the Company argues that only once did Walters mention the possibility of conversion to self-service and on that occasion he clearly attributed the possibility to cost increases imposed if the Union won and achieved the benefits it was promising. It also argues that, in any event, Walters was always understood in discussing unionization to be referring to cost increases imposed by the Union's promised benefits. In analyzing Walters' statements regarding conversion to self-service, flexibility of work hours and retention of part-time workers, the ALJ correctly applied the standards set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). As stated in *Gissel*, and employer is free to tell only "what he reasonably believes will be likely economic consequences of unionization that are outside of his control." *Id.* at 619, 89 S.Ct. at 1942 quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967). He must base such predictions on "objective fact." *Id.* at 619, 89 S.Ct. at 1942. He may not imply that action unfavorable to the employees will be

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[4] The ALJ found that all of the Union authorization cards would be counted as valid despite objections by the Company that Union officials and Company employees misrepresented to signers the significance of the cards. With all the cards counted, the Union was favored by a majority of employees at the time the Company began its unfair labor practices.

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taken "solely on his own initiative for reasons unrelated to economic necessities and known only to him." *Id.* at 619, 89 S.Ct. at 1942.

The record supports the ALJ's conclusions that Walters's statements fell outside the permissible bounds established in *Gissel*. There was testimony as to more than one reference to self-service conversion and there was also testimony as to Walters's failure in most instances to attribute possible unfavorable changes to any costs which would result from union representation. Under the circumstances, the ALJ was justified in finding that the statements constituted veiled threats of reprisal for pro-Union votes. *See, e. g., El Rancho Mkt.*, 235 NLRB 468 (1978), *enf'd*, 104 LRRM 2612 (9th Cir. 1979); *NLRB v. Rollins Telecasting, Inc.*, 494 F.2d 80, 84–85 (2d Cir.), *cert. denied*, 419 U.S. 964, 95 S.Ct. 224, 42 L.Ed.2d 178 (1974); *Marathon LeTourneau Co.*, 208 NLRB 213 (1974).

Similarly, there was sufficient evidence to support the ALJ's conclusion that Krieger and Walters violated section 8(a)(1) in stating that physical examinations might result from unionization. There was proof that physical exams were only required in Union contracts at the request of the employer. The ALJ could reasonably conclude then that such references were veiled threats that examinations might be required by the employer if the Union won the election. Krieger's other statements, both in his speech and his December 22 letter, regarding flexible work hours and other company benefits also support a finding that he implicitly threatened employees with imposing harsher conditions should the Union achieve recognition. As the ALJ noted, Krieger's statement that the Union might "force" him to discontinue these "favors" did not fairly rest on any possibility that the Union would bargain away these benefits. In general, there was sufficient evidence for the ALJ to conclude that Walters's and Krieger's statements were not accompanied by any causal links to specific Union demands and therefore constituted coercive threats rather than honest forecasts. *See, e. g., NLRB v. Mangurian's, Inc.*, 566 F.2d 463, 466 (5th Cir. 1978).

We also believe there was sufficient evidence to uphold the ALJ's finding that statements made in Krieger's speech constituted a solicitation of grievances and a promise to remedy those grievances. The Company's only defense on this point was that Krieger was merely stating and reconfirming a long-standing "open door" policy, but there was sufficient evidence for the ALJ to conclude that no such prior practice existed. Such a change in policy toward grievances and corrective action justifies a finding of a section 8(a)(1) violation. *See, e. g., Jefferson National Bank*, 240 NLRB 1057 (1979); *Carbonneau Industries*, 228 NLRB 597 (1977); *Reliance Electric Co.*, 191 NLRB 44 (1971).

On the issue of wage increases, the Company first attacks the propriety of the ALJ's granting of the General Counsel's request to amend the complaint to include the charge that the raises were disproportionately large. We think it was proper for the ALJ to allow the amendment, since the Company was given a full and fair opportunity to rebut the charge. Company counsel was asked whether, if amendment was granted, the Company wished to submit any additional evidence, and counsel replied in the negative. Moreover, from a reading of counsel's concluding argument it is clear that the Company took the position that no further proof on this issue was necessary since the General Counsel had failed to establish a *prima facie* case.

On the merits, however, we agree with the Company's position, and with the dissenting member of the Board, that the General Counsel failed to sustain his charge that the 1978 wage increases were unusually large. When wage increases are granted during the course of an election campaign, the burden is on the employer to overcome the presumption that benefits were intended to influence the employees to vote against the Union. *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964); *Faith Garment Co. v.*

NLRB, 630 F.2d 630, 632 (8th Cir. 1980); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 675 (1st Cir. 1979). Here, the Company sustained its burden by demonstrating that the 1978 wage increase was in accord with its established policy of announcing raises in the fall, that the increases were withheld slightly beyond the usual time only because of a good faith concern as to the legality of the increases, and that, once competent advice was given by counsel, the Company acted quickly to give increases retroactive to the time the annual increases would usually have been given.

The issue of the size of the wage increases is distinct. NLRB decisions make clear that where the size of increases is in question, the burden is on the General Counsel to demonstrate that the increases were abnormally large and were timed to influence employees' organizational decisions. Once this is shown, the General Counsel has put forth a *prima facie* case of interference with employee rights, and the burden shifts to the employer to establish that the increases were consistent in size with those granted in prior years or that the increases were timed so as not to interfere with employee rights. *See, e. g., Colonial Haven Nursing Home, Inc.,* 218 NLRB 1007 (1975); *The Savings Bank Co.,* 207 NLRB 269 (1973); *Summitville Tiles, Inc.,* 190 NLRB 640, 640 n.1 (1971); *see also Alco Venetian Blind Co., Inc.,* 253 NLRB No. 161 at n.2 (1980); *San Lorenzo Lumber Co.,* 238 NLRB 1421 (1978). Here, the only evidence introduced by the General Counsel was the testimony of employee Vogt that in the two prior Novembers he received 2% increases, but in 1978, he received a 7% increase. As the ALJ found, however, Vogt received increases of approximately 3.5%. Moreover in May of 1976 he had received an increase of over 6%. Thus, the ALJ found that in the two years prior to 1978 Vogt had received increases totalling 13.4%.

The only other evidence in the record supporting the charge was that offered by two of the Company's witnesses. Employee Schaffer received 1976 and 1977 increases of approximately 4% and 5% respectively; employee Williams received increases in each of the prior years of slightly over 4%. They both received 1978 increases of 7%. This evidence, as to only three employees, is clearly insufficient. We also take note that the Consumer Price Index rose at a substantially greater rate in 1978 than in the two preceding years.

The ALJ also erred in buttressing the meager evidence supporting the General Counsel's charge by drawing an "adverse inference" from the Company's failure to produce payroll records. As one court has remarked, the rule that an unfavorable inference shall be drawn against a party which fails to introduce evidence known to be in its control will not apply where a party has good reason to believe that its opponent has failed to meet its burden of proof. In such a situation, there is a good faith belief that there is no need to offer further evidence, and therefore no inference can properly be drawn from nonproduction. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. NLRB,* 459 F.2d 1329, 1338 (D.C.Cir.1972), citing *NLRB v. A.P.W. Products Co.,* 316 F.2d 899, 903 (2d Cir. 1963). We also note that the Company's records had been subpoenaed by the General Counsel who, as we have pointed out, bore the burden on this issue.

Finally, the Board's decision on this issue is inconsistent with its recent decision in *Alco Venetian Blind Co., supra.* In that case, the Board agreed with the ALJ that the General Counsel had failed to establish that wage increases varied unlawfully from those granted in previous years, and the proof supporting the General Counsel was stronger than that in this case. There, although the wages granted to each employee each year varied in size, the company's records revealed that the raises in the year in question increased from the year before on average from approximately 6.5% to 12.5%. With a few exceptions, the increases for the preceding year were in the range of 5% to 5.7%, while for the year in question, they

generally ranged from 11% to 12.9%. The ALJ, however, took note of the increasing rate of inflation and found it responsible for the larger raises. The ALJ stated that in terms of real wages employees had received very small increases.

For these reasons, the holding that the Company violated section 8(a)(1) by granting unusually large increases cannot stand. It follows that the appropriateness of the bargaining order remedy is called into question. While we might remand for reconsideration of the remedy in light of our unfair labor practice holding, we believe that the remaining unfair labor practice findings are insufficient as a matter of law to support a bargaining order remedy. *See, e.g., Peerless of America, Inc. v. N.L.R.B.*, 484 F.2d 1108 (7th Cir. 1973). In *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 298 (2d Cir. 1980), this Circuit most recently ruled on the appropriateness of ordering recognition and bargaining as a remedy for unfair labor practices committed by an employer during the course of an election campaign. As we noted in that opinion, *id.* at 212, the traditional and preferred remedy in such cases is to vacate the original election, enjoin future unfair practices, require posting of notices disavowing interference, direct that union representatives be given reasonable access to the employees, and finally order a new Board-supervised election. The issuance of a bargaining order is warranted only where these remedies are found inadequate and where "it may reasonably be concluded that the employees will be unable to exercise a free choice in a Board-supervised rerun election." *Id.*[5]

The Supreme Court in *NLRB v. Gissel Packing Co., supra*, held that bargaining orders would be an appropriate remedy either in the "exceptional" cases where unfair labor practices were "pervasive" or "outrageous" or in those "less extraordinary cases marked by less pervasive practices" where the Board found that the severe impact of the unfair practices on employee free choice and the likelihood of their recurrence precluded the possibility of a fair rerun election. In *Jamaica Towing, supra*, 632 F.2d at 212–13, we noted that, in applying *Gissel*, certain labor violations, called "hallmark" violations, have generally been considered by courts and the Board as sufficient to support issuance of bargaining orders unless mitigating factors existed. Such violations include closing of a plant or threats of closure or loss of employment, granting of benefits to employees, or reassignment, demotion or discharge of union adherents. In contrast to these violations are practices such as interrogation of employees, promises of benefits, expressions of anti-union resolve, or threats of decreased benefits, which will not support a bargaining order absent serious and long-lasting untoward effects on employees.

Having overturned the ALJ's finding of a hallmark violation—the granting of unusually large wage increases—we believe the remaining practices are insufficient to justify a bargaining order. While the remaining unfair practices are numerous, they fall into the less coercive category.[6] Moreover, the unfair practices almost all consisted of implied rather than overt threats or promises, and thus were less likely to have a strong and lasting effect. Indeed, the only practice found specifically by the ALJ as certain to have lingering consequences concerned the amount of the wage increases, the practice we have found lacking support in the record. Moreover, the impressive amount of testimony by

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[5] We note once again the continuing concern both in this Circuit, *see, e.g., Coating Products, Inc. v. NLRB*, 648 F.2d 108 (2d Cir. 1981); *NLRB v. Jamaica Towing, Inc., supra*, and elsewhere, *see, e.g., Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980), over the frequency with which the Board appears to be issuing bargaining orders rather than rerun elections where employers commit unfair labor practices in the course of election campaigns. In this case, we asked counsel for the Board to inform us of the number of cases in which the Board was granting bargaining orders rather than ordering new elections. We were informed that in the past three years, in the overwhelming majority of cases in which bargaining orders were requested by the General Counsel, they were granted by the Board, and only in a small minority of those cases were elections ordered. The figures submitted, however, are not particularly informative because they exclude cases where the General Counsel has not sought a bargaining order and include cases where no election was ever held. In any event, we reiterate our concern that where the unfair labor practices are neither so pervasive as clearly to call for a bargaining order, nor so minimal as to call for a new election, the Board seems to exercise its discretion in favor of a bargaining order, despite repeated statements by this and other courts that rerun elections remain in the "preferred" or "superior" remedy under the NLRA.

[6] It is arguable that Walters's statements regarding the possible conversion of the Monroe facility to self-service and the discharge of part-time employees, which statements threatened a loss or lessening of employment for some Monroe employees might constitute a "hallmark" violation sufficient to support a bargaining order. The statements would have concerned only a small number of employees in the bargaining unit and fall far short of the threats of wholesale plant closures which have been found sufficient to support bargaining orders in other cases.

We also do not believe that the fact that the employer, as found in the second Board proceeding also now before us for enforcement, again solicited grievances demonstrates a significant likelihood of recurrence of unfair labor practices. It is quite understandable that a year after the election, with the status of employee representation still in limbo, the employer would try to discuss labor problems with employees. As soon as the General Counsel intervened, the Company acted quickly to rectify its error. This is not sufficient reason to believe that the Company is likely to recommit serious unfair labor practices during a second election campaign.

employees who did not even recall the statements which were found to constitute unfair labor practices suggests that the effects of those practices would be minimal. Finally, we note that there has been a good deal of turnover in the bargaining unit: the ALJ noted that only 21 of the original 32 employees remained at the Company at the time of the hearings, and according to the Company, only 13 of the 32 remained at the time of the Board's bargaining order. Consequently, we conclude that the record fails to show any lingering inhibitory effects or likely recurrence of the unfair labor practices. *See, e.g., Jamaica Towing, supra; Grandee Beer Distributors v. NLRB,* 630 F.2d 928 (2d Cir. 1980). We therefore deny enforcement of that part of the Board's order requiring recognition and bargaining upon request.

Enforcement of the Board's order in No. 80–4236 is granted in part and denied in part.

No. 80–4234:

In a separate matter also on appeal, No. 80–4234, the Board found that on January 19, 1980, while the earlier unfair labor practice proceeding was still before the ALJ, the Company sent a letter to all employees stating that a meeting would be held to discuss "problems" at Chester Valley, and to see if labor and management could "work together on rectifying these problems" possibly through formation of a "joint employer/employee committee." On the same day it issued its opinion approving the ALJ's resolution of the earlier unfair labor practice proceeding, the Board held that the Company's letter violated (1) sections 8(a)(5) and 8(a)(1) of the NLRA since it constituted direct dealing with employees during a time when the employer had an obligation to bargain with the Union, and (2) section 8(a)(1) of the NLRA since it constituted an unlawful solicitation of grievances. The first violation was premised upon the ALJ's holding in the earlier matter, approved by the Board, that the Company's bargaining obligation commenced on November 1, 1978, the time its unfair labor practices began. Because we have held that no bargaining obligation could be imposed by the Board, there could have been no violation of section 8(a)(5) by direct dealing.

The second Board holding, that of a violation of section 8(a)(1) alone, however, is affirmed, since the letter quite plainly included both a solicitation of grievances and a promise to remedy those grievances. The Company's only defense is that it has independently corrected its error by cancelling the meeting and sending letters to employees informing them of their rights under the NLRA. This is of little avail since the

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Board is still entitled to enforcement of its orders despite corrective actions taken by offending parties. *See, e.g., William J. Burns Detective Agency, Inc. v. NLRB,* 441 F.2d 911, 914 (2d Cir. 1971), *aff'd on other grounds,* 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed. 2d 61 (1972).

Because of our holding as to the impermissibility of a bargaining order and the vacating of the Board's holding as to a violation of section 8(a)(5), a revised order is necessary, and we therefore deny enforcement and remand to the Board. We point out that since the Board's order in the first matter will include traditional remedies for an 8(a)(1) violation caused by improper solicitation of grievances, the remedial order in that matter might encompass all the relief needed to remedy the more recent violation of section 8(a)(1). Thus, a separate order may be unnecessary.

First National Maintenance Corp. v. NLRB

452 U.S. 666, June 22, 1981—627 F.2d 596

On certiorari to 2d Cir.

JUSTICE BLACKMUN delivered the opinion of the Court

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Must an employer, under its duty to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment." §§ 8(d) and 8(a)(5) of the National Labor Relations Act (Act), as amended. 49 Stat. 452. 29 U.S.C. §§ 158 (d) and 158 (a)(5), negotiate with the certified rep-

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*Briefs of *amici curiae urging reversal were filed by Robert J. Fenlon for the American Society for Personnel Administration: by Marvin E. Frankel, Saul G. Kramer.* and *Stephen A. Bokat* for the Chamber of Commerce of the United States: and by *Daniel Popeo* and *Paul D. Kamenar* for the Washington Legal Foundation.

J. Albert Woll, Laurence Gold, George Kaufmann, and *John A. Fillion* filed a brief for the American Federation of Labor and Congress of Industrial Organizations el al, as *amici curiae* urging affirmance.

resentative of its employees over its decision to close a part of its business? In this case, the National Labor Relations Board (Board) imposed such a duty on petitioner with re-

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spect to its decision to terminate a contract with a customer, and the United States Court of Appeals, although differing over the appropriate rationale, enforced its order.

I

Petitioner, First National Maintenance Corporation (FNM), is a New York corporation engaged in the business of providing housekeeping cleaning, maintenance, and related services for commercial customers in the New York City area. It supplies each of its customers, at the customer's premises, contracted-for labor force and supervision in return for reimbursement of its labor costs (gross salaries, FICA and FUTA taxes, and insurance) and payment of a set fee. It contracts for and hires personnel separately for each customer, and it does not transfer employees between locations.[1]

During the spring of 1977, petitioner was performing maintenance work for the Greenpark Care Center, a nursing home in Brooklyn. Its written agreement dated April 28, 1976, with Greenpark specified that Greenpark "shall furnish all tools, equipment [*sic*], materials, and supplies," and would pay petitioner weekly "the sum of five hundred dollars plus the gross weekly payroll and fringe benefits." App. in No. 79–4167 (CA2). pp. 43, 44. Its weekly fee, however, had been reduced to $250 effective November 1, 1976. *Id.*, at 46. The contract prohibited Greenpark from hiring any of petitioner's employees during the term of the contract and for 90 days therafter. *Id.*, at 44. Petitioner employed approximately 35 workers in its Greenpark operation.

Petitioner's business relationship with Greenpark, seem-

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ingly, was not very remunerative or smooth. In March 1977, Greenpark gave petitioner the 30 days' written notice of cancellation specified by the contract, because of "lack of efficiency." *Id.*, at 52. This cancellation did not become effective, for FNM's work continued after the expiration of that 30-day period. Petitioner, however, became aware that it was losing money at Greenpark. On June 30, by telephone, it asked that its weekly fee be restored at the $500 figure and, on July 6, it informed Greenpark in writing that it would discontinue its operations there on August 1 unless the increase were granted.[2] *Id.*, at 47. By telegram on July 25, petitioner gave final notice of termination. *Id.*, at 48.

While FNM was experiencing these difficulties, District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL–CIO (union), was conducting an organization campaign among petitioner's Greenpark employees. On March 31, 1977, at a Board-conducted election, a majority of the employees selected the union as their bargaining agent.[3] On July 12, the union's vice president, Edward Wecker, wrote petitioner, notifying it of the certification and of the union's right to bargain, and stating: "We look forward to meeting with you or your representative for that purpose. Please advise when it will be convenient." *Id.*, at 49. Petitioner neither responded nor sought to consult with the union.

On July 28, petitioner notified its Greenpark employees that they would be discharged three days later. Wecker immediately telephoned petitioner's secretary-treasurer, Leonard Marsh, to request a delay for the purpose of bargaining. Marsh refused the offer to bargain and told Wecker that the termination of the Greenpark operation was purely a matter

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of money, and final, and that the 30 days' notice provision of the Greenpark contract made staying on beyond August 1 prohibitively expensive. *Id.*, at

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[1] The record does not show the precise dimension of petitioner's business. See 242 N.L.R.B. 462, 464 (1979). One of the owners testified that petitioner at that time had "between two and four" other nursing homes as customers. *Ibid.* The Administrative Law Judge hypothesized, however: "This is a large Company. For all I know, the 35 men at this particular home were only a small part of its total business in the New York area." *Id.* at 465.

[2] The record does not disclose how the contract's 30-day written notice provision was satisfied. In any event, the parties make no point of any shortage in the notice.

[3] The union was certified on May 11, 1977. App. in No. 79–4167 (CA2), p. 50.

79–81, 83, 85–86, 94. Wecker discussed the matter with Greenpark's management that same day, but was unable to obtain a waiver of the notice provision. *Id.*, at 91–93, 98–99. Greenpark also was unwilling itself to hire the FNM employees because of the contract's 90-day limitation on hiring. *Id.*, at 100–101, 106–107. With nothing but perfunctory further discussion, petitioner on July 31 discontinued its Greenpark operation and discharged the employees. *Id.*, at 110–116.

The union filed an unfair labor practice charge against petitioner, alleging violations of the Act's §§ 8(a)(1) and (5). After a hearing held upon the Regional Director's complaint, the Administrative Law Judge made findings in the union's favor. Relying on *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), he ruled that petitioner had failed to satisfy its duty to bargain concerning both the decision to terminate the Greenpark contract and the effect of that change upon the unit employees.[4] The judge reasoned:

> "That the discharge of a man is a change in his conditions of employment hardly needs comment. In these obvious facts, the law is clear. When an employer's work complement is represented by a union and he wishes to alter the hiring arrangements, be his reason lack of money or a mere desire to become richer, the law is no less clear that he must first talk to the union about it * * *. If Wecker had been given an opportunity to talk, something might have been worked out to transfer these people to other parts of [petitioner's] business * * *. Entirely apart from whether open discussion between the parties—with the Union speaking on behalf of the employees as was its right—might have persuaded [petitioner] to find a way of continuing this part of its operations, there was always the possibility that Marsh might have persuaded Greenpark to use these same employees to continue doing its maintenance work, either as direct employees or as later hires by a replacement contractor." 242 N.L.R.B. 462, 465 (1979).[5]

The Administrative Law Judge recommended an order requiring petitioner to bargain in good faith with the union about its decision to terminate its Greenpark service operation and its consequent discharge of the employees, as well as the effects of the termination. He recommended also, that petitioner be ordered to pay the discharged employees backpay from the date of discharge until the parties bargained to agreement, or the bargaining reached an impasse, or the union failed timely to request bargaining, or the union failed to bargain in good faith.

The National Labor Relations Board adopted the Administrative Law Judge's findings without further analysis, and additionally required petitioner, if it agreed to resume its Greenpark operations, to offer the terminated employees reinstatement to their former jobs or substantial equivalents; conversely, if agreement was not reached, petitioner was ordered to offer the employees equivalent positions, to be made available by discharge of subsequently hired employees, if necessary, at its other operations. *Id.*, at 463.

The United States Court of Appeals for the Second Circuit, with one judge dissenting in part, enforced the Board's order, although it adopted an analysis different from that espoused by the Board. 672 F.2d 596 (1980).[6] The Court of Appeals reasoned that no *per se* rule could be formulated to govern an employer's decision to close part of its business. Rather, the court said, § 8 (d) creates a *presumption* in favor of mandatory bargaining over such a decision, a presumption that is rebuttable "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain," for example, by demonstrating that "bargaining over the decision would be futile," or that the decision was due to "emergency financial circumstances," or that the "custom of the industry, shown by the absence of such an obligation from typical collective bargaining agreements, is not to bargain over such decisions." *Id.* at 601–602.

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[4] The Administrative Law Judge rejected petitioner's contention that it had satisfied, by that single phone call to Wecker, its duty to bargain about the termination.

[5] The judge further found that petitioner's "regular and usual" method of operation involved "taking on, finishing, or discontinuing this or that particular job," 242 N.L.R.B., at 466, and that "[t]here was no capital involved when it decided to terminate the Greenpark job. The closing of this one spot in no sense altered the nature of its business, nor did it substantially affect its total size." *Ibid.* The Administrative Law Judge therefore found inapplicable the Board's ruling in *Brockway Motor Trucks, Division of Mack Trucks, Inc.*, 230 N.L.R.B. 1002, 1003 (1977), enf. denied, 582 F.2d 720 (CA3 1978), that an employer's decision to close part of its business is not a mandatory subject of bargaining if it involves such a " 'significant investment or withdrawal of capital' as to 'affect the scope and ultimate direction of an enterprise,' " quoting from *General Motors Corp.*, GMC *Truck & Coach Div.*, 191 N.L.R.B. 951, 952 (1971).

[6] Because the court adopted different grounds for enforcement of the Board's order, it was error to enforce without a remand to the Board for further examinaiton of the evidence and proper factfinding. *NLRB v. Pipefitters*, 429 U.S. 507, 522, n. 9 (1977); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

The Court of Appeals' decision in this case appears to be at odds with decisions of other Courts of Appeals,[7] some of which

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decline to require bargaining over any management decision involving "a major commitment of capital investment" or a "basic operational change" in the scope or direction of an enterprise,[8] and some of which indicate that bargaining is not mandated unless a violation of § 8(a)(3) (a partial closing motivated by antiunion animus) is involved.[9] The Court of Appeals for the Fifth Circuit has imposed a duty to bargain over partial closing decisions. See *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512, cert. denied, 385 U.S. 935 (1966). The Board itself has not been fully consistent in its rulings applicable to this type of management decision.[10]

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Because of the importance of the issue and the continuing disagreement between and among the Board and the Courts of Appeals, we granted certiorari. 499 U.S. 1076 (1981).

II

A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937). Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.[11] § 1 of the Act, as amended, 29 U.S.C. § 151. Congress ensured that collective bargaining would go forward by creating the Board and giving it the power to condemn as unfair labor practices certain conduct by unions and employers that it deemed deleterious to the process, including the refusal "to bargain collectively." §§ 3 and 8, 29 U.S.C. §§ 153 and 158.

Although parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of "wages, hours, and other terms and conditions of employment."[12] A unilateral change as to a subject within

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[7] The Court of Appeals in this case, for example, agreed, 627 F.2d, at 601, with the Third Circuit in *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (1978), that a presumption in favor of bargaining was to be established, but it analyzed differently how that presumption would be rebutted. The Third Circuit had decided that the competing interests of the employer and the employees, under the particular circumstances, must be weighed, and it had remanded the case before it to the Board for fact-finding into the circumstances behind the partial closing. See also *Equitable Gas Co. v. NLRB*, 637 F.2d 980 (CA3 1981) (subcontracting); *ABC Trans-National Transport, Inc. v. NLRB*, 642 F.2d 675 (CA3 1981) (partial closing); *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (CA3 1965) (partial closing). Several courts have agreed with the Second Circuit. See *e.g.*, *Davis v. NLRB*, 617 F.2d 1264 (CA7 1980) (change of full-service restaurant to self-service cafeteria); *NLRB v. Production Molded Plastics, Inc.*, 604 F.2d 451 (CA6 1979) (plant closing).

[8] See, *e.g.*, *NLRB v. International Harvester Co.*, 618 F. 2d 85 (CA9 1980); *NLRB v. Adams Dairy, Inc.*, 350 F. 2d 108 (CAS 1965), cert. denied, 382 U.S. 1011 (1966); *NLRB v. Transmarine Navigation Corp.*, 380 F. 2d 933 (CA9 1967); *Royal Typewriter Co. v. NLRB*, 533 F. 2d 1030 (CA8 1976): *NLRB v. Rapid Bindery, Inc.*, 293 F. 2 170 (CA2 1961); *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (CA10 1969).

[9] See, *e.g.*, *Morrison Cafeterias Consolidated, Inc.*, *v. NLRB*, 431 F.2d 254 (CA8 1970); *NLRB v. Drapery Mfg. Co.*, 425 F. 2d 1026 (CA8 1970); *NLRB v. William J. Burns International Detective Agency, Inc.*, 346 F.2d 897 (CA8 1965).

[10] Compare *National Car Rental System, Inc.*, 252 N.L.R.B. 159, 161 (1980) (employer's decision to terminate car leasing operations at one location not a mandatory subject because " 'essentially financial and managerial in nature,' involving a 'significant investment or withdrawal of capital, affecting the scope and ultimate direction of an enterprise,' " quoting from *General Motors Corp., GMC Truck & Coach Div.*, 191 N.L.R.B., at 952), and *Summit Tooling Co.*, N.L.R.B. 479. 480 (1972) (decision to close a subsidiary not a mandatory subject because "its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products"), with *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 567, 568 (1966) (employer's decision to shut down one of multiple plants was a mandatory subject because it was "a decision directly affecting terms and conditions of employment" and "interests of employers are of sufficient importance that their representative ought to be consulted in matters affecting them"). See also *Kingwood Mining Co.*, 210 N.L.R.B. 844 (1974), aff'd *sub nom. United Mine Workers v. NLRB*, 169 U.S. App. D.C. 301, 515 F. 2d 1018 (1975).

[11] "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding act in the history of labor disturbances that it is a proper subject to judicial notice and requires no citation of instances." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S., at 42 (unpholding the constitutionality of the Act).

[12] Sections 8(a)(5) and 8(b)(3) of the Act make it an unfair labor practice for an employer and union representative, respectively, "to refuse to bargain collectively." 29 U.S.C. §§ 158(a)(5) and 158(b)(3). Section 8(d), added, as was § 8(b)(3), to the Act by the amendatory Labor Management Relations Act, 1947, 61 Stat. 136, defines the duty to bargain as

> "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer

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this category violates the statutory duty to bargain and is subject to the Board's remedial order. *NLRB v. Katz,* 369 U.S. 736 (1962). Conversely, both employer and union may bargain to impasse over these matters and use the economic weapons at their disposal to attempt to secure their respective aims *NLRB v. American National Ins. Co.,* 343 U.S. 395 (1952).[13] Congress deliberately left the words "wages, hours, and other terms and conditions of employment" without further definition, for it did not intend to deprive the Board of the power further to define those terms in light of specific industrial practices.[14]

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Nonetheless, in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place:

> "Section 8(a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. * * * But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 178 (1971).

See also *Ford Motor Co. v. NLRB,* 441 U.S. 448 (1979); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964); *Teamsters v. Oliver,* 358 U.S. 283 (1959).

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Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. See *Fibreboard.* 379 U.S., at 223 (STEWART J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employee. *Chemical Workers,* 404 U.S., at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Fibreboard,* 379 U.S., at 223 (STEWART. J., concurring). Cf. *Textile Workers* v. *Darlington Co.,* 380 U.S. 263, 268 (1965) ("an employer has the absolute right to terminate his entire business for any reason he pleases"). At the same time, this decision touches on a matter of central and pressing concern to the union and its

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> in good faith with respect to wages, hours, and other terms and conditions of employment * * *." 29 U.S.C. § 158(d).

Section 9(a) further specifies that

> "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *." 29 U.S.C. § 159(a).

[13] A matter that is not a mandatory subject of bargaining, unless it is illegal, may be raised at the bargaining table to be discussed in good faith, and the parties may incorporate it into an enforceable collective-bargaining agreement. Labor and management may not, however, insist on it to the point of impasse. *NLRB v. Borg-Warner Corp.,* 356 U.S. 342 (1958).

[14] In enacting the Labor Management Relations Act, 1947, Congress rejected a proposal in the House to limit the subjects of bargaining to

> "(i) [w]age rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects." H.R. 3020 § 2(11), 80th Cong., 1st Sess. (1947).

The adoption, instead of the general phrase now part of § 8(d) was clearly meant to preserve future interpretation by the Board. See H.R. Rep. No. 245, 80th Cong., 1st Sess., 71 (1947) (minority report) ("The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment"); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34–35 (1947). Specific references in the legislative history to place closing, however, are inconclusive. See 79 Cong. Rec. 7673, 9682 (1935) (comments of Sen. Walsh and Rep. Griswold).

member employees: the possibility of continued employment and the retention of the employees' very jobs. See *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720, 735–736 (CA3 1978); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 566–568 (1966).

Petitioner contends it had no duty to bargain about its decision to terminate its operations at Greenpark. This contention requires that we determine whether the decision itself should be considered part of petitioner's retained freedom to manage its affairs unrelated to employment.[15] The aim of

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labeling a matter a mandatory subject of bargaining, rather than simply permitting, but not requiring, bargaining, is to "promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace," *Fibreboard*, 379 U.S., at 211. The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole.[16] *Ford Motor Co.*, 441 U.S., at 500–501; *Borg-Warner*, 356 U.S., at 350 (condemning employer's proposal of "ballot" clause as weakening the collective-bargaining process). This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process[17]

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to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining.[18] Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

The Court in *Fibreboard* implicitly engaged in this analysis with regard to a decision to subcontract for maintenance work previously done by unit employees. Holding the employer's decision a subject of mandatory bargaining, the Court relied not only on the "literal meaning" of the statutory words, but also reasoned:

> "The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant.
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> No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of em-

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[15] There is no doubt that petitioner was under a duty to bargain about the results or effects of its decision to stop the work at Greenpark, or that it violated that duty. Petitioner consented to enforcement of the Board's order concerning bargaining over the effects of the closing and has reached agreement with the union on severance pay. App. in No. 79–4167 (CA2), pp. 21–22.

[16] "The Act does not compel agreements between employers and employees. It does not compel any agreement whetever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' * * * The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S., at 45. Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S 543, 549 (1964) ("The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to arrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship").

[17] The employer has no obligation to abandon its intentions or to agree with union proposals. On proper subjects, it must meet with the union, provide information necessary to the union's understanding of the problem, and in good faith consider any proposals the union advances. In concluding to reject a union's position as to a mandatory subject, however, it must face the union's possible use of strike power. See generally Fleming, The Obligation to Bargain in Good Faith, 47 Va. L. Rev. 988 (1961).

[18] The subjects over which mandatory bargaining has been required have changed over time. Employers and unions have been required to bargain over such diverse topics as profit-sharing plans, *Winn-Dixie Stores, Inc. v. NLRB*, 567 F. 2d 1343 (CA5), cert. denied, 439 U.S. 985 (1978); layoffs and recalls, see *Awrey Bakeries, Inc. v. NLRB*, 548 F. 2d 138 (CA6 1976); contractual clauses concerning race discrimination, see *Wichita Eagle & Beacon Publishing Co.*, 222 N.L.R.B., 742 (1976); and "most favored nation" clauses, *Dolly Madison Industries, Inc.*, 182 N.L.R.B., 1037 (1970). See also *Borg-Warner*, 356 U.S., at 353 (Harlan, J., concurring in part and dissenting in part).

> ployment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U.S., at 213.

The Court also emphasized that a desire to reduce labor costs, which it considered a matter "peculiarly suitable for resolution within the collective bargaining framework," *id.*, at 214 was at the base of the employer's decision to subcontract:

> "It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests." *Id.*, at 213–214.

The prevalence of bargaining over "contracting out" as a matter of industrial practice generally was taken as further proof of the "amenability of such subjects to the collective bargaining process." *Id.*, at 211.

With this approach in mind, we turn to the specific issue at hand: an economically motivated decision to shut down part of a business.

III

A

Both union and management regard control of the decision of shut down as operation with the utmost seriousness. As has been noted, however, the Act is not intended to serve either party's individual interest, but to foster in a neutral

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manner a system in which the conflict between these interests may be resolved. It seems particularly important therefore, to consider whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act.

A union's interest in participating in the decision to close a particular facility or part of an employer's operations springs from its legitimate concern over job security. The Court has observed: "The words of [§ 8 (d)] * * * plainly cover termination of employment which * * * necessarily results" from closing an operation. *Fibreboard,* 379 U.S., at 210. The union's practical purpose in participating however, will be largely uniform: it will seek to delay or halt the closing. No doubt it will be impelled, in seeking these ends to offer concessions information and alternatives that might be helpful to management or forestall or prevent the termination of jobs.[19] It is unlikely however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions. There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by § 8 (a)(5). See *e.g., NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 196 (CA3 1965); *NLRB* v. *Adams Dairy, Inc.*, 350 F.2d 108 (CA8 1965), cert. denied. 382 U.S. 1011 (1966). And under § 8(a)(5), bar-

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gaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy. A union, by pursuing such bargaining rights, may achieve valuable concessions from an employer engaged in a partial closing. It also may secure in contract negotiations provisions implementing rights to notice, information, and fair bargaining. See BNA, Basic Patterns in Union Contracts 62–64 (9th ed., 1979).

Moreover, the union's legitimate interest in fair dealing is protected by § 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. *Textile Workers* v. *Darlington Co.*, 380 U.S. 263 (1965). Under § 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."

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[19] We are aware of past instances where unions have aided employers in saving failing businesses by lending technical assistance reducing wages and benefits or increasing production, and even loaning part of earned wages to forestall closures. See S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 845–851 (1960); C. Golden & H. Rutenberg, The Dynamics of Industrial Democracy 263-291 (1942). See also *United Steel Workers of America. Local No. 1330* v. *United States Steel Corp.*, 492 F. Supp. 1 (ND Ohio), aff'd in part and vacated in part, 631 F.2d 1264 (CA6 1980) (union sought to purchase failing plant); 104 LRR 239 (1980) (employee ownership plan instituted to save company); *id.*, at 267–268 (union accepted pay cuts to reduce plant's financial problems). These have come about without the intervention of the Board enforcing a statutory requirement to bargain.

Thus, although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered. It also has direct protection against a partial closing decision that is motivated by an intent to harm a union.

Management's interest in whether it should discuss a decision of this kind is much more complex and varies with the particular circumstances. If labor costs are an important factor in a failing operation and the decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make continuing the business profitable. Cf. U.S. News & World Report, Feb. 9, 1981, p. 74; BNA, Labor Relations Yearbook–1979, p. 5 (UAW agreement with Chrysler Corp. to make concessions on wages and fringe benefits). At other times, management may have great need for speed, flexibility, and secrecy in **683** meeting business opportunities and exigencies.[20] It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.[21]

There is an important difference, also, between permitted bargaining and mandated bargaining. Labeling this type of decision mandatory could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose. See Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 UCLA L. Rev. 1089, 1103–1105 (1967). In addition, many of the cases before the Board have involved, as this one did, not simply a refusal to bargain over the decision, but a refusal to bargain at all, often coupled with other unfair labor practices. See, *e.g., Electrical Products Div. of Midland-Ross Corp. v. NLRB*, 617 F. 2d 977 (CA3 1980), cert. denied, 449 U.S. 871 (1981); *NLRB v. Amoco Chemicals Corp.*, 529 F.2d 427 (CA5 1976); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (CA8 1976); *NLRB* **684** *v. American Mfg. Co.*, 351 F.2d 74 (CA5 1965) (subcontracting); *Smyth Mfg. Co.*, 247 N.L.R.B. 1139 (1980). In these cases the employer's action gave the Board reason to order remedial relief apart from access to the decisionmaking process. It is not clear that a union would be equally dissatisfied if an employer performed all its bargaining obligations apart from the additional remedy sought here.

While evidence of current labor practice is only an indication of what is feasible through collective bargaining, and not a binding guide, see *Chemical Workers*, 404 U.S., at 176, that evidence supports the apparent imbalance weighing against mandatory bargaining. We note that provisions giving unions a right to participate in the decisionmaking process concerning alteration of the scope of an enterprise appear to be relatively rare. Provisions concerning notice and "effects" bargaining are more prevalent. See II BNA. Collective Bargaining Negotiations and Contracts § 65:201–233 (1981); U.S. Dept. of Labor, Bureau of Labor Statistics, Bull. 2065, Characteristics of Major Collective Bargaining Agreements, Jan. 1, 1978, pp. 96, 100, 101, 102–103 (1980) (charting provisions giving interplant transfer and relocation allowances; advance notice of layoffs, shutdowns, and technological changes; and wage-employment guarantees; no separate tables on decision-bargaining, presumably due to rarity). See also U.S. Dept. of Labor, Bureau of Labor Statisics, Bull. No. 1425–10 Major Collective Bargaining Agreements, Plant Movement, Transfer, and Relocation Allowances (July 1969).

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[20] See *International Assn. of Machinists & Aerospace Workers v. Northeast Airlines, Inc.* 473 F.2d 549, 556–557 (CA1), cert. denied, 409 U.S. 845 (1972); *Raskin Packing Co.*, 246 N.L.R.B. No. 15 (1979); *M&M Transportation Co.*, 239 N.L.R.B. 73 (1978); Goetz, The Duty to Bargain About Changes in Operations, 1964 Duke L. J. 1, 9–10. Cf. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (noting the "danger of inadvertent leaks" in giving union confidential information).

[21] See *ABC Trans-National Transport, Inc. v. NLRB*, 642 F.2d 675 (CA3 1981); Loomis & Herman, Management's Reserved Rights and the NLRB—An Employers's View, 19 Lab. L.J. 695 (1968); Comment, "Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency, 14 UCLA L. Rev. 1089 (1967).

Further, the presumption analysis adopted by the Court of Appeals seems ill-suited to advance harmonious relations between employer and employee. An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. If it should decide to risk not bargaining, it might be faced ultimately, with harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation. See, *e.g.*, *Electrical Products Div. of Midland-Ross Corp.*, 239 N.L.R.B. 323 (1978), enf'd, 617 F. 2d 977 (CA3 1980), cert. denied, 449 U.S. 871 (1981). Cf. *Lever Brothers Co.* v. *International Chemical Workers Union*, 554 F. 2d 115 (CA4 1976) (enjoining plant closure and transfer to permit negotiations). Also, labor costs may not be a crucial circumstance in a particular economically based partial termination. See. *e.g.*, *NLRB* v. *International Harvester Co.*, 618 F. 2d 85 (CA9 1980) (change in marketing structure); *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698 (CA10 1969) (loss of major customer). And in those cases, the Board's traditional remedies may well be futile. See *ABC Trans-National Transport, Inc.* v. *NLRB*, 642 F. 2d 675 (CA3 1981) (although employer violated its "duty" to bargain about freight terminal closing, court refused to enforce order to bargain). If the employer intended to try to fulfill a court's direction to bargain, it would have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining would suffice before it could implement its decision. Compare *Burns Ford, Inc.*, 182 N.L.R.B. 753 (1970) (one week's notice of layoffs sufficient), and *Hartmann Luggage Co.*, 145 N.L.R.B. 1572 (1964) (entering into executory subcontracting agreement before notifying union not a violation since contract not yet final), with *Royal Plating & Polishing Co.*, 148 N.L.R.B. 545, 555 (1964), enf. denied, 350 F. 2d 191 (CA3 1965) (two weeks' notice before final closing of plant inadequate). If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith. See *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (CA1), cert. denied, 346 U.S. 887 (1953). A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board. See, *e. g.*, *International Offset Corp.*, 210 N.L.R.B. 854 (1974) (union's failure to realize that shutdown was imminent, in view of successive advertisements, sales of equipment, and layoffs, held a waiver of right to bargain); *Shell Oil Co.*, 149 N.L.R.B. 305 (1964) (union waived its right to bargain by failing to request meetings when employer announced intent to transfer a few days before implementation).

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We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision,[22] and we hold that the decision itself is *not* part of § 8(d)'s "terms and conditions," see n. 12, *supra*, over which Congress has mandated bargaining.[23]

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[22] In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts. See, *e. g.*, *International Ladies' Garment Workers Union* v. *NLRB*, 150 U.S. App. D.C. 71, 463 F. 2d 907 (1972) (plant relocation predominantly due to labor costs); *Weltronic Co.* v. *NLRB*, 419 F. 2d 1120 (CA6 1969) (decision to move plant three miles), cert. denied, 398 U.S. 938 (1970); *Dan Dee West Virginia Corp.*, 180 N.L.R.B. 534 (1970) (decision to change method of distribution, under which employee-drivers became independent contractors); *Young Motor Truck Service, Inc.*, 156 N.L.R.B. 661 (1966) (decision to sell major portion of business). See also Schwarz, Plant Relocation or Partial Termination—The Duty to Decision-Bargain, 39 Ford. L. Rev. 81, 100–102 (1970).

[23] Despite the contentions of *amicus* AFL–CIO our decision in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330 (1960), does not require that we find bargaining over this partial closing decision mandatory. In that case, a union certified as bargaining agent for certain railroad employees requested that the railroad bargain over its decision to close down certain stations thereby eliminating a number of jobs. When the union threatened to strike over the railroad's refusal to bargain on this issue, the railroad sought an injunction in federal court. Construing the scope of bargaining required by § 2, First, of the Railway Labor Act, 45 U.S.C. § 152, First, the Court held that the union's effort to negotiate was not "an unlawful bargaining demand," 362 U.S., at 341, and that the District Court was precluded from enjoining the threatened strike by § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, which deprives federal courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute • • • from • • • [c]easing or refusing to perform any

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In order to illustrate the limits of our holding, we turn again to the specific facts of this case. First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss and the union made no claim of antiunion animus. In addition, petitioner's dispute with Greenpark was solely over the size of the management fee Greenpark was willing to pay. The union had no control or authority over that fee. The most that the union could

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have offered would have been advice and concessions that Greenpark, the third party upon whom rested the success or failure of the contract, had no duty even to consider. These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard.* Further, the union was not selected as the bargaining representative or certified until well after petitioner's economic difficulties at Greenpark had begun. We thus are not faced with an employer's abrogation of ongoing negotiations or an existing bargaining agreement. Finally, while petitioner's business enterprise did not involve the investment of large amounts of capital in single locations, we do not believe that the absence of "significant investment or withdrawal of capital," *General Motors Corp., GMC Truck & Coach Div.,* 191 *N.L.R.B.,* at 952, is crucial. The decision to halt work at this specific location represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.

The judgment of the Court of Appeals, accordingly, is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting

Section 8(d) of the National Labor Relations Act, as amended, requires employers and employee representatives "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). The question in this case is whether First National Maintenance Corporation's decision to terminate its Greenpark Care Center operation and to discharge the workers employed in that operation was a decision with respect to "terms and conditions of employment" within the meaning of the Act, thus rendering its failure to negotiate with the union unlawful.

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As this Court has noted, the words "terms and conditions of employment" plainly cover termination of employment resulting from a management decision to close an operation. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 210 (1964). As the Court today admits the decision to close an operation "touches on a matter of central and pressing concern to the union and its member employees." *Ante,* at 677. Moreover, as the Court today further concedes, Congress deliberately left the words "terms and conditions of employment" indefinite, so that the NLRB would be able to give content to those terms in light of changing industrial conditions. *Ante,* at 675, and n. 14. In the exercise of its congressionally delegated authority and accumulated expertise, the Board has determined that an employer's decision to close part of its operations affects the "terms and conditions of employment" within the meaning of the Act, and is thus a mandatory subject for collective bargaining. *Ozark Trailers, Inc.,* 161 N.L.R.B. 561 (1966). Nonetheless, the Court today declines to defer to the Board's decision on this sensitive question of industrial relations, and on the basis of pure specula-

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work. . . ." Although the Court in part relied on an expansive interpretation of § 2, First, which requires railroads to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," and § 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c), defining "labor dispute" as "any controversy concerning terms or conditions of employment," its decision also rested on the particular aims of the Railway Labor Act and national transportation policy. See 362 U.S., at 336–338. The mandatory scope of bargaining under the Railway Labor Act and the extent of the prohibition against injunctive relief contained in Norris-LaGuardia are not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices. See *Chicago & N. W. R. Co.* v. *Transportation Union,* 402 U.S. 570, 579, n. 11 (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"). Cf. *Boys Markets, Inc.* v. *Retail Clerks,* 398 U.S. 235 (1970); *Buffalo Forge Co.* v. *Steelworkers,* 428 U.S. 397 (1976).

tion reverses the judgment of the Board and of the Court of Appeals. I respectfully dissent.

The Court bases its decision on a balancing test. It states that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business," *Ante,* at 679. I cannot agree with this test because it takes into account only the interests of *management;* it fails to consider the legitimate employment interests of the workers and their union. Cf. *Brockway Motor Trucks v. NLRB,* 582 F.2d 720, 734–740 (CA3 1978) (balancing of interests of workers in retaining their jobs against interests of employers in maintaining unhindered control over corporate direction). This one-sided approach hardly serves "to foster in a neutral man-

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ner" a system for resolution of these serious, two-sided controversies. See *ante,* at 680–681.

Even if the Court's statement of the test were accurate, I could not join in its application which is based solely on speculation. Apparently, the Court concludes that the benefit to labor-management relations and the collective-bargaining process from negotiation over partial closings is minimal, but it provides no evidence to that effect. The Court acknowledges that the union might be able to offer concessions, information, and alternatives that might obviate or forestall the closing, but it then asserts that "[i]t is unlikely, however, that requiring bargaining over the decision * * * will augment this flow of information and suggestions." *Ante,* at 681. Recent experience, however, suggests the contrary. Most conspicuous, perhaps, were the negotiations between Chrysler Corporation and the United Auto Workers, which led to significant adjustments in compensation and benefits, contributing to Chrysler's ability to remain afloat. See Wall Street Journal, Oct. 26, 1979, p. 3. col. 1. Even where labor costs are not the direct cause of a company's financial difficulties, employee concessions can often enable the company to continue in operation—if the employees have the opportunity to offer such concessions.[*]

The Court further presumes that management's need for "speed, flexibility, and secrecy" in making partial closing decision would be frustrated by a requirement to bargain. *Ante,* at 682–683. In some cases the Court might be correct. In others, however, the decision will be made openly and de-

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liberately, and considerations of "speed, flexibility, and secrecy" will be inapposite. Indeed, in view of management's admitted duty to bargain over the effects of a closing, see *ante,* at 677–678, n. 15, it is difficult to understand why additional bargaining over the closing itself would necessarily unduly delay or publicize the decision.

I am not in a position to judge whether mandatory bargaining over partial closing *in all cases* is consistent with our national labor policy, and neither is the Court. The primary responsibility to determine the scope of the statutory duty to bargain has been entrusted to the NLRB, which should not be reversed by the courts merely because they might prefer another view of the statute. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 495–497 (1979); see *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 236 (1963). I therefore agree with the Court of Appeals that employers presumptively have a duty to bargain over a decision to close an operation, and that this presumption can be rebutted by a showing that bargaining would be futile, that the closing was due to emergency financial circumstances, or that, for some other reason, bargaining would not further the purposes of the National Labor Relations Act. 627 F.2d 596, 601 (CA2 1980). I believe that this approach is amply supported by recent decisions of the Board. *E. g., Brooks-Scanlon, Inc.,* 246 N.L.R.B. 476, 102 LRRM 1606 (1979); *Raskin Packing Co.,* 246 N.L.R.B. 78, 102 LRRM 1489 (1979); *M. & M. Transportation Co.,* 239 N.L.R.B. 73 (1978). With respect to the individual facts of this case, however, I would vacate the judgment of the Court of Appeals, and remand to the Board for further examination of the evidence. See *SEC v. Chenery Corp.,* 318 U.S. 80, 94–95 (1943).

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[*] Indeed, in this case, the Court of Appeals found: "On the record, * * * there is sufficient reason to believe that, given the opportunity, the union might have made concessions, by accepting reduction in wages or benefits (take-backs) or a reduction in the work force, which would in part or in whole have enable Greenpark to give FNM an increased management fee. At least, if FNM had bargained over its decision to close, that possibility would have been tested, and management would still have been free to close the Greenpark operation if bargaining did not produce a solution." 627 F.2d 596, 602 (CA2 1980).

Raymond T. Kolinske v. William A Lubbers, GC

516 F. Supp. 1171 (D.C.D.C.), June 22, 1981

On action challenging failure to pay strike benefits

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Joyce Hens Green, District Judge: This matter is before the Court on the motion of the defendants, William A. Lubbers, General Counsel of the National Labor Relations Board (hereinafter the "General Counsel" and the "N.L.R.B") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "UAW"), to dismiss the complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. Alternatively, the General Counsel has moved for summary judgment.

The facts alleged in the complaint, taken as true for purposes of the motions to dismiss, reflect that the plaintiff is a long time employee of the McLaughlin Company at its Petoskey, Michigan plant. The McLaughlin Company, an "employer" as defined in 29 U.S.C. § 152(2) and therefore subject to the jurisdiction of the N.L.R.B., has for many years recognized Local 1669 of the UAW as the exclusive bargaining agent for many of its employees. The plaintiff, however, has not ever been a member of either Local 1669 or the UAW, but works in the bargaining unit represented by Local 1669.

Local 1669 and the McLaughlin Company, in 1975, entered into a collective bargaining agreement containing a provision creating an "agency shop,"[1] which required the plaintiff, as an employee in the unit represented by Local 1669, to pay fees to Local 1669 equivalent to union dues as a condition of employment.[2] The plaintiff paid the required fees to Local 1669 during the duration of the bargaining agreement.

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While this agreement was in effect (and now), Article 16 of the UAW's Constitution required that 30% of members' dues be placed in the UAW strike insurance fund. The UAW treated plaintiff's fees in a similar fashion, apportioning 30% for placement in the fund from which strike benefits were paid to employees.

The 1975 agreement expired in the spring of 1978 and Local 1669 went on strike, establishing a picket line at the Petoskey plant of the McLaughlin Company. Plaintiff, though not a union member, honored the picket line and did not work during the strike at the Petoskey facility.

The UAW paid strike benefits to members of Local 1669 who performed picket line or other strike duties, but when plaintiff applied for such benefits, the UAW refused payment on the ground that he had not performed picket line or other strike duties.

During the 1978 strike (and at the present time), the UAW Constitution provided in Article 8, Section 20 that:

> Non-members covered by an agency shop clause in a UAW contract shall receive all the material benefits to which members are entitled but shall not be allowed other membership participation in the affairs of the union.

A 1962 interpretation of this section issued by the UAW International Executive Board declared:

> Such non-members shall not be allowed attendance at Union meetings, the right to hold or run for any Union office (elected or appointed) or any voting rights within the Union unless and until they have become members of the Union in

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[1] In his *Basic Text on Labor Law*, Professor Robert A. Gorman described the agency shop:

> The agency shop requires that an employee * * * simply pay the union for services rendered by the union to employees within the bargaining unit as the employees' "agent" in negotiating and administering the labor contract. The Labor Act permits—and most agency shop agreements provide for—the exaction of a service fee which is equivalent in amount to the initiation fees and periodic dues which are paid by full union members. The rationale is that even nonmembers reap the benefit of union representation and should not be permitted a "free ride."

Id. at 642.

[2] Agency shop clauses are established pursuant to Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which defines unfair labor practices and, as interpreted in *N.L.R.B. v. General Motors*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963), permits a union to seek such a clause in collective bargaining. The employer had argued that permitting an agency shop clause in the bargaining agreement would have placed him in violation of § 8(a)(3)'s proscription against "discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." The Court found that the employer's acceptance of an agency shop clause would not constitute an unfair labor practice.

accordance with the provisions of this Constitution.

The 1978 strike ended when Local 1669 and the McLaughlin Company reached accord on a new collective bargaining agreement, which included an agency shop provision similar to that clause executed in the 1975 agreement.

After the UAW rejected plaintiff's demands for strike benefits, he filed on July 11, 1978 an unfair labor practice charge with the Regional Director of the N.L.R.B.'s 7th Region, alleging that the UAW's denial of strike benefits violated Section 8(b)(1)(A) of the National Labor Relations Act (hereinafter the "NLRA"), 29 U.S.C. § 158(b)(1)(A).[3] On August 28 the Acting Regional Director refused to issue a complaint, and two months later plaintiff's appeal was denied.

On September 13, 1978, plaintiff brought another charge against the UAW and Local 1669, claiming that the continued collection of fees from the plaintiff by Local 1669 and the UAW, a portion of which is expended on programs unavailable to the plaintiff, violated § 8(b)(1)(A). On October 26, the Regional Director decided not to issue a complaint and on October 31, plaintiff's appeal of this decision was denied.

Plaintiff later instituted this action, contending that the General Counsel infringed plaintiff's right to refrain from associational activity, guaranteed by Section 7 of the NLRA, and the First Amendment to the Constitution; and his right not to be deprived of property without due process of law, guaranteed by the Fifth Amendment to the Constitution. Against the UAW, plaintiff alleges a breach of the duty of fair representation in that the Union engaged in conduct which was arbitrary, discriminatory, unconstitutional, and in bad faith.

Plaintiff seeks a writ of mandamus directing the General Counsel to issue complaints charging unfair labor practices against Local 1669 and the UAW for their failure to pay him strike benefits unless he participates in picketing and for their collection of fees allocated to be spent on programs in which he may not participate. Pending the completion of proceedings on these complaints, plaintiff seeks a stay in the action against the UAW. Were the relief against the General Counsel not granted, plaintiff seeks against the UAW either a refund of 30% of his fees paid from 1975–1978 or an award of the full amount of strike benefits for the 1978 strike and any that might result in the future, provided he honors the picket line.

The first question demanding resolution is whether there is jurisdiction to entertain plaintiff's request for a writ of mandamus ordering the General Counsel to issue an unfair labor practice complaint. Under Section 3 of the NLRA, 29 U.S.C. § 153, the General Counsel is vested with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under [Section 10 of the NLRA, 29 U.S.C. § 160 (procedures for unfair labor practice complaints)]." This section has been uniformly interpreted to grant unreviewable discretion to the General Counsel. *See Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 316, 99 S.Ct. 1123, 1131–32, 59 L.Ed.2d 333 (1979) (the General Counsel can "in his unreviewable discretion refuse to issue * * * a complaint."); *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 912, 17 L.Ed.2d 842 ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."); *Bandlow v. Rothman*, 278 F.2d 866 (D.C.Cir.), *cert. denied*, 364 U.S. 909, 81 S.Ct. 273, 5 L.Ed.2d 224 (1960) (per curiam) (district court lacks power to order General Counsel to issue a complaint).

Plaintiff asserts that this dispute falls into one of the recognized exceptions to the principle of nonreviewability. In *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), the Supreme Court held that the district court had jurisdiction under 28 U.S.C. § 1337[4] "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.* at 188, 79 S.Ct. at 183. In *Leedom*, the Court found that the Board exceeded its statutory power by including in a single bargaining unit a group of professional employees with a group of non-professional employees without following proper procedures. In other certification actions, courts have narrowly and frugally construed the *Leedom* exception. *See Physicians National House Staff Association v. Fanning,* 642 F.2d 492 (D.C. Cir.1980) (en banc) ("[T]he district courts are powerless to adjudicate the merits of certification decisions absent a clear violation of the National Labor Relations Act by the Board." *Id.,* at 500.

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[3] Section 8(b)(1)(A) provides that a union commits an unfair labor practice when it restrains or coerces employees exercising rights guaranteed in Section 7. 29 U.S.C. § 158(b)(1)(A). Section 7 gives employees "the right to refrain from [union activity] except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [section 8(a)(3)]." 29 U.S.C. § 157.

[4] Section 1337 provides that district courts shall have jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Additionally, district courts have exercised jurisdiction over actions by the Board which infringe constitutional rights. *Fay v. Douds,* 172 F.2d 720, 723 (2d Cir. 1949) (Hand, J.) (giving district court jurisdiction if the "assertion of consititutional right is not transparently frivolous.") In *McCormick v. Hirsch,* 460 F.Supp. 1337 (M.D.Pa. 1978), the Court accepted jurisdiction over a complaint where the plaintiff, the superior for all Catholic elementary and secondary schools within a diocese, alleged that the N.L.R.B. had no jurisdiction over Roman Catholic schools that employ lay teachers who seek unionization. The court held that enjoining the Board from asserting jurisdiction over a Catholic parochial high school was necessary to protect the plaintiff's religious freedom.

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Although judicial review of the General Counsel's decision not to issue a complaint might protect that rights of the individual more adequately, on occasion, and ensure responsible decision making,[5] it is apparent that jurisdiction does not lie in the district court to determine whether the General Counsel erred in this matter. Both the statutory exception as embodied in *Leedom* and the constitutional exception announced in *Fay* concerned certification actions undertaken by the entire Board, not a discretionary decision made by the General Counsel pursuant to § 3 of the NLRA. Indeed, research discloses no decision overruling the discretion of the General Counsel and ordering him to issue an unfair labor practice complaint.[6] It would then not only defy the heavy burden of precedent to accept jurisdiction over the General Counsel's decision not to issue a complaint, but more impressively, would establish a new precedent inappropriate in this unique instance.

The question remains, however, whether the plaintiff has stated a cause of action against the UAW. The UAW maintains that the court lacks jurisdiction over the cause of action asserted and that the plaintiff has not stated a legal claim upon which relief can be granted under the Constitution or under the union's duty to represent the plaintiff fairly. The plaintiff, rejecting these arguments, claims that the Court has jurisdiction, and that in conditioning his receipt of strike benefits on picketing activity, the union has infringed his First Amendment freedoms of speech and association. Plaintiff also contends that the union's allocation of 30% of his fees into the strike insurance fund is an unlawful apportionment of non-members' payments since, as such non-member, he is being denied strike benefits unless he participates in the affirmative activity of picketing.

Plaintiff asserts that jurisdiction exists under two separate statutory grants, 28 U.S.C. § 1337, the provision giving the district court jurisdiction to hear matters "arising under any Act of Congress regulating commerce * * *," and Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, which permits suits for violation of contracts between an employer and a labor organization or between any such labor organizations.

In suits alleging the breach of the duty of fair representation, district courts have exercised jurisdiction under section 301 where the suit alleges a union misuse of fees collected from non-members pursuant to agency shop agreements. *Bagnall v. Air Line Pilots Association,* 626 F.2d 336 (4th Cir. 1980), *cert. denied* ——— U.S. ———, 101 S.Ct. 943, 67 L.Ed.2d 112 (1981); *Seay v. McDonnell Douglas Corp.,* 427 F.2d 996, 1000 (9th Cir. 1970), *on remand,* 371 F.Supp. 754 (C.D. Cal. 1973), *aff'd in*

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[5] *See* Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not to Issue a Complaint under the NLRA,* 86 Yale L.J. 1349 (1977) ("Independent judicial scrutiny would * * * provide a remedy to protect the rights of private parties against arbitrary or erroneous decisions, and ensure that labor policy is made, not by the General Counsel, but by the body to whom Congress has entrusted the task—the NLRB." *Id.* at 1360–61).

[6] At least one court has held that where the General Counsel's refusal to issue an unfair labor practice complaint is based on an erroneous interpretation of the limitations period governing the action, the General Counsel can be ordered to address the plaintiff's charges on the merits. Southern California District Council of *Laborers v. Ordman,* 318 F.Supp. 633 (C.D.Cal. 1970). *See also Illinois State Employees Council 34 v. N.L.R.B.,* 395 F.Supp. 1011 (N.D.Ill. 1975), *aff'd* 530 F.2d 979 (7th Cir. 1976) (General Counsel's interpretation of notice provisions of NLRA upheld; decision not to issue a complaint was based on sound judgment.

Where the General Counsel, after issuing an unfair labor practice complaint, decides to settle a case informally, that decision is subject to judicial review. *See* Rosenblum, *supra,* at 1363–64 n.58 and accompanying text.

part, rev'd and remanded in part, 533 F.2d 1126 (9th Cir. 1976). In this case, the plaintiff alleges that the union breached the duty of fair representation in not paying him strike benefits from a fund comprised of money collected from union members and non-members, including the plaintiff, under an agency shop provision in the collective bargaining agreement.

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The UAW claims that the plaintiff's cause of action arises not out of the collective bargaining agreement, but rather out of the Union Constitution's provision noted at 2, *supra,* that entitles non-members covered by an agency shop clause to benefits equal to those received by members but not to the rights of membership participation in the union's affairs. Section 301, the UAW contends, does not confer jurisdiction on suits arising under constitutions because such disputes are merely internal union conflicts and thus present no situation where a contract exists between an employer and a labor organization or between any such labor organizations. Union constitutions, the UAW maintains, are not contracts under § 301. *See Smith v. United Mineworkers of America,* 493 F.2d 1241 (10th Cir. 1974); *Hotel & Restaurant Employees Local 400 v. Svacek,* 431 F.2d 705 (9th Cir. 1970). *Contra, Local 1219 v. United Brotherhood of Carpenters and Joiners,* 493 F.2d 93 (1st Cir.1974); *Parks v. Brotherhood of Electrical Workers,* 314 F.2d 886 (4th Cir.) *cert. denied* 372 U.S. 976, 83 S.Ct. 1111, 10 L.Ed.2d 142 (1963) (finding that union constitutions are contracts within § 301). The UAW argues further that plaintiff has not satisfied this Circuit's requirement that the plaintiff plead a sufficient factual basis underlying the possible breach of the union constitution. *Local 1199, Hospital and Health Care Employees v. National Union of Hospital and Health Care Employees,* 533 F.2d 1205 (D.C.Cir. 1976).

In *Baker v. Newspaper & Graphic Communications Local 6,* 628 F.2d 156 (D.C.Cir. 1980), this Circuit held that § 301 did not confer jurisdiction on the federal courts to consider purely intra-union conflicts. Five union members sued their employer, their local union, and their international union alleging a breach of the duty of fair representation and the duty to permit plaintiffs to participate in union affairs. Because the controversy was between a union and some of its members and because it did not have the "requisite general effect on labor-management relations," *id.* at 164, the Court refused to exercise jurisdiction over the dispute.

This action differs materially from *Baker* for the simple reason that plaintiff is not a member of the United Auto Workers who, as such union member challenges some particular conduct by his representative in collective bargaining. Rather, the complaint presents a dispute between a union and a non-union member seeking to enforce his rights as against the union under an agency-shop clause. Not only do these facts present more than an "intra-union conflict," but the dispute is likely to have a widespread effect on labor-management relations at the McLaughlin Company. Accordingly, jurisdiction under § 301 is proper. *See also Seay v. McDonnell Douglas Corp.,* 427 F.2d 996 (9th Cir. 1970), *on remand,* 371 F.Supp. 754 (D.C.Cal.1973), *aff'd in part, rev'd and remanded in part,* 533 F.2d 1126 (9th Cir. 1976) ("While appellants' complaint does not allege a violation of the collective bargaining agreement on its face inasmuch as the agreement does not specifically discuss the permissible purposes for which agency dues may be expended, Section 301 must be given a broad reading." *Id.* at 1000).[7]

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[7] Additionally, 28 U.S.C. § 1337 has been held to confer jurisdiction on federal district courts for suits alleging the breach of the duty of fair representation despite the doctrine that federal courts, like state courts, have no jurisdiction to adjudicate independently matters either "arguably protected" or "arguably prohibited" by Sections 7 or 8 of the NLRA. *See San Diego Building Trades v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

In *Street Employees v. Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), the Supreme Court in *dicta* reiterated its prior holding in *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967)

> "that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement."

Id. at 299, 91 S.Ct. at 1924. This language has led courts to conclude that the exception to the pre-emption doctrine for § 301 suits based on alleged breaches of collective bargaining agreements applies with equal force to a complaint averring a breach of the duty of fair representation under 28 U.S.C. § 1337. *See Beriault v. Local 40, Super Cargoes & Checkers,* 501 F.2d 258 (9th Cir. 1974).

In the instant action, not only are the rationales for the preemption doctrine inapplicable because the complaint seeks relief for a breach of the duty of fair representation, but the allegation that plaintiff's constitutional rights are infringed render the need to defer to the NLRB's special expertise or the congressionally designed structure for labor policy inappropriate. Jurisdiction under § 1337 vests over this action in conjunction with the applicability of § 301.

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The UAW, in addition to seeking dismissal for lack of jurisdiction, has also alleged that the plaintiff's complaint does not afford a basis for relief. Against the plaintiff's assertion of constitutional violations and fair representation claims, the UAW contends that there is no state action and that the Union's policy of paying strike benefits only to those individuals who participate in strike-related activities is a legitimate expenditure of non-members' fees. The UAW also argues that it has not breached any duty owed the plaintiff because its actions do not rise to the level of arbitrary or discriminatory conduct and because plaintiff's employment relationship was unaffected.

The issue of state action presents a close inquiry, necessitating an excursion into the past. Under the Railway Labor Act, 45 U.S.C. § 152 Eleventh, Congress explicitly provided for union or agency shops notwithstanding state laws. In *Railway Employees Department v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Court held that union security agreements entered into pursuant to this section of the Railway Labor Act were imbued with sufficient governmental conduct to subject the agreement to constitutional guarantees of free speech and association. The Court viewed the congressional enactment as an explicit effort to permit union security clauses, vigorously trumpeting that "the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Id.* at 232, 76 S.Ct. at 718.

The NLRA, however, overrides no state law with respect to agency shop agreements. While the Act permits employers to enter into agreements with unions to establish union or agency shops, Section 8(a)(3), the Labor Management Relations Act, Section 14(b), does not preclude the states' enaction of "right to work" laws which would prohibit union or agency shops. *See Oil, Chemical, and Atomic Workers International Union v. Mobil Oil Co.,* 426 U.S. 407, 409, 96 S.Ct. 2140, 2142, 48 L.Ed.2d 736 (1976).

Mixed results have emerged from those courts determining whether agency shop provisions such as the one in the instant case constitute state action. In *Reid v. McDonnell Douglas Corp.,* 443 F.2d 408 (10th Cir. 1971), it was held that under the NLRA, agency shop provisions did not rise to the level of state action because the Supreme Court's holding in *Hanson* was restricted to the Railway Labor Act, which specifically overrode state laws prohibiting agency or union shops. The Tenth Circuit noted,

> In NLRA matters, the federal government does not appear to us to have so far insinuated itself into the decision of a union and employer to agree to a union security clause so as to make that choice governmental action for purposes of the first and fifth amendments.

Id. at 410–411 (footnote omitted).

The First Circuit in *Linscott v. Millers Falls Co.,* 440 F.2d 14 (1st Cir.), *cert. denied* 404 U.S. 872, 92 S.Ct. 77, 30 L.Ed.2d 116 (1971), held that the agency shop provision under Section 14(b) of the Labor Management Relations Act, 29 U.S.C. § 164(b), and by implication Section 8(a)(3) of the NLRA, were entered into by unions and employers pursuant to federal authorization and thus were state action, despite the power of the state legislatures to override this authorization by enacting right to work laws. The Court stated,

> If federal support attaches to the union shop if and when two parties agree to it, it is the same support, once it attaches,
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>
> even though the consent of a third party, the state, is a precondition. The means by which the agreement is attained does not affect the significant language in *Hanson* * * * 'The federal statute is the source of the power and authority by which any private rights are lost or sacrificed,' and note 4 appended thereto, '4. Once courts enforce the agreement the sanction of government is, or course, put behind them.'

Id. at 16 (citations ommitted). *See also Lykins v. Aluminum Workers International Union,* 510 F.Supp. 21, 25 (E.D. Pa.1980), slip op. at 9 (difference in the effect of the Railway Labor Act and the NLRA on contrary state law regarding agency shop provisions does not change the "congressional imprimatur" placed on such clauses by both statutes). *Cf. Beck v. Communication Workers of American,* 468 F.Supp. 93 (D.Md. 1979) (court notes attachment of constitutional guarantees to disbursement of fees collected from non-members under an agency shop provision in private and public employment.[8]

Agency shop clauses, the vital creature of Congressional contemplation and enactment, are subject to, and braced by, constitutional guarantees. That the states may vanquish agency shop clause by legislative prohibition does not reduce the effect of the congressional authorization given in Section 8(a)(3). Consider the detail of congressional approval.

> It shall be an unfair labor practice for an employer—* * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(a)(3). The Supreme Court in *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d. 670 (1963), held that § 8(a)(3) was meant to allow agency shop clauses serving "the desire of Congress to reduce the evils of compulsory unionism with allowing financial support for the bargaining agent." *Id.* at 744, 83 S.Ct. at 1460. There is no doubt that absent § 8(a)(3), agency ship provisions entered into in the normal course of collective bargaining would be private action. But § 8(a)(3) clearly puts the stamp of congressional approval on agency shop clauses. The *General Motors* decision describes Congress' intent to ensure that employees who remain non-members of the union but who nonetheless accept its benefits pay fees for the union's work on their behalf. Compared to § 8(a)(3), the provision in the LMRA which permits states to pass right to work laws and prohibit agency shops is general and broad, applying to the entire gamut of the LMRA and the NLRA:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor orgainzation as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

29 U.S.C. § 164(b).

Plainly, it would be unusual to hold that the authority of state governments over agency shops determines whether the federal statutory authorization in § 8(a)(3) is state action. The governmental action inquiry, instead of focusing on state power or authority, views the conduct at issue and whether it is sanctioned, authorized, or pursued by a governmental entity. Here, Congress not only tolerated but expressly authorized agency shop agreements. This congressional imprimatur is sufficient to imbue agency shop clauses with constitutional guarantees.

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[8] In his dissent from the denial of certiorari in *Buckley v. American Federation of Television and Radio Artists*, 419 U.S. 1093, 95 S.Ct. 688, 42 L.E.d.2d 687 (1975). Justice Douglas, joined by the Chief Justice, noted "When Congress authorizes an employer and union to enter into union shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it imposed them by statute."

The question now arises whether the plaintiff has stated a cause of action for the violation of his constitutional rights. Plaintiff contends that UAW's policy of conditioning receipt of strike benefits on picketing activity impairs his freedom of speech and association. In plaintiff's view, he can not be asked to do more, in order to receive strike benefits, than strike; forcing him to pick up a sign and display it publicly constitutes, he asserts, an unwarranted invasion of his freedom not to associate with the UAW and not to speak.[9] The UAW maintains its policy, applied dispassionately to union members and non-members alike, represents a lawful and constitutional choice in that courts have permitted unions to expend fees collected from non-members in any manner the union desires provided it is related to collective bargaining, contract administration, and grievance, adjustment.

In *International Association of Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d. 1141 (1961), the lightning rod of subsequent decisions, the Court held that fees from non-members collected under an agency shop provison entered into by collective bargaining, under the Railway Labor Act, 45 U.S.C. § 152 Eleventh, could not be expended to support political causes which the non-member opposes. The Court noted that the use of such funds for political purposes "is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Id.* at 768, 81 S.Ct. at 1800.

Two years later in *Brotherhood of Railway and Steamship Clerks v. Allen,* 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), addressing some of the practical problems in formulating remedies for improper expenditures of non-members fees the Court found improper an injunction restraining unions from collecting the non-members fees if the union could demonstrate that some of the money was allocated for expenses germane to collective bargaining. A dissenting employee, however, could seek and obtain a refund for portions of his fee spent on policital causes under a formula agreed to by the union and the employee or, in the absence of an agreement, under a proportion ordered by the Court.

More recently, in *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court examined an agency shop agreement involving union of public employees whereby non-members were required to pay a fee to defray expenses from which they benefitted. The plaintiffs challenged the agency shop provision as violative of their First Amendment freedoms and contended that the union was engaged in unlawful expenditure of their fees for political and ideological causes with which they disagreed. On a motion for summary judgment, the Michigan courts had upheld the validity of the agency shop clause generally, and denied plaintiffs any relief on the issue of how their fees were spent because they did not object initially to the union about political contributions initially. In vacating that judgment the Supreme Court determined that the union and the employer could not compel dissenting non-union members to contribute to the support of ideological causes that they may oppose, but that the public employee union, as a condition of employment, could direct payment of fees to be expended on matters related to collective bargaining, contract administration, and grievance adjustment. The Court declared.

> To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.

Id. at 222, 97 S.Ct. at 1793 (footnote omitted).

From the pleadings presented, the plaintiff clearly states a cause of action for the union's alleged violation of his constitutional rights. *Street, Allen* and *Abood,* although permitting unions to exact funds from protesting non-members to defray expenses related to collective bargaining, do not authorize a union to compel non-members who have honored the picket line to participate in affirmative picketing activity in order to receive strike benefits to which they have contributed under the agency shop clause. Although picketing is a substantial post in the protective fence of a union's collective bargaining activity, it is by no means clear that UAW's policy of conditioning a non-member's receipt of strike benefits can survive the sturdy design of constitutional craftsmanship. At first blush, it appears unfair to permit plaintiff to receive material benefits equal to those offered to union members while those members toil the picket line and plaintiff merely remains absent from work. To require plaintiff, however, to carry a placard, in full public view, bespeaks an activism that raises significant constitutional quandries. To claim that collective bargaining activity may immunize a union against all requirements that it may impose on non-members under an agency shop provision would obscure the venerable principles of American jurisprudence. It is the individual's constitutional guarantees that fix the boundaries of a balanced adjudication of conflict inherent with agency shop presence. Plaintiff is entitled to raise his First Amendment interests in order to attack UAW's method of apportioning strike benefits, and the UAW cannot seek refuge from those interests merely by claiming that its activity is related to collective bargaining.

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[9] "[R]ights to associate with X are necessarily rights to dissociate from Y." L. Tribe, *American Constitution Law* § 15–8 at 974 (1978).

The final issue remaining is whether the plaintiff has stated a non-constitutional claim for breach of the duty of fair representation. The UAW argues that the duty does not extend to matters such as the instant case because it does not affect the plaintiff's employment relationship; even were the duty to apply, no breach has occurred. Plaintiff disputes both points, maintaining that the fair representation is just as forcefully applicable here as in *Abood, Street, Allen, Seay,* and *Beck.*

Initially recognized by the Supreme Court in *Steele v. Louisville & Nashville Railroad,* 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), the duty of fair representation obliges the union "to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 892 (1967). The NLRB in *Miranda Fuel Co., Inc.,* 140 N.L.R.B. 181 (1962), held that § 7 of the NLRA gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment," and "that Section 8(a)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." *Id.* at 185.

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It cannot be said at this time that the plaintiff has presented no valid cause of action for breach of this duty. Plaintiff is compelled to pay the fees to the UAW or else the employer must discharge him or face an unfair labor practice charge under § 8(a)(1). Plaintiff objects to the manner in which the union expends that portion of his fees allocated for strike benefits. Moreover, it does not appear that the Union has prevailed on its claim that, assuming all of the pleadings are true, it has not acted in a manner that is unfair, that discriminated against non-members individiously, or that is in bad faith.

Although the controversy between the plaintiff and the UAW is before the Court only on the motion of the UAW to dismiss, it appears that, as the plaintiff notes in his opposition to the defendants' motions, "the facts are largely undisputed." Pl.Opp. at 13. Entry of summary judgment may well have been appropriate at this stage. The Federal Rules for Civil Procedure, however, require that the parties be given an opportunity to file appropriate affidavits as well as any supplementary points and authorities before summary judgment is awarded. For the remaining parties to supplement the record with the necessary material in accordance with Fed.R.Civ.P. 56 cannot be too burdensome a task since the principal legal authority for this action has already been presented in the context of the instant motion. Accordingly, the parties will be set on a rapid schedule of filings to propel this litigation to fitting conclusion.

It is this 23rd day of June, 1981

ORDERED that the motion of the General Counsel of the National Labor Relations Board, William A. Lubbers, to dismiss this action against him for lack of jurisdiction be and it hereby is granted, and it is

FURTHER ORDERED that the UAW's motion to dismiss for lack of jurisdiction and for failure to state a claim be and it hereby is denied, and it is

FURTHER ORDERED that the parties file their respective motions for summary judgment with appropriate affidavits and any supplementary points and authorities no later than July 7, 1981, and that oppositions be filed no later than July 21, 1981.

NLRB v. Living and Learning Centers, Inc.

652 F.2d 209 (1st Cir.), June 23, 1981—251 NLRB 284

On petition to enforce Board Order

Before BOWNES and BREYER, Circuit Judges, and WYZANSKI, Senior District Judge*

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WYZANSKI, Senior District Judge: The National Labor Relations Board (NLRB) petitions for enforcement of its order directing Living and Learning Centers, Inc., (the Employer) to bargain with and supply information to Local 925 Service Employees International Union, AFL-CIO-CLC (the Union). § 8(a)(5) and (1) of the National Labor Relations Act (the Act); 29 U.S.C. § 158(a)(5) and (1). The Employer opposes the petition principally because it challenges the NLRB's determination that the Employer's teachers, teacher assistants, cooks and maintenance employees at the Waltham, Massachusetts child's day care center (Waltham Center) constituted an appropriate unit under § 9(b) of the Act, 29 U.S.C. § 159(b).

On June 6, 1979 the Union filed a petition asking that the NLRB, pursuant to § 9(b) of the Act, certify it as the representative of the Company's Waltham center teachers, teacher assistants, cooks and maintenance employees. After a hearing before an officer appointed by him, the NLRB's Regional Director made the following findings.

The Employer is a Massachusetts corporation engaged in the operation of day care centers in Massachusetts, Rhode Island, Connecticut and New Hampshire * * *.

The Petitioner seeks a unit limited to teachers, teacher assistants, cooks and

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maintenance employees employed at the Employer's Waltham, Massachusetts day care center. This unit consists of approximately 19 employees. There is no history of collective bargaining in this unit.

The Employer concedes the appropriateness of the job classifications sought by the Petitioner, but contends that the only appropriate unit is one including all 29 of its day care centers in Massachusetts, or, alternatively, all of its day care centers in Massachusetts, Rhode Island (one center), Connecticut (seven centers), and New Hampshire (one center).

The Employers' executive headquarters are located in Waltham, Massachusetts and occupy a separate floor in the building which houses the day care center, which is the subject of the instant petition.

Each day care center has a director, an assistant director, a cook and a maintenance man. The number of teachers and teacher assistants varies with the size of the enrollment at the individual day care center. There are approximately 2,500 children enrolled in the Employer's day care centers in Massachusetts and approximately 400 teachers and teacher assistants.

The children enrolled at the Employer's day care centers range from 6 months to 6 years in age. As well as being custodial, all of the Employer's day care centers have an educational curriculum. "I am! I can!," a 340 page folio-sized handbook sets forth the Employer's philosophy of child care and details methods and techniques of instruction. Once every four to six weeks all the directors of the Massachusetts centers meet with the executive officers at the Waltham, Massachusetts headquarters. At this meeting the executive officers indicate the methods of presentation of the monthly "themes," which are general concepts such as "round and red" and "person" and which are the same for all centers, in terms of the "I am! I can!" viewpoint and techniques. The directors are then responsible, without effective supervision from the Waltham, Massachusetts headquarters, to see that these "themes" are developed by the teachers and teacher assistants in consonance with the "framework" provided by the executive officers at the above meetings. While the record does not reveal with specificity the nature of the instructions which the directors receive at these meetings, they would appear to be general in nature from the fact that it is the teaching staff which initially prepares the weekly plan of instruction and activity for the current theme, subject to subsequent director approval, and it is expected that different centers may present a theme in an entirely different way. While two copies of the "I am! I can!" handbook are available at each center, the teachers and teacher assistants are not required to read it.

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*Of the District of Massachusetts, sitting by designation.

Each center director has authority to hire and discharge the teachers, teacher assistants, cooks and maintenance employees; to schedule their hours and to approve their sick days, personal days and leaves of absences. However, in practice the directors first consult with the Waltham, Massachusetts headquarters in the great majority of discharge cases. The director is also empowered to resolve disputes among center employees, although he may, but is not required to, ask the area supervisor to intervene if the dispute involves the teaching staff and the director or assistant director. While each director reports to one of four area supervisors at the Waltham, Massachusetts headquarters, the presence of these are [sic] supervisors at the center locations and their contact with the employees in the unit job classifications is minimal.

The Employer holds "workshops" which teachers and teacher assistants from all the centers may attend at their own discretion. The record does not disclose the frequency of such workshops, nor the degree of participation in them by teachers and teacher assistants.

Of teachers presently employed at the Waltham, Massachusetts center, none has been transferred from other day care centers. Three teachers presently employed at other centers have been transferred from the Waltham, Massachusetts center. The total of presently employed transferred teachers from all centers in Massachusetts is 25.

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The Employer has a centrally estblished single wage and benefit policy for all its Massachusetts centers. Wages range from the legal minimum to $3.25 per hour. The only benefit is three days of sick leave per year. No wage increase for any employee may be granted to any employee without approval from the Employer's headquarters. However, the directors are authorized to recommend wage increases for individual employees working under their direction.

Under a single contract, the Massachusetts Department of Public Welfare pays, on a uniform basis, some percentage (undisclosed on the record) of approximately one third of the children enrolled in the Massachusetts center. Pursuant to the licensing of day care centers, the Massachusetts Office for Children sets minimum standards as to teacher qualifications, the teacher/student ratio, and health requirements.

Payroll information is assembled at the individual centers and forwarded to the Waltham, Massachusetts headquarters, from which the employees' paychecks are then sent out.

All major purchases and financial transactions are decided at the Waltham, Massachusetts headquarters.

The Board has held that a single-plant, or single-store, unit is presumptively appropriate absent * * * "a functional integration so severe as to negate the identity of a single-plant, or a single-store unit." *Gray Drug Stores, Inc.*, 197 NLRB 924, 925 (1972). Based upon the above, it is found that the degree of the Employer's control of personnel policies and the extent of integration of the operations of the Massachusetts centers is insufficient to overcome the presumption in the present case. This conclusion is based on the infrequent interchange and communication among the employees of the various centers and the separate immediate supervision by the director, who hires and may fire the center employees and is alone responsible on a day-to-day basis for the direction of their work and the resolution of their disputes. Accordingly, a unit limited to the Waltham, Massachusetts location is found to be appropriate. *Haag Drug Company, Incorporated*, 169 NLRB 877, 879 (1968); *Purity Food Stores, Inc. (Sav-More Food Stores)*, 150 NLRB 1523, 1527 (1965).

Upon the basis of his findings, the Regional Director ordered an election. The Board denied the Employer's request for review. The union won the election and the NLRB certified it as the representative of the teachers, teacher assistants, cooks and maintenance employees at the Waltham Center.

On February 26, 1980 the Union asked the Employer for specified information for the purpose of preparing contract proposals. The Employer refused on the ground that the unit certified by the NLRB was not an appropriate one. On April 7, 1980 the Union filed an unfair labor practice charge alleging that the Employer had violated § 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to furnish relevant information. The Employer's answer, in addition to challenging the unit determination, denied that its activities so affected interstate commerce as to subject it to the Act, and alleged that it was without knowledge that the Union was a labor organization within the meaning of the Act.

In response to a motion of the NLRB's General Counsel, the NLRB entered a summary judgment and found that the Employer had violated § 8(a)(5) and (1) of the Act. Thereafter, the NLRB filed this petition. We rule against the Employer on all the issues raised in the Employer's answers referred to in the previous paragraph.

1. The NLRB's jurisdiction to determine an appropriate unit for collective bargaining—*see* 29 U.S.C. § 159(c)—and its jurisdiction to prevent any person from engaging in an unfair labor practice—*see* 29 U.S.C. § 160(a)—alike depend on whether the matter is one "affecting commerce." That term "did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963). The NLRB had jurisdiction to issue the order here involved both because the employer had a gross annual income in excess of $250,000—*see NLRB v. Kent County Ass'n for Retarded Citizens*, 590 F.2d 19, 23–24 (1st Cir. 1978)—and because it annually shipped and received goods valued in excess of $2,000 to or from Massachusetts. *Fairview Nursing Home*, 202 *NLRB* 318, 319 *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. den.*, 419 U.S. 827, 95 S.Ct. 46, 42 L.Ed.2d 51 (1974); *Von Solbrig Hospital, Inc. v. NLRB* 465 F.2d 465 F.2d 173, 174 (7th Cir. 1972); *NLRB v. Inglewood Park Cemetery Association*, 355 F.2d 448, 451 (9th Cir.), *cert. den.*, 384 U.S. 951, 86 S.Ct. 1572, 16 L.Ed.2d 548 (1966); *NLRB v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962).

2. The testimony of the Union's business agent supported the finding of the Regional Director that the Union is a "Labor organization" within the meaning of § 2(5) of the Act, 29 U.S.C. § 152(5).

3. We reject the Employer's challenge to the NLRB's unit determination.

The "selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.' *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947)." *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40 (1st Cir. 1981); *South Prairie Construction Co. v. Local No. 627*, (1967) (*per curiam*) 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382.

Here the NLRB determined that unit including all the employees (except "managerial employees, guards, and supervisors as defined in the Act") working at a particular center was appropriate. The Employer can succeed in overturning that determination only by demonstrating that that determination was "clearly not appropriate," not merely by showing that some other determination would have been better. *Banco Credito y Ahorro v. NLRB*, 390 F.2d 110, 112 (1st Cir.), *cert. den.*, 393 U.S. 832, 89 S.Ct. 101, 21 L.Ed.2d 102 (1968).

Even without the aid of any presumption, the NLRB's decision is at the least plausible. It does not smack of a gerrymander. *See S.D. Warren Co. v. NLRB*, 353 F.2d 494, 498 (1st Cir. 1965). Like a "plant" unit—which is a unit specifically contemplated by § 9(b)—a "center" unit is a natural or geographically based subdivision of an employer's employees. It immediately seems to be an appropriate unit because there is apt to be a bond of interest among all the persons employed by the same employer in connection with the same enterprise at the same locus. This, of course, does not mean that there may not be other appropriate, and more inclusive units which would also be appropriate, and which, for reasons of administrative or managerial efficiency, may be preferred by an employer. However, as we held in the *Banco Credito* case, it is not sufficient for the employer to persuade us that a systems-wide unit would be more appropriate than a single center unit; the employer must show that the single center unit is "clearly not appropriate." Moreover, the NLRB is entitled to give greater weight to the interests of the employees in the Waltham Center than to the Employer's managerial interests in a multi-center unit. In the *Big Y* case *supra* we quoted with approval the following holding of *NLRB v. The Western and Southern Life Ins. Co.*, 391 F.2d 119, 123 (3d Cir. 1978):

> "* * * the overriding policy of the Act is in favor of the interest in employees to be represented by a representative of their own choosing for the purpose of collective bargaining, and the Board was entitled to give this interest greater

weight than that accorded to the employer in bargaining with the largest, and presumably most convenient possible unit * * *."

In deciding this case, the Regional Director's opinion was guided by a rebuttable presumption which the NLRB had adopted in 1968. Rejecting its own earlier views, the NLRB, upon the basis of its increasing experience, formally adopted a presumption that a single facility unit in a chain of units is an appropriate unit even though the employer administered from one headquarters labor relations, personnel, and other aspects of all the units in the chain.

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Haag Drug Co., 169 *NLRB* 877 (1968). *See Gray Drugstores, Inc.*, 197 *NLRB* 924, 925 (1972). Inasmuch as the presumption is consistent with the Act, has, like a "plant" unit, a rational foundation, and is founded on experience, the NLRB was entitled to invoke the presumption in this case. *NLRB v. Baptist Hospital,* 442 U.S. 773, 787, 99 S.Ct. 2598, 2606, 61 L.Ed.2d 251 (1979); *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978); *Big Y Foods, Inc. v. NLRB, supra.* It had the effect of shifting to the challenger the burden of proof. *NLRB v. Baptist Hospital, Inc., supra,* 442 U.S. 781, 99 S.Ct. 2603.

In the instant case the presumption was strengthened by the showing that the director of the Waltham Center had the power to hire and fire employees (even though he customarily checked with headquarters before he dismissed an employee); that the director determined the precise times at which an employee should work; that the director was empowered to resolve disputes at the center; that the employees (not including the director) at the Waltham Center had not been transferred from elsewhere in the chain; that they had no regular, frequent contacts with employees elsewhere in the chain;[1] and that the Waltham Center was not in close geographical proximity to most of the other centers.

The significant evidence relied upon by the Employer to rebut the presumption was considered by the Regional Director in his decision. He referred to items such as these: that headquarters established a single wage and benefit policy for all its Massachusetts centers and decided just what each employee should be paid; that all major purchases and financial transactions were conducted at headquarters; that the directors of the Waltham Center and other centers were subject to area supervisors; that Massachusetts standards for teachers were the same in each unit of the chain; that contributions by the Commonwealth of Massachusetts to welfare children throughout the whole chain were covered by a single contract; and that there were opportunities for the teachers to go to workships open to teachers from different centers. Other matters to which the Employer refers but to which the Regional Director did not refer were not of critical significance (e. g., tuition, transfer of directors, uniform use throughout the chain of a booklet setting forth the Employer's personnel policies, and the teacher's right of appeal to headquarters from the action of a director settling a conflict).

The analysis which we have made of the Regional Director's decision shows that, unlike the situation in *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 930 (1st Cir 1965) and *NLRB v. Purity Food Stores, Inc.*, 376 F.2d 497, 501 (1st Cir.) *cert. den.* 389 U.S. 959, 88 S.Ct. 337, 19 L.Ed.2d 368 (1967), the NLRB gave fair and reasonable consideration to the relevant factors in determining that the Waltham Center was an appropriate unit. As we recently said in *Big Y Foods, Inc. v. NLRB, supra,*

> " * * * all that we as a reviewing court are authorized to consider is whether the administrative agency failed to give fair and reasonable consideration to the relevant factors; the weight assigned by the agency to each factor it has fairly considered is a matter for it to determine. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 [71 S.Ct. 456, 464, 95 L.Ed. 456] (1951); *Vermont Yankee Nuclear Power v. NRDC,* 435 U.S. 519, 558 [98 S.Ct. 1197, 1219, 55 L.Ed.2d 460] (1978); *Strycker's Bay Neighborhood Council v. Karlen,* 444 U.S. 223, 227–228 [100 S.Ct. 497, 499–500, 62 L.Ed.2d 433] (1980)."

We are not unmindful that there are cases in which courts have set aside NLRB determinations that single units in a large chain were not appropriate units on the ground that in those cases the local

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[1] The testimony that 25 of the present teachers in the Employer's Massachusetts schools have taught in two or more of the Employer's schools is not shown to apply to the teachers now at the Waltham Center.

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managers lacked authority to decide the kind of issues which are the usual subject of collective bargains. *E. g. NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 383 (2d Cir. 1968); *NLRB v. Davis Cafeteria, Inc.*, 396 F.2d 18, 21 (5th Cir. 1968); *NLRB v. Frisch's Big Boy Ill-Mar, Inc.*, 356 F.2d 895, 897 (7th Cir. 1966). Those decisions do not apply to this case because here the local managers did have authority to resolve some collective bargaining issues—for example, discharges, disputes, hiring of new employees, and assignments of working hours. Moreover, as is acknowledged in *NLRB v. Solis Theatre Corp., supra,* those cases do not stand for an absolute proposition that the NLRB may *never* determine that a local unit in a chain enterprise is an appropriate unit unless the NLRB finds that the manager of the local unit has authority to decide collective bargaining issues. To lay down such an absolute rule would enable an employer, by centralizing all matters of labor policy, to prevent the NLRB from selecting as appropriate a unit of smaller dimensions than the employer's whole enterprise even though that smaller unit was the one which in light of all the relevant factors the NLRB determined would be appropriate under § 9(b) "in order to assure to employees the fullest freedom in exercising the rights guaranteed by" the Act.

In a case where a local manager had no authority finally to decide collective bargaining issues, but the NLRB had given the absence of such authority and all other relevant factors full and fair consideration, we sustained the NLRB's determination that a local branch unit was appropriate. *Banco Credito y Ahorro v. NLRB, supra.* That case is more than adequate authority to sustain the order of the NLRB in the instant case, particularly in light of the 1968 presumption which shifts the burden of proof.

PETITION GRANTED.

Marriott In-Flite Services, a Division of Marriott Corporation v. NLRB

652 F.2d 202 (1st Cir.), June 23, 1981—252 NLRB 707

On petition to review and set aside Board Order

Before CAMPBELL BOWNES and BREYER, Circuit Judges

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BOWNES, Circuit Judge: Petitioner Marriott In-Flite Services, a division of the Marriott Corporation, has petitioned us to review and set aside an order of respondent National Labor Relations Board requiring Marriott In-Flight to bargain collectively with intervenor Teamsters Local Union No. 25 as the exclusive bargaining representative of a unit composed of transportation department employees at the company's East Boston facility. The Board has requested that we enforce its order. For the reasons stated below, we deny the petition of Marriott In-Flite and enforce the order of the National Labor Relations Board.

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I.

Marriott In-Flite operates a food and beverage catering service for airlines[1] out of a facility at Logan International Airport in East Boston, Massachusetts. On February 12, 1980, Teamsters Local Union No. 25, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, filed a representation petition with the Board seeking certification as the collective bargaining representative of the food and equipment handlers, food and equipment helpers, coordinators, and autombile mechanics employed in Marriott In-Flite's transportation department in East Boston, some 84 employees. Marriott In-Flite urged that the Board endorse a plant-wide production and maintenance unit comprising approximately 254 employees, including not only the employees of the transportation department, but also such groups as cooks, chefs, lead porters, storekeepers, and utility/sanitation employees. Following a hearing conducted by a hearing officer of the Board, the Acting Regional Director found an appropriate unit[2] to be

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[1] Marriott In-Flite also services an area hospital.

[2] In his Decision and Direction of Election, the Acting Regional Director noted that the East Boston facility has two locations: the production facility at One Wood Island Park and a storage and garage facility about 2.4 miles away from One Wood Island Park at Jeffries Street, where major vehicle repairs are made. All employees are permanently assigned to One Wood Island Park.

> [a]ll transportation department employees of the Employer located at its One Wood Island Park, East Boston, Massachusetts facility including food and equipment handlers, helpers, coordinators and auto mechanics but excluding all other commisary [*sic*] employees, office clerical employees, guards and supervisors as defined in the Act. (footnotes omitted).

Marriott In-Flite then filed a Request for Review of this unit determination, arguing again that a plant-wide unit was appropriate. This request was denied and an election was held; the union won by a vote of 48 to 35[3] and was certified on May 16, 1980, as the exclusive bargaining representative for the handlers, helpers, coordinators, and automobile mechanics. In order to test this certification, Marriott In-Flite refused to bargain with the union. As a result, the Regional Director filed a complaint charging that the actions of Marriott In-Flite constituted unfair labor practices within the meaning of §§ 8(a)(1)[4] and (5)[5] of the National Labor Relations Act. The Board transferred the case to itself, found that Marriott In-Flite had violated §§ 8(a)(1) and (5), and issued the order contested here.

II.

The Board's authority to determine an appropriate unit for collective bargaining stems from § 9(b) of the National Labor Relations Act, which provides that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]

29 U.S.C. § 159(b). The Supreme Court has noted that § 9(b)

> confers upon the Board a broad discretion to determine appropriate units * * *. Our power of review also is circumscribed by the provision that findings of the Board as to the facts, if supported by evidence, shall be conclusive * * *. So we have power only to determine whether there is substantial evidence to support the Board, or its order oversteps the law.
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> * * * The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed.

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Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947) (citations omitted).[6] Under § 9(b), the unit need not be the only appropriate unit or the most appropriate unit; it must only be *an* appropriate unit. *E.g.*, *NLRB v. J.C. Penney Co.*, 620 F.2d 718, 719 (9th Cir. 1980); *MPC Restaurant Corp. v. NLRB*, 481 F.2d 75, 78 (2d Cir. 1973); *see Banco Credito y Ahorro Ponceno v. NLRB*, 390 F.2d 110, 112 (1st cir.) (per curiam) (employer must show unit designated by Board is clearly not appropriate), *cert. denied*, 393 U.S. 832, 89 S.Ct. 101, 21 L.Ed.2d 102 (1968). We may overturn the Board's § 9(b) unit determination only if the determination is not supported by substantial evidence, if its basis has not been disclosed, if it is in violation of the Act or some other statute or the Constitution, or if it is arbitrary or unreasonable. *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 44 (1st Cir. 1981).

III.

In order to apply the law properly in this case, we must describe the organization and operation of the East Boston facility in some detail. Testimony at the hearing established that production at Marriott In-Flite begins when the storekeepers receive merchandise and funnel it to holding or storage areas. Production consists of both hot and cold food processing areas; the former is staffed by chefs, lead cooks, and cooks, and both are staffed by station attendants who prepare and package all but the simplest [7] meals or snacks, place the meals or snacks on trays, arrange the trays on carriers, and move the carriers to designated holding areas. The remainder of the production department encompasses utility employees, who wash equipment and utensils from flights; porters, who perform janitorial jobs; house mechanics, who repair production equipment and perform such chores as simple painting, plumbing, and building maintenance; and dispatchers, who are responsible for obtaining passenger counts from the airlines and, when feasible, for notifying the food department and the handlers of these counts.

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[3] Seven ballots were challenged; this number was insufficient to affect the outcome of the election.

[4] Section 8(a)(1) provides:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

29 U.S.C. § 158(a)(1).

[5] Under § 8(a)(5) it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." 29 U.S.C. § 158(a)(5).

[6] Although Congress effectively overruled the Supreme Court's holding in *Packard Motor Car Co. v. NLRB*, 330 U.S. 685, 67 S.Ct. 789, 91 L.Ed. 1040 (1947), that foremen could organize into a unit for purposes of collective bargaining, *Packard* is still cited for the proposition that the Board's selection of an appropriate bargaining unit is rarely to be disturbed. See, for example, *South Prairie Constr. Co. v. Local No. 627, International Union of Operating Engr's*, 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382 (1976) (per curiam).

The transportation department, which the Board found to be an appropriate bargaining unit, is, as noted, composed of handlers, helpers, coordinators, and auto mechanics. Handlers [8] and helpers, who work in two-person teams, are responsible for servicing the flights. After learning the passenger counts for the flights that they will stock, a handler and helper pick up the previously-packed carriers at the handling areas, assemble utensils, liquor, and ice as needed, place the material on dollies, and wheel the dollies onto the loading dock where they load their vehicle. From the dock, the team drives to the airport terminals and loads the planes with food and clean equipment.[9] While on the airfield the team will often strip aircraft of used utensils and equipment. The distance to the terminals from Marriott In-Flite's facility varies from one-half mile to almost two miles; maximum driving time is eight to ten minutes. After completing their work on the field, the handler and helper return to Marriott In-Flite to unload the soiled equipment, transport it to the dirty equipment area, and report to dispatch for new passenger counts.

The second component of the transportation department, the coordinators, check the loads while they are on the dock to ensure that they are complete and often check with the airlines to ensure that they are satisfied. As their title suggests, these employees coordinate loading with the gate agents and, on some occasions, stand by to see if it will be necessary to add meals. They are also responsible for setting up their own "bank meals," usually previously packed by a production shift, to cover a possible shortfall of meals on a flight. Certain helpers and handlers known as "bankmen" also stand by to add or remove meals from planes, supplying what is necessary from the small trucks that they drive.

The auto mechanics, who are responsible for maintaining the department's vehicles, work either at the Jeffries Street location or in a maintenance area adjacent to the loading dock at One Wood Island Park.

IV.

To support their respective positions, each party stresses different characteristics of the One Wood Island Park operation. Marriott In-Flite points out that all employees are paid by the hour, receive the same overtime premiums, are entitled to the same fringe benefits and vacation leave as determined by the company's corporate headquarters, punch in on the same time clock, receive their uniforms from their employer, and are provided meals in the same cafeteria. The facility is under one general manager, although it appears undisputed that a single operations manager has exclusive responsibility for the handlers, helpers, coordinators, and mechanics. The employer emphasizes that the handlers, helpers, and coordinators spend 50% or more of their time working *inside* the facility alongside the excluded employees, moving through all parts of the kitchen, assembling and in some cases preparing certain foods and drinks, and handling airline utensils and equipment. They share with the sanitation workers responsibility for cleaning the dock area and removing equipment and food from the trucks when they return from the airfield and also come into contact with these workers when collecting clean equipment from the sanitation area. Marriott

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[7] William Thompson, the operations manager at the East Boston facility, testified that handlers or supervisors pack some very simple snacks into the carriers themselves.

[8] Thompson testified that the employees responsible for the paperwork and inventory in the liquor service are carried as handlers because of the degree of their responsibility, although they do not drive or even travel to the airfield.

[9] Thompson estimated that a team would service as few as one or as many as four flights per trip and that on average each team would make two to four trips a day to the field.

In-Flite argues that the work of the handlers, helpers, and coordinators is an integral part of the production process.

The Board stresses that the handler, helpers, and coordinators spend approximately 50% of their work day *away* from Marriott In-Flite's kitchen facilities, and the rest of their work day loading and unloading their trucks or monitoring the loading process. Their presence in the facility's kitchen and their contact with the other employees is characterized as sporadic and incidental to their driving function. Similarly, the automobile mechanics have little contact and no job function overlap with employees not in the unit. Food and equipment handlers, coordinators, mechanics, and some helpers are licensed by the agency that operates the airport to drive onto the airfield. Most of the handlers and coordinators are also issued a license by one of the airlines that Marriott In-Flite services. Unlike other employees, the members of the transportation department must wear photo identification.

Employees in the designated unit also have substantially higher wages than all nonunit employees but chefs, cooks, and in-house mechanics,[10] and generally are pro-

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moted separately, undergo special training not required of other employees, bid for work schedules with priority based on transportation department seniority, and often deal directly with representatives from the employer's airline accounts. Only 10% to 20% of the helpers were hired from the food production department; most were new employees.[11] Interchange between these and other facility employees is minimal; only two porters have been trained to substitute as helpers in an emergency.

V.

In determining an appropriate unit, the Board evaluates considerations that tend to show the presence or absence of a community of interest among the employees in the requested unit, including the common experience, duties, wages, hours, and other working conditions of the employees, the organization of the business, and any history of collective bargaining. *E. H. Koester Bakery Co.*, 136 N.L.R.B. 1006, 1009 (1962). Because most of the members of the transportation department spend a substantial amount of their time driving or riding on trucks, both parties agree that the analysis set forth in *Koester* to deal with the dual community of interest that often distinguishes truckdrivers from other classifications of employees is appropriate.[12] In *Koester* the Board stated that:

> In our evaluation we shall consider, among others, the following factors: (1) Whether they [the employees] have related or diverse duties, mode of compensation, hours, supervision, and other conditions of employment; and (2) whether they are engaged in the same or related production process or operation, or spend a substantial portion of their time in such production or adjunct activities. If the interests shared with other employees are sufficient to warrant their inclusion, we shall include the truckdrivers in the more comprehensive unit. If, on the other hand, truckdrivers are shown to have such a diversity of interest from those of other employees as to negate any mutuality of interest between the two groups, we shall exclude them.

Id. at 1011.

Here the Board took official notice of the record below, including the stenographic recording of the

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[10] Thompson testified to the following starting pay rates for Marriott In-Flite employees:

Station attendant, hot or cold food	$3.70/hr.
Porter	3.70/hr.
Utility/sanitation employee	3.70/hr.
Dispatcher	4.00/hr.
Lead porter or utility/sanitation employee	4.00/hr.
Helper	4.25/hr.
Handler	4.85/hr.
Coordinator	5.20/hr.
Auto mechanic	6.05/hr.
In-house mechanic	6.05/hr.
Cook	4.70/hr.
Chef	6.50/hr.

[11] Thompson noted that, because it acquired a new account and because another account expanded its operation, Marriott In-Flite had hired a substantially greater number of helpers recently than it would have hired under normal circumstances.

[12] Marriott In-Flite cites both *Koester* and *Kalamazoo Paper Box Co.*, 136 N.L.R.B. 134 (1962), as "guiding principles" for determining the unit placement of truckdrivers. Although the considerations listed by the Board in *Kalamazoo* do not vary to any great extent from those outlined in *Koester*, we believe that, because *Kalamazoo* concerned the attempted severance of truckdrivers from an existing production and maintenance unit with a history of bargaining with the employer, *Koester* is more apposite to this case.

hearing and the decision of the Acting Regional Director. In his Decision and Direction of Election, the Acting Regional Director considered just such factors, discussing the duties of all the employees, particularly those of the members of the transportation department, the method of compensating the employees, the supervision of the designated unit, the separate method of promotion and job assignment in the new unit, and the special training required of its members. On the basis of these and other considerations, the Acting Regional Director found that the employees of the transportation department comprised a homogeneous group sharing a community of interest distinct from that of other employees at Marriott In-Flite's East Boston facility.

Although the facts in this case are close and although we might not decide upon the same unit based upon these facts, the Board's unit determination involved "a

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large measure of informed discretion" and is supported by substantial evidence; it should not be disturbed. *Packard Motor Car Co. v. NLRB*, 330 U.S. at 491, 67 S.Ct. at 793 (1947).[13]

VI.

In a further effort to undermine the decision of the Board, Marriott In-Flite claims that the Board abused its discretion when making this unit determination by giving controlling weight to the extent of unionization by the intervenor union, an emphasis specifically forbidden by 29 U.S.C. § 159(c)(5), which states that the extent to which the employees have organized shall not be controlling in determining whether a unit is appropriate under 29 U.S.C. § 159(b).

However, we find little to indicate that the Board took into account the extent of the unionization, let alone gave this factor controlling significance. *See. Beck Corp. v. NLRB*, 590 F.2d 290, 293 (9th Cir. 1978) (per curiam) (Board can consider extent to which employees have organized). The Acting Regional Director's opinion makes no mention of the extent of the unionization, and in our review of his opinion and of

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the record, we have found nothing to substantiate Marriott In-Flite's charge. In fact, the only basis for this claim is the employer's contention that a consideration of all the factory involved does not support the Board's unit determination; we have already rejected this argument.

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[13] We do not view the Acting Regional Director's reliance on *National Caterers of New York, Inc.*, 129 N.L.R.B. 699 (1960), with quite the alarm exhibited by Marriott In-Flite. *National Caterers* presents a factual situation very similar to the one at hand. In *National Caterers* the Teamsters sought to represent flight equipment handlers and their helpers employed by Caterers, a subsidiary of Hot Shoppes, Inc., in a single unit. Another union sought to represent all production employees of the same employer. The employer contended that only a unit composed of all its own and another local subsidiary's employees was appropriate. *Id.* at 700.

Because *National Caterers* was decided before *Koester*, the Board was obviously not able to utilize specifically *Koester's* analysis in its decision. In deciding that a separate unit for handlers and helpers was appropriate, however, the Board discussed the duties of the handlers and helpers, noting that they spent approximately one hour per work day driving, four hours loading and unloading trucks, and three hours in the employer's facilities performing such tasks as preparing ice, packing ice cream into bulk containers, and placing packaged food items on carrying trays. The Board also considered that handlers were paid a substantially higher hourly rate than all employees but the cooks, worked a longer day than food production employees, *id.* at 702, that all employees except handlers and helpers were interchanged, *id.* at 700–01, but that all employees were under common supervision. *Id.* at 700. The Board specifically mentioned that, although handlers and helpers did on occasion perform certain kitchen tasks, these were ordinarily performed by food production employees. *Id.* at 702.

Thus it is apparent that the Board in *National Caterers* did in effect use the analysis outlined by *Koester* for determining the appropriate unit for truckdrivers. We note that the facts in the case *sub judice* point even more compellingly to a finding that a unit composed only of transportation department employees is appropriate.

Marriott In-Flite requests that we take judicial notice of the Board's determinations in other Marriott Corporation cases. We see no reason to do so, because we do not believe that the Board's unit determinations for other Marriott In-Flite facilities have any particular bearing on this case. In *Marriott In-Flite Services*, 188 N.L.R.B. 452 (1971), the union wished to represent *all* eligible employees at the employer's Friendship Airport facility near Baltimore, Maryland. The Board determined that this was an appropriate unit, rejecting Marriott In-Flite's contention that its employees at its National Airport and Dulles International Airport operations, located 37 miles and 59 miles away respectively from Friendship, in Virginia, should also be included in the unit.

Similarly in *Marriott In-Flite Services*, 192 N.L.R.B. 379 (1979), the unions sought to represent kitchen employees at Marriott In-Flite's facilities at John F. Kennedy Airport (two kitchens) and La Guardia Airport (one airport) in the New York metropolitan area. The employer wanted to include employees at its two kitchens at Newark Airport. In an opinion concerned with considerations of geographic and administrative coherence, the Board directed separate elections at both Kennedy *and* La Guardia. *Id.* at 380. It also included shift supervisors and kitchen clericals in the unit.

The other Marriott In-Flite cases are equally distinguishable. *See Marriott In-Flite Services*, 209 N.L.R.B. 478 (1974) (enlarging unit to include not only employees at four flight-catering kitchens, but also employees at four cafeteria-type facilities in airline terminals in two New York City area airports); *Marriott In-Flite Services*, 168 N.L.R.B. 365 (1967) (enlarging one in-flite kitchen unit to include two similar kitchens located at same airport, when employer planned to consolidate three kitchens in near future).

Nor do we believe that our decision in *NLRB* v. *Purity Food Stores, Inc.*, 354 F.2d 926 (1st Cir. 1965), is to the contrary. As we recently noted in *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40 (1981), *Purity Food Stores* merely indicated that "*some minimum* consideration [should] be given to the employer's side of the picture, the feasibility, and disruptive effects of piecemeal unionization." *Id.* at 14 (quoting *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 931 (1st Cir. 1965)) (emphasis added by *Big Y Foods court).*"[14] Particularly in view of the declaration in § 9(b) that the Board shall determine the unit appropriate to assure employees the fullest freedom in exercising the right guaranteed by the Act, the Board is entitled to give greater weight to the employees' than to the Board's view of the appropriate boundaries of the unit." *Id.; see NLRB v. Living and Learning Centers, Inc.*, 652 F.2d 209, 213 (1st Cir. 1981). Assuming that the Board did in fact consider the extent of unionization in this case, that consideration was not unwarranted.

The petition of Marriott In-Flite Services is denied.

The petition of the NLRB for enforcement of its order is granted.

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[14] We do not agree with Marriott In-Flite that a labor dispute involving only transportation department employees would necessarily shut down the entire East Boston facility. Moreover, if this concern were controlling, it is difficult to see how any unit other than a plantwide unit could ever be found appropriate.

NLRB v. Amax Coal Company, a Division of Amax, Inc.

United Mine Workers of America, Local 1854 et al. v. NLRB

107 LRRM 2769, June 29, 1981—614 F.2d 872

On certiorari to 3d Cir.

Before BURGER, Chief Justice and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, Justices

JUSTICE STEWART delivered the opinion of the Court: This case concerns the relationship between two important provisions of the Labor Management Relations Act, 1947 (LMRA).[1] Section 8(b)(1)(B) of the National Labor Relations Act, as amended by § 101 of the LMRA, makes it an unfair labor practice for a union "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances * * * ."[2] Section 302(c)(5) of the LMRA permits employers and unions to create employer-financed trust funds for the benefit of employees, so long as employees and employers are equally represented by the trustees of the funds.[3] The question at issue is whether the employer-selected trustees or a trust fund created under § 302(c)(5) are "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8(b)(1)(B).

I

The Amax Coal Company owns several deep shaft bituminous coal mines, most of them in the midwestern United States. The United Mine Workers of America (the union) represents Amax's employees, and, with respect to the midwestern mines, Amax is a member of the Bituminous Coal Operators Association (BCOA), a national multiemployer group that bargains with the union. Through its collective-bargaining contract with the union, Amax, along with the other members of the BCOA, agreed to contribute to the union's national pension and welfare trust funds. These funds, established under § 302(c)(5) of the Act, provide comprehensive health and retirement benefits to coal miners and their families. In accord with § 302(c)(5)(B), the trust funds are administered by three trustees, one selected by the union, one by the members of BCOA, and one by the other two.[4]

In 1972, Amax opened the Belle Ayre Mine in Wyoming, the company's first sub-bituminous surface mine. Although Amax did not join the BCOA with respect to that mine, Amax and the union negotiated a collective-bargaining contract for Belle Ayre which resembled the BCOA national contract, and under which Amax contributed specified amounts of money to the national trust funds to benefit the employees at Belle Ayre. In January 1975, when the collectively bargained contract covering the Belle Ayre Mine ended, the union struck Belle Ayre and other western mines, attempting to compel the mine owners to establish a multiemployer bargaining unit and to agree to a new collective contract proposed by the union, under which the members of the new employer unit would contribute to the national trust funds. Amax resisted, and the union, threatened with a complaint from the National Labor Relations Board Regional Counsel for illegally attempting to coerce the employer into a multiemployer bargaining unit, soon began separate negotiations with Amax. Those negotiations came to an impasse, and the union continued its strike at the Belle Ayre Mine. Amax then filed with the Board unfair labor practice charges against the union.

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[1] 29 U.S.C. § 141 et seq.

[2] 29 U.S.C. § 15b (b)(1)(B).

[3] 29 U.S.C. § 186(c)(5).

[4] The trust agrement set out the health and retirement benefits provided to employees and their dependents, defines the terms and the responsibilities of the trustees, describes the method of administration of the trust and provides for periodic audits reports and notices. The agreement also taxes the employers contributions to the trust requiring a specified number of cents per total of coal produced. With the one exception that the trustees themselves retain the power to fix the rate for coal salvaged from slurry, sludge, or other refuse.

The matter of pension and welfare benefits had been a major barrier to agreement between Amax and the union, and formed an important part of Amax's charges before the Board. Amax had proposed its own benefit and pension trust plan, outside the purview of § 302(c)(5), but the union, claiming that such a plan would not be sufficiently portable to or reciprocal with the national trust funds, had rejected this proposal. Rather, the union had insisted that Amax, even as a separately bargaining employer, continue to contribute to the national trust funds for the Belle Ayre employees. Amax, of course, as a member of BCOA, had participated in selecting the management appointed trustee of the national trust funds, but it now wanted to appoint its own trustee for any trust fund covering the employees of the Belle Ayre Mine. Amax took the view that any management-appointed trustee of a § 302(c)(5) trust fund was a collective-bargaining "representative" of the employer within the meaning of § 8(b)(1)(B); therefore, since the management trustee of the national trust fund had already been selected by BCOA, Amax contended that the union's insistence that it participate in the national trust funds with regard to Belle Ayre employees constituted illegal coercion under § 8(b)(1)(B) of the Act. Amax also charged the union with refusing to bargain in good faith in violation of § 8(b)(3) of the Act.[5]

The National Labor Relations Board unanimously concluded that the union had acted legally in bargaining to impasse and striking to obtain Amax's participation in the national trust funds for the Belle Ayre employees.[6]

The Board noted that the purpose of § 8(b)(1)(B) was to ensure that an employer can bargain through a freely chosen representative completely faithful to his interest under the principles of agency law, while the trustee of a joint trust fund, though he may appropriately consider the recommendations of the party who appoints him, is a fiduciary owing undivided loyalty to the interest of the beneficiaries in administering the trust.[7] Accordingly, the Board concluded that the union had not violated § 8(b)(1)(B).

On cross petitions by the parties, the Court of Appeals for the Third Circuit, relying on its earlier decision in Associated Contractors of Essex County, Inc. v. Laborers International Union, 559 F.2d 222, 227–228, 95 LRRM 2908, held that management-appointed trustees of a § 302(c)(5) trust fund act as both fiduciaries of the employee-beneficiaries and as agents of the appointing employers, and, insofar as is consistent with their fiduciary obligations, are expected to administer the trusts in such a way as to advance the employer's interests. 614 F.2d 872. 881–882, 103 LRRM 2482. The Court therefore concluded that the union had acted in violation of § 8(b)(1)(B) in exerting its economic power to induce Amax to participate in the national trust funds with respect to employees of the Belle Ayre Mine, and reversed the Board's ruling to the contrary. We granted certiorari to consider the important question of Federal labor law this case presents. ——— U.S. ———.

II

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[5] 29 U.S.C. § 158(b)(3)

[6] On other claims by Amax, the Board found that the union had not bargained in bad faith in violation of § 8(b)(3), but that the union had acted illegally in attempting to coerce Amax to join the multiemployer bargaining unit for the western mines, in failing to notify the Federal Mediation and Conciliation Service of its dispute with Amax before striking, and by insisting to impasse on certain contract proposals that would have violated § 8(e) of the Act, 29 U.S.C. § 158(e). The Court of Appeals affirmed all these rulings, and they are not before this Court.

[7] The Board relied on its earlier resolution of this same issue in Sheet Metal Workers' International Association and Edward J. Carlough (Central Florida Sheetmetal Contractors Association, Inc.), 234 NLRB No. 162, 97 LRRM 1476.

Although § 302(a) of the Act [8] generally prohibits an employer from making payments to any representative of his employees, § 302(c)(5) allows an employer to contribute to an employee benefit trust fund that satisfies certain statutory requirements. To ensure that the funds in such a trust are not used as a union "war chest," Arroyo v. United States, 359 U.S. 419, 426, 44 LRRM 2028, the Act provides that the funds may be used only for specified benefits for employees and their dependents, and that the basis for these payments be laid out in a detailed written agreement between the union and the employer.[9] The fund must be subject to an annual audit, and the results of the audit must be made available to all interested persons.[10] Furthermore, pension or annuity funds must be kept in a trust separate from other union welfare funds.[11] Finally, § 302(c)(5)(B) requires that "employees and employers [be] equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon * * *."[12]

Congress directed that union welfare funds be established as written formal trusts, and that the assets of the funds be "held in trust," and be administered "for the sole and exclusive benefit of the employees * * * and their families and dependents * * *." * * *." 29 U.S.C. § 186(c)(5). Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. See Perrin v. United States, 444 U.S. 37, 42–43. Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts, § 170(1); 2 Scott on Trusts, § 170. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity." Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (Cardozo, J.). A fiduciary cannot contend "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of the secondary one." Woods v. City National Bank & Trust Co., 312 U.S. 262, 269.

Given this established rule against dual loyalties and Congress' use of terms long established in the courts of chancery, we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary. See Owen v. City of Independence, 445 U.S. 622, 637. However, although § 302(c)(5)(B) requires an equal balance between trustees appointed by the union and those appointed by the employer, nothing in the language of § 302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him, or that an employer may direct or supervise the decisions of a trustee he has appointed.[13] And the legislative history of the LMRA confirms that § 302(c)(5) was designed to reinforce, not to alter, the long established duties of a trustee.

As explained by Senator Ball, one of the two sponsors of the provision, the "sole purpose" of

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[8] 29 U.S.C. §186(a).

[9] Trust funds may pay only "for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance." 29 U.S.C. §186(c)(5)(A).

[10] 29 U.S.C. §186(c)(5)(B).

[11] 29 U.S.C. §186(c)(5)(C).

[12] If the trustees deadlock over a matter of trust administration, the statute further provides that the trustees may select a neutral arbiter, or "in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office * * *." 29 U.S.C. §186(c)(5)(B).

[13] The use of the word "representatives" in § 302(c)(5)(B) in no way suggests that Congress did not intend to incorporate the equitable principles of fiduciary duty. The requirement that employer and employee be equally represented among the trustees of an employee benefit fund prevents any misuse of those funds by union officers who would otherwise have sole control of vast amounts of money contributed by the employer. See Arroyo v. United States. 359 U.S. 419, 425 426, 44 LRRM 2028. The management-appointed trustee "represents" the employer only in the sense that he ensures that the union-appointed trustee does not abuse his trust with respect to the funds contributed by the employer. Nowhere in the debates over § 302(c)(5) did any Member of either House of Congress suggest that the employer "representative" as a trustee of a benefit fund created under this statute could or should advance the interest of the employer in administering the fund. In fact, some opponents of the provision objected that the requirement of equal management-union representation imposed onerous administrative duties on the employers. E.g. 93 Cong. Rec. 4880, reprinted in 2 NLRB Legislative History of the Labor Management-Relations Act, 1947, at 1316 (1948) (Leg. Hist. LMRA) (Sen. Murray).

§ 302(c)(5) is to ensure that employee benefit trust funds "are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them * * *." 93 Cong. Rec. 4678 (1947), reprinted in 2 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 1305 (1948) (Leg. Hist. LMRA). Senator Ball stated that "all we seek to do by [§ 302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753, 2 Leg. Hist. LMRA, at 1322; see H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 66–67, 1 Leg. Hist. LMRA, at 570. The debates on § 302(c)(5) further reveal Congress' intent to cast employee benefit plans in traditional trust form precisely because fiduciary standards long established in equity would best protect employee beneficiaries. For example, one opponent of the bill suggested that § 305(c)(5) was unnecessary because even without that provision, the "officials who administer [the fund] thereby become trustees, subject to all of the common law and state safeguards against misuse of funds by trustees." 93 Cong. Rec. 4881, 2 Leg. Hist. LMRA, at 1318 (Sen. Morse), Senator Taft, the primary author of the entire Act answered that many existing funds were not created expressly as trusts, and that § 302(c)(5)'s requirement that each fund be an express and enforceable trust would ensure that the future operations of all such funds would be subject to supervision by a court of chancery, 93 Cong. Rec. 4886, 2 Leg. Hist. LMRA, at 1322. See also 93 Cong. Rec. 4802, 2 Leg. Hist. LMRA, at 1304 (Sen. Ball); 93 Cong. Rec. 3623, 1 Leg. Hist. LMRA, at 753 (Rep. Case, author of House bill on which § 302(c)(5) was patterned). In sum, the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party.[14]

Whatever may have remained implicit in Congress' view of the employee benefit fund trustee under the Act became explicit when Congress passed the Employee Retirement Income Security Act of 1974 (ERISA) ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet. See 29 U.S.C. §§ 1002(1) and (2); H.R. Conf. Rep. No. 93–1280, 93d Cong., 2d Sess., 296, 307. Section 404(a)(1) of ERISA requires a trustee to "discharge his duties * * * solely in the interest of the participants and beneficiaries * * *." 29 U.S.C. § 1104(a)(1).[15] Section 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2). Section 405(a) imposes on each trustee an affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries. 29 U.S.C. § 1105(a).

Moreover, the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest. Except in circumstances involving excess contributions or termination of the trust, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." § 403(c)(1), 29 U.S.C. § 1103(c)(1). Finally, § 406(a)(1)(E) prohibits any transaction between the trust and a "party in interest," including an employer, and § 407 carefully limits the amount and types of employer-owned property and securities that the trustees may obtain for the trust. 28 U.S.C. §§ 1106(a)(1)(E), 1107.[16] In sum, ERISA vests the "exclusive authority and discretion to manage and control the assets of the plan" in the trustees alone, and not the employer or the union. 29 U.S.C. § 1103(a).

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[14] The legislative history of § 302(c)(5) also bears directly on the actual question underlying the statutory issue in this case: whether Congress intended to prohibit union demands for employer participation in established multiemployer trust funds. One of the events that greatly influenced the legislative efforts culminating in the Act was the demand of John L. Lewis, then head of the United Mine Workers, that all mine owners contribute 10 cents per ton of coal produced into a central welfare fund established by the union itself. United States v. Ryan. 350 U.S. 299, 304–305, 37 LRRM 2581; S. Rep. No. 105 (Part I), 80th Cong., 1st Sess., 1 Leg. Hist. LMRA, at 458. The debates and reports reveal that despite considerable congressional opposition to Lewis' demands, ibid.; S. Rep. No. 105, Part 1, 612, 672–673, 753 (remarks of Reps. Hartley, Fisher, and Case); 93 Cong. Rec. 4805, 4876–4878, 1 Leg. Hist. LMRA, at 1305, 1311–1313, 1315 (Sens. Byrd and Taft). Congress specifically rejected proposals that would have rendered those demands illegal either by providing that union proposals concerning pension welfare benefits were not mandatory subjects of bargaining or by prohibiting all such funds even indirectly established or managed by a union. See H.R. 3020, 80th Cong., 1st Sess., §§ 2(11), 8(a)(2)(C)(ii), 1 Leg. Hist. LMRA, at 39–40, 51; H.R. Rep. No. 245, 80th Cong., 1st Sess., 14–17, 2 Leg. Hist. LMRA, at 1012.

[15] A "participant" is "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan * * *, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). A "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

The legislative history of ERISA confirms that Congress intended in particular to prevent trustees "from engaging in actions where there would be a conflict of interest with the fund, such as representing any party dealing with the fund." S.Rep. No. 93-383, 93d Cong., 1st Sess., 31, 32. In short, the fiduciary provisions of ERISA were designed to prevent a trustee "from being put into a position where he has dual loyalties and therefore he cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.R.Conf. Rep. No. 93-1280, supra, at 309.[17]

III

The language and legislative history of § 302(c)(5) and ERISA therefore demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must over come any loyalty to the interest of the party that appointed him. Thus, the statutes defining the duties of a management-appointed trustee make it virtually self-evident that welfare fund trustees are not "representatives for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8(b)(1)(B). But close examination of the latter provision makes it even clearer that § 8(b)(1)(B) does not limit the freedom of a union to try to induce an employer to select a particular § 302(c)(5) trustee.[18]

Congress enacted § 8(b)(1)(B) largely to prevent unions from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or the settlement of emloyee grievances. See American Broadcasting Companies v. Writers Guild of America, West, Inc, 437 U.S. 411, 422–423, 429–431, 435–436, 98 LRRM 2705; Florida Power & Light Co. v. IBEW, Local 641, 417 U.S. 790, 803, 86 LRRM 2689; S.Rep. No. 105 (Pt. I), 1st Sess., 21, 1 Leg. Hist. LMRA, at 427; 93 Cong. Rec. 4266, 2 Leg. Hist. LMRA 1077 (Sen. Ellender).[19] The legislative history reveals the concern of some Senators that if unions could strike or bargain to impasse to compel employers to join industry-wide bargaining units, the large unions might exercise monopoly power over wages or call strikes threatening large portions of the national economy. S. Rep. No. 105 (Pt. I), 1st Sess., 51, Leg. Hist. LMRA, at 457; 93 Cong. Rec. 4710–4711, 2 Leg. Hist. LMRA, at 1246–1258 (Sen. Taft). However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly. It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industry-wide employer association, while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Moreover, union pressure to force an employer to contribute to an established employee trust fund does not amount to dictating to an employer who shall represent him in collective bargaining and the adjustment of grievances, because the trustees of a § 302(c)(5) trust fund simply do not, as such, engage in these activities. The terms "collective bargaining" in § 8(b)(1)(B) of the Act is defined by § 8(d):

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[16] Although § 408(c)(3) of ERISA permits a trustee of an employee benefit fund to serve as an agent or representative of the union or employer, that provision in no way limits the duty of such a person to follow the law's fiduciary standards while he is performing his responsibilities as trustee.

[17] In 1980, Congress amended ERISA to impose new responsibilities upon the trustees of multiemployer trust funds, passing the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1209, which reaffirmed that the trustees must act solely in the interest of the trust beneficiaries, see H.R. Rep. No. 96-869 (Part 1), 96th Cong., 2d Sess., 67.

[18] Neither statutory provision refers to the other and though the same congressional committees considered the issues of employee benefit trust funds and multiemployer bargaining, the legislative history nowhere suggests that Congress intended that the restrictions on union activity created by § 8(b)(1)(B) were relevant to the selection of § 302(c)(5) trustees. Indeed, though faced with a United Mine Workers demand that owners contribute a fixed percentage of their coal receipts to a multiemployer trust fund created by the union. Congress rejected several proposals that would have denied the union the power to make such demands. See n. 14, supra.

[19] Another concern of § 8(b)(1)(B), of no relevance here, was to prevent a union from striking to force an employer to fire a supervisor who, in the union's view, was too stern in his treatment of employees. 93 Cong. Rec. 3953–3954, 2 Leg. Hist. LMRA 1012 (Sen. Taft).

> "[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *." 29 U.S.C. §158(d).

Under this definition, the collective-bargaining representatives of an employer and a union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to such economic weapons as strikes and lockouts, without any compulsion to reach agreement. See Carbon Fuel Co. v. Mine Workers, 444 U.S. 212, 219, 102 LRRM 3017; NLRB v. Insurance Agents' International Union, 361 U.S. 477, 495, 45 LRRM 2704.

The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure. The management-appointed and union-appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U.S.C. § 186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer.[20] Indeed, the trustees have an obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer "for the sole benefit of the beneficiaries of the fund." United States v. Carter, 353 U.S. 210, 220, 13 LRRM 238. Finally, disputes between benefit fund, trustees over the administration of the trust cannot, as can disputes between parties in collective bargaining, lead to strikes, lockouts, or other exercises of economic power. Rather, whereas Congress has expressly rejected compulsory arbitration as a means of resolving collective-bargaining disputes, § 302(c)(5) explicitly provides for the compulsory resolution of any deadlocks among welfare fund trustees by a neutral umpire. Compare 29 U.S.C. § 158(d) with 29 U.S.C. § 186(c)(5); see, n. 12, supra.[21]

Like collective bargaining, the adjustment of grievances concerns the relationship between employer and employee. See 29 U.S.C. § 159(a). The trustees' concern, however, is the relationship between the beneficiaries and the fund. The only "grievances" it may adjust are those concerning the eligibility of employees or their dependents for participation in the benefits of the fund. See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164–171, 78 LRRM 2974. And whereas Congress has adopted the principle of voluntary settlement, free of governmental compulsion, in the adjustment of employee grievances against the employer, § 203(d) of the Act, 29 U.S.C. § 173(d), a trustee deadlock over eligibility matters, like any other deadlock, must be submitted to the compulsory resolution procedure established by § 302(c)(5).

"Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities namely collective bargaining and the adjustment of grievances." Florida Power & Light Co., v. I.B.E.W., Local 641, 417 U.S. 790, 803, 86 LRRM 2689. The duties of an employer-appointed trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to both of these activities. The Court of Appeals, therefore, was mistaken in believing that the conduct of the union in this case violated the provisions of § 8(b)(1)(B).[22]

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[20] The sole and minor exception under the agreement governing the national trust funds in this case is the authority of the trustees to fix the number of cents per ton of salvage coal produced which a mine operator must contribute to the funds. See n. 4, supra.

[21] If the administration of § 302(c)(5) trust funds were "collective bargaining" within the meaning of federal labor law, as it would be under the Court of Appeals' view, the NLRB would have to review the discretionary actions of the trustees according to the statutory duty of good-faith bargaining. 29 U.S.C. §§ 158(a)(5), (b)(3), (d). The Board would thereby be thrust "into a new area of regulation which Congress [has] not committed to it, NLRB v. Insurance Agents' International Union, 361 U.S. 477, 499, 45 LRRM 2704. Moreover, under the Court of Appeals' view, a trustee would be subject to simultaneous regulation by the Board, the Secretary of Labor, and the courts, and might be torn between conflicting duties imposed by the National Labor Relations Act and ERISA. For example, ERISA requires a trustee to prevent any other trustee from breaching his fiduciary responsibilities to the trust beneficiaries, 29 U.S.C. §§ 405 (a)(3), (b)(1)(A). On the other hand, § 8(b)(1)(B) bars a union representative from interfering with the employer's collective-bargaining agent's performance of his duties in accordance with the employer's instructions. American Broadcasting Companies v. Writers Guild of America, West, Inc., 437 U.S. 411, 436, 98 LRRM 2705. Therefore, if trust fund administration is collective bargaining, a trustee could be charged with an unfair labor practice by carrying out his duties under ERISA.

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

JUSTICE STEVENS, dissenting: The Key to this case, in my judgment, is the distinction between the process by which a person is appointed to office and the manner in which he performs that office after he has been appointed. Congress has provided that labor and management shall each appoint the same number of representatives to serve as trustees of jointly-administered employee pension and welfare funds.[1] Giving each side of the bargaining table exclusive control of the appointment of half of the trustees does not compromise in any way the fiduciary obligations of the trustees after they assume office. Conversely, the imposition of fiduciary responsibilities on the trustees after they have been appointed surely does not lend any support to the Court's quixotic notion that a union may interfere—by a strike if necessary—with management's selection of its representatives.

Three quite different theories might provide a basis for deciding this case in favor of the United Mine Workers (the union). First, the Court might conclude that the union was merely trying to induce Amax to agree to contribute to the national multiemployer trust funds and that is had no interest in the identity of the management trustees of those funds. Second, the Court might conclude that because Amax, as a member of the Bituminous Coal Operators Association, actually participated in the selection of the management trustees of the union's national trust funds, there is no basis for its claim that the union was interfering with that prerogative of management. Third, the Court might conclude that it is permissible for a union to restrain or to coerce an employer in the selection of its repre-

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[22] The view of the Court of Appeals that the union could not seek to compel the employer to join an established employee trust fund conflicts with recent legislation concerning multiemployer pension plans. In this case, Amax claimed complete power under § 8(b)(1)(B), unaffected by union economic pressure, to select the sole trustee, or all the trustees, of the trust fund benefiting the Belle Ayre Maine employees. Since, by definition, it is impossible for every employer participating in a multiemployer trust fund to exercise such power, the Court of Appeals' decision upholding Amax's claim would effectively preclude a union from resorting to economic pressure to cause an employer to participate in a multiemployer trust fund. Congress amended ERISA in 1980 to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans. In these amendments, Congress sought to "foster the maintenance and growth of multiemployer pension plan . . . [and] to provide reasonable protection for the interests of the participants and beneficiaries of financially distressed multiemployer pension plans." Section 3(c)(2) and (c)(3) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1209–1210. Section 3(a)(4)(A) of the 1980 Act states that "withdrawals of contributing employees from a multiemployer pension . . . adversely [affect] the plan, its participants and beneficiaries, and labor-management relations . . ." 94 Stat. 1209. The Court of Appeals' decision therefore runs afoul of express congressional policy favoring multiemployer trusts.

[1] Section 302(a) of the Labor-Management Relations Act of 1947 generally prohibits payments by employers to representatives of their employees. 29 U.S.C. § 186(a). Section 302(c)(5) creates an exception to this general prohibition for payments to certain trust funds established for the sole benefit of employees. 29 U.S.C. § 186(c)(5). The statute contains detailed requirements that trust funds must satisfy to qualify for the exception:

"The provisions of this section shall not be applicable * * * with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similiar payments, and their families and dependents); *provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirements or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the District Court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot by used for any purpose other than paying such pensions or annuities * * *." 29 U.S.C. § 186(c)(5).

sentatives for the purpose of administering joint employee pension and welfare funds.

If the Court relied on either of the first two rationales, or if its opinion could be read as resting on a blend of all three, this case would not be particularly significant. I believe, however, that the Court's opinion will be read as holding that it is not an unfair labor practice for a union to attempt to exercise an economic veto over an employer's selection of the management trustees of a jointly administered employee benefit fund.[2] In my opinion, that holding is foreclosed by rather plain statutory language and is flagrantly at odds with the intent of Congress.

I

The equal representation requirement of § 302(c)(5) is one of a number of restrictions employed by Congress to prevent the mismanagement or misuse of employee benefit funds by union officials. See, e.g., Arroyo v. United States, 359 U.S. 419, 426, 44 LRRM 2028; Associated Contractors, Inc. v. Laborers International Union. 559 F.2d 222, 226, 95 LRRM 2908 (CA3 1977).[3] Equal representation was required, not to satisfy employer demands for a voice in benefit fund administration,[4] but to insure that money paid for the welfare of employees actually was used for that purpose. As Senator Taft explained:

> "Certainly unless we impose some restriction we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages.
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> * * * * *
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> "This amendment is, in effect, a provision to prevent the abuse of the right to establish such funds by collective bargaining, pending further study of the whole problem. Otherwise I think we shall find that the welfare fund will become a racket. In many unions it is very easy for it to become a racket." 93 Cong. Rec. 4877 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act. 1947, 1312–1313 (Leg. Hist. LMRA).

The requirement of equal labor-management representation is a central factor in the congressional formula to prevent such abuse. See, e.g., Associated Contractors. Inc., supra, at 227; Toensing v. Brown, 374 F.Supp. 191, 195, 88 LRRM 2643 (ND Cal. 1974), aff'd, 528 F.2d 69, 91 LRRM 2174 (CA9 1975).

Although the Court repeatedly uses the word "trustee" to identify the persons who administer pension and welfare funds established in compliance with § 302(c)(5), Congress used the word "representative." See 29 U.S.C. § 186(c)(5). Congress' use of this term does not, of course, qualify the fiduciary responsibilities of those persons.[5] It is nevertheless important for two reasons. First, it is a reminder that one of the means selected by Congress for insuring neutrality in the administration of a trust fund was to give each side of the bargaining table an equal voice in the selection of trustees. Second, it is a recognition of the fact that the administration of a trust fund often gives rise to questions over which representatives of management and representatives of labor may have legitimate differences of opinion that are entirely consistent with their fiduciary duties.

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[2] The Court states that:

"[C]lose examination of the latter provision makes it even clearer that § 8(b)(1)(B) does not limit the freedom of a union to try to induce an employer to select a particular § 302(c)(5) trustee" Ante, at 11.

[3] In addition to containing numerous specific references to John L. Lewis and the United Mine Workers central fund, see, e.g., S. Rep. No. 105, 80th Cong. 1st Sess., 52 (1947), reprinted in 1 Legislative History of the Labor Management Relations Act. 1947, 458 (Leg. Hist. LMRA); 93 Cong. Rec. 3623–3624, A2012 (1947), 1 Leg. Hist. LMRA 753–756, 869 93 Cong. Rec. 4805, 4876–4878, 5147 (1947); 2 Leg. Hist. LMRA 1305, 1306, 1310–1315, 1498, the legislative history is replete with general expressions of concern about union mismanagement and misuse of employee benefit funds. See, e.g., S. Rep. No. 105 80th Cong., 1st Sess. 52 (1947), 1 Leg. Hist. LMRA 458; 93 Cong. Rec. 3628 (1947); 1 Leg. Hist. LMRA 757 93 Cong. Rec. 4805, 4806, 4876–4877, 4882–4883 (1947); 2 Leg. Hist. LMRA 1305, 1306, 1310–1313, 1321, 1322. The equal representation requirement was a direct response to these concerns. As Senator Ball explained:

> "In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second." 93 Cong. Rec. 4883 (1947), 2 Leg. Hist. LMRA 1322.

See also S. Rep. No. 105, 80th Cong., 1st. Sess., 52 (1947), 1 Leg. Hist. LMRA 458; 93 Cong. Rec. 3623 (1947); 1 Leg. Hist. LMRA 753; 93 Cong. Rec. 4805, 4877 (1947), 2 Leg. Hist LMRA 1305, 1312.

[4] Indeed, opponents of the bill that became § 302 argued that many employers wanted absolutely nothing to do with the administration of employee benefit funds. See, e.g., 93 Cong. Rec. 4879, 4882 (1947), 2 Leg. Hist. LMRA 1316, 1319, 1320.

[5] However, the fact that Congress used the term "representative" rather than "trustee" is significant in light of the Court's reliance on the principle that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." Ante, at 6.

The Court's extended discussion of the fiduciary responsibilities of employee benefit fund trustees has, in my judgment, little bearing on the question presented in this case. It is undisputed that such trustees are fiduciaries whose primary loyalty must be to the beneficiaris of the funds. The question with which we are confronted here is whether this fiduciary duty is necessarily wholly inconsistent with "representative" status. The Court answers this question in the affirmative by citing traditional principles of trust law and their federal statutory counterparts. This approach leads the Court into error because it ignores the purpose underlying § 302(c)(5) and the carefully designed means chosen by Congress to achieve that purpose.

The trustees of employee benefit funds often exercise broad discretion on policy matters with respect to which management and labor representative may reasonably have different views. Besides describing the trustees as "representatives," Congress expressly recognized in § 302(c)(5) that such differences would arise, for it provided a procedure to resolve such differences in the event of a deadlock between "the employer and employee groups." Nothing in the statute or the legislative history suggests that differences along labor-management lines are in any way inconsistent with the trustees' fiduciary duty to the trust beneficiaries. Indeed, it is precisely because management and the union can have legitimate differences with respect to matters of trust administration that the equal representation requirement serves as an effective safeguard. Although the Court seems to ignore this principle in its decision today, it has been recognized in the past by other federal courts [6] and by the commentators.[7]

The trust agreement at issue in this case allows ample room for such labor-management differences. For example, it authorizes the trustees to determine how much money each operator shall contribute to the fund on account of the production of salvaged coal. See Joint App. 98k–98l. That kind of detail could be covered in the basic collective-bargaining argeement or left to the trustees for resolution in the light of changing circumstances. When the trustees resolve such an issue, one surely could not charge a management representative with a breach of trust merely for favoring a lower rate than the union representatives suggest.

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[6] In Associated Contractors, Inc. v. Laborers International Union, 559 F.2d 222, 95 LRRM 2908 (CA3 1977), the decision on which the Court of Appeals relied in this case, the court recognized that the inevitable conflict between the views of labor and the views of management with respect to the administration of employee benefit funds was an essential feature of the statutory protection designed by Congress:

> "The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function as fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective-bargaining process between them * * *. The trustees' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c)(5). Congress envisioned the conflict of views of employer and employee as a distilling process which would provide safeguards against trust fund corruption." Id., at 227–228 (citations omitted).

See also Ader v. Hughes. 570 F.2d 303, 308 (CA10 1978); Lamb v. Carey, ——— U.S. App. D.C. ———, 498 F.2d 789, 793, 86 LRRM 2412 (1974), cert denied, 419 U.S. 869, 87 LRRM 2453; Toensing v. Brown, 374 F.Supp. 191, 195, 88 LRRM 2643 (ND Cal. 1974), aff'd, 528 F.2d 69, 91 LRRM 2174 (CA9 1975).

[7] One commentator described the statutory scheme, as follows:

> "The governing trust agreement separately entered into by the parties to the collective-bargaining agreement may specify general categories of benefits, but it normally delegates to the trustees broad discretion to determine specific benefit levels and eligibility requirements, to modify the benefit plan, and to administer the plan.
>
> "Exercise of this discretionary power may involve important questions of policy or judgment on which union and employer trustees may well differ. This potential divergence of interests was the underlying reason for the statutory requirement of equal representation. Employer representatives were intended to act as a check on the untrammeled discretion of the union. The possibility of adverse interests leading to dispute is recognized by the statutory provision for breaking deadlocks through appointment of an impartial umpire." Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L. Rev. 911, 922–923 (1970) (footnote omitted).

See also Goetz, Employee Benefit Trusts Under Section 302 of Labor Management Relations Act, 59 Nw. U. L. Rev. 719, 748 (1965).

The Court states that the trustees may never "compromise the claims of the union or the employer with regard to the latter's contributions" to the fund. Ante, at 13. But what if one contributor to a multiemployer fund is unable to pay its bills currently? Do trustees have no power to enter into temporary arrangements or compromises?[8] In making decisions regarding the investment of the assets of the fund, legitimate differences among faithful trustees certainly may arise. Conceivably, management representatives may favor conservative investment policies that are best designed to guarantee the long-range solvency of the fund while labor representatives may favor investments with higher yields that will support a demand for more liberal benefits at the next bargaining session. No written trust agreement can entirely eliminate the need for discretionary decisions by trustees nor make it impermissible for the trustees to give consideration to the interests that they represent when confronting day-to-day administrative problems.

Some of the issues the trustees must resolve in processing applications for benefits are almost identical to those that arise in grievance proceedings. Rights to pension benefits and to seniority are measured in part, by the employee's length of service. Either in the adjustment of a grievance over seniority or in the trustees' approval or disapproval of a claim for retirement benefits, it may be necessary to resolve a dispute over how to measure the period of employment. Bargaining units tend to develop an unwritten "law of the shop" to resolve such recurring minor disputes; it seems to me equally permissible for trustees to develop a similar common law of their own and for representatives of the two sides of the bargaining table to reflect different points of view as that law develops. The guarantee of impartiality in making decisions of this kind is not a total divorce of every trustee from the interests that he represents; rather, neutrality is guaranteed by having an equal number of "representatives" of the two conflicting interests make the decisions, subject always to their basic obligation as fiduciaries. That this is the scheme of the statute is perfectly clear from its terms.[9]

It is equally clear that this scheme will be compromised if the employer's selection of his representatives is now to be a subject of collective bargaining. The danger to the legislative scheme is not mitigated by the fact that the employer need not agree with the union's demand that a particular person be named a management trustee. The employer may consider it less costly to give the union a veto over the selection of the management trustees than to grant a wage increase.[10] Any bargaining over the identity of a trustee inevitably will destroy the precise balance that Congress intended by directing that each side shall select its own representatives. As JUSTICE BLACKMUN aptly stated while a Member of the Court of Appeals for the Eighth Circuit:

> "[T]o permit the union in any degree to participate in the choice of employer representatives does violence to the statutory standard of equal representation." Blassie v. Kroger Co., 345 F.2d 58, 72, 59 LRRM 2034 (CA8 1965).[11]

In my opinion, the Court today "does violence to the statutory standard" because it misapprehends the safeguard established by Congress in § 302(c)(5), and instead applies to this case principles of trust law and statutory provisions that have little, if any, relevance to the precise question presented.

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[8] The trust agreement in this record suggests the contrary:

"The Trustees shall take such action as they deem appropriate to collect any such delinquencies, and shall advise the International Union and the appropriate Districts and Locals of the Union, on at least a monthly basis, of such delinquencies, as long as such delinquencies continue." Joint App. 98p.

[9] As noted above, the word "trustee" does not appear in § 302(c) of the LMRA. That section does require that "employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute * * *." 29 U.S.C. § 186(c)(5). It seems to me that this statutory language is quite inconsistent with the Court's view that the trustees are essentially fungible once they have been appointed.

[10] Because the equal representation requirement primarily benefits the fund's beneficiaries rather than the employer, it is unlikely that an employer would be willing to risk a strike or other economic pressure on the part of the union in order to preserve its right to choose its own representatives to the employee benefit fund. As the legislative history suggests, see n. 4, supra, many employers probably view the equal representation requirement as an unwelcome burden at best, rather than as an essential right worth defending at the risk of extended labor strife. Cf Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 290, 314 (1948). ("The provisions dealing with employer contributions to union trust funds set the employer up as watchdog, although it has no interest in the fund").

[11] See also Associated Contractors, Inc., supra, at 227; Quad City Builders Assn. v. Tri City Bricklayers Union, 431 F.2d 999, 1003, 75 LRRM 2255 (CA8 1970).

II

In addition to arguing that there is an inherent inconsistency between the duties of a "trustee" and the duties of a "representative"—and therefore that the trustees of an employee benefit fund cannot be representatives even though they are so named by Congress—the Court suggests that in any event these representatives are not selected "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B).[12] The Court seems to read this provision as a narrow, precisely defined prohibition against interference with the selection of a relatively small number of representatives whose primary function is to represent the employer in collective-bargaining negotiations or in the adjustment of grievances. Once again, the Court overlooks the distinction between interfering with the selection process and interfering with the performance of a supervisor's duties after he has been selected. I believe the Courts narrow construction was not intended by Congress, and that the statute prohibits union interference with management's selection of all personnel who have any, however minor, collective bargaining or grievance adjustment responsibilities. When § 8(b)(1)(B) is read in light of its purpose and legislative history, it is plain that the prohibition applies to the selection of the employer's representatives in the administration of joint benefit funds.

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The Court's narrow view of § 8(b)(1)(B) has its source in Florida Power & Light Co. v. I.B.E.W., Local 641, 417 U.S. 790, 86 LRRM 2689—a case that did not involve any direct interference with the employer's selection of supervisors. In that case, we held that "a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer of behalf of the employer." 417 U.S., at 804–805. Thus, to make out a violation of the statute in such a case, it is not enough to show that the union disiplined a supervisor who had some collective bargaining or grievance adjustment responsibilities; the discipline itself must relate directly to the supervisor's performance of these duties. See also American Broadcasting Co. v. Writers Guiid, 437 U.S. 411,429–430, 98 LRRM 2705. This direct relationship is an appropriate element of a § 8(b)(1)(B) violation in a case involving union discipline of a supervisor because such discipline only indirectly affects the "selection" of management representatives, the primary focus of the statute. However, whenever the union conduct has a direct impact on the employer's selection of a representative, it is not necessary that that conduct bear a direct relationship to the representative's collective bargaining or grievance adjustment duties; it is sufficient that the union attempt to coerce or to restrain management in the selection of a representative who will have such duties, even if they will constitute only a small portion of his overall responsibilities.

The legislative history of § 8(b)(1)(B) supports a broad reading of the prohibition against union conduct aimed directly at the actual selection of employer representatives. Section 8(b)(1)(B) was intended to protect the basic management prerogative of selecting foremen and more senior executives who exercise supervisory authority over employees and represent the company in its relationship with employees and their collective bargaining agent. The sparse comments on the provision in the legislative history persuade me that Congress intended the description of "representatives for the purposes of collective bargaining or the adjustment of grievances" to refer to a category of employer representatives whose selection was exclusively a matter of management prerogative.

Thus, Senator Taft explained the provision by using the example of an unpopular foreman who may well have had no specific responsibility for either collective bargaining or adjusting grievances. He said:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' " 93 Cong. Rec. 3953 (1947), 2 Leg. Hist. LMRA 1012.

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[12] Section 8(b) of the Act provides, in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. . . ." 29 U.S.C. § 158(b)(1)(B).

A few days later, in a brief discussion of provisions in the bill intended to deal with "strikes invading the prerogatives of management," Senator Ellender identified § 8(b)(1) as covering the coercion of an employer" either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official." 93 Cong. Rec. 4266 (1947), 2 Leg. Hist. LMRA 1077. His description of the provision surely supports a broad reading of the prohibition against strikes invading the prerogatives of management, rather than a narrowly restricted reference to a precisely defined category of representatives principally involved in collective bargaining and grievance adjustment.[13]

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Therefore, to sustain its position in this case, it seems to me that the Court must establish that no part of the duties of an employee benefit fund trustee involve collective bargaining or grievance adjustment activities. But even if one gives the narrowest literal reading to the term "collective bargaining," it is clear that employee benefit trust agreements generally, and the trust agreement involved in this case in particular, authorize the two groups of representatives to engage in collective bargaining activity. The statute broadly defines collective bargaining to encompass any conference with respect to "the negotiation of an agreement, or any question arising thereunder." 29 U.S.C. § 158(d).[14] Such negotiation is manifestly a part of a trustee's duties.[15]

In addition to the provision delegating to the trustee the power to fix the contribution rate for salvaged coal production, see supra, at 7–8, the agreement in this case provides that the trustee representing the union and the trustee representing the employers shall select the neutral trustee.[16] When the trustee representing the union and the trustee representing the employers select the neutral trustee, they surely are resolving a question arising under the agreement. It is therefore perfectly clear that they are literally engaged in collective bargaining as that term is defined in the Act. Indeed, whenever they confer about various questions that arise in connection with the administration of the trust agreement, they inevitably are engaged in that activity as defined in the statute. The fact that differences between labor and management trustees in the administration of the fund are to be resolved through the neutral umpire procedure established in § 302(c)(5), rather than through strikes or lockouts, does not in any way change the character of the trustees' function.

In this case, there is no need to decide when, or indeed if ever, the refusal of one trustee to confer with another might constitute a refusal to bargain in good faith and therefore an unfair labor practice. It may well be true that the fiduciary obligations imposed by the Employee Retirement Income Security Act, 29 U.S.C. § 1101 et seq., or by other provisions of the LMRA, may make a different remedy appropriate for a violation of the trustee's statutory duties. In this case, however, we are merely confronted with the question whether the employer's right to designate its representative to the board of a jointly-administered trust fund is a matter for negotiation with the union or is strictly a matter of management prerogative. The language of the statute, its structure, its purpose, and the history of administration of trust funds pursuant to the Act since it was passed, all support the conclusion that this is a matter of management prerogative over which the union has no right to strike.[17] In my opinion, the Court of Ap-

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[13] Senator Ellender's full statement on this point reads as follows:

"I shall now deal briefly with strikes invading the prerogatives of management.

"The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill in subsection 8(b)(1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences. 93 Cong. Rec. 4266 (1947), 2 Leg. Hist. LMRA 1077.

[14] In pertinent part, § 8(d) of the LMRA reads:

"For the purposes of this section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U.S.C. § 158(d).

[15] The wall between collective bargaining activities and the duties of welfare fund trustees on which the Court's opinion is based simply does not exist. As one commentator has observed:

> [T]he subjects about which the trustees confer are within the scope; mandatory collective bargaining under the act.

* * * * *

"Despite the unusual setting the deliberations of trustees of these funds may be looked upon as an extension of the collective bargaining process within contractual and statutory limits." Goetz, supra, at 922.923. See also Toensing v. Brown, supra, at 195–196.

[16] The agreement provides:

"*Section (e)* Responsibilities and Duties of Trustees

"(1) Each Trust shall be administered by a Board of three Trustees, one of whom shall be appointed by the Employers, one of whom shall be appointed by the Union; and one of whom shall be a neutral party, *selected by the other two.*" Joint App. 98n emphasis added).

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peals' judgment should be affirmed. I therefore respectfully dissent.

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[17] This conclusion is in no way inconsistent with the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 94 Stat. 1204, the Court's statement to the contrary notwithstanding. See ante, at 15–16 n. 22. While Congress sought in that Act to enhance the stability of multiemployer plans, it did not address the question presented in this case, nor did it prohibit the withdrawal of employers from such plans. Rather Congress provided that withdrawing employers must fund a proportional share of a plans unfunded benefits. MPPAA § 104.94 Stat. 1217. Thus, the general expressions of concern in the legislative history of this Act must be read in light of the action Congress actually took to allay those concerns.

Charles E. Helton v. NLRB

656 F.2d 883 (D.C. Cir.), June 29, 1981—248 NLRB 83

On petition to review Board Order

Before ROBINSON Chief Judge, WRIGHT, Circuit Judge, and VAN PELT,* SENIOR DISTRICT JUDGE

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT

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J. SKELLY WRIGHT, Circuit Judge: Petitioner Charles Helton seeks review of a National Labor Relations Board (NLRB) decision finding that his union, Teamsters Local 515, did not commit an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act (the Act) [1] when it refused to allow him to post materials critical of the union on the union's bulletin board, even though it would have permitted him to post any other materials.[2] We conclude that the union may not restrict employees' rights of expression in this manner.

I. BACKGROUND

Teamsters Local 515 represents employees at the Chattanooga, Tennessee terminal of Roadway Express, Inc. (the company). The union bulletin board was located in the employees' "breakroom" at the terminal.[3] It was maintained pursuant to the collective bargaining agreement in effect between the union and the company, which provided:

> The Employer agrees to provide suitable space for the union bulletin board in each garage, terminal or place of work. Postings by the union on such boards are to be confined to official business of the union.[4]

Although the collective bargaining agreeement stated that the board was to be used only for official union business, this provision was not enforced. From at least 1967 until 1978 [5] the union had permitted employees and nonemployees to post a wide variety of notices. Items posted on the board included for-sale notices, announcements of church revivals, nonunion political campaign materials, and even *Playboy* centerfolds.[6]

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*Of the United States District Court for the District of Nebraska, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

[1] Section 8(b)(1)(A of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (197 , provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [7] * * * : *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]

Section 7 of the NLRB, 29 U.S.C. § 157 (1976), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment * * *.

[2] *See Teamsters Local 515*, 248 NLRB 83 (1980) (NLRB Decision), *reprinted at* Appendix (App.) 10. Charles Helton was the charging party in the NLRB proceeding. The General Counsel of the NLRB prosecuted the charge below and now defends the NLRB 's ruling. Teamsters Local 515 was respondent below. It is not participating in this appeal. The Association for Union Democracy and the American Civil liberties Union have submitted briefs *amici curiae*.

[3] *See Teamsters Local 515*, Decision of Administrative Law Judge (ALJ Decision), *reprinted at* App. 1–8.

[4] *Id.* (*quoting* Art. 19 § 2 of collective bargaining agreement).

[5] *Id.* at App. 5.

Two other bulletin boards were also located in the employees' breakroom. The company kept its own bulletin board, which was glass-covered and locked, and which was used for posting work rules and safety notices. Occasionally, the company would also allow the union to place notices there. The third board, which was relatively small, was an all-purpose board used primarily to post notices regarding the employees' sick fund. This board was commonly referred to as the "sick fund board." [7]

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In late 1978 petitioner Helton, who was a company employee and a union member, joined the Professional Drivers' Council (PROD). PROD is an organization of rank-and-file Teamsters that promotes truck safety and seeks to expose union corruption and pension fund abuse.[8] Shortly after he became a member Helton received some literature from PROD, including a copy of a newspaper article describing Internal Revenue Service charges against a Las Vegas gambler to whom the Teamsters' pension fund had loaned large sums of money and a PROD editorial critical of the Teamsters' pension fund management.[9]

On December 14, 1978 Helton posted the newspaper article and the PROD editorial on the union bulletin board. Later that day the union's job steward, acting pursuant to instructions of the union's business agent, removed this literature.[10] When Helton asked the business agent why the materials had been removed, the agent stated that "being a union official he had the legal right to add to or delete from that board, whatever he saw fit." [11] Several weeks later, on January 8, 1979, Helton posted new PROD material on the union board. This literature was also critical of the Teamsters and accused several union officials of improper and illegal conduct. Again the job steward removed the literature.[12] The union did not take any other action against Helton, however.[13]

Shortly after these incidents occurred the union board, the company board, and the sick fund board were removed from the breakroom so that the walls could be painted. When the painting was completed only the company board and the union board were returned. Both were placed under locked glass.[14] Thereafter Helton asked union officials for permission to post PROD literature on the union bulletin board. They refused to grant permission. However, they continued to allow employees to use the union bulletin board for nonunion business and for personal notices.[15]

Petitioner filed unfair labor practice charges against Teamsters Local 515 with the NLRB on February 6, 1979. The General Counsel issued a complaint, and a hearing was held before an Administrative Law Judge (ALJ) in June 1979.[16] At the hearing the union's business agent testified that he had removed the PROD material from the bulletin board because:

> It was derogatory, it was adverse toward our local union and the Teamsters in general. And, I felt it shouldn't be there because it created controversy among the members * * * I felt it should not go on the board. * * *.[17]

In his decision the ALJ ruled that the union had committed an unfair labor practice under Section 8(b)(1)(A), which makes it an unfair labor practice for a union to "restrain or coerce * * * employees" in the exercise of their rights under Section 7 of

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[6] *Id.* at App. 2. Both employees and nonemployees used the union bulletin board. As the ALJ states, "In short, it is admitted that there were no restrictions on the use of this bulletin board by either Roadway or the Union * * *." *Id.*

[7] *Id.*

[8] *Id.* at App. 3. Helton testified that "his understanding of the purpose of PROD was to reform the Teamsters by bringing to the members['] attention corruption within the union and to disseminate information concerning governmental agencies which could assist in solving various problems." *Id.*

[9] *Id. See also* General Counsel Exhibit 2, *reprinted at* App. 61 (copy of newspaper article and PROD editorial).

[10] ALJ Decision at App. 3.

[11] *Id.*

[12] *Id. See also* General Counsel Exhibit 3, *reprinted at* App. 61 (copy of PROD literature posted on Jan. 8, 1979).

[13] *See* NLRB Decision, 248 NLRB at 83, App. 13.

[14] *See* ALJ Decision, at App. 3 n.2.

[15] *Id.*

[16] *Id.* at App. 1.

[17] *Id.* at App. 4 (ellipses in orginal).

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the Act.[18] He began by stating that Helton's activities were clearly encompassed by Section 7.[19] He then observed that according to well settled precedent an employer would commit an unfair labor practice under Section 8(a)(1) if it prevented its employees from posting union literature on company bulletin boards but allowed them to post other noncompany materials.[20] The ALJ reasoned that unions should be held to the same standard of conduct with respect to their own bulletin boards.[21] In reaching this conclusion the ALJ found that the availabilty of alternative means of communication, for example, leaving the material on tables in the breakroom, was immaterial. He further found that there was no danger that employees would mistake PROD literature for official union literature and that, although the PROD literature was extremely critical of the union, it was not so offensive that it did not deserve protection. Finally, the ALJ rejected as "mere conjecture" the business agent's contention that the literature might lead to altercations among employees.[22]

The union filed exceptions to the ALJ's decision in September 1979. A three-member panel of the NLRB reversed by a vote of 2-1. The majority did not overturn any of the ALJ's findings of fact. It also conceded that Helton's activites were encompassed by Section 7. It ruled, however, that unions should not be held to the same standard of conduct as employers.[23] Section 8(a)(1) makes it an unfair labor practice for an employer "to *interfere with*, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]" (emphasis added).[24] Section 8(b)(1)(A), on the other hand, only makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce" employees in the exercise of the rights guaranteed by Section 7.[25] According to the majority, there was no restraint or coercison here; the union did not discipline or threaten Helton, and its actions were "completely devoid of any implication of retribution * * *."[26] The majority also noted that "Helton had ready access to other, equally effective, means of distribution."[27]

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The dissenting member of the panel would have found a violation of Section 8(b)(1)(A). He argued that "it is difficult to conceive of a greater restraint or coercive impact on Section 7 rights than that which suppresses freedom of expression concerning matters inherent in that section."[28] The absence of a threat of reprisal did not "legitimize the action."[29] He agreed with the ALJ that the avail-

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[18] 29 U.S.C. § 158(b)(1)(A) (1976). *see* also note 1 *supra (quoting* §§ 8(b)(1)(A) and 7).

[19] ALJ Decision at App. 5 (*citing Roadway Express, Inc.*, 239 NLRB 653 (1978); *Transcon Lines*, 235 NLRB 1163 (1978), *enforced*, 589 F.2d 232 (5th Cir. 1979)). Teamsters Local 515 apparently conceded that Helton's activites were protected by § 7. *Id.*

[20] The ALJ observed that an employer could not discriminatorily apply an otherwise valid no-solicitaion rule solely to prevent distribution of union materials. *Id.* He then cited *Vincent's Steak House*, 216 NLRB 647 (1975), in which the NLRB expressly held that an employer could not prevent its employees from posting union literature on company bulletin boards when it allowed them to post other noncompany materials. *See* note 32 *infra.*

[21] ALJ Decision at App. 5. The ALJ went on to state that if the union had enforced the provision in the contract restricting use of the bulletin board to official union business, there would have been no unfair labor practice. We do not approve or disapprove this conclusion here. It is possible that such contractual provisions violate the union's duty of fair representation. *See* note 73 *infra.*

[22] ALJ Decison at App. 5–6.

[23] See NLRB Decision 248 NLRB at 83, App. 12. Chairman Fanning and Member Penello formed the majority. Member Jenkins dissented.

[24] Section 8(a)(1); 29 U.S.C. § 158(a)(1) (1976), provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7.]

[25] 29 U.S.C. § 158(a)(A) (1976). *See* note 1 *supra (quoting* text of §8(b)(1)(A)).

[26] NLRB Decision, 248 NLRB at 83, App. 13.

[27] *Id.* The NLRB noted: The record is clear that PROD literature is distributed in the breakroom without any action being taken by either the Employer or the Respondent, and Helton, could also have posted the material on the all-purpose bulletin board." *id*, 248 NLRB at 83 n.3, App. 13 n 3. The ALJ never expressly found that alternative means of communication existed. Helton now disputes the factual accuracy of the NLRB's claim. *See* petitioner's brief at 12–13 n.7: text and note at note 49 *infra.*

[28] NLRB Decision, 248 NLRB at 84, App. 16 (Member Jenkins, dissenting).

[29] *Id.* In his dissent Member Jenkins relied heavily on the Supreme Court's decision in *NLRB v. Magnavox Co.*, 415 U.S. 332, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974). In that case a union challenged an employer's rule against distribution of literature on company property. This rule was presumptively invalid. However, the collective bargaining agreement in effect between the union and the employer provided that the employer could issue rules governing use of plant property, it also provided that there would be bulletin boards for union notices. Thus the Court was confronted with the question whether the union had waived the employees' § 7 rights by agreeing to an otherwise invalid no-distribution rule in return for the use of a union bulletin board. The Court held that the union could not waive the individual employees' § 7 rights. The bulletin boards were not an adequate substitute since they were to be used only for union notices and thus would not give a union's adversaries an opportunity to communicate with their fellow employees.

Member Jenkins suggests that *Magnavox* effectively holds that a union may not restrict the employees' right to disseminate views critical of the

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ability of alternate channels of communication was immaterial.[30]

II. THE NLRB's INTERPRETATION OF SECTION 8(b)(1)(A)

As we have seen, the NLRB concedes that Helton's activities on behalf of PROD are encompassed by Section 7 of the Act.[31] It further concedes that under Section 8(a)(1) an employer may not prohibit employees from posting union materials on its bulletin board when it allows them access to the board for other purposes.[32] The NLRB reasons, however, that Section 8(b)(1)(A) is far more narrow than Section 8(a)(1); it only proscribes union conduct that involves threats of violence, economic reprisal, or discipline. To support this position it points out that 8(b)(1)(A) does not contain the words "interfere with."

We find that Section 8(b)(1)(A)'s prohibition against restraint or coercion does apply to the union conduct at issue here; its range of application is not limited to union conduct involving threats of violence or economic coercion.[33] The NLRB's narrow interpretation is inconsistent with

the plan meaning of the statute and with the legislative history, is not supported by Supreme Court decision or the NLRB's own precedent, and is fraught with practical difficulties.

A. *The Statutory Language and the Legislative History*

As a preliminary matter, the meaning of a statute should be sought in the language in which it is framed. *See Local 1976, United Brhd of Carpenters & Joiners v. NLRB,* 357 U.S. 93, 100, 78 S.Ct. 1011, 1016, 2 L.Ed.2d 1186 (1958); *see also Southeastern Community College v. Davis,* 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1976); *Internat'l Brhd of Teamsters v. Daniel,* 439 U.S. 551, 566 n.20, 99 S.Ct. 790, 800 n.20, 58 L.Ed.2d 808 (1979); *Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). The action taken by the union here certainly falls within the plain meaning of Section 8(b)(1)(A). When the union removed Helton's literature from the bulletin board, it "restrained" him in the exercise of his Section 7 rights, at least as the word "restraint" is commonly understood.[34]

As the NLRB emphasizes, however, interpertation of Section 8(b)(1)(A) cannot be governed solely by reliance on the statutory language. The Taft-Hartley Act, which added Section 8(b)(1)(A) to the National Labor Relations Act, was "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, United Brhd of Carpenters & Joiners v. NLRB, supra,* 357 U.S. at 99–100, 78 S.Ct. at 1016.[35] Thus the Supreme Court has stated that in-

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union. The majority distinguished *Magnavox* on several grounds. First, this case, unlike *Magnavox,* involved § 8(b)(1)(A) rather than § 8(a)(1). Second, there was no contractual waiver of individual employees' § 7 rights. Third, union policing of a union bulletin board is not equivalent to "the blanket denial to adversaries of 'equal access to and communications with their fellow employees.' " NLRB Decision, 248 NLRB at 83 n.2, App. 12 n.2 (*quoting NLRB Magnovox Co., supra,* 415 U.S. at 326, 94 S.Ct at 1102).

[30] NLRB Decision, 248 NLRB at 84, App. 15 (Member Jenkins, dissenting).

[31] *See Roadway Express, Inc., supra* note 19 (ruling that PROD membership and literature are protected by §7 of the Act); *Transcon Lines, supra* note 19 (same); *cf. Nu-Car Carriers, Inc.,* 88 NLRB 75 (1950), *enforced,* 189 F.2d 756 (3d Cir.), *cert. denied,* 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1951) (employee criticism of bargaining position adopted by union is protected by § 7).

[32] *See Vincent's Steak House, supra* note 20 (employer may not discriminate against union regarding use of bulletin board); *see also Sterling Machine & Engineering, Inc.,* 247 NLRB No. 77 (1980); *Container Corp. of America,* 244 NLRB No. 53 (1979); *Liberty Nursing Homes, Inc.,* 236 NLRB 456 (1978). *See generally Republic Aviation Corp.* v. NLRB, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 462 (1945) (no-solicitation rule that discriminates against union is not valid).

[33] We do not hold, however, that 8(b)(1)(A) is precisely analogous to § 8(a)(1). As we explain in Part III *infra,* the former differs from the latter in one essential respect: it contains a proviso which states that a union may prescribe rules "with respect to the acquisition or retention of membership[.]" 29 U.S.C. § 158(b)(1)(A) (1976). By including this proviso Congress recognized that the relationship between the union and the employee is not identical with that between the employer and the employee, and that the union has an interest in controlling its membership. We conclude that this proviso does not exempt the conduct at issue here.

[34] N. Webster, Third New International Dictionary 1936 (unabridged ed. 1961), states that to "restrain" means, *inter alia,* "to hold (as a person) back from some action, procedure, or course * * *." As Helton points out in his brief, petitioner's brief at 14, actions that limit First Amendment rights are commonly referred to as "restraints." *See, e. g., Madison School District v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 177, 97 S.Ct. 421, 427, 50 L.Ed.2d 376 (1976); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct. 1239, 1243–44, L.Ed.2d 448 (1975).

[35] The Taft-Hartley Act added § 8(b)(1)(A) to the National Labor Relations Act in 1947. Before that the time was no unfair labor practice pro-

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terpretations of Section 8(b)(1)(A) must be guided not just by the section's literal language, but also by an understanding of the congressional purpose. *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 179, 87 S.Ct. 2001, 2005–06, 18 L.Ed.2d 1123 (1967); *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 292, 80 S.Ct. 706, 716, 4 L.Ed.2d 710 (1960).[36] Our review of the legislative history fails to convince us that Congress intended Section 8(b)(1)(A) to apply solely to union conduct involving threats of violence, economic reprisal, or discipline.

The sponsors of the Taft-Hartley Act, in explaning their proposed legislation, focused primarily on the need to control union violence and economic coercion. For example, Senator Taft, in responding to a request for examples of the sort of conduct that Section 8(b)(1)(A) would prohibit, described threats of bodily harm, mass picketing in organization campaigns, and coercion that prevented employees not involved in a labor dispute from going to work. 93 Cong. Rec. 4435–4436 (1947), 2 Legislative History of the Labor Management Relations Act, 1947 (Leg.Hist.) 1205–1206 (1948). *See also* 93 Cong.Rec. 4016–4017, 4271, 4432, 4434, 2 Leg.Hist. 1018–1021, 1139, 1199, 1203 (remarks of Senator Ball). However, nothing

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in the legislative history supports the conclusion that violence and economic reprisal were the sole evils at which Section 8(b)(1)(A) was aimed. rather, it appears that Congress intended Section 8(a)(1)(A) to cover a range of conduct as broad as that covered by Section 8(b)(1). Senator Ball, a cosponsor of the legislation, stated that "the purpose of the amendment is very simple. It is to insert an unfair-labor practice for unions *identical* with the first unfair labor practice prohibited to employers in the present act * * *." 93 Cong.Rec. 4016 (1947), 2 Leg.Hist. 1018 (emphasis added). *See also* 93 Cong.Rec. 4021, 4023, 4025, 4436 (1947), 2 Leg.Hist. 1028, 1031, 1032, 1207; S.Rep.No.105, 80th Cong., 1st Sess. 50, 1 Leg.Hist. 456.

Omission of the words "interfere with" from Section 8(b)(1)(A) was not intended to indicate that union conduct should be measured against a less demanding standard than employer conduct. The legislation as originally proposed contained these words. They were deleted because it was feared that they would unduly restrict union organization campaigns; they might be "construed to mean that any conversation, any persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice." 93 Cong.Rec. 4399 (1947), 2 Leg.Hist. 1138 (remarks of Senator Ives). Senator Taft agreed to the deletion because he was convinced it would have no effect on the application of Section 8(b)(1)(A):

> I have consulted with the attorneys and they tell me that elimination of the words "interfere with" would not, so far as they know, have any effect on the court decisions. Eliminating those words would not make any substantial change in the meaning. * * *

Id. (remarks of Senator Taft). Similarly, Senator Ball stated that "the words 'interfere with' are very vague," that even with respect to employers "no complaint is ever issued on the interference angle," and that, because union organizational activities might be affected, it is "important that such vague language be eliminated * * *." 93 Cong.Rec. 4399 (1947), 2 Leg.Hist. 1139 (remarks of Senator Ball).

B. *Supreme Court Decisions Interpreting Section 8(b)(1)(A)*

The NLRB argues that the Supreme Court decisions interpreting Section 8(b)(1)(A), which rely in part on the legislative history, support the position it has adopted here. We disagree. These decisions do not hold that Section 8(b)(1)(A) only proscribes union conduct involving threats of violence, intimidation, or economic reprisal.

The NLRB relies heavily on the Supreme Court's decision in *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, supra.* In that case the Court held that peaceful recognitional picketing by a labor union did not restrain or coerce employees within the meaning of Section 8(b)(1)(A). The NLRB points out that in reaching this conclu-

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vision for unions. Of course, it is "a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirits, nor within the intention of its makers." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892). These cases merely emphasize that this principle is particularly important in interpreting labor legislation. *See also Nat'l Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 619–620, 87 S.Ct. 1250, 1254–1255, 18 L.Ed.2d 357 (1967) (making same point with respect to § 8(e), 29 U.S.C. § 158(e) (1976)).

sion the Court reviewed the legislative history of the Taft-Hartley Act and concluded that the chief evil at which Section 8(b)(1)(A) was aimed was "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal." 362 U.S. at 287, 80 S.Ct. at 714. The Court then emphasized the peaceful nature of the picketing in question. The NLRB suggests that by adopting this line of reasoning the Supreme Court endorsed a narrow interpretation of Section 8(b)(1)(A). However, the Court never expressly held that the sole purpose of Section 8(b)(1)(A) was to prevent union violence;[37] in particular, it never suggested that Section 8(b)(1)(A) might not apply to union conduct lying somewhere between threats of violence and simple peaceful persuasion. In fact, the Supreme Court decided to uphold peaceful recognitional picketing primarily because provisions in the House version of the bill that would have explicitly prohibited such picketing were deleted in conference. The Court also relied on statements in the Senate debates clearly indicating that the bill's sponsors did not intend it to apply to peaceful methods of persuasion. 362 U.S. at 287–289, 80 S.Ct. at 713–715.[38]

Although *Drivers Local 639* might be read as containing some support for the NLRB's narrow interpretation of Section 8(b)(1)(A), a subsequent decision significantly undercut that support. In *Internat'l Ladies' Garment Wkrs Union v. NLRB,* 366 U.S. 731, 738, 81 S.Ct. 1603, 1607–08, 6 L.Ed.2d 762 (1961), the Supreme Court stated:

> In the Taft-Hartley law, Congress added § 8(b)(1)(A) to the [National Labor Relations] Act, prohibiting, as the Court of Appeals held, "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1)." * * * It was the intent of Congress to impose upon unions *the same* restrictions which the [National Labor Relations] Act imposed on employers with respect to violations of employee rights.

(Emphasis added; citation and footnote omitted.) The Court then held that, just as an employer violates Section 8(a)(1) by granting exclusive bargaining representative status to a union that does not have majority support, so also a union violates Section 8(b)(1)(A) by accepting such status.[39]

The NLRB also relies on the Supreme Court's decision in *N.L.R.B. v. Allis-Chalmers Manufacturing Co., supra,* 388 U.S. 175, 87 S.Ct. 2001, 18 L.Ed.2d 1123. In that case the Court held that a union did not violate Section 8(b)(1)(A) when it fined its members for violating union membership rules. As the N.L.R.B. correctly points out, this union conduct would seem to fall within the literal meaning of the terms "restrain" or "coerce." However, the Court did not approve the union fines because it believed that the words "restrain or coerce" should be given a narrow interpretation.[40] Rather,

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[37] As the NLRB emphasizes, the Court does state that § 8(b)(1)(A) "is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof * * *." *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639,* 362 U.S. 274, 290, 80 S.Ct. 706, 715, 4 L.Ed.2d 710 (1960). It goes on to state, however, that § 8(b)(1)(A) requires "conduct involving more than the general pressures upon persons employed by the affected employers implicit in general economic strikes." *Id.* In other words, it leaves open the possibility that conduct lying somewhere between violence and peaceful recognitional picketing may be covered by the Act.

[38] The Court further observed that in the Labor-Management Reporting and Disclosure Act of 1959 Congress legislated a comprehensive code governing organizational strikes and picketing. Although this statute prescribes peaceful strikes in some circumstances, it also prevents the NLRB from interfering with legitimate picketing activity. *See* 29 U.S.C. § 158(b)(7)(C) (1976). The Court observed that if it were to interpret § 8(b)(1)(A) as applying to peaceful picketing it would interfere with this legislative scheme. *Id.* at 291, 80 S.Ct. at 716.

[39] The N.L.R.B.seeks to distinguish *Internat'l Ladies' Garment Wkrs Union v. N.L.R.B,* 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961), on the ground that when an employer and a union enter into an agreement under which the employer recognizes the union as exclusive bargaining representative even though a majority of the employees do not support the union, they have engaged in "the very sort of direct economic coercion which Congress intended to prohibit." Respondent's brief at 16 n.8. We fail to understand how such agreements constitute economic coercion. The employees' jobs are not threatened in the same way that they are threatened by strikes or picketing. Nor do the employees face any other economic penalty. Certainly the Court's opinion does not characterize the agreement as economic coercion.

[40] The N.L.R.B. emphasizes that in *Allis-Chalmers* the Court again reviewed the legislative history of the Taft-Hartley Act and noted that the chief evil at which it was aimed was union conduct involving threats of violence and economic reprisal. *See N.L.R.B. v. Allis-Chalmers Manufacturing Co.,* 388 U.S. 175, 184–190, 87 S.Ct. 2001, 2008–2012, 18 L.Ed.2d 1123 (1967). It did not hold, however, that § 8(b)(1)(A) would apply solely to such conduct. In fact, it also noted those portions of the legislative history suggesting that Congress intended the scope of § 8(b)(1)(A) to be as broad as the scope of § 8(a)(1). The Court referred to the legislative history primarily because it wished to demonstate the abesence of any intention to regulate the internal affairs of unions.

Other Supreme Court decisions have also suggested that § 8(b)(1)(A) is aimed primarily at violence or economic reprisal. Again, however, they do not hold that these are the only evils at which the provision is aimed. *See N.L.R.B. v. Boeing Co.,* 412 U.S. 67, 78 n.15, 93 S.Ct. 1952, 1958–59

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the Court decided to protect the union's conduct because it concluded that Congress had not intended to regulate internal union affairs. It noted that Section 8(b)(1)(A) contains an internal union affairs proviso, which states that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership[.]" [41] The NLRB did not rely on this proviso in reaching its decision here. In any event, as we explain in Part III *infra*, we do not believe that the proviso protects the union's conduct.

C. *NLRB Precedent*

The NLRB further argues that it has consistently held that Section 8(b)(1)(A) applies only to union conduct involving threats of violence, economic coercion, or discipline. If this were true, deference to the agency interpretation might be appropriate. An administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight.[42] *Internat'l Brhd of Teamsters v. Daniel, supra*, 439 U.S. at 566 n.20, 99 S.Ct. at 800 n.20; *United States v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 2442–43, 45 L.Ed.2d 486 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 74, 95 S.Ct. 272, 279, 42 L.Ed.2d 231 (1974); *Investment Company Institute v. Camp*, 401 U.S. 617, 626–627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Even in its own decisions, however, the NLRB has not relied on a narrow inter pretation of Section 8(b)(1)(A); the N.L.R.B. has never before held that the section applies only to threats of violence, economic reprisal, or discipline.[43]

The NLRB has pointed out that the central focus of the congressional debate over the Taft-Hartley Act was on union tactics involving physical violence and economic coercion. *See Nat'l Maritime Union* [*v. N.L.R.B.*], 78 NLRB 971, 982–987, *enforced*, 175 F.2d 686 (2d Cir.), *cert. denied*, 338 U.S. 954, 70 S.Ct. 492, 94 L.Ed. 589 (1949).[44]

Moreover, it has consistently held that union violence and intimidation violates Section 8(b)(1)(A). *See, e.g., NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir.), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 736, 50 L.Ed.2d 750 (1976) (enforcing NLRB order); *Nat'l Cash Register Co. v. NLRB*, 405 F.2d 497 (6th Cir. 1972) (same). And the Board has held that economic coercion is unacceptable under Section 8(b)(1)(A). *See, e.g., Teamsters Local 1040*, 174 NLRB 1153 (1969).[45] However, the NLRB has

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n.15, 36 L.Ed.2d 752 (1973); *Scofield v. NLRB*, 394 U.S. 423, 428 n.4, 89 S.Ct. 1154, 1157 n.4, 22 L.Ed.2d 385 (1969). Both *Scofield* and *Boeing*, like *Allis-Chalmers*, involve the scope of the NLRB's authority to regulate internal union affairs.

[41] 29 U.S.C. § 158(b)(1)(A) (1976).

[42] On the other hand, this deference is constrained by the "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Internat'l Brhd of Teasmsters v. Daniel*, 439 U.S. 551, 566 n.20, 99 S.Ct. 790, 800 n.20, 58 L.Ed.2d 808 (1979). The language and history of § 8(b)(1)(A) do not support the NLRB's interpretation. Thus, even if the NLRB had consistently employed a narrow reading of the statute, we might have been unable to endorse that reading. *See SEC v. Sloan*, 436 U.S. 103, 117–119, 98 S.Ct. 1702, 1711–1712, 56 L.Ed.2d 148 (1978) (rejecting Securities & Exchange Commission's interpretation of Securities Act).

[43] We think it worthwhile to note that agencies have an obligation to be consistent in their adjudicative decisions. *See, e. g., Sunbeam Television Corp. v. FCC*, 243 F.2d 26 (D.C.Cir. 1957). This is not to say that they may never adjust previous rules of decision. *See, e. g., Leedom v. Internat'l Brhd of Elec. Wkrs*, 278 F.2d 237 (D.C.Cir 1960). At the very least, however, they must explain departures from past practice. *See, e. g., Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974). By employing a narrow interpretation of § 8(b)(1)(A) in this case, the NLRB may not have fulfilled the requirement of consistency.

[44] In *Nat'l Maritime Union*, 78 NLRB 971, 982–987 (1948), *enforced*, 175 F.2d 686 (2d Cir.), *cert. denied*, 338 U.S. 954, 70 S.Ct. 492, 94 L.Ed.2d 589 (1949), the Board held that a union did not violate § 8(b)(1)(A) when it called a strike against employers who would not agree to a contract provision that would have required them to use a union hiring hall. The NLRB reviewed the legislative history and concluded that "Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join." 78 NLRB at 985. The NLRB then reasoned that Congress did not intend § 8(b)(1)(A) to be considered violated any time union conduct interfered with protected rights under § 7. *Id.* at 985–986. But *Nat'l Martime Union* does not hold that § 8(b)(1)(A) applies only to union conduct involving threats of violence or economic reprisal. Indeed, the decision also notes that portion of the legislative history which states that "[t]he purpose of the amendment is simply to provide that where unions * * * indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the union also shall be guilty of unfair labor practices." *Id.* at 983 (*quoting* 93 Cong.Rec. 4016 (1947), 2 Leg. Hist. 1058 (statement of Sen. Ball)).

[45] In *Teamsters Local 1040*, 174 NLRB 1153 (1969), the Board held that a union violates § 8(b)(1)(A) when it forbids its members to engage in strike-breaking by threatening job-related sanctions, such as blacklisting with future employers.

also found Section 8(b)(1)(A) violations in situations where the union had not threatened discipline or other retribution.

For example, in *Internat'l Union of Elec., Radio & Machine Wkrs, Local 601,* 180 NLRB 1062 (1970), an employee sought to exercise his Section 7 right to refuse to authorize a payroll dues deduction and to tender his dues by personal check instead. The union refused to accept his checks. The ALJ found that the union had violated Section 8(b)(1)(A) in part because he believed the union's conduct constituted an implied threat to the employee's job. In adopting the ALJ's proposed order the NLRB rejected this finding of an implied threat, stating "we do not find it necessary to rely on any surrounding threatening circumstances." *Id.* at 1062. The simple fact that the union had prevented the employee from exercising his Section 7 right to refuse to allow a payroll deduction was sufficient to support a finding of an unfair labor practice. *Id.*[46] Similarly, in *General Motors Corp.,* 168 NLRB 1723 (1966), and *General Motors Corp.,* 147 NLRB 509 (1964), the NLRB held that a union violated Section 8(b)(1)(A) when it agreed to contractual provisions banning distribution of rival unions' literature during nonworktimes and in nonworking areas. The union's conduct in these cases, which presented an issue closely related to the issue we confront here, clearly did not involve threats of economic coercion.[47]

D. *Practical Difficulties With NLRB interpretation*

We also believe that the NLRB's interpretation of Section 8(b)(1)(A) poses substantial practical problems. The NLRB, the unions, and the courts would be required to distinguish between conduct that restrains or coerces employees in the exercise of their Section 7 rights, but does not involve threats of violence or economic reprisal, and conduct that restrains or coerces employees and also involves threats of violence or economic reprisal. This line-drawing exercise, which would be unnecessary if the plain meaning of the statute controlled, would require resolution of difficult issues of fact.[48]

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The facts of this case help illustrate the potential difficulties. The NLRB, which emphasized that no disciplinary action was ever taken against Helton, apparently believes that the union's conduct cannot be viewed as intimidation.[49] It might be argued, however, that the union's conduct carried an implicit threat, namely, that Helton would be punished if he continued his activities on behalf of PROD. Although this question was apparently not explored at the hearing before the ALJ, it is quite possible that Helton was intimidated by the union's action. Thus, under the NLRB's interpretation of Section 8(b)(1)(A), proper resolution of this case might require determining whether Helton felt threatened, whether his fears were reasonable, and whether the union intended to threaten Helton.[50] All of these questions would be avoided if the statute is interpreted to prohibit any action that restrains an employee in the exercise of his Section 7 rights.

III. RELEVANCE OF INTERNAL UNION

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[46] The NLRB stated:

> The significant factor in this situation is that the only way in which an employee was permitted to comply with his obligation to remain a union member in good standing under a lawful union-security clause was to execute a dues checkoff authorization card. Such an obligation deprives the employee of his right to select or reject the checkoff system as the method by which to pay his periodic dues to the Union. The Board has repeatedly held that dues checkoff authorization must be made [ ]voluntarily,[ ] and that an employee has [ ]a right under Section 7 of the Act to refuse to sign checkoff authorization cards.[ ] Any conduct, express or implied, which coerces an employee in his attempt to exercise this right clearly violates Section 8(b)(1)(A).

Internat'l Union of Elec., Radio & Machine Wkrs, Local 601, 130 NLRB 1062 (1970) (footnotes omitted).

[47] The NLRB argues that these cases do involve economic coercion. "In waiving employee distribution rights in the contracts in those cases, the unions used the inherently coercive powers of the employer to prevent employee distribution of literature adverse to the unions * * *." Respondent's brief at 11. We find this contention unpersuasive. The union does not engage in economic coercion simply because it joins forces with the employer. Economic coercion, as we understand it, involves conduct that threatens employees with loss of their jobs or with some other pecuniary sanction. No such conduct occurred in the *General Motors* cases.

[48] We do not mean to imply that all § 8(b)(1)(A) cases would be easy if the ordinary meaning of the words "restrain or coerce" controlled. *See NLRB v. Allis-Chalmers Manufacturing Co., supra* note 40, 388 U.S. at 179, 87 S.Ct. at 2005–2006 (referring to "inherent imprecision" of words "restrain or coerce"). We merely wish to point out that the NLRB's interpretation compounds the difficulties of application.

[49] The NLRB does not seem to have considered the possibility that the union's action might be viewed as an implicit threat, and thus fit within its interpretation of § 8(b)(1)(A).

[50] If the NLRB were willing to concede that implicit threats were prohibited under § 8(b)(1)(A), then it might also be forced to confront the question whether it is enough that an employee is actually frightened, or whether the employee's fears must be reasonable, that is, whether an objective or a subjective test controls.

AFFAIRS PROVISO

Section 8(b)(1)(A) is different from Section 8(a)(1) in one essential respect. As we noted in our discussion of *Allis-Chalmers, supra,* Section 8(b)(1)(A) contains an internal union affairs proviso which states that a union does not commit an unfair labor practice when it prescribes "its own rules with respect to the acquisition or retention of membership[.]" [51] This proviso extends some protection to union conduct that would otherwise fall within the prohibition against restraint or coercion of employees in the exercise of their Section 7 rights. We conclude, however, that it does not insulate the conduct at issue here.[52]

In adopting the internal union affairs proviso Congress recognized that unions have an interest in preserving and strengthening their positions as collective bargaining agents. It further recognized that they cannot serve this interest unless they have some freedom to discipline members who violate rules and regulations govering membership.[53] However, union power cannot be absolute. The desire to minimize intrusion upon internal union affairs must be balanced against the need to protect employees who wish to assert their independence from the union, as well as against any other public policies embodied in the federal labor laws.[54]

In *Scofield v. NLRB,* 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969), the Supreme Court set forth a test for determining whether union action is protected by the proviso that acccommodates these competing concerns. The Court stated that Section 8(b)(1)(A) leaves a union free to enforce "a properly adopted rule," provided that the rule (1) "reflects a legitimate union interest," (2) impairs no policy Congress has imbedded in the labor laws," and (3) "is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 430, 89 S.Ct. at 1158.[55]

The union's conduct here does not pass this test. At the outset, there is a serious question whether the union's decision to prohibit the posting of PROD materials was made pursuant to a "properly adopted rule." [56] Certainly there was no such rule in the union bylaws or constitution or in the collective bargaining agreement. Nor was Helton given any other form of prior notice.[57] But even assuming the union's action was pursuant to a valid rule, it fails to satisfy the three critera set forth in *Scofield*. First, removal of Helton's PROD materials does not reflect a legitimate union interest. The union claimed that removal was necessary to prevent altercations and to limit undesirable criticism. But the NLRB has expressly held that the desire to prevent controversy or to suppress criticism of union leadership does not constitute a legitimate union interest.[58] *See Internat'l Union of Operating Engineers Local 400,* 225 NLRB 596 (1976); *Carpenters Local Union No. 22,* 195 NLRB 1 (1972).[59] In any

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[51] 29 U.S.C. § 158(b)(1)(A) (1976).

[52] Although the internal union affairs proviso is discussed in the briefs on appeal, the NLRB did not rely on the proviso in its decision. Thus, even if it did protect the conduct at issue here, we could not affirm on this basis. *See SEC. v. Chenery Corp.,* 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). We discuss the proviso here to demonstrate that the union conduct cannot be justified on any grounds.

[53] *See NLRB v. Allis-Chalmers Manufacturing Co., supra,* note 40, 388 U.S. at 180–182, 87 S.Ct. at 2006–2007. *See also* 93 Cong. Rec. 4272, 4433 (1947), 2 Leg. Hist. 1141, 1200 (statements of Sen. Ball); 93 Cong. Rec. 4024 (1947), 2 Leg. Hist. 1030 (statement of Sen. Taft).

[54] *See Scofield v. NLRB, supra* note 40; *NLRB v. Industrial Union of Marine Workers,* 391 U.S. 418, 88 S.Ct. 1717, 20 L.Ed.2d 706 (1968).

[55] In *Scofield* the Court applied this test to hold that a union fine and suspend union members for violating a union rule relating to production ceilings. *Scofields* v. *NLRB supra* note 40, 394 U.S. at 430–436, 89 S.Ct. at 1158–1161.

[56] The requirement that the disciplinary action be taken pursuant to a "properly adopted rule" is intended to protect union members from arbitrary of discriminatory union action. It might be argued that where the union did not act pursuant to properly adopted rule, but where it can show that its action was justified and that it did not behave in an arbitrary or discriminatory fashion, it deserves some protection under § 8(b)(1)(A); the proviso, as well as the legislative history, indicate a strong congressional desire to minimize instrusion upon internal union affairs. Even if this argument is correct, however, the principles set forth in *Scofield* would continue to apply; the union action would have to serve a legitimate union interest, it could not impair any policy imbedded in the labor laws, and there would have to be evidence suggesting that the employee could have escaped the union's action by resigning his union membership. We explain *infra* that the union conduct at issue here does not satisfy these requirements.

[57] On the other hand, even if the union did not have a formal rule against such postings when it decided to remove Helton's literature, its policy regarding such materials is now clear. Although it does not appear that a rule has been formally adopted, employees are on notice that if they post anti-union literature on the union bulletin board, it will be removed. Thus challenges to any future union action pursuant to this policy would probably be able to cross the initial hurdle erected by *Scofield*. *See* note 56 *supra*.

[58] The union clearly has some interest in maintaining a unified front; that interest does not extend to suppression of all criticism, however.

[59] In *Internat'l Union of Operating Engineers Local 400,* 225 NLRB 596 (1972), the NLRB held that a union rule prohibiting its members from holding unoffical meetings was invalid. After describing the *Scofield* test, it stated:

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event, the ALJ found that the union's fear that "such literature could lead to altercations between parties" was "mere conjecture and without evident[i]ary support." [60]

Second, the union's conduct impairs policies imbedded in the labor laws. It restrained expression protected not only under Section 7 of the National Labor Relations Act,[61] but also under Title I of the Labor-Management Reporting and Disclosure Act (LMRDA), the "Bill of Rights" for union members.[62] Section 101(a)(2) of that statute, 29 U.S.C. § 411(a)(2) (1976), provides that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions[.]" [63] Congress intended this free speech right to parallel the rights conferred under the First Amendment; it hoped to secure union democracy by establishing a right to express dissenting views without fear of discipline. The LMRDA was in part "designed to protect the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers." *Salzhandler v. Caputo,* 316 F.2d 445, 448–449 (2d Cir.), *cert. denied,* 375 U.S. 996, 84 S.Ct. 344, 11 L.Ed.2d 275 (1963).[64]

The importance of protecting the free speech rights of union members has been consistently recognized by courts asked to consider the scope of Section 101(a)(2) of the LMRDA. *See, e.g., Grand Lodge of Internat'l Ass'n of Machinists v. King,* 335 F.2d 340, 344 (9th Cir.), *cert denied,* 379 U.S. 920, 85 S.Ct. 274, 13 L.Ed.2d 334 (1964).[65] Indeed the right of free speech

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has been described as "almost absolute." *Turner v. Air Transport Lodge 1894 of Interna'l Ass'n of Ma-*

> It can hardly be maintained with any degree of persuasion that a rule prohibiting members from meeting to attempt to generate support for a redirection in their representation's negotiating strategy is one which either reflects a legitimate union interest or * * * impairs no policy Congress has embedded in the labor laws.

Id. at 601. In *Carpenters Local Union No. 22,* 195 NLFB 1 (1972), the Board held that a union could not fine a member who had challenged a union election.

> Here the Union, in the guise of enforcing internal discipline, has sought to deprive its members of the right, as guaranteed by the Labor-Management Reporting and Disclosure Act, to participate fully and freely in the internal affairs of his own union. A fine for that purpose not only in our opinion fails to reflect a legitimate union interest but rather in fact impairs a policy that Congress has imbedded in the labor laws.
> * * *

Id. at 2.

As the language quoted from *Carpenters* and *Operating Engineers* suggests, the questions whether a rule reflects a legitimate union interest and whether it overrides a policy imbedded in the labor laws are closely related. In both *Carpenters* and *Operating Engineers* the Board based its conclusion that the union rule did not reflect a legitimate union interest in part on the ground that it would interfere with rights extended under the Labor-Management Report and Disclosure Act. *Carpenters Local Union No. 22, supra,* 195 NLRB at 2; *Internat'l Union of Operating Engineers Local 400, supra,* 225 NLRB at 601–602. *See also* text and notes at notes 61–67 *infra.*

[60] ALJ Decision at App. 6.

[61] *See Roadway Express, Inc., supra* note 19, 239 NLRB 653; *Transcon Lines, supra* note 19, 235 NLRB 1163; *cf. Nu-Car Carriers, Inc., supra* note 31, 88 NLRB at 76 (employees may question the wisdom of their representatives or attempt to "align their union with their position").

[62] Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C § 411 et seq. (1976). As the Board has observed, determining whether a union rule satisfies the second prong of the *Scofield* test requires consideration of the full panoply of congressional labor policies. *See Carpenters Local Union No. 22, supra* note 59, 195 NLRB at 2; *see also Scofield* v. *NLRB,* supra note 40, 394 U.S. at 430, 89 S.Ct. at 1158. Thus not only the National Labor Relations Act, but also all other federal labor statutes, must be considered. *Carpenters Local Union No. 22, supra* note 59, 195 NLRB at 2 n.5.

[63] 29 U.S.C. § 411(a)(2) (1976). That section provides in full:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

[64] *See also Salzhandler v. Caputo,* 316 F.2d 445, 451 (2d Cir.), *cert. denied,* 375 U.S. 996, 84 S.Ct. 344, 11 L.Ed.2d 275 (1963) ("Congress has decided that it is in the public interest that unions be democratically governed and toward that end that discussion should be free and untrammeled"); *Navarro v. Gannon,* 385 F.2d 512, 518 (2d Cir. 1967), *cert. denied,* 390 U.S. 989, 88 S.Ct. 1184, 19 L.Ed.2d 1294 (1968); *Schuchardt v. Millwrights & Machinery Erectors Local Union No. 2834,* 380 F.2d 795, 797 (10th Cir. 1967); *Amalg. Clothing Wkrs of America Rank & File Committee v. Amalg. Clothing Wkrs of America, Philadelphia Joint Board, 334 F.Supp 760, 762 (E.D.Pa.1971), aff'd,* 473 F.2d 1303 (3d Cir. 1973).

[65] *See also Fulton Lodge No. 2 of Internat'l Ass'n of Machinists & Aerospace Wkrs v. Nix,* 415 F.2d 212, 217 (5th Cir. 1969) (right of free speech enjoys "particularly favored position"); *Salzhandler v. Casputo, supra* note 64, 316 F.2d at 448–451; *Deacon v. Internat'l Union of Operating Engineers, Local No. 12,* 273 F.Supp. 169 (C.D.Cal.1967); *Graham v. Soloner,* 220 F.Supp. 711 (E.D.Pa.1963). *See generally 105 Cong. Rec. 6718 (1959) (remarks of Sen. McClellan).*

Moreover, § 101(a)(2) protects dissemination of written materials as well as speech, *see Internat'l Brhd of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers v. Rafferty.* 348 F.2d 307 (9th Cir. 1965); *Farowitrz v. Associated Musicians of Greater New York, Local 802,* 330 F.2d 999 (2d Cir. 1965); *Salzhandler v. Caputo, supra* note 64; *Morrissey v. Nat'l Maritime Union,* 659 (S.D.N.Y.1975); *Pearl v. Tarantola,* 361 F.Supp. 288 (S.D.N.Y.1973).

chinists, 590 F.2d 409, 410 (2d Cir. 1978).[66] Thus it is clear that the union conduct at issue here, by interfering with Helton's efforts to challenge the Teamsters' leadership, deprived him of rights guaranteed by the LMRDA. If the union's conduct were endorsed, an important policy of the federal labor laws would be undermined.[67]

As for the third prong of the *Scofield* test, it seems unlikely that Helton could have avoided the union's action by resigning his membership. Presumably, the union would have removed Helton's materials from the bulletin board even if he had not been a union member. Under the circumstances, it is difficult to view the union's activity simply as an effort to police its membership.[68]

IV. AVAILABILITY OF ALTERNATIVE MEANS OF COMMUNICATION

As further support for its decision in this case the NLRB notes that "Helton had ready access to other, equally effective, means of distributi[ng]" PROD material.[69] It suggests that Helton could have posted the material on the sick fund board, or simply left stacks of literature in the breakroom. This argument lacks merit.

In the first place, it is not clear that Helton actually did have access to equally effective alternatives. He was not permitted to use the locked company board. Items posted on the sick fund board, which is no longer available, might not have had the same impact as items posted on the union board. Leaving stacks of literature in the breakroom would have been an inadequate substitute because company custodians would have removed the literature whenever they cleaned up.[70] Moreover, there is no assurance that the union itself would not have removed such material. In any event, this approach would have been relatively expensive.

More important, the existance of alternatives is irrelevant. It is well established that the availability of other channels of communication does not justify employer restraint of employees' Section 7 rights in nonwork areas at nonwork times. In

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NLRB v. Magnavox Co., 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974), the Supreme Court stated that unless the employer could show that productivity or discipline required restraint of Section 7 rights, it would not be appropriate to "balance the availability of alternative channels of communication against a legitimate employer business justification for barring or limiting in-plant communications." *Id.* at 326–327, 94 S.Ct. at 1102–1103. *See also Eastex, Inc. v. NLRB*, 437 U.S. 556, 570–576, 98 S.Ct. 2505, 2514–2517, 57 L.Ed.2d 428 (1978); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113, 76 S.Ct. 679, 685, 100 L.Ed. 975 (1956); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).[71] We see no reason why a different rule should apply here, where union conduct is at issue.[72] This simple fact that the union has attempted to restrain an employee in the exercise of his Section 7 rights is enough to justify a finding of a Section 8(b)(1)(A) violation.[73]

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[66] As we have seen, the rights of union members under the LMRDA are analogous to the free speech rights secured by the First Amendment. It is therefore relevant to note that the First Amendment decisions strongly disapprove of any form of content regulation. *See Office Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed2d 212 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1787–1788, 29 L.Ed.2d 284 (1971); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–270, 84 S.Ct. 710, 720–721, 11 L.Ed.2d 686 (1964).

[67] Indeed, even though the LMRDA does not explicitly grant enforcement powers to the NLRB, the NLRB has held that union conduct infringing upon LMRDA rights constitutes an unfair labor practice under § 8(b)(1)(A). *See Internat'l Union of Operating Engineers Local 400, supra* note 59; *Carpenters Local Union No. 22, supra* note 59. These decisions provide an independent basis for our conclusion that the union's conduct in this case violates § 8(b)(1)(A). Again, it is clear that the union's conduct deprived Helton of rights secured under the LMRDA.

[68] Even if this surmise is incorrect, our conclusion remains the same. The union's conduct clearly fails to pass the other two requirements of the *Scofield* test.

[69] NLRB Decision, 248 NLRB at 83, App. 13.

[70] Testimony of Helton, *reprinted at* App. 45.

[71] The NLRB has consitently ruled that the presence of alternative methods of communication is not relevant in determining the rights of employees. *See H & F Binch Co.*, 168 NLRB 929, 935 (1967); *Armco Steel Corp.* [v. *N.L.R.B.*] 148 NLRB 1179, 1185 (1964), *enforcement denied*, 344 F.2d 621 (6th Cir. 1965). Most circuit courts also embrace this view. *See United Steelworkers of America* v. *NLRB*, 393 F.2d 661 (D.C. Cir. 1968); *NLRB v. United Aircraft Corp.*, 324 F.2d 128 (2d Cir. 1963), *cert. denied*, 376 U.S. 951, 84 S.Ct. 969, 11 L.Ed.2d 971 (1964); *Time-O-Matic, Inc. v. NLRB*, 264, F.2d 96 (7th Cir. 1959).

[72] The NLRB argues that the availability of alternatives is relevant where union conduct is involved because it demonstrates that the union "has not engaged in collusion with the Company to alter employee communication rights incident to the employment relationship." Respondent's brief at 13 n.4. In other words, it has not engaged in economic coercion by relying on the economic power implicit in the employer-employee relationship. But we have already rejected the NLRB's contention that simple restraint is not enough to violate § 8(b)(1)(A), and that the union must engage in economic coercion or threaten violence. In any event, we find the NLRB's claim that union conduct closing all channels of communication constitutes economic coercion to be unconvincing. *See* note 47 *supra*.

V. CONCLUSION

We conclude that the union committed an unfair labor practice. The union's conduct constituted restraint of Helton's Section 7 rights within the meaning of Section 8(b)(1)(A). It was not insulated by the internal union affairs proviso since it did not serve a legitimate union interest and would have frustrated the free speech rights guaranteed by the LMRDA. Even if alternative means of comunication were available, their availability was irrelevant. We grant Helton's petition for review. The NLRB will submit a proposed decree in accordance with this opinion.

So ordered.

Vitek Electronics, Inc. v. NLRB

653 F.2d 785 (3rd Cir.), June 30, 1981—249 NLRB 885

On petition to review and cross-petition to enforce Board Order

Before Rosenn and Higginbotham, Circuit Judges, and McCune, District Judge[*]

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Rosenn, Circuit Judge: This petition for review and cross-application for enforcement of an order of the National Labor Relations Board presents a number of issues concerning the propriety of union conduct preceding a representation election. On April 5, 1979, the International Union of Electrical, Radio and Machine Workers (the IUE or Union) filed a petition with the National Labor Relations Board (the Board) for a representation election at the Edison, New Jersey, plant of Vitek Electronics, Inc. The election, involving a bargaining unit of 120 employees previously not represented by a union, was held June 7, 1979. The Union won, 70 to 45. Vitek filed eight objections with the Board's Regional Director (the "RD"). After an administrative investigation that included ex parte interviews with potential Vitek witnesses, but no hearing, the RD recommended that Vitek's objections be overruled. Vitek filed exceptions with the Board, but the Board, also without a hearing, adopted the RD's findings and recommendations.

Vitek, as a method of challenging the election, subsequently refused to bargain with the Union. On February 4, 1980, the General Counsel issued a complaint alleging violation of section 8(a)(1) & (5) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1) & (5) (1976). The Board entered summary judgment in favor of the General Counsel because the only issues raised by Vitek were essentially already litigated and lost by Vitek in the underlying representation case. Vitek filed this petition for review of the Board's subsequent order; the Board has cross-applied for enforcement. 29 U.S.C. § 160(e) & (f) (1976).

Our review is essentially a review of the Regional Director's post-election findings and conclusions as adopted by the Board. *See Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251 (1941); *Anchor Inns, Inc. v. NLRB,* 644 F.2d 292, 293 (3rd Cir. 1981). In his report the RD dealt with Vitek's eight objections in four groups. On its petition to this court Vitek attacks the findings and conclusions with respect to two of these groups of objections—one alleging union intimidation and another alleging union misrepresentation in campaign literature. We conclude that Vitek's objections to the Union's alleged misrepresentations, as presented to the RD, disclosed "substantial and material factual issues" that required the RD or the Board to conduct an evidentiary hearing prior to certification of the election results. We grant the petition for review and deny enforcement.

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I.

According to Vitek's initial submission to the RD, "[o]n the day of the election itself, and possibly on * * * the day prior to the election, the Union distributed to employees" two "handbills" (among others) whose contents were allegedly false. One was titled "IUE-Vitek News" (the "News" handbill) dated June 4, 1979. Its front page declared that although

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[73] In addition to his claim that the union committed an unfair labor practice, Helton contends that it breached its duty of fair representation. First, he suggest that any arbitrary union action violates the duty. Second, he argues that the union was not entitled to agree to contract terms that restricted postings on its bulletin board to official union business. We need not reach these arguments here. *See also* note 21 *supra* (noting that we neither approve nor disapprove the ALJ's statement that union action would have been justified if it had enforced contract provision limiting use of bulletin board to union matters).

[*] Honorable Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

> [l]atest figures issued by the government indicate that the cost of living is going up at a rate of 14% . . . the Vitek Company provides no cost of living protection for its workers, another reason why we need a union at Vitek.
>
> In other plants in this area, where the people have previously voted in the IUE, the Union has negotiated cost of living protective clauses.
>
> Under their union contract
>
> - *AT EDISON PRODUCTS (WHITE-WESTINGHOUSE), EDISON, N.J.*
> - *AT GULTON INDUSTRIES, METUCHEN, N.J.*
> - *AT DELCO BATTERY, NEW BRUNSWICK, N.J.*
>
> *the wages of IUE members are increased regularly, throughout the year, to keep pace with the cost of living increase announced by the U.S. Department of Labor.*
>
> This is the kind of protection we need at Vitek where wages are low enough without being further "cut" by runaway prices.

(Emphasis added.)

Vitek asserted that the IUE contracts at Edison Products, Gulton Industries, and Delco Battery did "not guarantee to employees absolute and unlimited protection against cost of living increases, as stated in the Union leaflet. Rather those cost of living formulas are 'capped' and keyed to a specific formula."

Another handbill was entitled "A Story By and For Vitek Workers" (the "Story" handbill). "Chapter One" of this story told the following unhappy tale:

> In the "good ole" days, before the union came on the scene, the company had every opportunity to make Vitek a decent place to work.
>
> But they goofed. *Rates of pay were the lowest in the area.* Seniority meant nothing when it came to promotions or overtime.
>
> Few safety precautions were taken to protect the people from carbon monoxide fumes, and when they got sick because of the fumes, many of the workers lost pay.
>
> Employees could be fired with no chance of appeal and all in all, management was completely in the driver's seat. (Emphasis added.)

Vitek contended that these statements were "completely false and misleading. For example, Vitek's rates of pay are among the highest in the area for similar work." [1] As to both handbills, moreover, Vitek claimed that the timing of the distribution effectively precluded Vitek from having "an adequate opportunity to obtain the necessary information and to prepare and distribute an appropriate response to these misrepresentations."

On June 27, 1979, Vitek's president, Robert G. Geissler, submitted an affidavit to the RD in support of Vitek's objections. He detailed the circumstances making impossible effective rebuttal of the Union's misrepresentations. He also explained why the Union handbills were, in his view, false and misleading. He noted that a Board agent had been provided with copies of the collective bargaining agreements between the IUE and Edison, Gulton, and Delco. Geissler also provided a comparison of Vitek's wages (both before and after April 15, 1979) and current wages at ten other area employers for allegedly comparable "unskilled" work. This comparison showed that of the eleven companies, Vitek's wages had been not the lowest but the highest, both before and after April 15, 1979.

Apparently in response to the Board agent's request for further information, Vitek submitted additional information in support of its objections, including a list of its various pay scales in effect from January 2, 1976 (the date on which "Vitek started hiring its own employees") through April 14, 1979. This list confirmed Geissler's earlier assertion, and showed that Vitek's wages had, since at least October 24, 1977 (and not, as suggested by the dissent, only since April 15, 1979), exceeded those of ten local labor-market competitors.

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[1] Vitek made and supported objections to other alleged misrepresentations in the "Story" handbill. Its petition in this court preserves these same objections. In view of our conclusion that a hearing was warranted by at least one misrepresentation in this handbill, we do not find it necessary to discuss in detail all of Vitek's additional arguments based on this handbill. *But see* note 10 *infra*. Upon remand Vitek will have the opportunity to show, in the course of a hearing, all of the prejudicial effects flowing from it.

Finally, on August 31, Vitek submitted detailed calculations of the precise extent to which the Union's "News" handbill had misrepresented its cost of living agreements at Edison, Gulton and Delco.

In his report, adopted by the Board, the Regional Director overruled all of Vitek's objections and recommended that the Union be certified. Regarding the Union's "Story" handbill, the RD held that "in the good ole days, before the Union came on the scene" referred to "some unspecified period of time in the past."[2] On the other hand, the evidence marshalled by Vitek to counter the assertions concerning relative wage rates related only to wages that took effect as of October 24, 1977. Thus, the RD found that there was "no evidence * * * submitted to support the Employer's assertion that the Petitioner's contention concerning wages was a material misrepresentation of fact." Further, the RD found that even if this was a misrepresentation, Vitek had (a) "prompted" it by its April 2 announcement to employees that it was conducting a "study of area wages," and (b) deliberately chosen to let it remain uncontested. Regarding the "News" handbill, relating to cost of living adjustment (COLA) clauses, it was "undisputed that Petitioner [i.e., the Union] does in fact have cost of living protective clauses which are designed to keep pace with increases in the cost of living albeit not at the actual rate of increase in the cost of living." Thus, the RD found that the handbill was not a "substantial departure from the truth." For these reasons, among others, the representations were held to be immaterial to the validity of the election.

II.

We begin by noting what was, prehaps, too obvious for the RD to mention in his report. Both of the handbills at issue here contained representations as to which Vitek raised at least a genuine issue concerning their falsity. Vitek's president stated by sworn affidavit that Vitek's pre-April 15, 1979 wage scale exceeded those of ten local competitors. Vitek further documented its claim that this same wage scale had existed since October 1977, well before the Union had "come to the scene" to engage in the current organization effort.[3] Thus, Vitek,

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did submit "comparative data * * * concerning * * * competitors' wage structures" that, if true, seemed to negate the truth of the Union's claim that Vitek's wages were "the lowest in the area." Secondly, it is apparent from the face of the Union's "News" handbill that in it the Union seemed to claim that its contracts at other plants insulated workers from the adversities of inflation. And Vitek clearly presented ample evidence to show that in fact those contracts fell short of such absolute protection by unquestionably substantial amounts: between 33 and 89 cents per hour, averaging 61 cents per hour.

Significantly, the RD never went so far as to find that the Union's statements were more than "arguably true." We agree. The other side of the coin, of course, is that he was implicitly saying that they were at least "arguably untrue." And Vitek's objections and supporting materials were sufficiently specific to raise a prima facie case of inaccuracy.

However, in assessing campaign rhetoric, "the Board tolerates a degree of hyperbole, intemperance and inaccuracy." *Aircraft Radio Corp. v. NLRB,* 519 F.2d 590, 593 (3d Cir. 1975). Thus, while we objectively raise the arguable falsity implicit in the "arguable" truth attributed by the RD to the Union's literature, this issue does not in itself afford us adequate ground for granting Vitek's petition. An election will only be set aside when there has been a substantial departure from the truth that "may reasonably be expected to have a significant impact on the election." *General Knit of California, Inc.,* 239 N.L.R.B. 619, 620 (1978).

Nor do we conclude on the basis of inaccuracy alone that Vitek's objections raised the "substantial and *material* factual issues" necessary to entitle it to a hearing under 29 C.F.R. § 102.69(d) (1980). In numerous decisions since *Hollywood Ceramics Co.,* 140 N.L.R.B. 221 (1962), the Board and the courts have recognized many elements that render a misrepresentation "immaterial" in this sense. Thus, the force of a misrepresentation may be substantially diluted when the employees possess special independent knowledge or sophistication which enables them to evaluate the statements critically;[4] where the employees had no reason to believe that the author of certain verbal denigration had any special knowledge on which they could rely;[5] where the employer had an adequate opportunity to set the record straight;[6] or where the inaccuracy is itself too minor or insignificant to affect the voters' choice, *i.e.*, is not a "substantial departure from the truth." *Hollywood Ceramics Co.*, 140 N.L.R.B. at 224.

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[2] In any event, the period must have pre-dated April 5, 1979, the date on which the Union petitioned for an election.

[3] In fact, Vitek submitted evidence of its own wage scales for a period extending back to January 1976. Given the rate of inflation in the economy as a whole, and given the size of Vitek's wage rate increase in 1977, there was good reason to believe that Vitek's competitors, whose 1979 wage rates fell below Vitek's 1979 rates, similarly lagged behind Vitek in 1976 and 1977.

Although this brief catalog is not complete, it necessarily informs us that factual determinations must enter into the decision whether the misrepresentations here warranted setting aside this election. *See NLRB v. Bill's Institutional Commissary Corp.*, 418 F.2d 405, 407 (5th Cir. 1969). Taking into account the proffer submitted by Vitek to support its post-election objections, we are persuaded that the grounds upon which the RD recommended certification could not adequately be developed without an evidentiary hearing. Of course, in reaching this conclusion that Vitek's ob- **791** jections entitled it to a hearing, our inquiry necessarily touches upon areas committed in some degree to the Board's discretion.[7] However, the ultimate question that we reach and decide today—whether Vitek has raised substantial and material factual issues—"is a question of law and ultimately a question for the courts." *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir.), *cert. denied,* 389 U.S. 917, 88 S.Ct. 238, 19 L.Ed.2d 265 (1967) (citing, *inter alia, NLRB v. Sun Drug Co.*, 359 F.2d 408, 415 (3d Cir. 1966) (denying a request for an evidentiary hearing on the issue "whether there was a substantial and material question of fact" because "[t]his is a question of law")); *accord, NLRB v. Polyflex M Co.*, 622 F.2d 128, 129 (5th Cir. 1980) (per curiam); *Methodist Home v. NLRB*, 596 F.2d 1173, 1179 (4th Cir. 1979); *NLRB v. Skelly Oil Co.*, 473 F.2d 1079, 1083 n.5 (8th Cir. 1973).

Because the representations were purportedly truthful assertions concerning wages, they could not be dismissed as "mere prattle or puffery"; wages are the breath and "stuff of life for Unions and members, the self-same subjects concerning which men organize and elect representatives." *Peerless of America, Inc. v. NLRB*, 576 F.2d 119, 124 (7th Cir. 1978) (quoting *Contract Knitter, Inc. v. NLRB*, 545 F.2d 967, 971 (5th Cir. 1977)). The Union's claim that it was describing its own contracts with nearby employers, as well as general wage rates in its geographical area of operation, lent its misrepresentations an air of authenticity that likely carried significant weight in the minds of Vitek's employees. Moreover, the Union's apparent expertise in this field was not countered by independent knowledge that Vitek's previously nonunionized employees were likely to possess.

Finally, the statements, insofar as they were (arguably) untrue, were hardly "insubstantial" departures from the truth. For instance, the Board does not dispute that IUE contract wages at Edison, Gulton, and Delco had, in the recent past, lost an average of 61 cents per hour to inflation. Thus IUE wages failed, by this amount, "to keep pace with" inflation, (arguably) contrary to the representation made in the "News" handbill. The realities of the marketplace render it indisputable that a 61 cent per hour misrepresentation of the wages obtained by the Union for workers in other bargaining units would have been a distortion of sufficient magnitude to exert an impermissible influence on the election results. *NLRB v. Millard Metal Service Center, Inc.*, 472 F.2d 647, 650 (1st Cir. 1973); *see also Howard Plating Industries v. NLRB*, 635 F.2d (6th Cir. 1980) (per curiam); *Luminator Division of Gulton Industries, Inc. v. NLRB*, 469 F.2d 1371 (5th Cir. 1972).

The RD argued in his report that the interpretive premise of this objection was not "necessarily" correct. The "News" handbill did not, said the RD, literally assert the existence of COLA clauses to "guarantee to employees absolute and unlimited protection." In fact, the handbill stated that IUE member wages were "increased regularly * * * to keep pace with the cost of living increase announced by the U.S. Department of Labor." The RD noted that adjustments "to" keep pace with inflation were "quite different" than adjustments that "would" keep pace with, and therefore afford "absolute protection" against, inflation. He concluded that the handbill contained not a simple lie, but rather a statement "subject to varying interpretations."

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[4] *Trustees of Boston Univ.* v. *NLRB*, 575 F.2d 301, 308–09 (1st Cir. 1978), *vacated on other grounds,* 445 U.S. 912 100 S.Ct. 1271, 63 L. Ed.2d 597 (1980); *NLRB v. O.S. Walker Co.*, 469 F.2d 813 (1st Cir. 1972); *cf. NLRB v. Maine Sugar Indus., Inc.*, 425 F.2d 942, 945 (1st Cir. 1970) (distinguishing between workers with and without a "union background")

[5] *Melrose-Wakefield Hosp. Ass'n v.* NLRB, 615 F.2d 563, 568 (1st Cir. 1980); *NLRB v. O.S. Walker Co.*, 469 F.2d 813 (1st Cir. 1972).

[6] *Lipman Motors, Inc. v. NLRB,* 451 F.2d 823 (2d Cir. 1971); *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 828–29 (4th Cir.), *cert. denied,* 389 U.S. 917, 88 S.Ct. 238, 19 L.Ed.2d 265 (1967). *But see Aircraft Radio Corp. v. NLRB,* 519 F.2d at 593 ("Fairness is not readily apparent when a party which has been successful in the balloting through the use of deliberate falsehood is allowed to retain its victory by pleading that its opponent had opportunity for rebuttal."); *NLRB v. Cactus Drilling Corp.*, 455 F.2d 871, 876 (5th Cir. 1972) (distinguishing rebuttal from opportunity to rebut).

[7] The scope of that discretion has, of course, been effectively narrowed over the years since *Hollywood Ceramics* was handed down, as this and other courts have gradually given factual content to the rather abstract pronouncements in the Board's seminal decision.

For purposes of determining whether a genuine issue of fact existed as to the accuracy of the statement, we have difficulty, to say the least, appreciating this subtle distinction. We think such subtlety would be even less appreciated by employees in the heat of an election campaign. Furthermore, we find incomprehensible the RD's conclusion that "to keep pace with" and "would keep pace with" the cost of living were "quite different." If two workers

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each start the year making $3.30 per hour but at the end of the year their wages differ by $.61 per hour, it satisfies neither common sense nor common English usage to assert that the wages of either have been adjusted "to keep pace with" the wages of the other. Even the Board's reputed expertise in labor matters[8] cannot prompt us to accept the RD's conclusory determination that Vitek's workers would be likely to interpret the phrase "to keep pace with" in such a way as to render the Union's handbill congruent with the truth.

As a result, we conclude that Vitek's objections and supporting material established a prima facie case for setting aside the election because of the content of the Union handbills. This, together with the apparent last-minute nature of the union misrepresentations, entitled Vitek to a hearing on its objections. *Anchor Inns, Inc. v. NLRB*, 644 F.2d at 296; *see, e. g., Peerless of America, Inc. v. NLRB*, 576 F.2d 119 (7th Cir. 1976); *NLRB v. Mr. Fine, Inc.*, 516 F.2d 60 (5th Cir. 1975); *NLRB* v. *Bill's Institutional Commissary Corp.*, 418 F.2d 405 (5th Cir. 1969); *see also NLRB v. Staiman Brothers*, 466 F.2d 564, 567 (3d Cir. 1972) ("It is implicit in a Consent Election agreement that * * * any proceedings pursuant thereto will satisfy minimal due process standards."). The RD, however, looked to other facts which he believed made the alleged misrepresentations immaterial. According to his report,

> the investigation revealed that the Employer, by letter dated April 2, 1979, advised its employees that it was conducting a "study of area wages," and by letter dated April 17, 1979, announced its newly established wage rates. It therefore appears that * * * [the Union's] statement regarding wages * * * was prompted by the actions of the Employer itself; and as the Employer had already conducted a study of area wages, it appears that it could have immediately and effectively responded to [the Union's] statement notwithstanding its statement to the contrary. * * * [T]he Employer, although admittedly aware of Petitioner's statement a full day before the election and having recently conducted a wage comparability study within the area, chose to let Petitioner's statement remain uncontested.

The Regional Director thus appears to have resolved factual issues bearing on materiality through consideration of material uncovered in an administrative investigation. But "[o]nce the right to a hearing is established, the investigation is not a substitute for it." *Anchor Inns. Inc. v. NLRB*, 644 F.2d at 297 (quoting *NLRB v. Claxton Manufacturing Co.*, 613 F.2d 1364, 1366 (5th Cir. 1980)). In this case the data submitted to the Board raised "substantial and material issues" regarding all of the necessary factual predicates for overturning the election, including Vitek's preclusion from timely offering a rebuttal to the Union's misrepresentations.[9] Yet the RD chose to resolve these issues not through a hearing but through an administrative investigation. Not only did this deprive Vitek of an opportunity to meet those arguments marshalled by the RD to negate materiality, but it also deprived this court and the Board of an adequate basis upon which to evaluate the validity of the process by which the RD arrived at his findings that the misrepresentations were immaterial.

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[8] *See Zieglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1010 (3d Cir. 1981); *cf. Peerless of America, Inc. v. NLRB*, 576 F.2d at 122 n.3 ("scholarly criticism for more than a decade has questioned that expertise").

[9] President Geissler averred in his affidavit that I was unable to present this information to our employees before they voted because the Union made its allegations concerning our pay rates on the very last day and it was impossible to assemble the information on "Exhibit 3" [the list of ten area competitors with wage rates lower than Vitek] prior to the vote. In fact, it has taken my staff more than two (2) weeks to assemble the information on "Exhibit 3", since many companies are nataurally reluctant to reveal their wage rates to outsiders.

Our reluctance to accept the RD's findings without the benefit of a record after hearing is compounded by the shallow basis upon which the RD overruled Vitek's objections. He seems to have held that (a) the Union's misrepresentation of past area wage rates was pardonable because it was "prompted" by Vitek's announcement of a current "study of area wages," and (b) Vitek's announcement of a wage study dispelled any genuine factual issue concerning its ability to respond to the Union's misrepresentation in the one available day preceding the election.

We fail to perceive how Vitek's April 2 announcement of a wage study provided justification for Union misrepresentation of area wages that prevailed in "the 'good ole' days." Vitek's announcement did not make factual claims that the Union was forced to rebut. Had that occurred, we might take into account whether the Union was time-pressured into an erroneous rebutal based upon tentative conclusions. We express no opinion whether under such a hypothetical set of facts, this court would also "excuse" plain misrepresentations. However, the record of this case discloses no substantial evidence upon which to predicate such a holding. The Union's alleged misrepresentation was published over two months following Vitek's announced study. More centrally, the Union misrepresentation referred to past wage rates, while Vitek's study was aimed at current rates. In addition, the RD relied on nothing but sheer supposition in assuming that, prior to the election, Vitek possessed sufficient data to rebut the wage claims. The RD did not indicate whether a formal study was actually made, or if so, how it was conducted, or what it revealed. We can understand how the mere announcement of a planned study might enter into a credibility determination on the issue of ability to rebut. We cannot, however, understand how the making of such an announcement can be used by the RD to deprive Vitek of the forum to which it would be otherwise entitled (*viz.*, an evidentiary hearing) in which to resolve the rebuttal issue.

We similarly reject the RD's resolution of the COLA issue on the ground that it involved no 'substantial departure from the truth." In concluding that the Union's "News" handbill was subject to "varying interpretations," the RD drew his ultimate distinction between truth and falsity by resort to a specious semantic distinction. As a result, we do not believe that he could properly determine on the basis of his investigation that, as a factual matter, the audience to which it was addressed would adopt an interpretation other than Vitek's. In view of the significance of the alleged discrepancy and our own skepticism that the item would be interpreted as other than a misrepresentation, we conclude that the RD should not have reached his decision without first affording Vitek a hearing in which to challenge the RD's assumption that the handbill would be interpreted by its intended audience consistently with the truth of the underlying facts.[10]

III.

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[10] The RD also found, in connection with the "Story" handbill, that there was "no evidence * * * submitted by the Employer that it had a seniority job-posting program or grievance procedure prior to April 2, 1979." Also the Union's assertion relating to lost pay from sickness due to carbon monoxide fumes was found by the RD to be, in part, corroborated. Nor was the RD troubled by the assertion that "[F]ew safety precautions were taken," since "no evidence was offered to show which steps were taken. Accordingly, I again find Petitioner's statement arguably true, and if steps were in fact taken to improve ventilation, employees would have been aware of these actions and, therefore, fully capable of evaluating Petitioner's statement."

We are not impressed by the harmlessness of the Union's allegations about carbon monoxide fumes and lost pay. Although the Union claims in this case do not match the invidiousness or the falseness of the claim in *NLRB v. Trancoa Chem. Corp.*, 303 F.2d 456 (1st Cir. 1962), or portray "spiteful, inhuman treatment" as in Ipsen Indus. Div. of Alcoa Standard Corp., 180 N.L.R.B. 412 (1969), we cannot be blind to the significant impact in the context of this campaign that the Union's fume-related literature may have had. It conveyed the impression that the factory was generally unsafe, that Vitek callously put workers to the rather barbaric choice between ruining their health or earning their pay, and that it was the appearance of the Union "on the scene" that had created the present, more healthful climate at the Vitek plant.

However, Vitek submitted evidence that the fume problems were a transitory, short-term problem related to Vitek's February 1979 move and that the problem arose and was resolved in a matter of weeks after the move. Moreover, its evidence tended to show that the only workers who lost pay due to claimed illness were those for whom Vitek had no reason to believe that it or its heating gas system were to blame. Thus the implication in the handbill, namely that Vitek improved its treatment of employees only after "the Union came on the scene," may well have amounted to a significant distortion of the truth.

Vitek has also argued here and below that it was entitled to a hearing on the question of whether the Union poisoned the pre-election atmosphere by intimidation. Vitek argues that a hearing is necessary because it needs compulsory process to compel testimony in its favor that would otherwise remain silenced by the thoroughness of the Union's intimidation.

Unfortunately, there is no adequate record here from which to tell whether the RD correctly determined that no hearing was necessary. When Vitek presented the RD with its allegations of intimidation, supported by nine affidavits specifying numerous "specific events concerning specific people," *NLRB v. Dobbs House, Inc.*, 613 F.2d 1254, 1259 (5th Cir. 1980), the RD concluded that three of the affidavits, even if true, set forth legally permissible behavior. He explained his legal conclusions at length. Next, the RD distinguished seven employees named in the other affidavits whose "suggested evidence * * * if supported by these witnesses themselves, would set forth arguable objectionable conduct." Yet the RD did not identify which employees, or which incidents, were cause for concern. A Board agent interviewed the (unnamed) witnesses. Their interviews apparently did not corroborate the arguably objectionable conduct set forth in the affidavits. The RD declines to interview six of the employees named in the affidavits because the evidence proferred concerning their testimony did not even arguably consitute objectionable conduct. Again, the RD did not explain which six employees or incidents he found useless to his inquiry.[11]

As a result, we cannnot tell whether Vitek's affidavits did or did not, in the RD's view, set forth "substantial and material issues of fact." Nor, in view of the uncertainly of the substantive legal questions raised by the affidavits and the importance of the right to a hearing, will we decide the question on our own de novo review of the affidavits views on the subject. The Board argues that the RD, like a trial judge on motion for summary judgment, is entitled to ignore issues of fact that are raised by affidavits not setting "forth such facts as would be admissible in evidence." Fed. R.Civ.P. 56(e). Because most of the legally objectionable incidents are allegedly set forth by way of hearsay, the Board now argues that the RD was entitled to ignore those incidents for purposes of deciding whether there was a substantial and material issue of fact. This contention deserves little credence on this appeal for at least three reasons. First, the RD did not draw any distinction between hearsay and nonhearsay evidence of objectionable conduct, and its impossible for us to assume, on this record, that this was the sole or dispositive basis for his decision not to hold a hearing.[12]

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Second, Rule 56(e) does not apply here, but even if it did, and even if the evidence relating to the legally objectionable incidents was solely hearsay, it might still be admissible in evidence in the requested hearing.[13] Finally, it is undisputed that at least some of the narrations in the supervisors' affidavits were not hearsay for all purposes. We find it inappropriate at this time to engage in a de novo determination of what those purposes might be and whether or not they would actually warrant the RD in refusing to admit them at hearing. The RD may set forth his reasons for so finding, should he choose to once again deny Vitek a hearing on the intimidation issue.

IV

The case will be remanded with direction to the Regional Director to conduct a hearing on the issues of the alleged misrepresentation and for appropriate findings on the need for any further requested hearings prior to any recommendation to certify the results of the election.

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[11] Vitek has asked this court to require that the RD submit the results of its ex parte investigation to the Board for its review. *See generally NLRB v. North Elec. Co.*, 644 F.2d 580 (6th Cir. 1981). Because Vitek's request could affect only the Board's decision on the *merits* of the intimidation claim, and because we are unable to dispose of the threshold issue, viz, whether or not absence of a hearing on this claim was justified, it will be unnecessary for us to confront Vitek's request at this time. We therefore find it unnecessary to grant Vitek's motion in this court to amend the record on reivew for purpose of informing us as to the RD's failure to submit particular documents to the Board.

[12] *See, e.g., NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965); *Monmouth Medical Ctr. v. NLRB*, 604 F.2d 820, 823 n.5 (3d Cir. 1979).

We cannot help but notice that the RD's inability to believe the content of the supervisor affidavits may indeed have played a large role in his failure to overturn the election. Thus for all that this record show, the RD may have impermissibly used the administrative investigation to resolve an issue of credibility that could only be properly resolved after a hearing.

[13] Subject to certain exceptions not relevant here, "[a]ny hearing" before the regional director on objections to the conduct of an election "shall be conducted in accordance with the provisions of * * * [29 C.F.R. [§ 102.66] * * *." 29 C.F.R. § 102.69(e) (1980). Section 102.66(a) provides that "[t]he rules of evidence prevailing in courts of law and equity shall not be controlling."

Costs taxed against the Board.

I.

A. **Leon Higginbotham**, Jr., Circuit Judge, dissenting: This case presents the question whether the National Labor Relations Board (the Board) erred in certifying the International Union of Electrical, Radio and Machine Workers, AFL–CIO (the Union) after an election campaign in which it was alleged that the Union misrepresented material facts and intimidated employees.[1] Vitek Electronics, Inc. (Vitek) argues that it did not have adequate time to respond to the Union's misrepresentations and that certain threats made by the Union and its agents against Vitek employees necessitated a hearing before the Regional Director (RD) to determine if the "laboratory conditions" of the election were so polluted as to require the setting aside of the Union's 70 to 45 victory.

The majority concludes that the RD and the Board erred by failing to grant Vitek a hearing. Thus, it ordered the Board to set aside the Union's 25 vote majority and to conduct a hearing on Vitek's objections. I have concluded that the Board could find that the Union's statement were within the permissible range of campaign rhetoric and that Vitek failed to meet its burden of establishing the need for a hearing on the intimidation issue. While I am not suggesting that it would have been impermissible for the Board to have ordered a new election or to have had further hearings on Vitek's complaints, I would hold that the Board was *not required* to order a new election and was *not required* to have any further hearings.

Whether one is considering elections on the national political scene or in the context of labor relations, it would be ideal if all the parties spoke the truth, the whole truth and nothing but the truth. It would be preferable that every statement given be precisely accurate and in no way misleading. But, reality tells us that such idyllic standards do not exist among vigorous adversaries who have much at stake riding on the outcome of an election. In any event, from media advertisements for consumer products, to extravagant promises made by political candidates, Americans are used to exaggerations, overstatements and distortions. And, as a consequence, working men and women are not so gullible that they necessarily believe that every statement uttered in election campaigns is precisely accurate. As Abraham Lincoln once wrote, "you can't fool all of the people all the time."

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Congress has delegated to the Board the power to determine (1) whether a particular misstatement is sufficiently material so as to fool or mislead employees unfairly at the polling place and (2) whether another election, where hyperbole is reduced, is required. In all due respect, the majority opinion reflects what I believe to be a failure in this circuit clearly to differentiate or appreciate the limited role of appellate review in National Labor Relations Board cases. Simply stated, it is for the Board to gauge the effect of campaign polemic. We are not empowered to sit as a super-board to try *de novo* what are essentially findings of fact. In short, the majority decision steps over the boundary lines for apellate review and invades the role which Congress gave exclusively to the Board. I, therefore, respectfully dissent from the majority's opinion.

I.

The burden is on the party seeking to overturn a Board-conducted representation election to establish that the election was not fairly conducted. *N.L.R.B. v. Mattison Machine Works,* 365 U.S. 123, 81 S.Ct. 434, 5 L.Ed.2 455 (1961) (per curiam). Whether the challenged conduct tended to interfere with the employees' free choice is to be determined primarily as a function of the Board's discretion. *N.L.R.B. v. A.J. Tower,* 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946); *N.L.R.B. v. Bancroft Mfg. Co.,* 516 F.2d 436, 439 (5th Cir. 1975), *cert. denied,* 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976); *N.L.R.B. v. Trinity Steel Co.,* 214 F.2d 120, 123 (5th Cir. 1954).

The Board's basic policy is to seek to insure that in selecting a bargaining representative the employees have full and complete freedom of choice. The board attempts, insofar as possible, to encourage laboratory conditions so that employees may exercise this right. *Hollywood Ceramics, Inc.,* 140 NLRB 221, 224 (1962). Gross misrepresentations with regard to material issues in an election, however, and disrupt these conditions and interfere with the expression of free choice. Yet, neither absolutely precise statements nor complete honesty exist in most election campaigns, and they are not even expected by the employees. Election campaigns, after all, are often hotly contested matters prone to the overstatement of one's own virtues, and the zealous condemnation of the other side's vices. Thus, "the Board must balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign with all the normal legitimate tools of electioneering." *Id.*

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[1] The alleged misrepresentations concerned cost-of-living clauses, wages, job safety, seniority and job security.

Reflecting this balance, the Board recognizes that a certain amount of inaccuracy and ambiguity are endemic to campaign propaganda. Hence, to warrant setting aside an election, the Board requires that there be a *substantial* misrepresentation of a material fact, made by one with special knowledge of the true facts and communicated to the parties so shortly before the election that the other party has no opportunity to correct it. *Id.* at 223, 224. Moreover, the misrepresentation must involve facts about which the employees are not in a position to know the truth. *General Knit of California*, 239 NLRB (1978); *Peerless of America, Inc. v. N.L.R.B.*, 576 F.2d 119, 123 (7th Cir. 1978). The mere fact "that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead [a court] to set [an] election aside." *Hollywood Ceramics Inc.*, 140 NLRB at 224. In fact, "even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election." *Id.* The rule could not be otherwise lest the losing party to an election be afforded too great an opportunity to delay the implication of the election results by litigating the accuracy of factual assertions which did not affect the election results. The application of this sound policy to the present facts in my view dictates that we enforce the Board's certification order.

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II.

Vitek objects to the Union's campaign handbill entitled "IUE–Vitek News, No. 3." In this leaflet, the Union asserted that the cost of living in America is rising at the rate of 14% and that at other plants in the area it has negotiated cost of living clauses that increase employee wages regularly "to keep pace with" the cost of living. The employer argues that the cost-of-living clauses are "capped" and "keyed" to formulas that do not guarantee cost-of-living adjustments equal to the actual rise in the cost of living. It contends and the majority apparently holds that this campaign document materially misrepresents the cost-of-living protective clauses the Union negotiated with three other employers and thereby establishes a prima facie case for setting aside the election. In so holding, the majority interprets this handbill to be a Union representation that the cost-of-living clauses in its contracts at Edison Products, Gulton Industries, and Delco Batteries guarantee cost-of-living increases equivalent to the actual rise in the cost-of-living. I do not agree.

The Board found that this handbill nowhere stated that any of its cost-of-living protective clauses would guarantee cost-of-living raises equal to the actual rise in the cost of living. The Company admits this. Nevertheless, it maintains that the employees interpreted the statement "to keep pace with the cost of living increase announced by the U.S. Department of Labor" as an absolute guarantee of "dollar for dollar" protection against inflation.[2] I would hold that it was proper for the Board to interpret this statement not to provide such protection.

Furthermore, the Board recognized that the Union had in fact negotiated cost-of-living protective clauses with the companies in question that did provide their employees with some protection against inflation. Thus, although this document is "vaguely worded and subject to different interpretations," *Hollywood Ceramics, Inc.*, at 224, it is not sufficiently misleading to justify setting the election aside. The Board's conclusion, therefore, in this regard is not so outlandish as to constitute an abuse of discretion. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

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[2] In fact, Vitek argues that the handbill guarantees a "dollar for dollar" cost of living increase despite the fact that the leaflet contains the following comment with respect to former President Carter's 7% wage controls:

> FLASH
>
> A federal court has just upheld the IUE–AFL–CIO lawsuit charging that President Carter's 7% wage controls are illegal.
>
> This is an important step forward in the union's fight to see that workers at plants such as Vitek are not held down at this time when the cost of living is going up at a rate of 14%
>
> IUE has performed a service, not just for its own members, but for workers throughout the country, by fighting against wage controls. It shows the strength of our union and our concern for the needs of working people.

Vitek also asserts that it did not have adequate time to respond to this document prior to the election. The document in question, however, invites the Company to speak to the employees at Union meetings on June 6, 1979 (the day before the election) regarding the statements made by both parties during the campaign. Surely, had Vitek felt the matter important enough, it could have taken this opportunity to explain to its employees that the cost-of-living clauses were capped at a certain percentage or keyed to a specific formula that did not provide an absolute guarantee of "dollar for dollar" protection against inflation.

III.

The majority also objects to portions of the Union handbill entitled "A Story By and For Vitek Workers." The majority attacks this handbill because it states that "Back in the 'good ole' days" the employer's wages were the lowest in the area. I do not feel that the record in this case reveals this statement to be a material misrepresentation of fact. Indeed, Vitek initiated its uniform wage rates on January 2, 1976

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(revising them thereafter on October 2, 1976) and offered no evidence to indicate that between January 2, 1976 and October 2, 1976—before the Union came on the scene—its wages were not the lowest in the area. Hence, the Board could reasonably infer that such evidence did not exist.

Moreover, although as of April 15, 1979, Vitek did increase its minimum wage to about $1.00 more per hour than ten other area companies, this took place *after* the Union began its organization drive and had filed its representation petition on April 5, 1979. Accordingly, the Company's comparison of its pay scales with those of other area companies after April 15, 1979 are irrelevant to us since these rates reflect a wage increase given to the employees *after* and not *before* the Union began to organize.[3]

In conclusion, I believe that given the circumstances of this case, the Board could find that the alleged misrepresentations by the Union are not so substantial as to be reasonably expected to have had a significant impact upon an election which the Union won by a margin of 70 to 45, an election in which they garnered 61% of the total vote. Therefore, the Board did not abuse its discretion in holding that the challenged conduct did not interfere with the employees' free choice.

V.

Finally, the majority contends that "there is no adequate record here from which to tell whether the RD correctly determined that no hearing was necessary" on the question of whether the Union poisoned the pre-election atmosphere by intimidation. In support of this view, Vitek submitted into evidence the affidavits of several employees and supervisors, pinpointed several employees from whom affidavits were taken, and provided the names of numerous other employees whom it asserted had information relevant to its objections to the election. Vitek's legal counsel, however, was advised that if the Company was unable to provide more specific details with respect to the potential testimony of 17 of

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[3] I would also conclude that it was proper for the Board to find that this Union handbill did not materially misrepresent the Company's policies with regard to its safety precautions, or its seniority and discharge programs. In short, the Board found that the Union's campaign statement that "few safety precautions were taken to protect the people from carbon monoxide fumes and when [people] got sick because of the fumes, many of [them] lost pay" was not a material misrepresentation of fact.

In this regard, Vitek argues that extensive safety precautions had been taken and all employees reimbursed for time lost due to the fumes. Yet when the Company was requested to support its assertion with regard to the extensive safety precautions, it was only able to demonstrate that as of February 12, 1979 it had installed a new vent "to increase the amount of outside air entering the plant when the exhaust fans were on."

Second, Vitek's records indicate that on the day the new vent was installed, February 12, 1980, ten employees were sent to a local hospital's emergency room and then home by a doctor due to fume-induced sickness. On February 16 and February 26, 1979, 30 employees and seven employees, respectively, left work due to what they believed to be fume-induced illness. Hence, it was reasonable for the Board to infer that one fresh air vent had not solved the problem.

Third, the record shows that at least ten employees who felt they were suffering from a fume-induced illness, were not paid for all of their lost time. The Company unilaterally determined that seven of these employees failed to substantiate their claim of illness and that no reason existed for it to believe there was a problem with the heating system at the time. But, just because this is Vitek's view, the Board was hardly compelled to believe that, therefore, the Union's opposing view was a material misrepresentation of fact.

In any event, the Union statements about safety precautions involved matters within the context of the employee's working environment. Thus, the employees were in a position to possess independent knowledge with which to evaluate these statements.

Finally, I also would hold that the Board properly found that the Union did not materially misrepresent the Company's seniority and discharge policies. The Union asserted in its leaflet that before it came on the scene seniority had no effect on promotions and overtime and that employees could be fired with no chance of appeal. Vitek did institute a seniority job posting program and a grievance procedure on April 2, 1979. But, the Company presented absolutely no evidence that it had a seniority job-posting program or grievance procedure prior to April 2, 1979—that is before the Union began its campaign.

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its witnesses, they would not be interviewed. It is well established that the objecting party has the burden of supplying the Board with specific evidence that warrants setting aside an election before the Board must pursue an investigation. *See National Labor Relations Board Cashandling,* Manual (Part Two) Section 11392.5. In fact, the objecting party has the burden of producing specific evidence tantamount to an offer of proof before the Board is required to hold an evidentiary hearing or pursue an investigation. *Howard Johnson Company d/b/a Howard Johnson Distribution Center,* 242 NLRB 1286 (1979).

The RD properly concluded in this instance that (1) upon the basis of the evidence as a whole the Company failed "to raise substantial or material issues with [regard] to conduct affecting the results of the election" and; (2) that since "no evidence was offered that any of the employees not interviewed possessed any relevant information which would raise material or substantial issues concerning conduct affecting the results of the election, the Board agents acted in accordance with established Board policy in refusing to inverview" the employees in question. In this light, the Board has held that

> * * * where an objecting party presents prima facie evidence demonstrating that the election was not fairly conducted, we do not hesitate to make the necessary investments of time and money, nor can we then avoid the concomitant delay in making our procedures effective. On the other hand, where there has been no prima facie showing of misconduct * * * [it] * * * is not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns.

Newport News Shipbuilding and Dry Dock Company, 239 NLRB 82, 83–84 (1978).

VI.

For the foregoing reasons, I would deny the petition to review and set aside and grant the cross-application for enforcement of the Order of the National Labor Relations Board.

NLRB v. Wilker Brothers Company, Inc.

652 F.2d 660 (6th Cir.), June 30, 1981—236 NLRB 1371

On petition to enforce Board Order

Before Merritt, Kennedy and Boyce F. Martin, Jr., Circuit Judges,

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The National Labor Relations Board petitions this Court for enforcement of its order dated July 6, 1978 in case No. 26–CA–6388–1,2 holding the respondent, Wilker Brothers Company, Inc., guilty of violating §§ 8(a)(1) and 8(a)(3). The Board found that the company had conducted coercive interrogations and statements to employees, had made promises of benefits and implemented new benefits to undermine the union organizing effort, had reduced a benefit, and had discharged employee Linda Lewis for union activities. The employer argues the decision of the Board is not supported by substantial evidence.

More specifically, the Board found Vice-President Blumenthal had asked one employee, Linda Lewis, to help her find the "termites" in the plant and offered her a different job than she had wanted. He had told several employees whose names appeared on a union telegram naming the union in-plant organizing committee that they had stabbed him in the back. Blumenthal questioned one employee about charges filed with the Board, told another she was stupid for joining the union and that he would scratch her back if she scratched his when she asked for time off, and questioned others about union activities. Very shortly after the union telegram was posted, the employer announced two new holidays. The next month, Blumenthal announced he was going to lower the prices on the vending machines ten cents (prices had been raised by the supplier several months earlier) and he would pay the difference as another benefit to the employees. He did not say that the difference would be made up by not making the customary contributions to the Helping Hand Fund, a fund which was for employees in need and which had been funded by commissions from the machines. The month before the union telegram was sent, but after the union had

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begun organizing, the employer had announced new insurance benefits.

The Administrative Law Judge (ALJ) found that these statements were coercive and the granting of these benefits were violations of the Act. The ALJ did not find that the reduction in contributions to the Helping Hand Fund was a violation because the employees did not learn about this action until the hearing on the violations. The Board held this was a violation because it was a reduction in benefits.

The ALJ found that Linda Lewis was discharged due to union activities, although admittedly she had always been a poor worker, because she was discharged shortly after the telegram had been posted and the ALJ discredited the testimony that her work had become worse the last two weeks. The Board issued a cease and desist order and ordered notices to be posted, reimbursements to be made to the Helping Hand Fund, and reinstatement and back pay be granted to Linda Lewis.

The employer argues that the ALJ relied upon the uncorroborated evidence of an interested witness, contrary to the testimony of three witnesses, to award Lewis back pay and reinstatement. It also filed a motion before this Court to remand the reinstatement order to the Board because of newly discovered evidence that Linda Lewis has subsequent to the filing of this appeal been convicted of possessing schedule two controlled substances and of stealing from her employer.

The findings of the Board must be affirmed if supported by substantial evidence. *See* 29 U.S.C. § 160(e); *DeLorean Cadillac, Inc. v. NLRB,* 614 F.2d 554, 555 (6th Cir. 1980) (Order). The choice between two conflicting views in the record is for the Board to decide. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

This Court has reviewed the record and the decisions by the ALJ and the Board. It concludes that substantial evidence supports the Board's conclusion that the employer conducted coercive interrogations and improperly granted benefits. However, substantial evidence does not support the Board's conclusion that reduction of contributions to the Helping Hand Fund was a violation of the Act. A conferral or denial of benefits prior to an election violates the Act if timed to affect the employees with respect to their union activities. *See NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409–10, 84 S. Ct. 457, 459–60, 11 L.Ed.2d 435 (1964). But, employees can hardly be affected or coerced in their activities with respect to the union if they do not know about the employer's action. Here they were unaware until the hearing that the Helping Hand Fund's contributions were reduced.

This Court further finds that no substantial evidence supports the discharge of Linda Lewis. Her record shows intermittent complaints about her work all along, with three reports written up within two weeks of her discharge date. She admitted never being a very good worker and always being reprimanded (nearly every day), but denied her work worsened. Three of her supervisors testified to the contrary. This Court has held that the uncorroborated testimony of an interested witness who stands to gain from a back pay award should be subject to strict security. *See DeLorean, supra,* 614 F.2d at 555. This Court denies reinstatement and back pay to Linda Lewis. This Court need not address the motion to remand based on her criminal convictions.

This Court denies enforcement of the Board's order insofar as it orders reimbursement to the Helping Hand Fund and reinstatement and back pay to Linda Lewis. The Board's order is enforced in all other respects.

NLRB v. Clayton Construction Corporation

652 F.2d 6 (8th Cir.), June 24, 1981—250 NLRB 798

On petition to enforce Board Order

Before McMillian and Arnold, Circuit Judges, and HANSON,* Senior District Judge

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PER CURIAM: The National Labor Relations Board (the Board) petitions this court for enforcement of its order requiring the Clayton Construction Corp. of Urbana, Missouri (the Company) to immediately reinstate Floyd Groves as a Union steward and "make him whole for any loss of wages he may have suffered" by reason of the unlawful termination in violation of § 8(a)(1) and (3) of the National Labor Relations Act (the Act). For the reasons discussed below, we enforce the order.

The Board, adopting the findings of the administrative law judge (ALJ), concluded that Floyd Groves was discharged because of a good faith protest about the Company's assignment of work to certain employees in violation of its agreement with the Union. For reversal the Company argues that (1) the record fails to contain substantial evidence to support the conclusion that Groves was engaged in protected union activity at the time of his discharge and (2) Groves was discharged because of flagrant and persistent insubordination.

Larry Clayton is the Company's president and principal stockholder. As president, Mr. Clayton exercises responsibility for hiring, firing and supervising assigned work. In May, 1977, Mr. Clayton signed a collective bargaining agreement with the Union and has followed the terms of the agreement at the Urbana job site.

Floyd Groves was hired by the company in March, 1978, and was appointed Union steward in 1979 and served in that capacity until July 16, 1979, when he was discharged.

The events that took place on July 16 are the crux of this dispute. It is conceded that Mr. Groves was terminated because of his actions on that day and that he would not have been terminated otherwise.

On the morning of July 16, 1979, a piece of equipment was unexpectedly put out of operation for the day. As a result, Larry Clayton sought to shift working assignments among his employees so as to maintain production. A supervisor of the Company approached certain employees during their lunch break and told them of the afternoon's work assignments. The assignments included placing Groves on one machine and assigning Clint Harmon as an operator of another machine to work on the main sewer line.

Clint Harmon was employed by the Company as a laborer during normal work hours. After normal work hours, Harmon worked as an independent contractor for the Company. Harmon was not a member

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of the Union and thus, pursuant to the collective bargaining agreement, was not to operate equipment on the main sewer lines but rather was to limit his work to equipment on the lateral lines.

Groves, the Union steward, raised a question with Mr. Clayton about the job assignments made by his immediate supervisor on July 16. The substance of the conversation which took place at a separate location on the site is in dispute. Because of what was said during the conversation, Larry Clayton discharged Groves.

The conflicting testimony concerning what was said during the conversation required the ALJ to determine the credibility of various witnesses. After reviewing the testimony concerning the July 16 conversation and the events which took place that day, the ALJ found Larry Clayton to be an uncredible, impulsive and belligerent witness. The ALJ credited the testimony of Groves and Harmon concerning the conversation and the sequence of events.

The Board adopted the ALJ's findings without any substantial revision. Specifically, the Board found that (1) the Company unlawfully discharged Groves and (2) such discharge violated Groves' rights guaranteed him under § 8(a)(1) and (3) of the Act. Our study of the briefs and the record convinces us that there was substantal evidence on the record as a whole to justify the Board's conclusion.

This court has consistently held that such activity is protected, even if the assertion made by the union steward is ultimately incorrect. *Keokuk Gas Service Co. v. NLRB*, 580 F.2d 328, 333 (8th Cir. 1978); *see also May Department Stores Co. v. NLRB*, 555 F.2d 1338, 1339–40 (6th Cir. 1977); *Metal Blast, Inc. v. NLRB*, 324 F.2d 602, 603 (6th Cir. 1963). Mere inquiry into the circumstances of an assignment does not constitute insubordination meriting discharge. *See Dutchess Furniture, Division of Na-*

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*The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

tional Service Industries, Inc. 222 N.L.R.B. 42 (1976).

We also find that the remedy ordered in this case was within the Board's authority. *Florida Steel Corp.*, 231 N.L.R.B. 651 (1977); *F.W. Woolworth Co.*, 90 N.L.R.B. 289 (1950).

Accordingly, the Board's order is enforced.

NLRB v. Permanent Label Corporation

657 F.2d 512 (3d Cir.), June 30, 1981; certiorari denied 455 U.S. 940—248 NLRB 118

On petition to enforce Board Order

Argued Nov. 4, 1980.

Before SEITZ, Chief Judge, and HUNTER and GARTH, Circuit Judges

Reargued In Banc May 11, 1981.

Before SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges

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SEITZ, Chief Judge: The National Labor Relations Board (Board) petitions for enforcement of its order against Permanent Label Corporation (Company). To remedy the many unfair labor practices that the Board found the Company had committed, the Board ordered the Company to cease and desist from certain unlawful actions, to reinstate and grant backpay to certain employees, and to recognize and bargain collectively with the Distributive Workers of America, District 65 (Union). The Company resists enforcement on the ground that the various findings of unfair labor practices made by the Board, and the remedies ordered by the Board, are not supported by substantial evidence on the record as a whole.

I.

Our factual narration is based on the findings of the Administrative Law Judge (ALJ), which were adopted by the Board. In February 1977, a Company employee, Bernard Daly, contacted a Union agent and began talking to his fellow employees about the advantages of organizing their plant. Daly ceased his organizing activities when Supervisor Michael Bevilacqua informed him that he could be fired for talking about the Union while in the plant.

Daly resumed his organizing efforts in September 1977, after he and employee Michael Roberts were contacted by, and met with, Union organizer Tom Acosta. Together, Roberts and Daly interested other employees in joining the organizing effort. They recruited, among others, Eleanor Ott, Dorothy Saracco, and Elton DeMonteverde. By mid-October, Union organizer Acosta began holding meetings at which employees signed authorization cards, paid Union dues, and formed a Union, organizing committee.

In late October 1977, Supervisor Bevilacqua became aware of rumors of organizing activities in the plant. He investigated these rumors, asking Daly if he knew anything about an attempt by the Company's employees to organize. Daly denied any knowledge of such activity.

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On November 1, 1977, Daly was summarily discharged by the Company, allegedly for excessive absenteeism. The next day Ott was discharged, allegedly for the same reason. Neither employee had ever received a warning or disciplinary notice concerning excessive absenteeism.

Two days after the discharges of Daly and Ott, Company Vice-President Robert Tancredi met with employees on each of the plant's three shifts and delivered a speech expressing the Company's opposition to the Union. In this speech, Tancredi told employees that the Union could promise them more than the employer, but could only guarantee that they would pay monthly dues; that only the Company could guarantee job security; that it was important for job security to maintain the current level of business; that unionized plants sometimes became uncompetitive and found it difficult to stay in business; and that thus far the Company's success had been accomplished without outside interference.

In the meeting with second-shift employees, Tancredi permitted Roberts to read a petition directed to management that had been signed by approximately thirty employees. This petition asserted that the discharges of Daly and Ott were unjust, and that both should be rehired. Tancredi accepted the petition from Roberts and said he would consider it and return with an answer. Tancredi then adjourned the meeting, stating that he would stay and talk to employees about their grievances.

On November 9, the Union filed a complaint with the Board, and served a copy on the Company. This complaint asserted that the allegedly unlawful discharges of Daly and Ott constituted unfair labor practices. On November 15, Daly and Ott accepted the Company's offer of reinstatement, but the Company treated their two-week absence as justified suspension and offered them no back pay.

During the course of the organizing campaign, Production Control and Office Manager Jack Studt approached many employees individually, asking why they thought they needed a union and what problems or grievances they had about conditions in the plant. Studt told the employees that he thought the Company could resolve the problems within one year without the Union.

On November 11, 1977, Union organizer Acosta, accompanied by some members of the in-plant organizing committee, met with Plant Manager Doug Contreras. Acosta presented sixty-seven signed authorization cards and asked the Company to recognize the Union. The proposed bargaining unit included approximately 125 employees. Contreras replied that he did not recognize either the organizing committee or the Union as the representative of the employees. The Union filed a representation petition with the Board on November 14, 1977.

The Company's antiunion efforts continued after the Union had presented the authorization cards as evidence of its majority support. For example, on November 18, 1977, employee Zenaida Esquilin asked Saracco, who was a member of the employees' in-plant organizing committee, for a Union authorization card for a co-worker, Maria Garcia. Garcia signed the card. However, before she could return it to Saracco, foreman Bevilacqua confronted her and asked who had given her the card. She explained that it came from Esquilin and Saracco. Later that day, foreman Bevilacqua called Saracco into his office and told her not to pass out Union cards on Company time. He also told her that while she might talk to other employees on her break time, she could not at any time pass out Union cards or literature while on Company property.

On November 29, 1977, Roberts stationed himself at an employee entranceway near an employee parking lot in order to distribute information leaflets to employees arriving at the plant for their work shifts. Supervisor Robert Sanders told Roberts that he would be subject to disciplinary action if he continued to distribute the information leaflets. Although Roberts was stationed on Company property, he distributed the literature only in a nonwork area during his off-duty time. As a result of the Company's threat of disciplinary action, Roberts ceased distributing materials.

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Later that day, Roberts, Linderoth and Ott attended a Board conference with Company representatives. One half hour before they were to start their work shifts, Roberts called the plant to say they would be five or ten minutes late for work. On the phone, Supervisor Sanders, who earlier had threatened Roberts with discipline for distributing literature, told Roberts that the Company had instituted a policy that foreclosed employees who were late for a shift from working during that shift. Consequently, Sanders informed Roberts that all three employees should consider themselves suspended for the day. Sanders was acting under Plant Manager Contreras' instructions; Contreras, in turn, received his orders from Vice-President Tancredi, who was attending the Board conference and had called and told Contreras that the three employees would not be able to check into work on time.

During this period Company President Al Contreras, who normally spent little time at the Clifton plant, spoke individually with approximately 500 Clifton employees, expressing the Company's opposition to the Union. In the course of these conversations President Contreras coercively interrogated employees, solicited grievances, coerced employees to campaign against the Union, discouraged employees from wearing Union buttons, promised benefits, and threatened reprisals or other adverse consequences if the Union was elected as the employees' bargaining representative. For example, Contreras apparently offered employee Mia Mehmeti assistance for schooling and reassured Ott that she was eligible for health insurance. He stated to employees Iwanicki and Linderoth that if the Union was elected he would no longer care about the Company and not work hard for it because the Union would "ruin him"—it was clearly implied that along with his downfall would go that of the Company.

In the week of December 6, Plant Manager Contreras summoned Linderoth, Saracco, and Alice Gorski to his office. Vice-President Tancredi testified that he was aware of this meeting and its purpose. Some department and shift supervisors were present. The three employees were advised that they were considered to be supervisors; therefore, it was unlawful for them to engage in Union activity. Further, they were informed that the Company had the right to take action against them if they engaged in Union activity. The employees testified that they left this meeting with the understanding that each was in jeopardy of being fired if he or she had anything more to do with the Union. The three employees had never been advised that they were supervisors, and they did not consider themselves, nor did their fellow employees consider them, to be supervisors.

One week before the December 30, 1977 election, the Company paid year-end bonuses to all of its employees. In January 1977, the Company had posted a notice on the employee bulletin board announcing that to be eligible for a 1977 year-end bonus an employee had to have been on the Company payroll on December 31, 1976. This notice was removed at the end of November. The Company did not replace it with a new explanation of bonus eligibility or a statement of change in Company policy. Instead, one week to the election, the Company paid the 1977 year-end bonus to all its employees, including those with less than one year service.

Finally, on December 28, 1977, two days before the representation election, President Contreras delivered a prepared speech to employees on each of the shifts. He noted that he expected the Company to grow but that the introduction of the Union into the plant would hinder that growth. He stated:

> Our largest customer, the Mennen Company, which accounts for some 40% of this plant's sales is nonunion. We are the sole decorator of Menn packages. They have felt comfortable with our clean record of no union trouble and no

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> strikes at Permanent Label over the past 25 years. Sometimes when a company is unionized, customers divide their business between two or more vendors with different union contract expiration dates. They do this to eliminate the possibility of being cut off by a strike. I don't want to give the impression that just because a union is in a company there will be a strike, *but* we have shown you District 65's strike record, and you have seen the emphasis on strikes in their constitutions.

The ALJ found that there was no basis in fact for Contreras's predictions.

On December 30, 1977, the representation election was held. The Union lost by a vote of sixty-five to Sixty-four, with six challenged ballots. The filing of these unfair labor charges followed.

II.

The Board adopted the conclusion of the ALJ that the Company had committed several unfair labor practices during the pre-election period. The Board also adopted the recommendation of the ALJ that a bargaining order was necessary to remedy the unfair labor practices, but it modified the ALJ's bargaining order to run from November 11, 1977, the date on which the Union presented the Company with authorization cards signed by a majority of the employees and demanded recognition. The Company urges that we find that neither the findings of unfair labor practices nor the conclusion that a bargaining order was a necessary remedy are supported by substantial evidence on the record as a whole. The Board adopted the following conclusions of law:

> 1. In October—December 1977, by soliciting grievances and promising benefits and correction of grievances if the employees would forget the Union, and by threatening no correction of grievances and loss of jobs if they brought the Union in; by granting bonus benefits, just prior to the election; by coercive interrogation of employees concerning organizing, who supplied Union cards, and employee interest in the Union; by interfering with the employees wearing Union insignia; by promulgating and enforcing rules prohibiting solicitation by employees of Union memberships in plant work areas on nonwork time, and distribution of Union literature by employees in nonwork areas during nonwork time; by coercion to induce or attempt to induce influential employees to induce other employees to cease Union support; and by instructing nonsu-

pervisory employees, under threat of discipline, to cease support of the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

2. By discharging employees Bernard Daly and Eleanor Ott on November 2, 1977, because of their Union activity and to discourage employees interest and membership in the Union, Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. The change of their discharge, on November 16, 1977, to suspension without pay for the prior two weeks, reduced the severity of the discriminatory action but continued the violation of Section 8(a)(3) and (1) of the Act.

3. By suspending for one day without pay, on November 29, 1977, employees Michael Roberts, Robert Linderoth, and Eleanor Ott, because they attended a Board conference to assist the Union with the representation petition, Respondent engaged in unfair labor practices in violation of Section 8(a)(4) of the Act.

4. By refusing to recognize and bargain with the Union as representative of a majority of the employees as requested on November 11, 1977, but instead engaging, from the end of October to the end of December 1977, in commission of the unfair labor practices enumerated in paragraphs 1, 2 and 3 above, Respondent undermined the majority in the unit of employees that the Union represented, and made impossible the holding of a fair representation election. Respondent's refusal to bargain and embarking upon this course of misconduct constituted an unfair labor practice in violation of Section 8(a)(5) of the Act.

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6. Respondent's pre-election unfair labor practices nullified the results of the December 30, 1977 representation election, and these unfair labor practices cannot be corrected by conventional remedies, including a rerun election. Accordingly, it is appropriate and necessary that Respondent be ordered to bargain with the Union * * *.

A.

Before we reach the question whether the bargaining order should be enforced, we address the contention of the Company that the findings that it committed several unfair labor practices under the National Labor Relations Act, 29 U.S.C. § 158 (1976) (Act), are not supported by substantial evidence on the record as a whole. First, the Company argues that the finding that it engaged in unfair labor practices in violation of section 8(a)(1) of the Act lacks sufficient evidentiary support. We have reviewed the record evidence, and we have no hesitancy in finding that it forms more than a sufficient legal basis for the Board's conclusion. The Company apparently bases primary reliance on its contention that some of the ALJ's credibility findings were improper. Given the strong deference that we accord to credibility findings of the ALJ, we cannot say that they lack substantial record support. In any event, the totality of the record fully supports the ALJ's ultimate conclusions, even assuming infirmity in some of the few credibility findings challenged. Therefore, we conclude that the Company clearly overstepped the bounds of legality and violated section 8(a)(1) many times during the organization campaign.

Second, we consider the Board's determination that the Daly and Ott discharges, later converted to suspensions, were unfair labor practices under section 8(a)(3) and (a)(1) of the Act. The Company's basic contention seems to be that it was not aware of the Union organization effort at the time of the discharges; therefore, such discharges could not properly be attributable to antiunion animus.

We have reviewed the entire record and we believe that the evidence amply supports the conclusion that these initial discharges constituted unfair labor practices. When the reasons given by the Company for the discharges are viewed in light of the circumstances surrounding the discharges, we believe that the ALJ and the Board were justified in finding these reasons to be mere pretexts. We conclude that the finding that the discharges of Daly and Ott violated section 8(a)(3) and (a)(1) of the Act is amply supported by the record.

Third, the Company challenges the Board's finding that the one-day suspensions of Roberts, Linderoth and Ott, when their attendance at a Board conference caused them to be ten minutes late for their work shifts, were unfair labor practices in violation of section 8(a)(4). We believe that the record as a whole more than warrants the conclusion reached by the Board that the suspensions were retaliatory actions because of the employees' assistance to the Union. Therefore, these suspensions violated section 8(a)(4).

Finally, the Board adopted the conclusion of the ALJ that the Company's numerous unfair labor practices interfered with the free choice of the Company's employees, and therefore destroyed the "laboratory conditions" desirable for the conduct of a Board election. As a result, the Board concluded that the election of December 30, 1977 must be set aside. We think that the record findings, which we have found sufficient to support the findings of numerous violations of the Act, clearly support this determination.

B.

The Company contends that there is not substantial evidence to support the Board's conclusion that a bargaining order should issue because the Company violated section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as requested on November 11, 1977, and instead engaging in the unfair labor practices detailed above, which both undermined the Union's majority status and prevented the holding of a fair election. As our previous discussion has demonstrated, substantial evidence on the record as a whole supports the plethora of unfair labor practices found. However, it is established, at least in this circuit, that when the Board imposes a bargaining order, it must articulate the factors that justify the choice of this remedy over the ordering of a new election. *See, e.g., Hedstrom Co. v. NLRB,* 558 F.2d 1137 (3d Cir. 1977); *NLRB v. Armcor Industries, Inc.,* 535 F.2d 239 (3d Cir. 1976). If the ALJ provides a statement of reasons for recommending that the Board impose a bargaining order, the Board need only specifically adopt the findings and reasoning of the ALJ. A separate articulation by the Board of the reasons for imposing a bargaining order is unnecessary. *See Kenworth Trucks v. NLRB,* 5809 F.2d 55, 62–63 (3d Cir. 1978).

Nevertheless, the Company argues that the Board should have provided a statement of reasons justifying the imposition of a bargaining order independent of that provided by the ALJ because it modified the ALJ's bargaining order to run from the date of the Union's demand for recognition based on its card majority and not the date of the first unfair labor practices.[1] In making this argument, the Company relies on *Rapid Manufacturing Co. v. NLRB,* 612 F.2d 144 (3d Cir. 1979). According to the Company, *Rapid Manufacturing Co.* prohibition the Board from supporting a *Gissel* II bargaining order by relying on conduct that occurred before the Union demanded recognition. We do not read *Rapid Manufacturing Co.* this broadly. Obtaining a majority of Union authorization cards is a continuing process, and the length of time it takes to achieve a majority varies from plant to plant, often depending on the number of employees involved. We believe that in some circumstances the Board may properly consider unlawful conduct that occurred before the Union demanded recognition in determining whether the employer's course of unlawful conduct was sufficiently pervasive to undermine the Union's majority support and to make the possibility of a fair rerun election slight, and thus to support the imposition of a *Gissel* II bargaining order. Forbidding the Board from considering such conduct sets an artificial time barrier and ignores the possible cumulative effect of antiunion activity.

In this case, the course of unlawful conduct commenced approximately two weeks before the Union demanded recognition. The Union had arleady obtained a significant number of authorization cards. Therefore, we do not believe that the Board is precluded from relying on the statement of reasons for imposing a bargaining order provided by the ALJ merely because he relied on both premajority and postmajority conduct.

The Board specifically affirmed the rulings, findings, and conclusions of the ALJ, and adopted his order as modified. Therefore, if the ALJ provided a sufficient statement of reasons for recommending that the bargaining order be issued, the order of the Board should be enforced.

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[1] The Company's argument is based on the assumption that by modifying the date of the bargaining order, the Board implicitly indicated that the Company's unfair labor practices were not sufficiently egregious to suport a *Gissel I* bargaining order. *See NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547(1969). In his opinion, the ALJ distinguished the "outrageous and pervasive" practices that fall within the *Gissel I category and justify the imposition of a bargaining order without regard to majority status from the "less pervasive" practices that comprise the Gissel II* category and he stated that he believed that a bargaining order was appropriate under either category. For a discussion of the distinction between *Gissel II* categories, see *Rapid Mfg. Co. v. NLRB,* 612 F.2d 144, 148 (3d Cir. 1979). We will assume for purposes of this appeal that the Board's modification of the date of the bargaining order was based on the reason asserted by the Company.

The ALJ issued a fifty-three page opinion in which he detailed the Company's numerous violations of section 8(a)(1), (a)(3), (a)(4), and (a)(5). While detailing the course of conduct that gave rise to these violations, the ALJ described the attitude of the Company. The following characterization is representative:

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> Respondent's antiunion animus was clear and unrelenting. As President Contreras stated, there had been attempts to organize the plant before this attempt, he was constantly vigilant against renewed attempts, and he had been successful in keeping the Union out. The summary of his actions in this case, together with the related actions of the other managerial and supervisory staff of Respondent, denoted a spirit and willingness to take any means deemed necessary to defeat the Union and to deprive the employees of an untrammeled choice of a bargaining representative, including unlawful means.

In one section of his opinion, the ALJ concluded that the election must be set aside. In the next section, the ALJ addressed "whether a rerun election would be an adequate remedy, or would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period, requiring instead the remedy of a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Company,* 395 U.S. 575 [89 S.Ct. 1918, 23 L.Ed.2d 547] (1969)." The ALJ recommended that a bargaining order should issue for the following reasons:

> [U]pon becoming aware that the Union had begun organizing and was seeking representative status, Respondent engaged in a campaign designer to thwart the organizing and destroy any majority the Union may have succeeded in obtaining. Commencing about two weeks before the Union requested recognition * * *, Respondent engaged in * * * interrogation of the leading union proponent among the employees concerning organizing, then discharged him, and a coworker associated with him in organizing activity, in violation of section 8(a)(3), and launched a countercampaign against the Union affecting all employees, starting with "captive audience" employee meetings used to convey its antiunion hostility and to sound warnings of the dire consequences of bringing in the Union. * * *
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> Respondent continued its countercampaign during November and December until the election of December 30, with its president interviewing every employee on the plant floor between one and five times each, followed by a final "captive audience" speech; and by its vice president, plant manager, department heads, and shift foremen engaging in discussions with employees on and off the plant floor. In the course of this barrage of campaigning against the Union, Respondent's officers and supervisors overstepped the bounds of legality many times. Employees were promised benefits and correction of solicited grievances if they would forget the Union, and threatened with no correction of grievances and loss of jobs if they brought the Union in. A substantial group of employees, not entitled to year end bonuses under Respondent's written policy, were paid a bonus along with the other employees just prior to the election. Respondent illegally interferred with the employees' self organizational rights by coercive interrogation concerning their Union interest, interference with wearing of Union insignia, interference with employee solicitation of Union memberships and distribution of Union literature by promulgation and enforcement of illegal rules, coercion to induce influential employees to induce other employees to cease Union support, threatening discharge of three leading Union supporters unless they ceased Union activities under a sham claim that they were supervisors, and disciplining three employees for attendance at a Board conference to assist the Union on the representation petition.
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> In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election * * * and prevented the holding of a fair election.

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Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on issue of representation. * * * To remedy Respondent's unfair labor practices * * *, a bargaining order is necessary.

Upon reviewing the entire opinion of the ALJ, we believe the conclusion is inescapable that the ALJ delineated these factors, not merely as justification for setting aside the election, but as reasons why a rerun election "would appear to be a futile act that would permit Respondent to benefit by its misconduct in the pre-election period," thus justifying the imposition of a bargaining order. The fact that the ALJ had found that the election must be set aside in the previous section of his opinion supports this conclusion.

The primary purpose of requiring that the Board provide a statement of reasons leading to the imposition of a bargaining order is "to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied." *Hedstrom Co. v. NLRB* 629 F.2d 305, 309 (3d Cir. 1980) (in banc) (*Hedstrom II*). Moreover, requiring a statement of reasons is intended to add predictability and stability to this important area of labor law. This requirement is not intended to burden the Board, not to limit the issuance of bargaining orders. *See, e.g., id.; Armcor Industries, Inc,* 535 F.2d at 245.[2] We believe that the ALJ's statement of reasons in this case in more than sufficient to allow this court to determine whether the standards of *Gissel* have been met.

In this case the ALJ did not merely state conclusorily that the bargaining order should issue. Instead, he demonstrated that the violations were widespread, thus indicating the Company's proclivity to exceed the limits of the law in its attempt to prevent unionization. He also explained that high-level officers, including the president and vice president, had threatened reprisals, coercively interrogated employees, and illegally promised benefits. Moreover, he demonstrated that each employee in the plant was not only interviewed individually by the president but was also subjected to "captive audience" speeches. Therefore, he found that bargaining order was necessary to remedy these extensive unfair labor practices. We do not believe enforcement should be denied merely because the ALJ did not write down the inescapable inference he made in recommending that a bargaining order issue—that merely ordering the Company to refrain from future violations would not erase the effects of these threats and other egregious violations from the employees's memories, and thus that the possibility of a fair rerun election was slight.

We believe that it is sufficient for the ALJ to provide an extensive list of the factors giving rise to his recommendation that a bargaining order be issued, as was done in this case. If we were to require that the ALJ also specifically state each inference drawn from these factors no matter how obvious it is from the opinion, we would elevate form over substance and overstep the appropriate limits of judicial review of the Board's choice of remedy. Finally, the conclusion of the Board that a bargaining order is necessary to remedy the substantial unfair labor practices committed by the Company is supported by substantial evidence on the record as a whole, and is consistent with *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

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III.

The order of the Board will be enforced.

ALDISERT, Circuit Judge, concurring: Although I concur in the result reached by the majority, I take advantage of this in banc opportunity to set forth my dissatisfaction with the rule both the majority and dissenting opinions apply. The rule fabricated by this court on previous occasions provides that when the NLRB proposes a Gissel bargaining order, it must articulate in detail the factors that justify its choice of this remedy rather than ordering a new election.[1] *See Hedstrom Co. v. NLRB,* 629 F.2d 305 (3d Cir. 1980) (in banc) (*Hedstrom II*) *cert. denied,* —— U.S. ——, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981); *Hedstrom Co. v. NLRB,* 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom I*); *NLRB v. Armcor Industries, Inc.,* 535 F.2d 239 (3d Cir. 1976). In my view, this procedural rule was promulgated without authority and rests on certain unwarranted assumptions about the factfinding competence of Administrative Law Judges never openly articulated in the opinions supporting the *Armcor-Hedstrom* rule. Moreover, our decisions indicate that rather than applying the rule in a neutral fashion, the panes of this court have manipulated it primarily to achieve the results a given panel majority desires.[2]

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[2] We note that in *Kenworth Trucks,* 580 F.2d 55, a panel of this court found a similar statement of reasons sufficient to enforce a bargaining order. Although it is true that the *Kenworth Trucks* panel focused on whether the Board must separately articulate the reasons for imposing a bargaining order, it necessarily decided that the statement of reasons given in that case was sufficiently detailed to enforce the Board's order. For this court to enforce the bargaining order in *Kenworth Trucks* and to deny enforcement in this case would lead to the very inconsistency and unpredictability that requiring a statement of reasons justifying the imposition of a bargaining order was intended to prevent. *See, e.g., Armcor Indus., Inc.,* 535 F.2d at 245.

The rule has experienced a battered history in this court. The issue of what the ALJ and NLRB must find and say to impose a bargaining order has required three in banc sittings, *NLRB v. Armcor Industries, Inc.,* No. 77-1495 (November 15, 1978) (*Armcor II*) (unreported per curiam),[3] *Hedstrom II, and the present case,* and a number of panel opinions, *e.g. NLRB v. K&K Gourmet Meats, Inc.,* 640 F.2d 460 (3d Cir. 1981); *Electrical Products Division of Midland Ross Corp. v. NLRB,* 617 F.2d 977 (3d Cir.), *cert. denied,* —— U.S. ——, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980); *NLRB v. Garry Mfg. Co.,* 630 F.2d 934 (3d Cir. 1980); *Rapid Mfg. Co. v. NLRB,* 612 F.2d 144 (3d Cir. 1979). I joined the majority in *Hedstrom II* with the hope that the rule could be applied evenhandedly and because I felt that its purpose could be considered salutary: "to assist a reviewing court in determining whether the standards of *Gissel* have been satisfied." *Hedstrom II,* 629 F.2d at 309. The rule, I thought, was intended to add predictability and stability to an important area of labor law.[4] See majority op., at 519, 520. That the present case should be before us in banc so quickly after *Hedstrom II* eloquently attests to the utter failure of the rule to achieve its goal. We are en banc because the original panel disgorged three separate views on how to decide what I consider to be a very pedestrian case.

I.

In my view, this court's first error is its wrongful assumption of authority to promulgate an essentially procedural rule

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for the NLRB. This is not the only occasion when this court has ventured into rulewriting escapades for a federal administrative agency. We began these independent intellectual frolics when we imposed ourselves as a special procedural rules committee for the Social Security Administration. *See, e.g., Hargenrader v. Califano,* 575 F.2d 434 (3 Cir. 1978) (requirement in Social Security disability claim that hearing officer articulate "a statement of subordinate factual foundations on which ultimate factual conclusions [sic] are based" [5]); *Baerga v. Richardson,* 500 F.2d 309 (3d Cir. 1974) (dicta), *cert. denied,* 420 U.S. 931, 95 S.Ct. 1133, 43 L.Ed.2d 403 (1975). Although such a requirement may be "helpful in the joint work of the administrative agency and the courts," *Baerga,* 500 F.2d at 313, this observation alone cannot justify our intrusion into the procedures of a coordinate branch. This is not a federal common law area, nor an exercise of supervisory authority over courts inferior in the hierarchy. We must therefore look to Congress for any authority because, as I maintained in *Hargenrader,* 575 F.2d at 438-39 (dissenting opinion), federal courts of appeals were not given general supervisory powers over agencies of the executive branch. *See also Cotter v. Harris,* 642 F.2d 700, 708 (3d Cir. 1981) (Garth, J., dissenting). I found no Congressional authority in the Social Security cases; I find none here.

The judiciary's relationship to the NLRB is defined by 29 U.S.C. § 160(e) & (f). We are instructed that "findings of fact if supported by substantial evidence on the record considered as a whole shall be conclusive," 29 U.S.C. § 160(e). Congress has given little additional guidance for reviewing Board orders. When put to the task of defining the courts of appeals' scope of review of the NLRB's remedial orders, the Supreme Court has stressed our limitations:

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[1] The Board may satisfy this requirement by specifically adopting the ALJ's findings and reasoning without separate analysis. *See Kenworth Trucks v. NLRB,* 580 F.2d 55, 62-63 (3d Cir. 1978).

[2] Although I refer to the precept applied in this case as a rule, it fails to meet the criteria to deserve the name. Strictly speaking, a rule is a "precept attaching a definite, detailed legal consequence to a definite, detailed set of facts." Pound *Hierarchy of Sources and Forms in Different Systems of Law* 7 Tul.L.Rev. 475, 482 (1933). *See United States v. Criden,* 633 F.2d 346, 354 n.4 (3d Cir. 1980), *cert. denied,* —— *U.S.* ——, 101 S.Ct. 924, 66 L.Ed.2d 842 (1981). The hallmark of a rule is its predictable application. As discussed below, application of this rule yields anything but predictable results.

[3] Denying enforcement of a Gissel order by an equally divided court.

[4] I joined the court's opinion in *Hedstrom II,* but I am now convinced that the full court erred in not administering the last rites to the *Armcor* innovation when we had the chance to do so then. In changing my view, I am mindful that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank & Trust Co.,* 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting). *See also* R. Aldisert, The Judicial Process 861 (1976).

[5] I attempted recently to clarify this impenetrable formulation of a standard. *See Smith v. Harris,* 644 F.2d 985, 990 (3d Cir. 1981) (concurring opinion).

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941). The Board's remedial orders may not be set aside "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the act." *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943).

Contrary to the position of this court, review of a *Gissel* bargaining order has been dealt with no differently:

> It is for the Board and not the courts * * * to make [the] determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore, be given special respect by reviewing courts. *See Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 [85 S.Ct. 398, 13 L.Ed.2d 233] (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo v. FMC,* 383 U.S. 607, 621, 86 S.Ct. 1018, 1027, 16 L.Ed.2d 131 (1966).

Gissel, 395 U.S. at 612 n.32, 89 S.Ct. at 1939. The Court could not have been more clear in its limitation of review, yet circuit judges continue to be so "profoundly convinced of their own expertise in such matters," *NLRB v. General Stencils, Inc.,* 472 F.2d 170, 176 (2d Cir. 1972) (Hays, J., dissenting), that they freely impose procedural rules on the Board when the remedy chosen is a bargaining order. Our review is much more limited: was there substantial evidence to support the factual findings? or, was the decision abitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law?

Of course the Supreme Court does not require reviewing courts to rubber-stamp NLRB decisions. Rather, the Court has required the Board to provide some articulation of the reasons for its decisions. *See NLRB v. Metropolitan Life Ins. Co.,* 380 U.S. 438, 443–44, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965);[6] *see also SEC v. Chenery Corp.,* 332 U.S. 194, 195–96, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947) (*Chenery II*) (administrative decision must reveal its basis). These precedents, however, do not authorize the meticulous inquiry this court undertakes in every *Gissel* case. They require no more than an indication that the agency has in fact exercised its discretion. *See Metropolitan Life,* 380 U.S. at 443, 85 S.Ct. at 1064. It is up to the agency to decide how detailed this explanation must be once it crosses the minimum threshold of clarity.[7] If the record is unsufficient to reveal the bases for the decision, the court can remand to the agency for "such additional explanation of the reasons for the agency decision as many prove necessary." *Camp v. Pitts,* 411 U.S. 138, 143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). Even in conceding that a remand may at times be appropriate, however, the Court indicated that minimal explanations suffice. "The [agency's] explanation may have been curt, but it surely indicated the determinative reason for the final action taken: the finding that a new bank was an uneconomic venture in light of the banking needs and the banking services already available in the surrounding community." *Id.* Although it remanded the case to the court of appeals, it suggested that little else need be said for the court to review the decision. Nor do I understand the Supreme Court to require more exhaustive explanations when

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[6] "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action * * * ." *Burlington Truck Lines v. United States,* [371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed 207 (1962)]; *see Securities & Exchange Comm'n v. Chenery Corp.,* 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 [1947]. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would "propel the court into the domain which Congress has set aside exclusively for the administrative agency."

380 U.S. at 444, 85 S.Ct. at 1064 (citation omitted).

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the NLRB chooses to impose a *Gissel* bargaining order simply because elections are a favored manner of selecting a bargaining representative. *Cf. NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 407–408, 82 S.Ct. 853, 854–855, 7 L.Ed.2d 829 (1962) (per curaim) ("There is no place * * * for one test of the substantiality of evidence in reinstatement cases and another test in other cases.").

The rule applied in the present case goes far beyond the minimum threshold, and the dissent would require far more. As Justice Black observed in *Chenery I,* a judical requirement of detailed findings as the price of court approval of administrative action will "bog the administrative power in a quagmire of minutiae." 318 U.S. at 99, 63 S.Ct. at 464 (dissenting opinion). More important, "[h]ypercritical exactions as to findings can provide a handy but an almost invisible glideway enabling courts to pass 'from the narrow confines of law into the more spacious domain of policy.'" *Id.* (quoting *Phelps Dodge,* 313 U.S. at 194, 61 S.Ct. at 852).

The Supreme Court has recently reemphasized that federal courts should not interfere with administrative action in areas in which Congress has charged an agency with primary responsibility for settling difficult and complex social problems. It acknowledged that agencies must grant a minimum threshold of procedural rights, but stressed that although "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, . . . reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978). The Court warned:

> [T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC v. Schreiber,* 381 U.S. [279, 290, 85 S.Ct. 1459, 1467, 14 L.Ed.2d 383 (1965)], *quoting from FCC v. Pottsville Broadcasting Co.,* 309 U.S. [134, 143, 60 S.Ct. 437, 441, 84 L.Ed. 656 (1940)]. Indeed, our cases could hardly be more explicit in this regard. * * * [T]he basic reason for [the] decision [in *FCC v. Schreiber*] was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.
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> We have continually repeated this theme through the years, * * * [W]hile a court may have occasion to remand an agency decision because of the inadequacy of the record, the agency should normally be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modi-

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[7] Justice Frankfurter, speaking for the Court in *SEC v. Chenery,* 318 U.S. 80, 95, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943) (*Chenery I*), indicated that the "articulation requirement" is quite minimal:

> In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.

There the considerations urged in support of the SEC's order were not those on which the SEC relied. Thus the holding in *Chenery I,* reiterated in *Chenery II,* was nothing more than the familiar requirement that an administrative order cannot be sustained if based on a misperception of the law, even if it might be sustained on other grounds not articulated by the agency. To hold otherwise would allow a court to substitute its discretion for that of the agency, confusing administrative review with the kind of review applied to district court decisions.

> fied in light of such evidence as develops." [*FPC v. Transcontinental Gas Pipe Line,* 423 U.S. 326, 333, 96 S.Ct. 579, 583, 46 L.Ed.2d 533 (1976)].

435 U.S. at 543–44, 98 S.Ct. at 1211 (footnotes omitted); *see also Chrysler Corp. v. Brown,* 441 U.S. 281, 312–13, 99 S.Ct. 1705, 1723, 16 L.Ed.2d 208 (1979); *Wallace Corp. v. NLRB,* 323 U.S. 248, 253, 65 S.Ct. 238, 240, 89 L.Ed. 216 (1944). The *Armcor* rule simply cannot be justified on grounds that a *Gissel* bargaining order violates "constitutional constraints" or presents "extremely compelling" circumstances. Rather than being one of those "extremely rare" cases, the imposition of a bargaining order as a remedy is typical of the matters Congress delegated to agency discretion for the resolution of labor conflicts.

The rule announced in *Armcor* and applied here ignores the Supreme Court's admonitions and leads to needless friction between the courts and agencies with, at best, marginal benefits for the litigants and employees. In outlining permissible *Gissel* orders, the Supreme Court recognized the complexity of the decision and clearly left it in the hands of the agency. *See* 395 U.S. at 612 n.32, 89 S.Ct. at 1939. The Board, in turn, recognizing the peculiarities of each *Gissel* case, has avoided the promulgation of precisely defined rules, instead treating each case on its facts. *See, e.g., General Stencils,* 195 NLRB 1109 (1972).

II.

Because I find no Congressional authority for the rule, I conclude that other reasons underlie its continued use. I perceive two reasons for the rule's vitality even though in practice it yields unpredictable results: first, the rule sounds so obviously good that one opposes it only at the risk of inveighing against motherhood and apple pie, and second, the rule can be manipulated to achieve the subjective ends of the judges as they apply it more or less strictly. I will take the risk, and focus on the second reason. That the rule can be manipulated to produce desired results is evident from the cases this court has decided since *Armcor.*[8] Judge Gibbons has already noted that it is "no secret" that a significant number of judges on this court have been signalling the Board that *Gissel* bargaining orders "are unwelcome in this circuit" while another group of judges is giving quite a different signal. *NLRB v. K&K Gourmet Meats, Inc.,* 640 F.2d 460, 470–71 (3d Cir. 1981) (dissenting opinion) (comparing, *inter alia,* cases cited in note 8, *supra*). The *Armcor* line of decisions took the tack of refusing to enforce *Gissel* orders which recognized the union's representation by concluding that the Board's opinions were so opaque that a remand would be necessary. Like Judge Gibbons, I had hoped that the Board had hit upon a formula for stating its reasons satisfactorily. *See K&K,* 640 F.2d at 471–72. That the present unsophisticated case was voted in banc proves that my hopes were ill-founded.

A superficial reading of the opinions here suggests that the court is split over the application of a settled rule to a given state of facts. I doubt that many perceptive observers of this court will be deceived. The dispute here is not over application of a rule, but over the existence of an entirely different precept: whether the NLRB has the power to order an employer to bargain with a union that has not obtained representation status by an election because of an employer's pervasive unfair labor practices. Although recognizing that *Gissel* is binding precedent, panels of this court have nonetheless tried to subvert it indirectly, focusing their denial of enforcement on the Board's procedural failures. A rule that is manipulated to achieve desired results is not a "neutral principal," and in my view the decisions applying it are not genuinely principled decisions because they do not rest on "analysis and reasons * * * transcending the immediate result * * *." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv.L.Rev. 1, 15 (1959).

The panels and in banc courts will continue to divide as long as the opinions are cast as disputes over application of this dubious precept, settled though it may be. The precedential impact of cases at this level of dispute is severely limited by the facts presented. This in banc offering contains no assurance that panels will apply the rule more evenhandedly because each subsequent case will be factually distinguishable, and it may be that similar cases will be before us in banc (for who is to say that thrice is the limit stop of jural masochism?) as the particular labor-management philosophy of the randomly selected panel members continues to produce inconsistent results.[9] *In fine*, the *Armcor-Hedstrom* rule

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[8] *Compare NLRB v. K&K Gourmet Meats, Inc.,* 640 F.2d 460 (3d Cir. 1981); *NLRB v. Craw,* 565 F.2d 1267 (3d Cir. 1977); *Hedstrom Co. v. NLRB,* 558 F.2d 1137, 1148 (3d Cir. 1977) (*Hedstrom I*); with *NLRB v. Garry Mfg. Co.,* 630 F.2d 934 (3d Cir. 1980); *Hedstrom Co. v. NLRB,* 629 F.2d 305 (3d Cir. 1980) (in banc) (Hedstrom II); NLRB v. *Daybreak Lodge Nursing and Convalescent Home, Inc.,* 585 F.2d 79 (3d Cir. 1978); *Kenworth Trucks of Philadelphia v. NLRB,* 580 F.2d 55 (3d Cir. 1978).

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permits a two-judge panel majority to foist on the Board its notions of our national labor policy in a given case or controversy, a practice directly contrary to the Congressional mandate which has lodged this responsibility in the NLRB.

III.

In addition to hostility to *Gissel* bargaining orders, I also detect in the *Armcor-Hedstrom* rule a distrust of the persons charged with making an initial determination of the necessity of a *Gissel* bargaining order, the administrative law judges. This view is confirmed by the *Baerga-Hargenrader* line of cases, in which this court has imposed increasingly rigorous factfinding requirements on Social Security Administration ALJs *only* when the decision of the ALJ is to deny social security disability benefits. *See Cotter v. Harris*, 642 F.2d 700, 708–712 (3d Cir. 1981) (Garth, J., dissenting). Such distrust, I suspect, stems from a belief that ALJs are second-class judges (if judges at all), marginally qualified, beholden to the employing agency, and, often, veterans of the agency whose cases they now decide. Many Article III judges, as well as scholarly critics and attorneys, consider the federal judiciary's life tenure, employment by a separate branch, and other indicia of independence to be singular assurances of impartial judgment and easily scorn agency "employees" who perform judicial functions without the full investiture of Article III privileges.

Accepting for purposes of argument that to be impartial judges must be independent of all political or employment pressures, I submit that the view that the ALJs are not sufficiently independent or competent is now so shopworn as to be totally obsolete. To the contrary, ALJs, though not yet annointed with life tenure, enjoy an independence that in my view is plainly sufficient to satisfy reasonable doubts.[10]

For example, although ALJs are considered agency personnel, they are selected by the Office of Personnel Management (OPM) independently of agency recommendation or rating, 5 U.S.C. § 5362, and cannot be removed from office without a hearing establishing good cause before the Merit Systems Protection Board 5 U.S.C. § 7521. Their pay is controlled by the Civil Service Commission. ALJs can be disqualified from a case only upon petition by either the agency or a private party. 5 U.S.C. § 556(b). Similarly, cases are assigned on a rotating basis so that the agency cannot "fix" the result by choice of judge. 5 U.S.C. § 3105. They are not subject to the whim of the agency. ALJs are strictly independent of investigative or prosecutorial personnel in the agency. 5 U.S.C. § 554(d).

Moreover, the selection process for ALJs should inspire more respect for this office than is generally extended by Article III judges; it is a process that requires rigorous inquiries into the background and competence of the candidates. Applicants must supply twenty professional references. A minimum of seven years of litigation experience is required to meet the threshold selection requirement. A test opinion must be drafted and evaluated on the basis of many factors including clarity and conciseness. *See* Office of Personnel Management, Announcement No. 318, Administrative Law Judge 13–16 (1979). Finally, after the various scores have been combined, applicants considered tentatively eligible are interviewed by a special panel usually composed of an OPM official, an attorney qualified in the field of administrative law, and an agency official. This committee submits a recommendation to the director of OPM who makes final eligibility determinations among qualified candidates. Once appointed to an agency, an ALJ is not subjected to the usual probationary employment period for agency employees, further insuring ALJ independence. 5 U.S.C. § 3321.

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[9] As a dispute over application of law to facts, this case does not meet our usual requirements for rehearing in banc. This court's internal Operating Procedure VIII B. provides: "This court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controversial issue is solely the application of the law to the circumstances of the case."

[10] *See generally* Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 Admin.L.Rev. 109 (1981); Admin. Conference of the United States, Federal Administrative Law Judge Hearings 7–20 (1980). *Cf. Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980) (ALJ has standing to challenge attempted interference with decisional independence by Social Security Administration).

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The Supreme Court recognized in *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 28947, 57 L.Ed.2d 895 (1978), that ALJs are "functionally comparable" to judges employed in the judicial branch and conferred on them absolute immunity for judicial acts. In doing so the Court observed:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge. * * * More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgement because they were required to perform prosecutorial and investigative functions as well as their judicial work * * * and because they were often subordinate to executive officials within the agency * * *. Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Adminstrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners.

438 U.S. 513–14, 98 S.Ct. at 2914 (citations omitted).

The rigors of the selection procedure and the statutory protections of ALJ independence suggest to me that the federal judiciary need not look down its collective nose at ALJ decisions. *Cf. Eastern Engineering & Elevator Co., Inc. v. NLRB,* 637 F.2d 191 (3d Cir. 1980) (NLRB must respect special competence of ALJ who has the benefit of first-hand observation of witnesses). I am not proposing that the judiciary abandon all distinctions between ALJs and Article III judges when reviewing decisions, for Congress has clearly intended that review be on a different level. Of course, in the review of the choice and application of legal precepts, a judicial function dramatically different from reviewing factfinding, I have not been loath to criticize either the ALJ or the agency. *See Allegheny General Hospital v. NLRB,* 608 F.2d 965, 967–69 (3d Cir. 1979). But I perceive that under the legislative schema, at least in the context of factfinding, the difference may well be more tenuous than our decisions in the *Gissel* and *Hargenrader* context indicate.

IV.

I concur in the judgment enforcing the bargaining order in this case, but I reject the standard applied to the Board's decision. I reject the standard because it represents unwarranted interference with choices committed by Congress to the agency and thereby impedes the development of a coherent national labor policy by the NLRB. I also reject the standard because it is a rule applied to achieve results not based on the reasons given. I am convinced that as long as the court continues to anatomize the Board's reasons for imposing a bargaining order, these cases will continue to be self-inflicted wounds that will drain our energies; energies that should be husbanded, not dissipated.

I.

GARTH, Circuit Judge, concurring in part and dissenting in part, with whom JAMES HUNTER, III, and WEIS, Circuit Judges, join: I agree with the majority that there is substantial evidence to support the Board's findings of unfair labor practices. I also agree with the majority's reaffirmance of our precedents which require that the Board articulate its reasons for imposing a bargaining order. Maj. op. typescript at 11; *Hedstrom Co. v. NLRB,* 629 F.2d 305 (3d Cir. 1980) (*en banc*) (*Hedstrom II*); *NLRB v. Armcor Indus., Inc.,* 535 F.2d 239 (3d Cir. 1976). I do not agree, however, that either the ALJ or the Board complied with our

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articulation requirement and thus I would deny enforcement of the bargaining order.

II.

Both the majority and I recognize this court's insistence that the Board explain why it imposed a bargaining order rather than ordering a re-run election. In this respect we are all aware that the Supreme Court has admonished the Board that elections are the preferred way to ascertain whether a union has majority support. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 602, 89 S.Ct. 1918, 1934, 23 L.Ed.2d 547 (1969). The Second Circuit has summarized the law governing the Board's choice of remedies for employer unfair labor practices committed during a representation election as follows:

> Where an employer's misconduct taints a prior union election by adversely affecting the employees' freedom of choice, the traditional remedy, frequently characterized as the "preferred" or "superior" remedy, see *NLRB v. Jamaica Towing, Inc.,* 602 F.2d 1100, 1104 (2d Cir. 1979); *Donn Products, Inc. v. NLRB,* 613 F.2d 162, 165 (6th Cir. 1980); *Peerless of America, Inc. v. NLRB,* 484 F.2d 1108, 1122 (7th Cir. 1973), has been to (1) vacate the election, (2) enjoin the employer from engaging in such misbehavior, (3) require him to post "contrition" notices to his employees, disavowing any future interference, and (4) direct him to give union representatives reasonable access to the employees. This is then followed by a new Board-supervised election. The issuance by the Board of a bargaining order in lieu of a cease-and-desist order is only proper if, after an objective review of all of the relevant surrounding circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, it may reasonably be concluded that the employees will be unable to exercise a free choice in an Board-supervised rerun election.

Thus, to deny an election, and by so doing, to disenfranchise the employees, the circumstances must be egregious, and the reasons for the denial must be explained.[1] The only difference between the majority's opinion and this opinion is that whereas the majority is satisfied with the Board's "explanation", I am not. In order to explain my position respecting the absence of explanation and articulation by the Board in this case, a brief review of the context in which the problem arises is necessary.

Any discussion of bargaining orders must start with *Gissel* which established two categories of cases in which bargaining orders may be imposed. I agree with the majority that here we are concerned with a *Gissel II* case. *See* maj. op., typescript at 11, n.1. In *Gissel II* cases—"less extraordinary cases marked by less pervasive practices which nevertheless still have the tendency to undermine majority strength and impede the election process", *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969)—it first must be shown

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that at one point the union had a majority. The Board then should consider:

> the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and or ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue * * *

Id.

We have implemented this teaching by persistently requiring that the NLRB explicate the basis for the imposition of a bargaining order. *See Kenworth Trucks v. NLRB,* 580 F.2d 55, 59–60 (3d Cir. 1978); *NLRB v. Craw,* 565 F.2d 1267, 1271–72 (3d Cir. 1977); *NLRB v. Eagle Material Handling, Inc.,* 558 F.2d 160, 166–68 (3d Cir. 1977); *Hedstrom Co. v. NLRB,* 558 F.2d 1137 (3d Cir. 1977) (*Hedstrom*

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[1] Judge Weis has expressed his views as to why bargaining orders should not be issued in an ordinary case:

> Routine issuance of bargaining orders after a review of the facts and a conclusory finding that the unfair labor practices were "egregious," "prevasive" or "chilling" is simply unacceptable. Bargaining orders have been defended as a necessary sanction to deter misconduct by an overreaching employer, but such orders do not affect the employer alone—they also fall on employees. It is they who lose the right to vote in favor of one union or another or none at all—rights that the National Labor Relations Act guarantees to them. Moreover, the Board's remedies should right the wrong—not act as punitive measures. *Republic Steel Corp. v. NLRB,* 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940).
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> In imposing bargaining orders, the Board is subordinating the employee's right to express his choice to its forecast as to who would have won the election if the employer had maintained laboratory conditions. When that prediction is little more than a guess, however, the Board's paternalism does not justify depriving the employees of their vote. The extreme response of a bargaining order should be the exception and not the norm—a principle recognized by this court in *Armcor* and *Hedstrom.*

Electric Prods. Div. of Midland-Ross v. NLRB, 617 F.2d 977, 991 (3d Cir.), *cert. denied,* ——— U.S. ——, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980) (Weis, J., dissenting) (footnotes omitted).

I); *NLRB V. Armcor Indus., Inc.,* 535 F.2d 239 (3d Cir. 1976). This requirement aids our review of a petition for enforcement by helping to ensure that the Board has given full consideration to the preferred alternative of a re-run election. *See Armcor, supra* at 245.

In the *en banc* decision of *Hedstrom II,* we wrote:

> The primary purpose of this requirement is to assist a reviewing court in determining whether the standards of *gissel* have been satisfied. Since the propriety of a bargaining order depends upon the existence of certain circumstances, it is fitting for the board to "explain with specificity the results of the unfair labor practices and, in particular, the unlikelihood of a fair election," *NLRB v. Craw,* 565 F.2d 1267, 1272 (3d Cir. 1977), before seeking enforcement of such an order. This is not to say, of course, that a reasoned elaboration of the basis for a bargaining order by itself will assure that a careful weighing of the evidence has occurred, but only that it should help to further such an aim.

Id. at 309 (footnote omitted).

Our court held in *Hedstrom II* that the Board must provide a reasoned analysis, setting forth those factors justifying the imposition of a bargaining order. The analysis need not be elaborate, but the Board must:

> "estimate the impact [of the unfair labor practices], taking into account the factors in the particular case which are indicative of actual effect or which plausibly, in the light of existing knowledge, would contribute to or detract from an actual inpact," and appraise "those factors which might reasonably have a bearing" on the likelihood of a fair rerun election.

Hedstrom II at 309 *quoting Peerless of America, Inc. v. NLRB,* 484 F.2d 1108, 1118 n. 16 (7th Cir. 1973). *Peerless* was also quoted in *Kenworth Trucks of Philadelphia v. NLRB,* 580 F.2d at 60, *NLRB v. Craw,* 565 F.2d at 1271, and *NLRB v. Armcor Industries, Inc.,* 535 F.2d at 245.

Hedstrom I had resulted in a remand to the Board because no such analysis, articulation or explanation had been made by the Board in justifying the imposition of a bargaining order. Thereafter, in *Headstrom II,* the Board, complying with our directive, explained that a bargaining order was necessary and that a rerun election could not fairly be ordered. On the record of that case the Board found that:

> the total effect of the threats of closure, and the numerous other unfair labor practices against the background of the general awareness of the Fitchburg experience, was to instill in employees a strong fear of loss of employment that would continue to be operative even in the event of a second election. This fear could only have been exacerbated by the publication of the newspaper editorial.
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> We find that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, through present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.* * *"[11] This conclusion is not significantly affected by the reviewing court's reversal of our finding that President Ketcham violated Section 8(a)(1) by threating to fire an employee. The reversal does not disturb any of the findings concerning the threats of plant closure, or the overall context in which those threats occurred, which form the basis for our conclusion that a bargaining order is warranted.
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> [11] *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. at 614–615, 89 S.Ct. at 1940.

(Appendix *Hedstrom II* at 10a) (footnotes 10 and 12 omitted).

In further compliance with our requirements, the Board also reasoned and explained that the passage of time had not increased the prospects of a fair election:

> the effect of Respondent's threats of plant closure and its extensive unfair labor practices during the course of the campaign was to instill in employees the fear that they would lose their jobs through plant closure if the Union won the election. There is nothing to indicate that this fear has been erased during the past 3 years. To the contrary, recent events indicate that Respondent's vigorous opposition to the Union continues to result in unfair labor practices, thereby sustaining, reinforcing, or increasing the fear that the Company might still carry out its earlier threat to close operations if the Union prevails.

(Appendix 11a–12a). Finally, the Board reexamined our reversal of the Section 8(a)(5) violation and concluded that even absent that violation, a bargaining order was necessary.

A majority of this court held that the Board's explanation satisfied our mandate of a "reasoned analysis."

Our court is not alone in requiring the Board to explain its reasons for rejecting a re-run election in favor of imposing a bargaining order.[2] The Seventh Circuit, whose opinion in *Peerless of America Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973) was relied upon by this court in *Hedstrom II, Craw* and *Armcor*, has again forcefully reiterated an identical instruction to the Board in *Red Oaks Nursing Home v. NLRB*, 633 F.2d 503 (7th Cir. 1980). The court in that case found the Board's reasons for imposing a bargaining order insufficient. The ALJ, in an opinion adopted by the Board, had stated:

> I do not, however, consider the unfair labor practices committed to be minor in view of their nature, number, and extent of probable impact throughout the bargaining unit. In my opinion, neither the factors recited above nor the Board's traditional remedies for Section 8(a)(1) violations render it likely that another election would result in a truer measure of unihibited employee choice than the authorizaiton cards executed on or before August 22, 1977. I therefore in all the circumstances of this case find that the Respondent's unfair labor practices have undermined the Union's majority and make the holding of a fair election most unlikely, and recommend that the petition in Case 25–RC–6717 be dismissed and the Respondent be ordered to bargain on request.

Quoted in *id.* at 509.

In denying enforcement of the Board's order, the Seventh Circuit wrote:

> the opinion of the ALJ contains no consideration of the effectiveness of the ordinary remedies, the continuing impact of the unfair labor practices on the election process, and the probability of repeated violations, which are also prerequisites for a bargaining order. *See Peerless, supra,* 484 F.2d at 1118. By not stating separately why the circumstances of this case require a bargaining order, the
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> Board appears in effect to be automatically issuing bargaining orders on the basis of virtually *any* unfair labor practice, a policy clearly not in accordance with *Gissel. See NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998, 103 LRRM 2066 (4th Cir. 1979).

Id. at 509–510 (footnote omitted, emphasis in original).

It is thus evident that this Circuit is not the only circuit that requires the Board to provide an adequate articulation of reasons before it issues a bargaining order.

Requiring the Board to articulate its reasons for imposing a bargaining order does not represent an unwarranted judicial interference with administrative procedure. Indeed that requirement, as we have pointed out, stems from the Supreme Court's instructions in *Gissel,* and from fundamental rules of administrative law. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196–97, 67 S.Ct. 1975, 1577, 91 L.Ed. 1995 (1947); 5 U.S.C. § 557(c)(3)(A) (1976). The Supreme Court has consistently instructed that

> [i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, M., St.P.& P.R. Co.*, 294 U.S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023.

Chenery at 196, 67 S.Ct. at 1577.

This basic requirement which focuses on effective judicial review cannot be deemed to constitute an undue burden on the Board, and does not intrude upon internal Board procedures in a manner proscribed by the principle expressed in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). *See Kenworth Trucks v.*

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[2] *See, e.g., NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 211 (2d Cir. 1980); *Chromalloy Mining and Minerals v. NLRB*, 620 F.2d 1120, 1129–30 (5th Cir. 1980); *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988, 998 (4th Cir. 1979); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1978); *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1152 (9th Cir. 1977); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973).

NLRB, 580 F.2d 55, 61–63 (1978). Our requirement of reasoned articulation does no more than mandate that the Board inform us of the basis upon which its decision is predicated. "When the Board * * * exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 197 [61 S.Ct. 845, 853, 85 L.Ed. 1271]." *NLRB v. Metropolitan Insurance Co.,* 380 U.S. 438, 443, 85 S.Ct. 1061, 1064, 15 L.ED.2d 951 (1965). The obligation of reasoned analysis is essential to perform our reviewing function and to guarantee the integrity of the administrative process.

III.

I cannot agree with the majority that the opinion of the administrative law judge adopted by the Board in this case, satisfies the standard set forth in *Hedstrom II.* When contrasted with the analysis and articulation of the Board in *Hedstrom II,* it is quite apparent that the conclusory discussion of the administrative law judge in this case is woefully deficient. It is even less detailed than the analysis rejected in *Red Oaks.* Virtually the entire thrust of the ALJ's discussion here was focused *not* on the reasons why a fair re-election was impossible, but rather on the reasons why the initial election of December 30, 1977 had to be set aside. After summarizing the unfair labor practices found, he stated:

> In sum, Respondent sought to impress upon the employees the futility of voting the Union in, and that there would be harsher dealing and reprisal if they did. The mass of violations of Section 8(a)(1), (3), and (4) of the Act were egregious unfair labor practices, which had the tendency to undermine, and undermined, the Union's majority strength in the election of December 30, 1977, and prevented the holding of a fair election.
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> By refusing to recognize and bargain with the Union, as requested on November 11, 1977, and instead engaging in this course of unlawful conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent also violated Section 8(a)(5) of the Act, *Trading Port, Inc.,* 219 NLRB 298, 300–301 (1975).
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> Under the circumstances of this case, the sentiment of the unit employees expressed through the Union authorization cards is a more reliable measure of their desires on the issue of representation than the election held December 30, 1977. To remedy Respondent's unfair labor practices, including its Section 8(a)(5) refusal to bargain, a bargaining order is necessary, whether the violations be viewed as category one unfair labor practices under *Gissel, supra, see J.P. Stevens & Co., Inc., Culistan Division v. N.L.R.B.,* 441 F.2d 514, 521–522 (C.A. 5, 1971), *cert. denied* 404 U.S. 830 [92 S.Ct. 69, 30 L.Ed.2d 59], or as category two unfair labor practices, *see N.L.R.B. v. Kaiser Agricultural Chemicals etc.,* 473 F.2d 374, 382–383 (C.A. 5, 1973). The bargaining order will be issued as of the end of October 1977, when Respondent embarked on its course of unlawful conduct.

The reasoning of the ALJ was that since unfair labor practices had prevented the holding of a fair election and had undermined the union's majority strength, a bargaining order was necessary. At no time did he satisfy the *Hedstrom II* obligation to estimate the impact of the various violations and appraise "those factors which might reasonably have a bearing on the likelihood of a fair re-run election." *Hedstrom II* at 309. The ALJ never discussed in this section of this opinion why "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight * * *" *Gissel* 395 U.S. at 614, 89 S.Ct. at 1940. Only in the conclusions of law section of his opinion does the ALJ state, unsupported by any articulation of reasons, that "these [pre election] unfair labor practices cannot be corrected by conventional remedies, including a rerun election." App. at 50. He failed completely to address, let alone answer, the crucial inquiry whether there was a likelihood that the unfair labor practices would recur, a consideration that *Gissel* indicates should be taken into account. *Gissel* at 614, 89 S.Ct. at 1940.

Moreover, the ALJ and the Board, in holding that a bargaining order was necessary under *Gissel II,* did not distinguish between *pre-* and *post-card* majority violations. *See Rapid Mfg. Co. v. NLRB,* 612 F.2d 144 (3d Cir. 1979). I agree with the majority that unfair labor practices that occur before a card majority is attained, may, under certain circumstances, support the imposition of a *Gissel II* bargaining order. Yet in my opinion, an inference is present that *pre-card* (as contrasted with *post-card*) majority unfair labor practices do not significantly undermine the union's majority strength. This inference can be drawn because in *Gissel II* cases, where a majority is required, the union obviously gains adherents even after the occurrence of *pre-card* majority unlawful conduct. Normally such pre-majority violations would provide less support for the imposition of a bargaining order than would post-majority violations. Accordingly, when finding that the possibility for a fair re-run election is slight, the Board, if it relies on *pre-card* majority unfair labor practices, must carry a heavier burden in explaining why this conduct supports its imposition of a bargaining order. No such burden has been satisfied here by the Board. Indeed the ALJ and the Board failed even to distinguish between *pre-* and *post-card* violations. Thus I cannot agree with the majority that the ALJ's opinion, which the Board adopted, satisfies the *Gissle* or *Hedstrom II* requirements.[3]

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I do not believe that it is incumbent upon the members of this court to point out constantly and repetitively those factors which the Board must consider before it concludes that a fair re-run election cannot be held and that a bargaining order must be imposed. The Board, not the court, has the statutory burden of determining which remedy is appropriate. 29 U.S.C. § 160(c) (1976). *See Gissel* at 612 n. 32, 89 S.Ct. at 1939.[4] Certainly this court alone has furnished more than ample guidance to the Board, as to what is expected in meeting this burden.

At the last, the Board in its review of the ALJ's findings, should have considered: the closeness of the vote; the extent to which the impact of the unfair labor practices persisted in the minds of the employees and whether this impact likely would have tainted a future election; the change in the composition of the workforce; the status of the Mennen contract; the weight to be given *pre-card* majority violations; the effect of the passage of time; the probability of repeated violations by Permanent Label; and the effectiveness of perferred traditional remedies. There are undoubtedly other factors and facts that the Board should have considered, but since this court has repeatedly instructed the Board in various contexts as to what constitutes a proper analysis, *see Hedstrom II* at 311–12; *Rapid Mfg. Co., supra; NLRB v. Garry Mfg. Co.*, 630 F.2d 934 (3d Cir. 1980) (Weis, J., dissenting); *Electrical Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 990 (3d Cir.) *cert. denied*, —— U.S. ——, 101 S.Ct. 210, 66 L.Ed.2d 91 (1980) (Weis, J., dissenting), I am loathe to once again tread the same ground.

I do not believe that we as a court should be forced to infer from the ALJ's opinion, which lacks a reasoned articulation, what the ALJ intended to explain to justify the bargaining order. The majority in its interpretation of the ALJ's opinion, maj. op., at 520, has for the first time supplied the required articulation of reasons which neither the

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[3] I recognize that the "articulation" of the administrative law judge which was adopted by the Board in *Kenworth Trucks v. NLRB*, 580 F.2d 55 (3d Cir. 1978) could be equated in some respects to the articulation of the Board which we reject in this case. But I am satisfied that *Kenworth* does not compel the enforcement of the Board's order here. Nowhere in *Kenworth* did the Court address the sufficiency of the ALJ's explanation. Instead the *Kenworth* panel, as Chief Judge Seitz's opinion recognizes, maj. op., at 521 n.2, focused on whether the Board itself, as distinct from the ALJ, was required to analyze and articulate the reasons for the issuance of a bargaining order. After first holding that the Board had an independent obligation to formulate the reasons for issuing a bargaining order, the court on rehearig held that a separate articulation was not necessary the Board could simply adopt the ALJ's explanation. After having decided the central issue before it, the court then proceeded to enforce the Board's order, withour assessing the sufficiency of the ALJ's articulation of reasons.

On its face, the discussion implicitly accepted by the court in *Kenworth* is not dissimilar to the conclusory discussion found in this case. However, as I have pointed out, the court in *Kenworth* did not direct its attention to the adequacy of the ALJ's analysis. Thus, *Kenworth* may not be construed as holding that a conclusory analysis and conclusory articulation of reasons for the imposition of a bargaining order is all that is required. Even if *Kenworth* was construed as standing for such a proposition, our decision in *Hedstrom II* filed some two years after *Kenworth* and issuing from an *en banc* court clearly demonstrates that the type of conclusory statement found in *Kenworth* may not be relied upon to support a bargaining order.

Hence, whatever vitality may have once been attributed to such a construction of *Kenworth*, has been thoroughly undermined by *Hedstrom II*, and cannot fairly be read as diluting the *Hedstrom II* standard reaffirmed today.

[4] *Cf. Red Oaks Nursing Home v. NLRB*, 633 F.2d 503, 509 (7th Cir. 1980) ("typically, this court has reached the merits of the propriety of the order, in part to avoid further compromise of employee rights inherent in the delay of remand. * * * Thus, the effect of the Board's continuing neglect to fashion standards for the exercise of its discretion is to place exclusive reliance on judicially prescribed standards for determining the need for bargaining orders, a practice not contemplated by section 10(c) of the Act.")

ALJ nor the Board furnished. It is possible that these are the same reasons which the Board would have articulated in explaining its denial of a re-run election. But then again, the possibility exists that the Board's explanation may have differed from that now provided by the majority. It is for that very reason that the Supreme Court emphasized the following:

> simple but fundamental rule of administrative law * * * that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the
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> **535**
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> grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

Securities and Exchange Commission v. Chenery, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).

Because in this case the Board has once again failed to comply with our oft-repeated instructions, I would deny enforcement to its order so that a re-run election could immediately be ordered [5] or at the very least, I would remand for the explanation which this court requires. Thus, to the extent that the majority would give effect to the bargaining order, I respectfully dissent from the majority's opinion.

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[5] The longer a re-run election is delayed the less likely the union's chances of reversing the outcome of the first election. *Gissel* at 611 n.30, 89 S.Ct. at 1938. A remand also raises the possible need for further judicial review, and hence further delay.

Revco D.S., Inc., and/or White Cross Stores., No. 14 v. NLRB

653 F.2d 264 (6th Cir.), July 1, 1981—243 NLRB 261

On petition to review and cross-petition to enforce Board Order

Before EDWARDS, Chief Judge, KEITH, Circuit Judge, and CECIL, Senior Circuit Judge

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KEITH, Circuit Judge: This case is before us on a petition for review and cross petition for enforcement of an order of the National Labor Relations Board. The Board found that the employer

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in this case violated Section 8(a) of the National Labor Relations Act [1] by refusing to recognize and bargain with the Union as the duly certified representative of its employees. The Board's decision and order is reported at 243 N.L.R.B. No. 35.

On April 21, 1978, a representation election was held at the employer's retail store at Penn Mall in Pittsburgh, Pennsylvania. Seven votes were cast for the Retail Store Employees' union; four were cast against the union.

The company objected to the election, claiming that union misconduct had tainted the election results. The Regional Director conducted an administrative investigation of the objections. On June 30, 1978, the Regional Director issued a Report and Recommendation on Objections in which he concluded that company's objections raised no "substantial or material issues with respect to conduct affecting the results of the election." Accordingly, the Regional Director recommended that the company's objections to the election be overruled and that the union be certified as the exclusive bargaining representative of the company's employees. On September 14, 1978, the Board adopted the Regional Director's findings and recommendations and certified the Union.

In order to obtain appellate review of the Board's certification of the union, the company refused to bargain with the union. The company claimed that it refused to bargain because the union was improperly certified. The Board rejected the company's claims, issued a bargaining order and ordered the customary notices to be posted.

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[1] Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1); (5) provide in relevant part:

> It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * * (5) to refuse to bargain collectively with the representatives of his employees * * *

Section 7 of the Act, 29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *

A

In this appeal, the company challenges the fairness of the election. We note at the outset that the company has a heavy burden to justify overturning a secret ballot election. As we noted in *Harlan # 4 Coal Co. v. N.L.R.B.*, 490 F.2d 117, 120 (6th Cir.), *cert. denied*, 416 U.S. 986 94 S.Ct. 2390, 40 L.Ed.2d 763 (1974), "[C]ongress has entrusted to the Board considerable latitude in resolving disputes concerning representation, and our task is to determine whether the Board has acted arbitrarily in the exercise of its wide degree of discretion." *See also Randall Burkart/Randall Div. v. NLRB*, 638 F.2d 957 (6th Cir. 1981); *NLRB v. Pinkerton's*, 621 F.2d 1322 (6th Cir. 1980).

Most of the company's objections dealt with alleged union misconduct during the pre-election campaign. The company claimed that the union made numerous misrepresentations and put out unfair propaganda. The NLRB is cautious in setting aside elections on these grounds. The standard that the Board applies is whether pre-election misstatements "may reasonably be expected to have a significant impact on the election". *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 224 (1962), *reaffirmed in General Knit of California, Inc.*, 239 NLRB No. 101 (1978).[2]

The regional director did find that a union agent had stated to employees that a collective bargaining agreement could be obtained by January 1979, and that another union agent stated that the union had 1 year in which to obtain an agreement. However, the regional director concluded

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that these instances did not warrant overturning the election, since the union had not promised employees tangible benefits which it had the exclusive power to deliver nor had it misrepresented any existing material facts.

Similarly, the company complained that the employees were promised $50 per week in strike benefits should a strike occur, that their strike effort would be joined by one of the union's sister locals, and that local Pittsburgh customers would not cross the picket line anyway. The regional director concluded that the evidence did not support the allegations. However, even assuming the truth of the allegations, the regional director concluded that any discussion of strike benefits was not related to the election results, nor did it affect how the employees voted.

In addition, the company claimed that employee Paul Schwartz informed a fellow employee that if it wasn't for the union campaign, she would not have a job. Here, the regional commissioner accepted the fact that this statement was made. However, he pointed out the Schwartz was not an officer or agent of the union, and there was no basis for attributing the statement to the union. At best, the commissioner thought that Schwartz's statement was simply a private opinion.

The company further complained about remarks made by two employees during the campaign. These remarks were to the effect that the company had cut employee working hours because of a bonus that was given to a manager, that only 3% of the company's profits went to payroll, and that the Pittsburgh store could easily afford to pay $.50—$.75 per hour higher wages. Here, the regional director pointed out that the people in question were employees who supported the union campaign. The director found no basis for attributing these remarks to the union. The director characterized the employee statements as simply uninformed speculation, and concluded that any employee voter would readily recognize and discount assertions by co-workers, especially where there was no showing that the union was aware of or ratified the employees' conduct.

We agree with the regional director and the Board that the company's allegations are insufficient to warrant overturning the election or conducting an evidentiary hearing. In addition to the Board's above-outlined reasons for rejecting the company's claims, we note that the company at no time was precluded from making an effective reply to the alleged misrepresentations. The pre-election campaign was conducted for about a month prior to the election. As the Board notes in its brief, the company was not helpless to correct any misunderstanding.

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[2] This court has upheld the Board's *Hollywood Ceramics* test. *NLRB v. Pinkerton's*, 621 F.2d 1322, 1327 (6th Cor. 1980); *Harlan # 4 Coal Co. v. NLRB*, 490 F.2d 117, 124 (6th Cir.), *cert. denied*, 416 U.S. 986, 94 S.Ct. 2390, 40 L.Ed.2d 763 (1974); *NLRB v. Dean Foods Co., Inc.*, 421 F.2d 644, 665 (6th Cir.), *cert. denied*, 398 U.S. 939, 90 S.Ct. 1843, 26 L.Ed.2d 271 (1970).

B

In addition to the above-stated "campaign objections", the company also claimed that there was misconduct on election day. The employer presented two witnesses, Emmanuel Zimmerman, the company supervisor of stores for the greater Pittsburgh area, and Paul Christopher, merchandise manager. Zimmerman claimed that on the day of the election, union representative Jack Lewis came into the store and pointed at each of the employees present, but did not say anything to them. Zimmerman further testified that Lewis then walked over to where one employee was standing at the back of the store, grabbed his shoulder, and said "Hi, Bill", and started talking to him. Zimmerman said that he permitted the employee and Lewis to converse for about 30 seconds, after which time he instructed the employee to work in the front of the store. Christopher stated that on the day of the election he observed union representatives in the store on two occasions, and on each occasion they spoke to a single employee.

The regional director concluded that there was no objectionable conduct. The director pointed out that any conversation with employees occurred away from the polling area about three hours before the starting time of the election. There was no evidence that any of the remarks made by the union representatives were improper.

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We have no problems with the Board's determination so far. The company has a stiff burden to show circumstances warranting the overturning of a union election. We agree with the Board that the circumstances presented in this case do not warant additional inquiry at a hearing or overturning the election.

The final argument the company makes is that the Regional Director overlooked additional evidence supplied by company supervisor Zimmerman. This evidence shows that on the day of the election union agent Lewis, accompanied by company supervisor Zimmerman, visited each of the employees at the store. The purpose of this joint visit was to notify the employees that the polls were open. According to Zimmerman, when employees Kevin and Judy Wilson expressed uncertainty over whether they were going to vote, Lewis gave them a "look". Thereupon, both indicated that they would vote.

The company alleges coercive conduct. However, its own supervisor, Zimmerman, who was present at the scene, did not allege that any threatening or menacing conduct occurred. Accepting the company's assertions as true, there is no showing that Lewis coerced the Wilsons, or that he did more than register disapproval when they said they were undecided about voting. As the Board notes in its brief, Board elections would be fragile indeed if such conduct required that they be set aside. We must agree with the Board that the company's allegations do not warrant an evidentiary hearing.

II

The company also makes a procedural objection. The company claims that the "record" before the Board was deficient because it did not include the affidavits uncovered during the Regional Director's investigation.

In several recent decisions this court has ruled that "the Board abuses its discretion by adopting the report of the Regional Director when the Regional Director fails to transmit to the Board the evidence relied upon by the Regional Director." *NLRB v. North Electric Co.*, 644 F.2d 580 (6th Cir. 1981), *citing NLRB v. Curtis Noll Corp.*, 634 F.2d 1027, 1029 (6th Cir. 1980). *See also Prestolite Wire Div. v. NLRB*, 592 F.2d 302 (6th Cir. 1979).

We find these authorities to be distinguishable. This Court has never retreated from its position in *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), *cert. denied*, 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967) (Cecil, J.) that:

> It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. Mere disagreement with the Regional Director's reasoning and conclusions do[es] not raise "substantial and material factual issues." this is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagree-

ments and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof. [Citations omitted.]

In the above-cited cases, this court found that the company's allegations required either a hearing, *NLRB v. Curtis Noll Corp., supra; Prestolite Wire Div. v. NLRB, supra,* or at least required the Board to "interpret * * * and giv[e] weight to the evidence developed by the Regional Director." *NLRB v. North Electric Co., supra* at 584. Our examination of the company's allegations in this case, outlined above in part I, convinces us that the company's allegations are not sufficient to require a remand to the Board to consider the additional affidavits. There are simply not sufficient substantial and material issues raised. *See Reichart Furniture Co. v. NLRB,* 649 F.2d

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397 (6th Cir. 1981); *Randall, Burkart/Randall Div. v. NLRB,* 638 F.2d 957 (6th Cir. 1981); *Birmingham Ornamental Iron Co. v. NLRB,* 615 F.2d 661 (5th Cir. 1980); *Prestolite Wire Div. v. NLRB, supra* at 305-06 (citing cases). *See also Fotomat v. NLRB,* 634 F.2d 320 (6th Cir. 1980).

Courts should be wary of reversing the Board on procedural irregularities, absent evidence of prejudice. All such reversals do is cause further delays and add to the already unfortunate backlog of NLRB cases pending before this court. As Judge Cecil wrote in a related context:

> If a hearing is required to be held on all exceptions to an election or report of a Regional Director, it would unduly lengthen and prolong labor unrest, contrary to the very purposes of the National Labor Relations Act.

NLRB v. Tennessee Packers, Inc., supra, 379 F.2d at 178. *See also NLRB v. Basic Wire Products, Inc.* 516 F.2d 261, 266 (6th Cir. 1975) ("were we to mandate hearings every time a losing party cries 'foul,' we would frustrate the policy of the Act that calls for prompt certification of a properly victorious bargaining representative.")

Accordingly, the company's petition to review the Board's order is denied, and the Board's cross-petition for enforcement is granted.

Kenneth and Mary M. McGlaughlin, co-partners d/b/a Hudson-High Super Duper v. NLRB

652 F.2d 673 (6th Cir.), July 2, 1981

On petition to review Board Order

Before LIVELY, KEITH and MERRITT, Circuit Judges

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Kenneth and Mary McGlaughlin, co-owners of a Super Duper Market in Columbus, Ohio, petition this Court to review an NLRB decision (247 N.L.R.B. No. 199) that they violated § 8(a)(1) of the National Labor Relations Act by coercively interrogating a job applicant concerning his union activities, and § 8(a)(3) by refusing to hire that applicant because of his union activities. They also request that this Court deny enforcement of the Board's order, which requires that the applicant be offered immediate employment in the position applied for (or one substantially equivalent) and that he be given backpay to the date he would have commenced employment. The NLRB cross-petitions for enforcement of its order. 29 U.S.C. §§ 160(e) and (f).

The case arises from petitioners' failure to hire a job applicant for the position of produce clerk. Shortly after the super market opened under the petitioners' ownership, vacancies appeared imminent in two of its produce positions—one because a clerk failed to appear for work and the other because a clerk planned on leaving

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the job to return to college. Petitioner Kenneth McGlaughlin told his manager to contact Gary Motz, who had earlier applied for a position in the produce department, to see if he was still interested in employment there. At the time Motz worked full-time as a truck driver and part-time as a produce clerk at another store. The focal event of the case is a telephone conversation between Douglas Jones, the manager of petitioner's store, and Motz. After reiterating his interest and availability for the position, Motz told Jones that he was still working at the other grocery store but was on strike supporting a union recognitional drive. The two then argued about the value of unions. The close of the conversation is disputed.

Petitioners claim that Jones simply thanked Motz for his time and said he had all the information he needed. Motz testified, the administrative law judge found, and the Board argues, that Jones told Motz he would be wasting his time if he came to the store to work out any further details of the job. That was the final contact between the parties. The clerk who had planned to return to college decided to stay on at the market, and petitioners hired no one in Motz's stead.

Charges were filed with the NLRB shortly thereafter. After a hearing the administrative law judge found that petitioners had violated §§ 8(a)(1) and (3) (App. 91–106). On review the Board upheld the bulk of the administrative law judge's decision (App. 106–14), but it modified the remedy. The Board found that when contacted by Jones, Motz was being considered for immediate employment to replace the employee who did not appear for work, and not to replace the student (*id.* at 110 & n.6). The Board therefore altered the remedy to require petitioners to offer Motz employment in the same or similar position regardless of whether one had later become available, and ordered backpay to the date Motz would have commenced work had he been hired shortly after his phone conversation with Jones.

Petitioners challenge the Board's decision on three grounds. First, they argue that the evidence does not demonstrate that the phone conversation, including the discussion about unions, amounted to an interrogation, nor that any coercive element existed. The Board argues that Jones' expression of anti-union sentiment and questioning Motz as to his sympathies, especially in light of the fact that Motz was not hired, lent coercive overtones to the conversation. Petitioners' second argument is that the decision not to hire was based upon legitimate economic reasons, *viz.* falling produce sales and the decision of the college student to remain on the job. The Board responds that the decision not to hire Motz was motivated solely by anti-union animus, evidenced by Jones' complete about-face during the phone conversation. The fact that later economic considerations could support a decision not to hire a produce clerk cannot serve as a post hoc justification for a decision that at the time it occurred was based upon illegal motives. Petitioners state finally that the Board erred in modifying the administrative law judge's remedy, and they rely again on the argument that no position in the produce department was available or filled by any other applicant. In response, the Board again relies upon its finding that a job opening existed when Motz was interviewed and for which he would have been hired in the absence of the unfair labor practices.

Each of these issues arises from a question of fact, and the scope of judicial review of a factual finding by the Board is narrow. Board determinations will be upheld if supported by substantial evidence in the record, even if the court might reach a different conclusion were it to resolve the controversy *de novo*. *NLRB v. S.E. Nichols of Ohio, Inc.*, 472 F.2d 1228 (6th Cir. 1972); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). A review of the record in this case convinces us that sufficient evidence exists to support the Board's conclusion as to the coercive nature of the telephone conversation, petitioners' motivation in refusing to hire Motz, and petitioners' initial intent to hire a produce clerk to replace the clerk who failed to report to work. Although the evidence may be open to different constructions, upon a review of the entire record we do not think that the Board's interpretation is unsupported by substantial evidence. *Universal Camera, supra,* at 487–88, 71 S.Ct. at 463–64.

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Accordingly, the petition to reverse the Board's order is denied, and the cross-petition for enforcement is granted.

Charge Card Association v. NLRB

653 F.2d 272 (6th Cir.), July 7, 1981—247 NLRB 835

On petition to review Board Order

Before ENGEL and MERRITT, Circuit Judges, and PORTER, Senior District Judge*

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Petitioner, Charge Card Association, seeks review and respondent enforcement of the National Labor Relations Board order finding of violations of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1).

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*The Honorable David S. Porter, Senior Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Charge Card Association provides retail customer credit checking, billing and related services to its member banks. This case centers around the employees of the keypunch department. In the summer and fall of 1977, Local 10 of the Office and Professional Employees International Union conducted an organizing campaign at Charge Card. In late November or early December of 1977, keypunch department supervisor Mary Litwin gathered four small groups of employees in her office to discuss the Union campaign. The meeting lasted about fifteen minutes, during which Litwin gave the employees a three page document by the Association president to read. The Administrative Law Judge found that "Litwin asked why the employees felt that they needed a union; gave the employees reasons why she felt they did not need a union and named the benefits that the employees had with the Respondent." (A. 447). In October of 1977 Patricia Walter, the afternoon supervisor in the keypunch department, met with employee Sandra J. Clark, with whom she was friendly. The Administrative Law Judge found that "Walker attempted to 'diagram' for Sandra J. [Clark] how the Respondent 'would fold if the Union came in,' by showing 'how the banks would eventually pull out one by one'." (A. 448). Three weeks later Walker called Clark at home and offered to trade information, but Clark refused to exchange information. The Administration Law Judge specifically credited Clark and discredited Walker's denial that she had conversed with Clark concerning unions. The Administrative Law Judge concluded that the actions of the two supervisors put pressure on employees to reveal information concerning protected activities, in violation of §8(a)(1) of the Act.

It is not a violation of the National Labor Relations Act for an employer to express views, argument or opinion concerning unionization, or to solicit information from employees, as long as the expression does not coerce or interfere with the employees in exercising their rights. 29 U.S.C. § 158(c); *N.L.R.B. v. Paschall Truck Lines, Inc.*, 469 F.2d 74, 76 (6th Cir. 1972); *Hughes & Hatcher, Inc. v. N.L.R.B.*, 393 F.2d 557 (6th Cir. 1968). It is questionable whether the acts of supervisor Litwin in reading the Association statement and asking employees why they felt they needed a union constitute coercive interrogation in violation of the Act. It is evident, however, that supervisor Walker's statement that the Association "would fold if the Union came in" was a violation of the Act. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969) (predictions of effect of unionization must be based on objective fact to convey employer's belief as to demonstrable probable consequences beyond his control). Enforcement of the NLRB order is granted as to this charge.

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The remaining charges stem from acts that occurred after the attempt to formally organize was abandoned. The Union voluntarily withdrew its representation petition in December of 1977. There continued to be dissatisfaction in the keypunch department, and on Monday, January 9, 1978, thirteen of the nineteen department employees sought to present their grievances as a group to the Association president, who was out of town. In lieu of a group meeting, vice president Nagy met with the individual employees throughout the day. Nagy was aware that some of the employees appeared dissatisfied with the results of the meetings. The following day at least ten keypunch department employees called in sick. Day shift supervisor Litwin reported the abnormally high absences to personnel director Collins. Collins had the absent employees notified that they would not be permitted to return to work unless they presented a doctor's certificate attesting illness. The personnel manual states that the supervisor "may require written verification for any sick day taken, particularly where there is a history of excessive absenteeism." (A. 456). The Administrative Law Judge credited testimony, however, that it was the employer's practice to not require a certificate for absences less than five days unless the absence was near a holiday or there was a record of excessive absenteeism (A. 456–57).

When the keypunch employees returned to work the following day without a doctor's certificate they were not permitted to work and were ordered off the employer's premises. They were excluded the following day as well. That day they sent a letter to vice president Nagy stating that they had "staged a work stoppage in protest" and that they were "unconditionally ready to return to work" with the understanding that they would receive a deduction in pay for the one-day work stoppage (A. 451). The employees continued to report to work but were refused admission. On January 23d and 24th, personnel director Collins met with each employee and gave each a letter informing them that "[b]ecause of your actions, you have been suspended without pay" and that an adjustment in pay would be made for the day that they received sick pay. They were allowed to return to work "on a 180 day probationary status" during which "any unexcused absenteeism or tardiness * * * or any other disruption, insubordination or poor performance will result in the immediate termination of your employment." (A. 452). Each employee was asked to sign the letter but was not required to do so. The Administrative Law Judge credited testimony that during the meeting personnel director Collins expressed concern that the employees' actions "disrupted the Company" and that the purpose of the probation was to make sure that something like the action of the employees "didn't happen again." (A. 452). Four of the employees who participated in the work stoppage never returned to work. All other employees, except Sandra J. Clark, who was ill, returned to work. Three weeks after they returned to work each of the six employees involved in the work stoppage received a disciplinary letter from personnel director Collins. On April 11th three employees received additional disciplinary letters stating that they had violated the terms of the probation and that any further unexcused tardiness or absence would result in a five-day suspension without pay. Employee Sandra J. Clark was later suspended for five days when she failed to present a doctor's certificate for the full time of her absence (*See* A. 458-59).

The Administrative Law Judge concluded that the refusal to allow keypunch employees to return to work after the one-day work stoppage and the subsequent probation were violations of the Act. He also

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concluded that the suspension of Sandra J. Clark was unlawful. The Administrative Law Judge ordered the employer, among other things, to offer reinstatement to the employees.

A walkout of unorganized employees is a protected activity under the Act, *Vic Tanny International, Inc. v. N.L.R.B.*, 622 F.2d 237 (6th Cir. 1980); *cf. N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d. 298 (1962) (non-union employees did not lose right to engage in concerted activity merely because they did not present demand to employer prior to walkout), and an employer may not discipline or discharge an employee for engaging in protected activity. An employer, however, may discipline or discharge if such discipline would have been imposed even absent the protected activity. 29 U.S.C. § 160(c). The proper test for evaluating mixed-motive cases is whether punishment of protected activity or anti-union animus was a dominant motive in the employer's actions. The burden has been placed on the general counsel to demonstrate that absent protected activities the suspension or discharge would not have taken place. *Propak Corp. v. N.L.R.B.* 578 F.2d 169 (6th Cir. 1978). In *Wright Line*, 251 NLRB No. 150, 105 LRRM 1169 (1980), the Board determined that the General Counsel must make a prima facie showing that an illegal purpose was a "motivating factor" in the employer's decision. Once the prima facie case has been established the burden shifts to the employer to demonstrate that the same action would have been taken in the absence of the illegal motivation or factor. Under either the dominant motive test or the shifting burden as established in *Wright Line*, we conclude that there is not substantial evidence to support the conclusion that the reason for disciplining the employees was to punish them for engaging in a protected walk-out. The Administrative Law Judge agreed that it was an "admittedly unusual occurrence" to have more than half of the keypunch department call in sick on the same day. Charge Card, as an employer, "has the right to demand tht its employees be honest and truthful in every facet of their employment." *NLRB v. Mueller Brass Co.*, 509 F.2d 704, 713 (5th Cir. 1975). The fact that the employees falsely claimed to be sick in the course of engaging in protected activities does not insulate them from suspension for abusing their sick time. This Court cannot excuse lying even if in the context or protected activity. When the false calling in sick is viewed as an improper activity for which the employer may rightly suspend employees, it becomes apparent that substantial evidence supports a conclusion that lying was the dominant motive for the suspension. *N.L.R.B. v. Howell Automatic Ma-*

chine Co., 454 F.2d 1077, 1083 (6th Cir. 1972) (court need not accept inference colored by improper view of rights and duties of parties). Had the employees truthfully announced that they were withholding their services for one day in protest of the work conditions, the suspensions would have clearly been improper. As it was, the employees called in sick. In light of the unusally high absenteeism that day, it was not unreasonable for the employer to demand that the employees support their assertion of illness. This is true even if Charge Card suspected that the employees were in fact protesting work conditions. Just as employees cannot express dissatisfaction with work conditions by physically abusing their supervisors, employees cannot express their dissatisfaction with work conditions by lying.

Because the employer did not improperly place the employees on probation, the subsequent acts, including the suspension of Sandra J. Clark, were also not in violation of the Act.

Enforcement is granted with respect to paragraphs 1(a)-(c) and 1(e) of the NLRB order and denied with respect to the remainder of the order. Paragraph 2(g) is enforced to the extent consistent with the enforcement granted herein.

NLRB v. Klingler Electric Corporation, Klingler Electronics Division and Klingler Manufacturing Division

656 F.2d 76 (5th Cir.), July 7, 1981—245 NLRB 1247

On petition to enforce Board Order

Before SKELTON,* Senior Judge, and RUBIN and REAVLEY, Circuit Judges

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REAVLEY Circuit Judge: The National Labor Relations Board ("NLRB" or "the Board") has applied for enforcement of an order issued against Klingler Electric Corporation ("Klingler") for unfair labor practices in refusing to negotiate with the union certified by the Board to represent Klingler's employees. In response, Klingler alleges that the Board's certification of the union was improper because of certain irregularities in the original election of the union. We grant the Board's request for enforcement.

I. *The Background Facts*

Klingler operates a plant in Jackson, Mississippi, to produce electronic wiring boards. The production and maintenance employees at this plant were not represented by a union prior to May 1978, when the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("the Union") filed a representation petition with the LNRB, seeking an election for a bargaining unit made up of these employees.

At the formal representation hearing held on June 15, 1978, Klingler argued that eight "leadperson" employees are actually supervisory staff and, therefore, should be excluded from the bargaining unit because they are not "employees" protected by §§ 8(a) (1) and (3) of the National Labor Relations Act ("the Act"). 29 U.S.C.

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§ 158(a) (1) & (3). Each department of Klingler's plant has one leadperson who exercises a loose and somewhat informal supervision over the ten to twenty employees within the department. The duties of each leadperson vary greatly between the departments and personalities involved, but a leadperson typically receives instructions and design specifications from a Klingler plant supervisor and then assigns employees within his or her department to implement those instructions. At all other times a leadperson usually fills a manufacturing position identical to the other employees within his or her department.

The NLRB's acting regional director issued a decision and direction of election on June 30, 1978, finding that the eight leadpersons were not supervisory employees as defined by § 2(11) of the Act, 29 U.S.C. § 152(11), and scheduling the union election for July 28, 1978. Klingler filed a request with the Board for review of the acting regional director's decision. On the day before the election, the NLRB notified Klingler by telegram that "a substntial issue is raised concerning the supervisory status of the eight leadmen." Rather than delay the election, however, the board chose to allow the leadpersons to vote under challenge, which would allow Klingler to exclude the votes if it subsequently prevailed on this issue. The election was held on schedule and resulted in 32 votes in favor of the Union, 15 against, and 9 challenged ballots.

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*Senior Judge of the United States Court of Claims, sitting by designation.

Shortly after the election Klingler filed timely objections with the Board, claiming that several factors and incidents had destroyed the validity of the election.[1] The acting regional director conducted an administrative investigation of these objections pursuant to the Board's own rules and regulations. No formal hearing was held, but both parties were given full opportunity to submit evidence. Klingler offered several employees to give affidavits, including two plant supervisors and some of the disputed leadpersons. The acting regional director allowed counsel for Klingler to attend the taking of the affidavits from the plant supervisors, but not from the other employees. The acting regional director then took several other affidavits either at the request of the Union or on his own initiative.

On September 26, 1978, the acting regional director issued a supplemental decision and certification of the Union, overruling all of Klingler's objections to the election. It bears emphasis that this administrative investigation of Klingler's post-election objections and challenges sought only to determine whether Klingler had raised factual issues that justified a hearing on those challenges. Klingler had the burden of raising specific factual issues that, if proven, could invalidate the election, but all credibility questions were to be resolved in favor of Klingler in deciding whether a hearing was called for. *NLRB v. Singleton Packing Corp.*, 418 F.2d 275, 280 (5th Cir. 1969), *cert. denied*, 400 U.S. 824, 91 S.Ct. 47, 27 L.Ed.2d 53 (1970). The acting regional director concluded that it was not. Klingler asked the NLRB to review this supplemental decision, and the Board granted that request in relation to the supervisory status of the leadpersons and their conduct during the election. The Board instructed the acting regional director to investigate all aspects of this objection, accept new evidence from the parties, and issue a second supplemental decision setting forth the new evidence and transferring the case back to the Board for decision.

The acting regional director conducted this second investigation on January 3 and 4, 1979, taking additional affidavits on the same terms as the earlier investigation. On January 25, 1979, he issued a second supplemental decision based on this investigation. The decision reviewed the relevant evidence, concluded that the leadpersons were not supervisory employees, and recommended that Klingler's objections be entirely overruled. The Board reviewed the record forwarded by the acting regional director and issued its own decision on May **80** 31, 1979. The decision adopted the findings and recommendations of the acting regional director and certified the Union as the exclusive representative of Klingler employees in the unit.

In order to force a review of the Board's decision by this court, Klingler still refused to negotiate with the Union. Accordingly, the Union filed an unfair labor practices charge with the NLRB and the general counsel of the NLRB moved for summary judgment. Klingler responded to the motions by admitting the refusal to bargain and asserting as an affirmative defense its earlier objections to the election.[2] The Board found that all of these issues had been litigated in the previous representation proceedings and, therefore, ordered Klingler to bargain with the Union. It is our responsibility to decide whether to grant enforcement to the Board's order under § 10(e) of the Act. 29 U.S.C. § 160(e).[3]

II. *The Record Before the Board and Upon Judicial Review*

During the course of his administrative investigation, the acting regional director took certain affidavits from Klingler employees and then quoted from and relied upon portions of these affidavits in his decision and recommendations. But, pursuant to the Board's interpretation of one of its own regulations, he did not include these affidavits in the record that he transmitted to the Board. The Board thus adopted findings and recommendations without access to the complete documents upon which those findings and recommendations were, to some extent, predicated. Nor did Klingler have access to several to these affidavits[4] in framing its briefs to the Board and to this court, even though the acting regional director used them as part of the evidentiary basis for his decision. Klingler secured an order from this court that the affidavits be forwarded to us under seal, subject to the Board's legal claim that they should not be considered part of the record in this proceeding. Therefore, we must first address the procedural question whether these affidavits should be considered part of the record.

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[1] See section III, below.

[2] Representation proceedings are not subject to direct review by this court, and Klingler was following the appropriate procedure. *See NLRB v. Osborn Transportation, Inc.*, 589 F.2d 1275, 1278 n.4 (5th Cir. 1979), and cases cited therein.

[3] The statute reads, in pertinent part, as follows:

> The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28.

29 U.S.C. § 160(e).

The Board attempts to justify the exclusion of the affidavits by arguing that post-election objection procedures are purely a creation of their own regulations, because the Act makes no provision for such a proceeding. Consequently, the Board has established a regulation defining the contents of the record in post-election objection and challenge proceedings. 29 C.F.R. § 102.69(g). The pertinent sections of that regulation provide as follows:

> The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, * * * any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made [in the pre-election unit determination proceedings] shall constitute the record in the case. Materials other than those set out above shall not be part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may
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> append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision.

The Board interprets this regulation to be in two distinct sections: the first sentence specifying the contents of the record in a case with a formal hearing and the second sentence doing the same for all cases without hearings. Thus the Board argues that any affidavits that Klingler wanted to be seen by the Board should have been appended to its briefs to the Board and that, otherwise, they are not part of the record. We note in passing that that is not an adequate answer to the problem before us. The acting regional director relied upon some affidavits that Klingler has never seen, even from witnesses brought forward by Klingler. The only way that the relevant portions of these affidavits could get into the record is for the regional director to place them there, but the Board argues that § 102.69(g) prohibits him from doing so.

Previous versions of this regulation and the closely-related § 102.68 specified that "any briefs or *other documents* submitted by the parties" to the regional director should be part of the record (emphasis added). Based on that earlier language, this court once held that employee affidavits submitted by the parties must be sent to the Board as "other documents" within the meaning of § 102.68. *Southwestern Portland Cement Co. v. NLRB,* 407 F.2d 131, 134–35 (5th Cir.), *cert. denied,* 396 U.S. 820 90 S.Ct. 59, 24 L.Ed.2d 71 (1969).[5] But the NLRB subsequently amended both regulations to read "any briefs or *other legal memoranda* * * *" (emphasis added). 29 C.F.R. §§ 102.68 & 102.69(g) (1977). Since those amendments effectively overruled *Portland Cement,* this court has on at least three occasions declined to decide whether employee affidavits submitted by the parties were "documentary evidence" required by § 102.69(g) to be included in the record. *Birmingham Ornamental Iron Co. v. NLRB,* 615 F.2d 661, 665–67 (5th Cir. 1980) (declining to reach the question because the employer's factual allegations were insufficiently specific to require a hearing in any event); *NLRB v. Dobbs House, Inc.,* 613 F.2d 1254, 1260–61 (5th Cir. 1980) (declining to reach the question because the employer had full access to all of the affidavits excluded from the record, and any error was therefore harmless); *NLRB v. Osborn Transportation, Inc.*, 589 F.2d 1275, 1281–82 (5th Cir. 1979) (declining to reach the question for the same reason offered in *Dobbs House*, 613 F.2d at 1260–61). In the case now before us, Klingler has made specific factual allegations and has never had access to 15 affidavits taken by the acting regional director, at least four of which were specifically citied in his decision. We will therefore decide the issue that we have reserved on these previous occasions.

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[4] Some of Klingler's employees voluntarily submitted copies of their affidavits to their employer.

[5] *Portland Cement* cited § 102.68 as the relevant regulation. That appears to have been in error, because § 102.68 specifies the contents of the record in preelection unit determination hearings. The proceeding at issue in *Portland Cement* and in this case is is a *post-election* objection and challenge decided without a hearing, which is governed by 102.69(g). The two sections are quite similar, however.

It is well established that a regional director may, in the course of an administrative investigation, take confidential employee affidavits and withhold them from the parties. *See NLRB v. Robbins Tire,* 437 U.S. 214, 236–43, 98 S.Ct. 2311, 2324–27, 57 L.Ed.2d 159 (1978); *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 34–35 (5th Cir. 1969). If the acting regional director does nothing more than accumulate these affidavits for his own investigatory files, we would have no objection to his maintaining their confidentiality. In a post-election objection and challenge proceeding such as this, the objecting party has the burden of raising specific objections, backed by specific offers of proof, indicating that unlawful acts invalidated the election. Thus the acting regional director could have made a decision and recommendation based *solely* upon evidence known to and offered by Klingler. If that had been the case, it **82** would have been entirely appropriate for him to retain the affidavits he did not use within his investigatory files and decline to reveal them to Kingler or incomporate them in the record forwarded to the Board and to this court.

But that was not the case here: the acting regional director selected portions of the employee affidavits and cited them as the primary and almost exclusive evidentiary basis of his decisions, without revealing any of them to Klingler or incorporating any of them in the record. Certain of these affidavits were from witnesses offered by Klingler, and certain others were taken at the initiative of the acting regional director or at the request of the Union. A few of Klingler's own witnesses voluntarily gave Klingler copies of their affidavits, but Klingler has never seen at least four affidavits specifically cited by the acting regional director. Furthermore, the Board itself has never had access to eight other affidavits of Klingler employees cited by the regional director's decision, nor would we have such access in reviewing the Board's decision, were we to accept the Board's contentions.[6]

It bears emphasis that these affidavits make up almost the entire body of evidence that underlies the regional director's decisions. The only other substantive evidence is the transcript of the pre-election unit determination hearing held on June 15, 1978. This hearing was concerned with the supervisory status of the leadperson and, of course, had nothing to do with the subsequent election conduct that served as the basis for all ten of Klingler's substantive challenges to the election. The Board's interpretation of § 102.69(g) would thus ask us to review an agency action on the basis of a "record" that is devoid of any evidence on the most material issues.

The Board seeks to justify the confidentiality of all of these affidavits by arguing that employees will not be candid during the administrative investigation if their affidavits might be revealed to the employer or the union by being incorporated in the record. But if the affidavits are used as an evidentiary basis for the regional director's decision, the contents so used are no longer confidential anyway: they appear in the decision itself. The regional director could, before incorporating the affidavits in the record, simply screen out the affiant's name and other portions of the affidavit that bear no relevance to the testimony used in his decision. The Board's own regulations require a similar procedure if the affiant is called as a witness at a subsequent hearing. 29 C.F.R. § 102.118(b)(1) & (2)[7] We thus

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[6] Admittedly, these eight affidavits would have been included in the record if Klingler had attacked them to its submission to the Board under the exception contained in § 102.69(g). That possibility does not relieve the Board of its responsibility to consider the evidence used by the regional director, or this court of its responsibility to consider all the evidence that underlies an agency action.

[7] The regulation reads as follows:

(1) Notwithstanding the prohibitions of paragraph (a) of this section, [prohibiting release of investigatory documents] after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the trial examiner shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

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have difficulty identifying any substantial interest in the "confidentiality" of statements that are actually used in the regional director's decision and recommendations.

The only evidence that is actually needed for the regional director's decision is that which is known to and offered by the party seeking to overturn the election. In this challenge procedure, the objecting party bears the entire burden of adducing prima facie proof of facts sufficient to invalidate the election. *Singleton Packing,* 418 F.2d at 280. Thus the regional director could reach a decision based only on evidence offered by the objecting party. If there is any credibility issue on a point sufficient to invalidate the election, a hearing is required. *NLRB v. Claxton Manufacturing Co., Inc.,* 613 F.2d 1364, 1366–67 (5th Cir. 1980). The regional director may, therefore reach a decision without endangering any of his own confidential investigations because they are, quite simply, not essential for the limited decision before him.

Having thus disposed of any argument based on a policy of administrative confidentiality, we will examine the Board's own regulation to see what it requires. In its briefs and oral argument, the Board argues that the first sentence of § 102.69(g) is intended to refer only to cases involving a formal hearing, because it lists many items that exist only in relation to a hearing. Consequently, the record in an administrative investigation without a hearing, such as this case, would be defined only in the second sentence.

The Board's argument is groundless because the second sentence simply does not specify what the contents of the record should be in a non-hearing case. It only creates an *exceptional* means by which a party may place before the Board documents submitted to the regional director but excluded from the record by him. The irrationality of the Board's argument is shown by its own failure to follow that interpretation: the transcript of the preelection unit determination proceeding was forwarded to us as part of the record, even though this is a non-hearing case and such a transcript is designated as part of the record only in the first sentence of the regulation.

We interpret the first sentence of § 102.69(g) to define the record in all proceedings, whether or not a hearing is required. It is immaterial that the sentence includes some items that will not apply to a non-hearing case. That is also true under the Board's interpretation: for instance, there may not be any "stipulations" or "exceptions" even in a case with a hearing. We also hold that any reasonable interpretation of "documentary evidence" includes all portions of affidavits or other documents that are relevant to the evidentiary basis of the regional director's decision and recommendation.[8] The Sixth Circuit has given this same interpretation to the regulation.

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(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the administrative law judge shall order the general counsel to deliver such statement for the inspection of the administrative law judger in camera. Upon such delivery the administrative law judge shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that he may, in his discretion, decline to excise portions which although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With such material excised the administrative law judge shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholdings, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the administrative law judge.

Each affiant is advised of this limitation upon the confidentiality of his affidavit before giving his statement. NLRB Case Handling Manual Part I, Sec. 10058.4.

This regulation causes us some doubts as to how effective assurances of confidentiality can be in encouraging candid employee affidavits. Although the vast majority of proceedings before the Board are resolved without a hearing, See Robbins Tire & Rubber Co., 437 U.S. at 241 n.20, 98 S.Ct. at 2326 n.20, 57 L.Ed.2d 159, we-credit witnesses with the intelligence to realize that the more damaging their testimony against the employer, the more likely that a hearing will take place and that they will be called as a witness. Thus the greater the need for confidentiality in the taking of employee affidavits, the less likely the chance that the confidentiality will be observed under the Board's own regulations. The Board's interest in confidentiality seems even more tenuous in light of these regulations.

[8] We are aware that allowing the regional director to screen out portions of the affidavits that he considers irrelevant to his finding and recommendations confers virtually unrestrained discretion upon him. This discretion is considerably greater than that allowed by the Board's own regulations in a similar situation. See note 7 above. That Board may choose to establish some similar guidelines for regional directors in this kind of proceeding, but we will not assume that regional directors will abuse their discretion to screen out irrelevant sections of such affidavits. We will address that problem only if it arises.

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NLRB v. North Electric Co., 644 F.2d 580 (6th Cir. 1981).[9] We also agree with the Sixth Circuit that to exclude such documents from the record would raise serious due process problems. *Id.* at 583. *See also NLRB v. Curtis Noll Corp.*, 634 F.2d 1027 (6th Cir. 1980); *NLRB v. Cambridge Wire Cloth Co.*, 622 F.2d 1195, 1197–99 (4th Cir. 1980); *Prestolite Wire Div. v. NLRB*, 592 F.2d 302, 304–06 (6th Cir. 1979). We need not pursue that constitutional question at this time, however, because we interpret the Board's regulation in a way that does not offend the requirements of due process.

Furthermore, regardless of the Board's own procedures, 28 U.S.C. § 2112(b) requires that affidavits used as the evidentiary basis of decisions of the regional director and the Board must be part of the record available to this court in its review of those decisions.[10] Of course, this statute does not impose requirements upon the *internal* procedures of the Board, but administrative efficiency is certainly served if the Board has before it the same record that we will require for appellate review of the Board's decision.

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If these affidavits were not available to us, or if they offered the slightest basis for a different action by the Board, we would, of course, be required to remand this case to the Board for completion of the record and reconsideration of the case. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544–45, 98 S.Ct. 1197, 1212, 55 L.Ed.2d 460 (1978). But as we noted above, the affidavits accumulated by the acting regional director were forwarded to this court under seal. Having found that they must be considered part of the record relied upon by the acting regional director, we have examined the affidavits carefully.[11] We find that none of them contain any information that would add weight to Klingler's case or stand the slightest chance of affecting the Board's action. All of the relevant information they contain was fully and accurately stated in the two decisions of the acting regional director. Under these circumstances, it would be an exercise in futility and pointless delay to remand this case for "supplementation" of the record or "reconsideration" by the Board. The affidavits do not *add* relevant information, but merely allow us to *verify* that the acting regional director actually had, and accurately quoted, the evidence that he cited. We may, therefore, proceed to consider the substantive findings that he made and that the Board subsequently adopted.

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[9] We note that *Reichart Furniture Co. v. NLRB*, 649 F.2d 397 (6th Cir. 1981), a recent decision of another panel of the Sixth Circuit, indicates some retreat from the broader language of *North Electric* and *Prestolite Wire Div. v. NLRB*, 592 F.2d 302, 304–06 (6th Cir. 1979). The concurring opinion in *Reichart Furniture* makes explicit something that the majority opinion only implies: that this panel limits the interpretation of § 102.69(g) established in *North Electric Company* (requiring the regional director to include in the record all affidavits used in his decision) to those cases in which the employer has made allegations justifying a hearing.

We decline to so limit our interpretation of the Board's regulation. Both our holding and the Sixth Circuit's opinion in *North Electric Company* are based upon an interpretation of the specific language contained in § 102.69(g). But the panel opinion in *Reichart Furniture* makes no attempt to derive its limitations from the same regulation, nor can we imagine any basis for doing so. In fact the *Reichart Furniture* opinion makes no attempt to justify its limitation at all. We believe that the need of a party or a court to see the documentary evidence that has been used as the basis of an agency action is at least as great when the regional director decides that a hearing is not justified.

[10] The pertinent part of the statute reads as follows:

> The record to be filed in the court of appeals in such a proceeding [to review or enforce orders of administrative agencies] shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record.

28 U.S.C. § 2112(b).

[11] Theoretically, of course, we should look only at the affidavits actually used by the acting regional director. We would have no way of knowing that with certainty, however, and a remand would be necessary. But the distinction between the affidavits he used and those he did not use is meaningless in this case because all of the affidavits are innocuous and are valuable to the record only as confirmation of what the acting regional director has already cited in his decision.

So that Klingler may satisfy itself that the actual affidavits do not enhance its case, we have issued an order that the Board release to Klingler all relevant portions of affidavits used as evidence in this proceeding and not previously made available to Klingler by its employees. We have extended the tie for filing of a motion for rehearing so that Klingler may bring to our attention any new information that would justify a different result in this case.

III. *The Election Violations Alleged by Klingler and the Standard of Judicial Review*

Our enforcement of the Board's order requiring Klingler to bargain with the Union is dependent upon the validity of the Board's earlier decision certifying the Union after the election of June 30, 1978. *Osborn Transportation,* 589 F.2d at 1278 n.4; *Golden Age Beverage,* 415 F.2d at 28.

Klingler raises three factors as a basis for invalidating the election and, therefore, for denying enforcement to the Board's order:

1) that the lead persons were supervisory employees whose participation in the election on behalf of the Union tainted the election process;

2) that certain actions of the Board's representative in conducting the election influenced the election results; and

3) that Union payments to employees who had given up a day's work in order to testify on behalf of the Union at the pre-election representation hearing exerted improper influence on employee votes.

Our standard of review is based upon the recognition that Congress has entrusted broad discretion to the Board to conduct and supervise employee election. The specialized functions of the Board, such as classification of employees and the identification of an unacceptable degree of interference with free choice in union elections, require a quality and degree of expertise uniquely within the domain of the Board. If the Board's decision is reasonable and based on substantial evidence in the record considered as a whole, our inquiry is at an end. *Claxton Manufacturing,* 613 F.2d at 1365–66; *Dobbs House,* 613 F.2d at 1256; *Osborn Transportion,* 589 F.2d at 1279–80.

In order to gain the right to a new election, Klingler has the entire burden of 1) offering "specific evidence of specific events from or about specific people," and 2) showing that these objectionable activities, "when considered as a whole, either tended to or did influence the outcome of the election." *Claxton Manufacturing,* 613 F.2d at 1366. The latter showing is especially difficult where, as in Klingler's election, the union won by a wide margin. *NLRB v. Sumter Plywood Corp.,* 535 F.2d 917, 924 (5th Cir. 1976), *cert. denied,* 429 U.S. 1092, 97 S.Ct. 1105, 51 L.Ed.2d 538 (1977).

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But Klingler must first pass the hurdle of earning a hearing on these issues. If the Board assumes the truth of all the specific allegations raised by Klingler, but still finds these facts inadequate to influence the *outcome* of the election, no hearing is required. *Singleton Packing,* 418 F.2d at 280. Conversely, if the facts alleged are adequate for that purpose, factual questions may not be resolved against the employer without a hearing. *Claxton Manufacturing,* 613 F.2d at 1366–67.

IV. *Klingler's Objections*

A. *Participation of Leadpersons*

If Klingler's leadpersons are supervisory staff, they should not have been included in the bargaining unit and, under certain conditions, their advocacy of the union might invalidate the election. The Board's decision held, first, that the leadpersons are not supervisory personel and, second, that even if they were supervisors, their participation could not have affected the outcome of the election, based on the few allegations of objectionable conduct raised by Klingler. If the Board's second conclusion is adequately supported, we need not deal with the first. We will, therefore, assume that the leadpersons are supervisors for the purposes of this discussion.

First, we note that the Union won by a margin of 32 to 15 even when the 9 votes of the leadpersons were excluded. The validity of the election is thus not undermined merely by the votes of the leadpersons, and Klingler bears a heavy task in identifying specific conduct of the leadpersons that would tend to influence enough other votes to affect that outcome. In attempting to meet that burden, Klingler first alleges that the leadpersons were active in the organization and election campaigns. But pro-union activities by supervisors are merely an expression of personal preference and are not enought, by themselves, to invalidate an election. *NLRB v. Alamo Express, Inc.,* 430 F.2d 1032, 1035 (5th Cir. 1970), *cert. denied,* 400 U.S.

1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1971). Klingler must show that the activities

> created an environment of tension or coercion such as to preclude employees from exercising a free choice. For conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employee's actions at the polls.

Singleton Packing, 418 F.2d at 281 (quoting *NLRB v. Zelrich Co.,* 344 F.2d 1011, 1015, (5th Cir. 1965)).

The only evidence that Klingler offered of actual *coercive* conduct by the leadpersons was that two leadpersons made isolated and relatively mild threats of economic reprisals against fellow employees who did not support the union. The first of these statements was merely a misrepresentation that the union would not represent all employees equally in the distribution of benefits after the election, but would favor those who had supported the union.[12] The employee to whom the statement was made asked the union organizer privately about the statement and he publicly corrected the misinformation at an employee meeting immediately thereafter. Klinger offered no indication how this incident could have influenced other employees. The second incident was merely the comment, "she'll be the grease monkey" directed at an anti-union employer by a leadperson standing with several other employees. Nothing further was made of the remark, and it was never even connected directly to the election issue. Clearly, these two incidents standing by themselves are not sufficient to indicate that there was "an atmosphere of tension or coercion such as to preclude employees from exercising a free choice," *Singleton Packing,* 418 F.2d at 281, and the acting regional director was justified in finding that they would not warrant setting the election aside.[13]

Klingler also claims that the leadpersons signed and solicited union authorization cards, thereby tainting the showing of employee interest that the Board requires prior to directing an election. 29 C.F.R. §§ 101.17 & 101.18. But the second supplemental decision specifically found that the union's showing of interest was sufficient to warrant processing of the petition even if all of the cards signed and solicited by the leadpersons were excluded. Because Klingler does not dispute that finding, the point of error fails.

Klingler does not offer any other evidence that the participation of the leadpersons in the election, even if they are supervisors, tended to influence the outcome of the election. The acting regional director therefore properly overruled the objection.

B. *Conduct of the Election*

Klingler makes several weak allegations that certain aspects of the conduct of the election prejudiced the results. First, Klingler aruges that the Board should have stayed the election pending resolution of the leadperson supervisory issue, rather than allow the leadpersons to vote under challenge. Klingler raises no specific facts to support this point of error, other than a vague implication that some leadpersons might have been recruited to campaign on behalf of the company if they had been labeled as supervisors prior to the election. But Klingler does not identify any specific leadperson willing to so campaign or offer any evidence that such an effort could have affected the outcome of the election. This allegation is insufficiently specific to require a hearing. *Birmingham Ornamental Iron,* 615 F.2d at 666–67.

The second point of error based on the conduct of the election is that the Board's agent acted so as to allow a bitter but brief confrontation between a pro-union employee and one of Klingler's observers. When one of the leadpersons approached the ballot box, the company's observer noted to the Board's observer that the company wished to challenge her vote. The lead-person reacted by calling the observer "a bitch." When the Board's representative intervened and asked the leadperson's employment position, she replied that she was "just a general flunkie," that all the employees were "just general flunkies." Even if the conduct of the Board agent did precipitate the incident, which we doubt, it was neither explosive nor likely to influence a significant number of votes. One of the participants acknowledged that the issues between the two employees were essentially pesonal, and the remarks did not have a substantial connection to the election issue. Klingler offered absolutely no evidence of the incident's effect on the election, and the Board was therefore justified in concluding that the allegation was not sufficient to invalidate the election.

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[12] This leadperson also participated in a second similar incident prior to the filing of the representation petition. We do not consider that incident because the Board has decided, and this court has affirmed, that any misconduct occurring before the filing of the petition should be considered too remote in time to influence the subsequent election. *Golden Age Beverage,* 415 F.2d at 31.

[13] Klingler also alleged a third incident of a threat of economic reprisal by a rank-and-file employee. That employee threatened a coworker with the loss of a ride to work if she did not vote for the union. The coworker reported the remark to her employer and she never heard anything more of the threat. This threat was made to a single employee on a single occasion. Even when all three of these incidents are lumped together, they clearly do not amount to an atmosphere of coercion.

Klingler also alleged that this confrontation amounted to a violation of the rule established by the Board in *Milchem, Inc.,* 170 NLRB 362 (1968). In *Milchem,* the Board prohibited "prolonged conversations between representatives from any party to the election and voters waiting to cast ballots," because "the final minutes before an employee casts his vote should be his own, as free from interference as possible." 170 NLRB at 362. The acting regional director dispensed with this objection solely on the basis that there was no evidence that the leadperson was acting as an agent or repre-

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sentative of the Union.[14] In addition, we note that the comments were not "prolonged," or even a "conversation." The Board clearly had substantial evidence to conclude that the *Milchem* rule had not been violated.

The third point of error is that the Board's agent departed from the schedule of the election by opening the election 17 minutes late and closing it 15 minutes late. But only two employees out of the 58 eligible employees failed to vote, and Klingler does not offer the slightest indication how this minor departure from the election schedule could have influenced the election. Without such evidence, the Board was justified in overruling Klingler's objection.

C. *Union Payments to Employees*

The Union asked certain Klingler employees to appear and testify at the pre-election representation hearing in June 1978. The Union then reimbursed at least three of these employees for a day's wages by presenting checks to them at a general employee meeting with the comment by the union representative that he "had a little something or those people who had been at the hearing." Klingler maintains that these payments were excessive because it also paid the employees for those days. The acting regional director rejected that argument in his first supplemental opinion because Klingler had offered no evidence that it had paid the employees or that the payments were "used to improperly unfluence" employees. Subsequent to that opinion, Klingler did offer, in its appeal to the Board, payroll records showing that it had paid the employees for the days in question.

Assuming that these versions of the incident are correct, we agree that the coy remark that accompanied the Union's checks indicates something less than the most straightforward intent on the part of the Union representative. The checks certainly could have been distributed in a manner less likely to create a false impression of union largesse. But this court has held that "[i]n determining whether an election should be invalidated, the focus should be on the effects of a particular act on the electorate rather than on the actor's intent." *NLRB v. Gulf States Canners, Inc.,* 585 F.2d 757, 759 (5th Cir. 1978); *Plastic Masters, Inc., v. NLRB,* 512 F.2d 449, 450–51 (6th Cir. 1975). The acting regional director primarily looked to the Union's intent, which is never a controlling factor. But he also noted that Klingler had presented no evidence of "objectionable effect," which is the proper focus of the inquiry. Of course, proof of subjective effect upon the minds of the employees is quite difficult to show without a hearing. For that reason, we have held that the employer may justify the need for a hearing by showing that the payments had a "tendency to influence the outcome of the election" when viewed in light of all the relevant facts, a somewhat more lenient standard than the evidence of "objectionable effect" that the acting regional director apparently required in this case. *Gulf States Canners,* 585 F.2d at 759. If this election had been a close one, Klingler might have introduced evidence sufficient to meet the more lenient standard. When the margin of an election result is narrow, the tendency to influence the outcome may be inferred from little more than the external facts. *Id.,* 585 F.2d at 759. But when the margin is wide, a greater objective impact is required, which "would appear to be more capable of proof

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[14] It is clear that, if we were looking at the broader disruptive or prejudicial effect of this incident, it would be immaterial whether the leadperson were acting as a representative of the Union. *NLRB v. Carroll Contracting & Ready Mix,* 636 F.2d 111, 112–13 (5th Cir. 1981). Klingler essentially raised that broader question in the preceding paragraph. Here, Klingler objects to the incident on the more narrow grounds that it violates a rule established by the Board itself in a specific case Because Klingler has not cited us any NLRB case to indicate that the Board has construed the *Milchem* rule to require less than literal union representation, we cannot say that it was improper for the acting regional director to base his holding on the absence of that factor alone

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because of its overwhelming nature." *United States Steelworkers of America* v. NLRB, 496 F.2d 1342, 1347 n.11 (5th Cir. 1974).

In this case Klingler offered proof of nothing more than the incident itself, and it was simply not egregious enough to influence the outcome of an election decided by such a large margin, at least without more of a showing by Klingler of harmful effect. The acting regional director was, therefore, justified in overruling this objection.

V. *Conclusion*

The Board seeks to provide "laboratory conditions" for a free election, *General Shoe Corp.,* 77 NLRB 124 (1948), but even laboratories are not *perfect* environments. When the issue is union representation, feelings run strong and deep, and some departures from a perfectly neutral environment must be expected. Consequently, the need for a post-election hearing or a new election is judged not against a standard of perfection, but against the likelihood that the *outcome* of the election might have been affected. This election was not perfect, but it was decided by a relatively large margin, and the Board concluded that none of the facts alleged by Klingler were egregious enough to bring into question the integrity of that result. We find that the Board had a substantial basis to reach that conclusion.

The request of the National Labor Relations Board for enforcement of its order is GRANTED.

Miami Springs Properties, Inc., and James H. Kinley and Associates v. NLRB

653 F.2d 276 (6th Cir.), July 8, 1981—245 NLRB 278

On petition to set aside Board Order

Before JONES Circuit Judge, PECK, Senior Circuit Judge, and Horton, District Judge*

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Miami Springs Properties, Inc. petitions this Court to set aside an order of the National Labor Relations Board and the Board has cross-petitioned for enforcement of its order. The Board found that the company violated section 8(a)(1) of the Act by laying off and refusing to reinstate 18 employees after the employees engaged in protected concerted activity by walking off the job. The Board also found that the company violated section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate five employees because of their protected concerted activity. Finally, the Board found the company violated section 8(a)(1) of the Act because it threatened to close down to discourage union support, threatened employees with layoffs, promised employees they would be rehired if they withdrew support for the union, and promised other economic benefits if the employees withdrew their support for the union.

Miami Springs contends that there was not substantial evidence to support the Board's order. The Board's asserts that the lay-offs were unfair labor practices and

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were not cause by the company's troubled financial conditions. It relies on the fact that the lay-offs were not announced and that they took place immediately after the employees stopped work. The Board also relies on evidence of antiunion comments made by the president of the company, and disputes the company's characterization of its finances at the time of the lay-offs. This evidence is ample to support the Board's order.

There is no merit to the company's contention that the administrative law judge was biased against the company. The ALJ made careful assessments of all the facts and testimony and his conclusions are well supported by the record.

The petition of Miami Springs Properties, Inc. to set aside the Board's order is dismissed and the order of the National Labor Relations Board is ordered ENFORCED.

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*The Honorable Odell Horton, United States District Judge, Western District of Tennessee, sitting by designation.

Presbyterian/St. Luke's Medical Center v. NLRB

653 F.2d 450 (10th Cir.), July 8, 1981

On petition to review and cross petition to enforce Board Order

Before BARRETT and LOGAN, Circuit Judges, and O'CONNOR, District Judge*

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BARRETT, Circuit Judge. Presbyterian/St. Luke's Medical Center seeks review of an unreported order of the National Labor Relations Board requiring it to bargain with the St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL–CIO. The Board cross-petitions for enforcement of the order.

Presbyterian/St. Luke's Medical Center is a three hospital system located in Denver, Colorado. The Center grew out of a July, 1979, merger between St. Luke's Hospital Association and the Presbyterian Medical Center. Prior to the merger, St. Luke's Hospital Association operated a single facility—St. Luke's hospital. The Presbyterian Medical Center operated two institutions—one hospital located ten blocks from the St. Luke's facility, and a second acute-care institution twelve miles away in Aurora, Colorado. *See The Presbyterian Medical Center,* 218 N.L.R.B. No. 192 (1975).

In October, 1979, the Union filed with the Board a petition for certification as the bargaining representative of the registered nurses employed at the St. Luke's facility of the Medical Center. The Medical Center contested the petition challenging the appropriateness of the bargaining unit. The unit is limited to registered nurses at the St. Luke facility only, rather than all professionals, other than physicians, at all three hospitals. The Medical Center's position was tied to Congress' directive that the Board avoid unnecessary proliferation of bargaining units in non-profit health care facilities.

Following five days of hearings, the Board's regional director found that a separate unit of registered nurses at the St. Luke's facility was appropriate for collective bargaining purposes. The Medical Center's request for Board review was denied in January, 1980. Thereafter, a majority of the employees in the unit selected the Union as their representative. On January 24, 1980, the Board certified the Union as the exclusive collective bargaining representative for all registered nurses at St. Luke's Hospital.[1]

When the Medical Center subsequently refused to bargain with the Union, unfair labor practice charges were filed. Violations of § 8(a)(1) and 8(a)(5) of the National

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Labor Relations Act, 29 U.S.C.A. § 158(a)(1), (5), were alleged. In answer to the charges, the Medical Center admitted the refusal to bargain, defending instead on the inappropriateness of the unit. The Board overruled the Medical Center objections and ordered the Medical Center to bargain with the Union on request, as well as to post notices to that effect.

The sole issue on appeal is whether the Board erred in holding that the Medical Center committed an unfair labor practice by refusing to bargain with the St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL–CIO.[2]

The Appropriateness of the Bargaining Unit

For nearly thirty years, non-profit health care institutions were excluded from the operation of the National Labor Relations Act, *supra.* In 1974, Congress amended the Act extending coverage to large numbers of employees in the industry. *See generally,* Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act,* 70 NW.U.L. Rev. 202 (1975). The elimination of this exemption "reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to non-profit health care employees." *Beth Israel Hospital v.*

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*Of the United States District Court for the District of Kansas, sitting by designation.

[1] The bargaining unit certified consists of:

INCLUDED: Al full-time and regular part-time registered nurses, including in-service education nurses, cardiovascular specialists, diabetic stroke technicians, hyper-elementation nurse clinician, float pool nurses, certified anesthetists, and all other registered nursing employees at the St., Luke's facility of the employer located at 601 E. 19th Avenue in Denver, Colorado

EXCLUDED: Unit supervisors, assistant unit supervisors, department directors, assistant department directors, patient representatives and other supervisory and managerial employees, and guards as defined in the Act and all other employees of the above facility.

[2] It is settled that "an employer may secure judicial review of a unit determination by simply refusing to bargain with a union after its certification." *Osteopathic Hospital Founders Asso. v. NLRB,* 618 F.2d 633, 640 (10th Cir. 1980).

N.L.R.B., 437 U.S. 483, 497, 98 S.Ct. 2463, 2471, 57 L.Ed.2d 370 (1978).

One area of concern encompassed by the legislation dealt with disputes over bargaining units. Unable to agree on specific legislation, the House and Senate committees considering the amendment chose to address the problem in their respective reports. Each committee wrote:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]
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> [1] By our reference to *Extendicare,* we do not necessarily approve of all of the holdings of that decision.

S. Conf. Rep. No. 988, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Admin.News pp. 3946, 3950; S.Rept. No. 766, 93d Cong., 2d Sess. 5 (1974); H.Rept. No. 1051, 93d Cong., 2d Sess. 7 (1974).

Much has been written concerning the committees' statements in this area. *Mary Thompson Hospital, Inc. v. N.L.R.B.*, 621 F.2d 858 (7th Cir. 1980); *Allegheny General Hospital v. N.L.R.B.*, 608 F.2d 965 (3d Cir. 1979); *N.L.R.B. v. Mercy Hospital Ass'n.*, 606 F.2d 22 (2d Cir. 1979), *cert. denied,* 445 U.S. 971, 100 S.Ct. 1645, 64 L.Ed.2d 248 (1980); *N.L.R.B. v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979); *N.L.R.B. v. West Suburban Hospital,* 570 F.2d 213 (7th Cir. 1978); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3d Cir. 1977); *Long Island College Hospital v. N.L.R.B.*, 566 F.2d 833 (2d Cir. 1977), *cert. denied,* 435 U.S. 996, 98 S.Ct. 1647, 56 L.Ed.2d 84 (1978); *Memorial Hospital of Roxborough v. N.L.R.B.*, 545 F.2d 351 (3d Cir. 1976). With most of it we agree. In one statement, we heartily concur:

> Congress directed the Board to apply a standard in this field that was not traditional. Proliferation of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension.

St. Vincent's Hospital v. N.L.R.B., supra, at p. 592.

A.

Unit Scope

The appropriateness of a bargaining unit depends on both its scope and composition. We here deal with the first consideration—

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whether the bargaining unit should comprise employees solely at St. Luke's Hospital or at all employer facilities.

The Board has declined to accede to Congress' directive in determining issues of unit scope. In *Memorial Medical,* 230 N.L.R.B. No. 140 n.5 (1977), the Board held that the legislative history of the 1974 amendments demonstrated that concern with bargaining unit proliferation was solely with the composition of units within particular facilities, not with the question of whether the unit's scope should include one facility or several facilities.

Rather than apply Congress' directive, the Board has presumed single facility units appropriate "where there is no bargaining history in a more comprehensive unit of the degree of functional integration with other facilities is insufficient to negate the separate identity of the facility in which a union seeks representative status." *Samaritan Health Services, Inc.*, 238 N.L.R.B. 56 (1978). The presumption is, of course, rebuttable. *Id.* Among the factors considered are the geographic proximity of the facilities, history of collective bargaining unionization, extent of employee interchange, functional integration of operations, and centralization of management, particularly in regard to control of personnel and labor relations. *See e.g., N.L.R.B. v. Groendyke Transport, Inc.*, 417 F.2d 33 (10th Cir. 1969), *cert. denied,* 397 U.S. 935, 90 S.Ct. 944, 25 L.Ed.2d 116 (1970); *Magic Pan, Inc. v. N.L.R.B.* 627 F.2d 105 (7th Cir. 1980); *N.L.R.B. v. Chicago Health and Tennis Clubs, Inc.*, 567 F.2d 331 (7th Cir. 1977), *cert. denied,* 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978).

Consistent with the Board's views, the regional director applied the presumption here holding that "while a systemwide unit may be appropriate, the evidence does not rebut the presumption." R., Vol. I, p. 4. The Medical Center argues that the application of this presumption is inconsistent with the congressional admonition against undue proliferation of bargaining units in the health care field.

The issue as to what unit is appropriate for bargaining rests in the sound discretion of the Board. *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed.2d 1040 (1947); *Newspaper Printing Corp. v. N.L.R.B.*, 625 F.2d 956 (10th Cir. 1980). Nevertheless, we must insure that the Board's exercise of discretion is not unreasonable, arbitrary, unsupported by the evidence, or in conflict with congressional intent. *S.E.C. v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978); *N.L.R.B. v. Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965).

Our reading of the legislative history underlying of the 1974 amendments confirms the Board's views that the references "cautioning against undue proliferation in the health care field refer to matters involving unit composition, that is, the types of employees to be represented in a bargaining unit * * * with which any single institution must collectively bargain." *Memorial Medical, supra*, at n. 5. We do not agree, however, that this concern necessarily demonstrates congressional insensitivity to proliferation problems caused by the mechanical application of the presumption to issues of unit scope. Nor do we believe Congress' silence in this area blindly constituted ratification of the single facility presumption in health care facilities. In our view, it appears more likely that Congress did not anticipate the issue.

The Board is given broad authority to determine the unit appropriate for collective bargaining under section 9(b) of the Act, 29 U.S.C.A. § 159(b). Neither the Act nor the legislative history offer conclusive answers to the issue at bar. "But the absence of specific legislative history in no way modified the conventional judicial duty to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310, 96 S.Ct. 523, 528, 46 L.Ed.2d 514 (1976).

It has long been a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Steelworkers v. Weber*, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979), *quoting Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892). In the construction of labor legislation the principle has "particular application". *Woodwork Manufacturers v. N.L.R.B.*, 386 U.S. 612, 619, 87 S.Ct. 1250, 1255, 18 L.Ed.2d 357 (1967). This is so because legislation such as that involved here is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor." *Local 1976, United Brotherhood of Carpenters v. N.L.R.B.*, 357 U.S. 93, 99–100, 78 S.Ct. 1011, 1016, 2 L.Ed.2d 1186 (1958); *Woodwork Manufacturers v. N.L.R.B.*, *supra*.

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The legislative history here reveals a strong current of congressional concern for the problems engendered by unwarranted unit fragmentation whether it be in composition or scope. As we view it, the Board's refusal to consider Congress' directive with regard to scope issues has subjected the health care industry to the very dangers Congress sought to prevent.

We hold that the traditional factors used in scope determinations "must be put in balance against the public interest in preventing fragmentation in the health care field." *St. Vincent's Hospital v. N.L.R.B., supra*, at p. 592. Moreover, the Board must specify "the manner in which its unit determination[s] * * * implement[ ] or reflect[ ] that admonition." *N.L.R.B. v. West Suburban Hospital, supra*, at p. 216.

We recognize that labor legislation should normally be construed in a liberal manner to effectuate its remedial purposes. However, in our anxiety to aid the congressional purpose of promoting industrial stabilization through collective bargaining, we must guard against extending the scope of the statute beyond Congress's intent. *62 Cases of Jam v. United States*, 340 U.S. 593, 600, 71 S.Ct. 515, 520, 95 L.Ed. 566 (1951). The Board has failed to recognize Congress' directive in unit scope determinations.

Unit Composition

We now turn to the question of whether the Board erred in its determination of the unit's composition.

In the representation proceeding, the regional director ruled that (a) a unit restricted to registered nurses is presumptively appropriate, and (b) based on the Board's singularity of interests analysis, the presumption in favor of the registered nurses unit was not *overcome* by the Medical Center. Inasmuch as the Board erred in accepting the presumption of appropriateness, we must deny enforcement of its order.

(a)

The use of rebuttable presumptions is tied to various rationale—judicial economy, regularity and fairness; probability; and public policy. Louisell and Mueller, *Federal Evidence* § 68, pp. 541-542. Yet, the procedural effects may differ. Most affect only the burden of producing evidence. *See e.g.,* Fed.Rules Evid. rule 301, 28 U.S.C.A. Others affect both the burdens of producing evidence *and* of persuasion. *See e. g. Keyes v. School District No. 1, Denver, Colo.,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). In those presumptions falling within the first category, "the presumption *disappears* upon introduction of evidence sufficient of the presumed fact. [Emphasis supplied]. Louisell and Mueller, *supra* at § 69, pp. 554-555. *See* Fed.Rules Evid. Rule 301, 28 U.S.C.A.; Comm. of Conf.Rep.No.93-1597, 93d Cong. 2d Sess., *reprinted* [1974] U.S.Code Cong. & Admin.News pp. 7098, 7099. Rebuttable presumptions falling within the second category "retain their vitality until the trier of fact is persuaded as to the nonexistence of the presumed fact." Louisell and Mueller, *supra* at § 69, p. 555.

Our review of the record convinces us that the rebuttable presumption applied in this case shifted *both* the burdens of producing evidence *and* persuasion. The regional director specifically held that the presumption was not overcome by the Medical Center's evidence.

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In our view, there was sufficient evidence adduced to sustain the appropriateness of an all professional unit, excluding physicians. We, of course, focus on the "disparity of interests between employee groups which would prohibit or impede fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra,* at p. 419. A multidisciplinary team approach to patient care is employed by the Hospital. Interaction between registered nurses and other professionals is encouraged. Decentralization of the pharmacy has occurred with the physical relocation of individual pharmacists to nursing stations at patient care units. Social workers at the facility spend one-half their time in the patient care units. This, of course, results in substantial interaction between these professionals and the staff nurses.

Several nurses at the facility observed that they have little contact with nurses from units other than their own. One postoperative nurse observed that she had more contact with physical therapists than nurses outside her specialty. Other specialty nurses supported this view. Christine Tanner, a noted nurse educator, testified that nurses who specialize often have more in common with persons in disciplines related to their specialities than other registered nurses practicing in other speciality areas.

Certain of the registered nurses work 3:00 p.m.-11:30 p.m. or 11:00 pm.-7:30 a.m. This factor alone, however, is not dispositive. *Id.* at 419. Similarly, the licensing-education requirements, and departmental segregation are not wholly controlling. *Id.* at p. 419. "The fact that a state may choose to regulate a particular occupation should not be controlling in the determination of an appropriate bargaining unit." *Id.* at p. 420.

In sum, the evidence presented was sufficient to sustain a finding of the inappropriateness of the proposed unit had it been accepted. If the presumption had simply shifted the burden of producing evidence to the employer, the offer of this contradictory evidence would have neutralized the presumption.

In unfair labor practice hearings, such as that presented here, the Board, to the extent practicable, must apply the rules of evidence governing proceedings in the district courts of the United States. N.L.R.A. § 10(b); 29 U.S.C.A. § 160(b); *N.L.R.B. v. Process & Pollution Control Co.,* 588 F.2d 786 (10th Cir. 1978). When the Federal Rules of Evidence were adopted, Congress provided that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party against whom it was originally cast," Fed.Rules Evid. rule 301, 28 U.S.C.A.

Application of the presumption employed here violated the mandate of Federal Rule of Evidence 301.[3] Such a presumption cannot be used to alter General Counsel's burden to establish by a preponderance of evidence that an unfair labor practice has occurred. *See N.L.R.B. v. Dillon Stores*, 643 F.2d 687 (10th Cir. 1981); *N.L.R.B. v. First Nat. Bank of Pueblo*, 623 F.2d 686 (10th Cir. 1980); *N.L.R.B. v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*,——U.S.——, 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981). The Board's order was impermissibly tainted by the presumption's application.[4]

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(b)

We do not rest our decision on this ground alone. In our view, any use of a presumption which casts upon the Medical Center the burden of producing evidence of the inappropriateness of the unit violates Congress' directive of nonproliferation in the health care industry. The legislative history underlying the 1974 amendments expresses concern that egregious unit proliferation such as found in the construction trades, could impede effective health care delivery. We agree with our sister circuits that "the Board *must* expressly consider the congressional admonition in making unit determinations," *Mary Thompson Hospital, Inc., v. N.L.R.B., supra*, at 864, and focus on the "disparity of interests between employee groups which would prohibit or inhibit fair representation of employee interests." *N.L.R.B. v. St. Francis Hospital of Lynwood, supra*, at p.419.

We hold that requiring health care industry employers to bear the burden of producing evidence that limited bargaining units are more inappropriate than broader bargaining units runs contrary to Congress' admonition. Rather, the Board must specify "the manner in which its unit determination in this case implement[s] or reflect[s] that admonition." *N.L.R.B. v. West Suburban Hospital, supra*, at p. 216.

"The power of an administrative * * * board to administer a federal statute and to prescribe rules and regulations to that end is * * * [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. [An administrative decision] which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *United States v. Larionoff*, 431 U.S. 864, 873 n. 12, 97 S.Ct 2150, 2156, 53 L.Ed.2d 48 (1977) *quoting Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936).[5]

Conclusion

We must give "due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141, 60 S.Ct. 437, 440, 84 L.Ed. 656 (1940). Recognizing this, our function "ends when an error of law is laid bare." *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20, 73 S.Ct. 85, 87, 97 L.Ed. 15 (1952). At that point, our only recourse is to remand to the Board for reconsideration in light of our holding.

"Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy." *N.L.R.B. v. Food Store Employees*, 417 U.S. 1, 10, 94 S.Ct. 2074, 2080, 40 L.Ed.2d 612 (1974). *See also, South Prairie Construction Co. v Local 627, Intern, Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (per curiam). "For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities*

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[3] To the extent that *N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, 99 S.Ct. 2847, 61 L.Ed.2d 290 (1979) is contrary, we decline to follow it.

[4] The decision and order of the Board was entered on stipulating of the parties. This does not, however, change our views. That stipulation, specifically approved by the Board, provides in part:

> It is agreed that this case shall be in the same posture before the United States Court of Appeals for the Tenth Circuit as it would have been if the standards procedures has been followed, i.e., after a Complaint had issued, the Employer would have filed an answer defending the allegations on the grounds that the bargaining unit is inappropriate, the Union would have moved for summary judgement, the Employer would have responded to the motion again asserting the bargaining unit defense, the National Labor Relations Board would have granted the motion for summary judgement, and the Employer would have then appealed to the United States Court of Appeals for the Tenth Circuit.

[5] For these same reasons, the Board erred in applying its single facility presumption to the issue of unit scope. *See infra.*

Comm'n. v. Chenery Corp., 318 U.S. 80, 88, 6b3 S.Ct. 454, 459, 87 L.Ed. 626 (1943).[6]

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The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for proceedings consistent with this opinion.

It is so Ordered.

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[6] In our case remand is especially justified. Following the decision in this case, the Board reconsidered its prior opinions in the health care industry as regards registered nurse units. *See Newton Wellesley Hospital*, 250 NLRB No. 86 (1980). *See also: National Medical Convalescent of San Diego*, 254 NLRB No. 163 (1981); *Doctor's Hospital of Montclair*, 254 NLRB No. 175 (1981); *Federick Memorial Hospital, Inc.*, 254 NLRB No. 2 (1981); *Addison Gilbert Hospital*, 253 NLRB No. 141 (1981); *Mount Airy Foundation*, 253 NLRB No. 139 (1981); and *Brookwood Hospital Management Corp.*, 252 NLRB No. 107 (1980). An appellate court reviewing an agency decision following an intervening change of policy should remand to permit the agency to decide in the first instance whether it should reframe its order to better effectuate the policies underlying the Act it is charged with administering. *NLRB v. Food Store Employees*, supra, at p. 10, 94 S.Ct. at p., 2080. In this connection we note our disagreement with the Board's view that the "community of interests" test and the "disparity of interests" test are essentially identical. It is not the similarity of employees' training, hours, conditions and activities which determine the appropriateness of the Unit. It is, rather, the dissimilarity of interests relevant to the collective bargaining process that determines which employees are not to be included in a proposed unit. The proper approach is to begin with a broad proposed unit and then exclude employees with disparate interests. One should not start with a narrow unit, such as registered nurses, and then add professionals with similar interests.

NLRB v. Boston Beef Co., Inc.

652 F.2d 223 (1st Cir.), July 9, 1981—252 NLRB 711

On petition to enforce Board Order

Before Coffin, Chief Judge, Bownes, Circuit Judge, Mazzone, District Judge*

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Mazzone, District Judge: This case is before us upon application of the National Labor Relations Board (Board) under section 10(e) of the National Labor Relations Act (Act), 29 U.S.C. § 160(e), for enforcement of its order issued against the Employer, Boston Beef Co., Inc., on September 30, 1980, and reported at 252 N.L.R.B. No. 101. The Board ordered Boston Beef to cease and desist from violating sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(a)(1) and (a)(5), bargain with the Union,[1] and post appropriate notices.

I.

The action arises out of a representation election involving certain employees of Boston Beef, a wholesale meat distributor located in Worcester, Massachusetts. On October 18, 1979, the Union filed a representation petition with the Board's Regional Office in Boston, seeking certification as the collective bargaining representative of employees at the Employer's plant. On November 6, 1979, the Union and the Employer entered into a stipulation for certification upon consent election, authorizing a representation election in a unit consisting of the following employees:

> All full-time and regular part-time employees including drivers, loaders, shippers, receivers, packers, maintenance employees, shipping clerks, head shippers, head receivers and plant clericals of the Employer's plant located at Lafayette and Franklin Streets, Worcester, Massachusetts, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

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The Acting Regional Director approved this stipulation on November 15, 1979.

In the election, which was held December 5, 1979, fifteen votes were cast in favor of the Union and twelve against it. In addition, there were four challenged ballots, a sufficient number to have potentially affected the outcome of the election. Only one of the challenged ballots, however, that of Thomas Westerberg, is at issue here.[2] The Union challenged Westerberg's ballot on the ground that he was a "casual" rather than a "regular part-time" employee as provided in the stipulation, and therefore not entitled to vote in the representation election.

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*Of the District Court of Massachusetts, sitting by designation.

[1] Local No. 170, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

[2] The Board sustained a challenge to the ballot of one employee on the ground that he was no longer employed by Boston Beef. The Employer does not challenge that determination. The Board did not rule on the Union's two other challenges pending determination of this case because they would only become critical if we reversed and an evidentiary hearing would be necessary to resolve them.

The Regional Director recommended that the Board sustain the challenge to Westerberg's ballot. A three member panel agreed, and on May 19, 1980, the Board certified the Union as the exclusive representative of employees in the stipulated unit.

Thereafter, the Employer refused to bargain with the Union, claiming that the Board incorrectly excluded Westerberg from the relevant bargaining unit. The Union filed unfair labor practice charges, and on June 30, 1980, the Regional Director issued a complaint. On August 29, 1980, the Board transferred the case to itself and, in the order issued September 30, 1980, granted the General Counsel's motion for summary judgment. The Board held that the Employer's refusal to bargain with the Union violated sections 8(a)(1) and 8(a)(5) of the Act, and ordered the remedial actions outlined above.

II.

The facts underlying this controversy are not materially disputed. Thomas Westerberg began working for Boston Beef in June, 1979. During the summer, he worked an average of three nights a week, eight hours per night, loading trucks. At the end of the summer, Westerberg was laid off and returned to complete his final year of high school.

Westerberg was rehired in October, 1979, to do "display work" for the Employer at certain supermarkets in which Boston Beef had previously agreed to maintain display coolers for its products. He replaced another employee who left the respondent's employ due to illness. The display work involved replacement of old stock and rotation of Boston Beef products in the display coolers. Identical work is performed at other supermarkets by Westerberg's father, a full-time salesman for Boston Beef.[3]

Westerberg spent approximately five hours a week doing display work, and was paid a flat rate of fifty dollars per week. While performing this work, Westerberg did not spend time on the Employer's premises, and had no contact with unit employees. The record indicates that if Westerberg had any questions concerning his display work, he asked his father for assistance.

On November 1, 1979, some five weeks before the election, Westerberg began unloading trucks at the Employer's beef division on Thursday nights. Each week, Westerberg's father inquired as to whether sufficient work were available for his son on the upcoming Thursday night shift. Westerberg was not required to work Thursday nights, nor was he penalized for failing to appear for work. In fact, during the five weeks prior to the election, Westerberg worked only three Thursday nights. On the remaining Thursday nights, Westerberg did not work because of a conflict with his participation in his high school football program. When Westerberg did work the Thursday night shift, he generally worked for three hours and was paid by the hour.

He worked alongside unit employees, took the same breaks, and had the same supervision.

On these facts, the Regional Director and the Board concluded that Westerberg was not a "regular part-time" employee, and was therefore excluded from the relevant bargaining unit.

III.

The Employer concedes, and we conclude, that the Board's order should be enforced if it properly substained the Union's challenge to Westerberg's ballot. *Summa Corp. v. N.L.R.B.*, 625 F.2d 293, 295 (9th Cir. 1980). Our standard of review is restricted to an analysis of whether the Board abused its discretion in sustaining the challenge and certifying the election. *N.L.R.B. v. New England Lithographic Co., Inc.*, 589 F.2d 29, 31 (1st Cir. 1978), *quoting N.L.R.B. v. S. Prawer & Co.*, 584 F.2d 1099, 1101 (1st Cir. 1978).

The Employer first contends that the Board erroneously applied a "community of interest" test in determining that Westerberg was not a regular part-time employee. The community of interest standard is one traditionally relied on by the Board in determining whether an individual employee or job classification should be included in a particular collective bargaining unit. The test includes a consideration of whether the employee works at regularly assigned hours a substantial number of hours per week; performs duties similar to those of unit employees; and shares the same supervision, working conditions, wages, and fringe benefits as the unit employees. *See Westchester Plastics of Ohio, Inc. v. N.L.R.B.*, 401 F.2d 903, 907–08 (6th Cir.

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[3] It is undisputed that the Union and the Employer intended to exclude salesmen from the relevant bargaining unit.

1968). Boston Beef concedes that application of these principles is appropriate where the Board determines the appropriate bargaining unit in the first instance. However, it argues that community of interest principles are inapplicable where the Union and Employer have agreed upon a definition of the relevant unit prior to the election. In such cases, the Employer contends, the Board's only function is to ascertain the intent of the parties. *See The Tribune Company,* 190 N.L.R.B. 398 (1971). The Board may not rely upon community of interest principles to override a clear expression of the parties' intent. *Tidewater Oil Company v. N.L.R.B.,* 358 F.2d 363, 366 (2d Cir. 1966).

The Board contends that the phrase "regular part-time employees" is a phrase of art in the field of labor law. By including the phrase in this stipulation, it argues, the parties manifested their intent to resolve any dispute concerning unit membership according to the Board's established principles for determining "regular part-time" status, which includes a consideration of community of interest principles.

Although there is some support for the Board's contention that the phrase "regular part-time" employees has an established meaning in the labor context, *see, e. g., N.L.R.B. v. Sandy's Stores, Inc.,* 398 F.2d 268, 272 (1st Cir. 1968), we think the record in this case is unclear on the meaning the parties intended to give the phrase. More precisely, in view of his rather unique employment status, it is unclear whether the parties intended to include Westerberg in the category of "regular part-time employees" at the time the stipulation was drafted.

Under these circumstances, however, resort to the community of interest principles was nevertheless appropriate. While concededly the Board may not rely upon the community of interest test to subvert the clear intent of the parties, where the intent is unclear or the stipulation ambiguous the Board may properly rely upon community of interest principles to help resolve the ambiguity. *N.L.R.B. v. Mercy College,* 536 F.2d 544, 548 at n. 11 (2d Cir. 1976); *Knapp-Sherrill Co. v. N.L.R.B.,* 488 F.2d 655, 659–60 (5th Cir.) *cert. denied,* 419 U.S. 829, 95 S.Ct. 50, 42 L.Ed.2d 53 (1974); *see New England Lumber v. N.L.R.B.,* 646 F.2d 1, 3 (1st Cir. 1981). Accordingly, we find no error in the Board's use of the community of interest test in determining whether Westerberg should have been considered a regular part-time employee.

IV.

Turning to the Board's substantive conclusion, the Employer argues that the Board abused its discretion in concluding that Westerberg was not a regular part-time employee. Concededly, there are facts in the record which arguably support the Employer's position, notably the fact that Westerberg's employment was not limited to a fixed period, and the fact that his working conditions during the Thursday night shift were substantially identical to those of the unit employees.

The Board has frequently attempted to define the circumstances under which student employees will be considered regular part-time employees. Our review of the cases indicates that the Board has often reached opposite conclusions on the basis of seemingly minor factual differences. *Compare San Francisco Art Institute,* 236 N.L.R.B. 1252 (1976); *Highview, Inc.,* 223 N.L.R.B. 646, 649 (1976); *enforced in pert. part,* 590 F.2d 174, *modified,* 595 F.2d 339 (5th Cir. 1979); *Pawating Hospital Association,* 222 N.L.R.B. 672, 672–73 (1976); and *California Inspection Rating Bureau,* 215 N.L.R.B. 780, 782–83 (1974) (part-time students excluded from units which included, *inter alia,* regular part-time employees) *with Dick Kelchner Excavating Co.,* 236 N.L.R.B. 1414, 1415 (1978); *Femco Machine Co.,* 238 N.L.R.B. 816, 826 (1978); *Hearst Corp., San Antonio Light Division,* 221 N.L.R.B. 324 (1975); *Serv-U-Stores, Inc.,* 225 N.L.R.B. 37, 39 (1976); and *Dee Knitting Mills, Inc.,* 214 N.L.R.B. 1041, 1048–49, *enforced,* 538 F.2d 312 (2d Cir. 1975) (students regarded as regular part-time employees). While concededly, the Board's application of the community of interest standard in this context has not always been a model of consistency, *see generally,* Malin, *Student Employees and Collective Bargaining,* 69 Ky.L.J. 1, 5–15 (1980), we are especially reluctant to substitute our judgment for that of the Board on an issue, such as this, where the Board possesses significant expertise and minor factual differences are so important, so long as there is substantial evidence to support the Board's conclusion.

In this case there is ample support in the record for the Board's conclusion that Westerberg did not share a community of interest in wages, hours, and working conditions with the remaining unit employees, and thus was properly not regarded as a regular part-time employee. To begin with, Westerberg's display work was performed at a geographically remote location, under the general supervision of his father, a nonunit employee. He was paid a flat weekly salarly, as opposed to an hourly wage, for the display work. While performing the display work Westerberg had no contact with unit employees.[4]

Turning to the Thursday night work, the Board could reasonably have placed great reliance upon the small number of hours Westerberg spent engaged in that work; the fact that he was not required to work Thursday nights and was not penalized in any way for failing to work; and the fact that he skipped work two out of the five weeks immediately preceding the election, in order to participate in his high school's football program. *Compare Sandy's Stores,* 398 F.2d at 273 (reversing the Board's finding of regular part-time status where employee, a high school student, worked only one day a week and missed work twenty per cent of the time).

Having found substantial evidence in the record to support the Board's conclusion that Westerberg was a casual rather than a regular part-time employee, and therefore properly excluded from the relevent bargaining unit, we affirm the Board's finding that the employer's refusal to bargain constituted an unfair labor practice and enforce its September 30, 1980 order in its entirety.

Enforcement granted.

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[4] The Employer attempted, in its brief and at oral argument, to characterize Westerberg's display work as being similar to the Thursday night loading work. The record clearly indicates significant differences in almost every aspect of the two jobs.

NLRB v. Keystone Steel & Wire Division of Keystone Consolidated Industries, Inc.

653 F.2d 304 (7th Cir.), July 9, 1981—248 NLRB 283

On petition to review and cross petition for enforcement

Before SWYGERT, Senior Circuit Judge,* SPRECHER, Circuit Judge, and WYATT, Senior District Judge**

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SPRECHER, Circuit Judge. In earlier proceedings, the National Labor Relations Board ("Board") found, and this court affirmed, that Keystone Steel and Wire, Division of Keystone Consolidated Industries, Inc. ("Company") had violated section 8(a)(1), 8(a)(5), and 8(d)(3) of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 158(a)(1), 158(a)(5), and 158(d)(30, by unilaterally changing a term and condition of employment covered by a collective bargaining agreement in force between the Company and the Independent Steelworkers' Alliance ("Union"). But although this court affirmed the Board's finding of an unfair labor practice, we found that the Board's remedial order was too broad. We remanded the case to the Board for issuance of a more limited order. The Board has now issued a new order. The Company challenges the supplemental order as again being too broad. Rejecting the Company's argument, we order enforcement of the supplemental order.

I

The Company and the Union were parties to a collective bargaining agreement which provided, among other things, for a hospital, medical, and surgical benefit program administered by Blue Cross-Blue Shield ("Blue Cross"). The Company, without bargaining with the Union, and in the face of the Union's refusal to consent, discontinued the Blue Cross plan and implemented a hospital, medical, and surgical benefit program administered by the Metropolitan Life Insurance Company ("Metropolitan"). The Board found that the Company's switch in health benefit packages amounted to a unilateral modification of a term and condition of employment which violated sections 8(a)(1), 8(a)(5) and 8(d) of the Act. *Keystone Steel & Wire,* 237 NLRB No. 91 (1978). The Board rejected the Company's argument that the switch in the health insurance plans was "merely" a switch in

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administrators, and held that the identity of the plan administrator was sufficiently related to the type, quality, and delivery of benefits to employees as to qualify as a mandatory subject of bargaining.

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*At the time of oral argument, Judge Swygert was a circuit judge in active service; he assumed senior status on July 1, 1981.

**Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, is setting by designation.

The Board ordered a three-part remedy. First, it ordered the Company to cease and desist from refusing to bargain regarding the administrator of the health care program. Second, the Board ordered the Company to cease and desist from any "like or related" unfair labor practice and from "otherwise refusing to bargain collectively in good faith" with the Union. Third, it ordered the Company to reinstate Blue Cross as the program administrator, if the Union requested such reinstatement, and to post the appropriate notice.

On review by this court, we affirmed the Board's conclusion that the switch of the health benefits programs is mandatory subject of bargaining. *Keystone Steel & Wire v. NLRB*, 606 F.2d 171, 179 (7th Cir. 1979) (*"Keystone I"*). Rejecting the company's argument that its action merely changed administrators, not benefits, we concluded that its action not only changed administrators but also "brought other changes which have a material and significant effect or impact upon the terms and conditions of employment." *Id.* Among the effects of the program change were the loss of a labor consultant to help with claims problems and the establishment of a lower payment allowance for certain medical or surgical procedures. *Id.* Thus, we affirmed the Board's finding of an unfair labor practice.

We concluded that the Board's remedy, however, was overly broad and seemed heavy-handed. *Id.* at 180. Specifically, we rejected a requirement that, upon request, Blue Cross be reinstated as the program administrator, because the parties had conceded that Blue Cross would have been unable to provide the program for all of the Company's divisions across the country. *Id.* We thus remanded the case to the Board for a more limited remedy.

Now, the Board has issued a supplemental remedial order having several aspects. *Keystone Steel & Wire*, 248 NLRB No. 40 (1980). First, the Company must restore all benefits and services that were eliminated by the switch to Metropolitan. Second, the Company may not revoke or lessen any benefits currently enjoyed under the Metropolitan plan. Third, the Company must "make whole" any employees for any losses caused by the switch. Finally, the company must post the appropriate notices. To implement the requirement that benefits and services be restored, the Board ordered two specific corrective measures:

> (a) Utilization of the same geographical areas used by Blue Cross/Blue Shield for determining its usual and customary charges, or, in the alternative, payment of at least the same level of usual and customary benefits as Blue Cross/Blue Shield.
>
> (b) Provision of a "labor consultant" to handle the health insurance claims of unit employees.

248 NLRB No. 40 at 4. The Board emphasized that the Company's restoration obligations were not limited to just these measures.

The Company now challenges this supplemental order as being too broad; the Board applies for enforcement. We reject the Company's arguments and enforce the Board's order.

II

We begin with a review of the Board's power to fashion remedies for violations of the Act. Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has been committed, to correct the effects of the unfair labor practice by requiring the violator "to take such affirmative action * * * as will effectuate the policies" of the Act. 29 U.S.C. § 160(c). The Board's power to fashion remedies is broad and discretionary, subject to limit judicial review. As the Supreme Court stated in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct 398, 405, 13 L.Ed.2d 233 (1964):

> "[T]he relation of remedy to policy is peculiarly a matter for administrative competence * * * ." * * * "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." * * * . The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other then those which can fairly be said to effectuate the policies of the Act."

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(citations omitted).

In developing remedies for specific situations, the Board, drawing on its expertise in industrial relations, must attempt to create "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61

S.Ct. 845, 852, 85 L.Ed. 1271 (1941). The Board's choice of remedies to effectuate the policies of the Act is "peculiarly a matter for administrative competence." *Id.* In reviewing the Board's remedies, "courts must not enter the allowable area of athe Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Id.* The Board's discretion to fashion remedies in not unfettered, however. The Board's remedies must be "calculated to effectuate a policy of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349, 73 S.Ct. 287, 290, 97 L.Ed. 377 (1953), and must not be punitive, *Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655, 81 S.Ct. 875, 877, 6 L.Ed.2d 1 (1961).

III

The first question, then, is whether the supplemental order does effectuate a policy of the Act. A major policy of the Act is to stabilize industrial relations by fostering collective bargaining agreements equally binding employers and unions. *See, e.g., Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453–54, 77 S.Ct. 912, 916, 1 L.Ed.2d 972 (1957), and *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–26, 61 S.Ct. 320, 324–25, 85 L.Ed. 309 (1941). Industrial stability depends, in part, upon the binding nature of collective bargaining agreements. Both employer and employee acceptance of any given agreement, and indeed, of the very concept of collective bargaining, depend upon a guarantee that their agreement will not be unilateraly altered. Applied to this case, which involves terms and conditions of employment, the policy behind the Act requires that no change in those terms and conditions be made without the express consent of the employees, through their union.

Where, as here, the employees' expectation for "no change without consent" is defeated by the unilateral action of the employer, the stability of the bargaining relationship is impaired. The likely effect of such instability is to create perceptions of unfairness and of union weakness.[1] The reaction to these perceptions may be increased militancy and labor unrest. Thus, we conclude that the Board's remedy here, correcting a unilateral change in a term or condition of employment,[2] is consistent with an important policy behind the Act.

IV

The next question is whether the Board's supplemental orders is punitive or otherwise beyond the scope of the Board's authority. To determine the propriety of the supplemental order, we must consider it in light of the defect in the original order. In *Keystone I,* this court found the unilateral change of program, administrators to be an unfair labor practice because the Union did not consent to the change. Although the Metropolitan progream offered some additional benefits, it also caused the loss of a labor consultant and it provided lower benefits for some medical procedures. We found the order requiring reinstatement of Blue Cross to be too broad, but suggested that an order requireing the Company to correct detrimental differences would be more appropriate. *Keystone I,* 606 F.2d at 180. The supplemental order complies precisely with our suggestion. The supplementary order no longer requires reinstatement of Blue Cross, but requires the Company to restore all benefits enjoyed by the employees before the change in administrators, including the labor consultant and any health benefits reduced by the change. The supplemental order also directs the company to "make whole" any employees who sustained any monetary losses as a result of the Company's action.

Not only is the Board's supplemental order fully encompassed within the scope of our remand, but it is also consistent with precedent. The Board's order here is a traditional "make whole" order which this court and others typically have upheld in unlawful unilateral change cases where the orders provide both for restoration of working conditions or benefits improperly denied and for monetary compensation for any losses sustained. *See, e.g., Fibreboard,* 379 U.S. at 215–17, 85 S.Ct. at 405–06; *Davis v. NLRB,* 617 F.2d 1264, 1273 (7th Cir. 1980); *Zim's Foodliner, Inc. v. NLRB,* 495 F.2d 1131, 1144 (7th Cir.), *cert. denied,* 419 U.S. 838, 95

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[1] *Cf. NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429 n. 15, 87 S.Ct. 559, 564 n.15, 17 L.Ed.2d 486 (1967) ("For the real injury in this case is to the union's status as bargaining representative * * *. ").

[2] As in our previous decision, *Keystone I,* 606 F.2d at 179, we should not, and do not, consider the merits of the Company's action. That the Metropolitan plan offers some additional benefits to employees is irrelevant. The relevant fact is that the Union never consented to the change.

S.Ct. 66, 42 L.Ed.2d 65 (1974); *Hinson v. NLRB,* 428 F.2d 133, 136–37 (8th Cir. 1970); *NLRB v. Scam Instrument Corp.,* 394 F.2d 884, 887 (7th Cir.), *cert. denied,* 393 U.S. 980, 89 S.Ct. 449, 21 L.Ed.2d 441 (1968); *NLRB v. Central Ill. Public Service Co.,* 324 F.2d 916, 919 (7th Cir. 1963); and *Leeds & Northup Co. v. NLRB,* 391 F.2d 874, 879–80 (3d Cir. 1968).

The Company argues that here the Board is doing more than restoring benefits lost by the Company's unilateral action. It complains that under the Board's supplemental order, in situations where the Metropolitan plan offers greater benefits than the Blue Cross plan, the employees must receive the higher Metropolitan benefits and in situations where the Metropolitan plan pays less, the employees must be "made whole" for any out-of-pocket loss. In other words, the Company complains that the supplemental order causes employees to receive greater benefits than they would have received had the Company not committed the unfair labor practice. This disingenuous argument must fall.

When the Company unilaterally changed insurance plans, its action resulted in some favorable and some unfavorable changes to the employees. The Board's policy in cases of combine favorable and unfavorable unilateral changes is to order a return to the status quo ante with regard to the unfavorable changes, but to not penalize employees by ordering revocation of the favorable changes. *See Moody Chip Corp.,* 243 NLRB No. 36, 18 (1979); and *North American Mfg. Co.,* 224 NLRB 1252, 1260 (1976). We endorse the Board's policy. In effect, the favorable change becomes the established condition of employment. An employer can change this condition only as it can change any condition—by giving notice of the proposed change and by successfully bargaining with the union to secure the union's approval.

The Board's policy is entirely consistent with the purposes of the Act. The refusal revoke favorable changes simply ensures that, under whatever formula the Company implements to restore the employees' health benefits, the Company cannot use the Board's order as a license to abolish or alter any of the favorable changes resulting from its unlawful conduct without fulfilling its statutory duty to bargain. That some employees ultimately may receive greater benefits than they would have received if the Company had not acted illegally is not, theefore, the result of any defect in the Board's order. Rather, any potential for greater benefits is due entirely to the Company's unfair labor practice. Thus, the Board is not impermissibly dictating terms of ther parties contract. if is merely ordering its traditional remedy of a return to the status quo ante, combined with its traditional refusal to penalize employees by revoking benefits conferred as a result of an unfair labor practice.

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The Company also argues that, since the original order did not include a monetary "make whole" provision, the supplemental order's inclusion of such a remedy necessarily means that it cannot be "more limited" than the original remedy, as we ordered in *Keystone I,* 606 F.2d at 180. But this argument is also wide of the mark.

Our objection to the original order was that it ordered the Company, upon request by the Union, to reinstate Blue Cross as the program administrator for all of the Company's divisions, when such reinstatement would have been economically disruptive, if not impossible. That the Board has now issued its traditional "make whole" order, although it failed to do so in its initial order, does not run afoul of our concern with the initial order. The Company cites no law, and we know of none, limiting the remedies in supplemental orders to those contained in original orders. *Cf. NLRB v. Allied Products Corp.,* 629 F.2d 1167, 1173 (6th Cir. 1980) ("As a consequence of the remand, the Board expanded its make whole remedy to include [persons previously excluded]. We believe that the Board's expansion of the remedy is consistent with the Act * * *."). Thus, we conclude that the subsequent addition of the "make whole" remedy is proper. The Board's supplemental order does not flout, but is consistent with, or instructions on remand.

Finally, the Company admits that no employees have filed claims or grievances for monetary losses as a result of the change in health care benefits over three years ago. Therefore, it seems unlikely that the Company will suffer any significant loss as a result of the "make whole" order. But as we have discussed, even if the Company were to suffer a significant loss, we find the "make whole" order entirely proper.

V

The Company's last arguments are that the Board's order requiring the Company to ensure that in no circumstances shall benefits be lower than those currently enjoyed will allow windfalls to employees and will create severe administrative burdens. Neither of these arguments is persuasive.

First, contrary to the impression the Company attempts to create, in no case will employees receive any benefits above the cost to the employee of the health services provided. A brief examination of the effect of the Board's supplemental order on a hypothetical medical procedure costing $500 is useful. If the Blue Cross plan allowed a benefit of $500 but the Metropolitan plan allows a benefit of $400, the Company must "make whole" an employee for the $100 penalty created by the Company's change. But if the Metropolitan plan allows $600, the employee does not receive an extra $100; the employee only receives reimbursement for the cost of the care. If both plans allow less than $500, the employee must absorb the difference between the cost and the higher amount allowed. Thus, the employee receives the higher amount allowed by either plan, but under no situation does the higher benefit create a windfall for the employee.

Finally, the Company claims that the cost of maintaining two benefit tables—the Blue Cross table and the Metropolitan table—must be "severe". This argument falls of its own weight, for the Company argues at length that the Metropolitan benefits are better than the Blue Cross benefits—obviously, the Company already has and maintains two benefit tables. In any event, the Company proffers no specific evidence of any administrative burden and its argument amounts to nothing more than mere paper pleading. Furthermore, any administrative inconvenience must be blamed on the Company's violation of the Act.

VI

We have carefully considered all of the other arguments of the parties not specifically discussed in this opinion. We find those arguments either wanting merit or insufficiently important to warrant extended discussion; their discussion would not have altered this result. For the foregoing reasons, the Board's supplemental order is

Enforced.

NLRB v. Blevins Popcorn Co.

659 F.2d 1173 (D.C. Cir.), July 10, 1981

On petition to review determination of special master

Before WRIGHT, TAMM, and WALD, Circuit Judges

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT

Opinion concurring in the result filed by Circuit Judge TAMM

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J. SKELLY WRIGHT, Circuit Judge: In this appeal the National Labor Relations Board (NLRB) seeks review of a determination by a Special Master that the Blevins Popcorn Company (the company) did not violate a contempt and purgation order issued by this court on September 16, 1977. In that order we stated that the company would face sanctions if it did not begin bargaining in good faith with the American Federation of Grain Millers, AFL–CIO (the union), which represented employees at the company's Ridgway, Illinois facility.[1] As we explain below, we conclude that the Special Master imposed an unduly heavy burden of proof on the NLRB. We also conclude that the Master may not have applied the proper legal principle in determining whether the company bargained in good faith. Thus we remand to the Master for new findings of fact and conclusions of law.

I. BACKGROUND

A. *Enforcement Order and First Contemp Proceeding*

On May 4, 1977 this court entered a judgement enforcing in full a decision and order of the NLRB issued against the company on June 19, 1975. *See Blevins Popcorn Co.*, 218 NLRB 689 (1975). In its decision the NLRB found that the company had unjustifiably refused to bargain with the union over rates of pay, wages, hours, and other terms and conditions of employment. The order, as enforced, directed the company to:

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[1] *See* Special Master's Findings of Fact and Conclusions of Law, *reprinted at* Appendix (A) 1, 2. The company, a wholly owned subsidiary of the Conwood Corporation, is engaged in production and sale of packaged popcorn. It operates three facilities in the South and the Midwest. *Id.* at 4.

> 1. Cease and desist from:
>
> (a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with American Federation of Grain Millers, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:
>
> > All production and maintenance employees, including truckdrivers employed at the Employer's facility in Ridgeway [*sic*], Illinois, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act
>
> (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
>
> 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.
>
> (a) Upon request, bargain with the above-named labor organization as the exclusive representive of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

218 NLRB at 691.[2]

On September 16, 1977, upon motion of the NLRB, this court entered a second order summarily adjudging the company in civil contempt for willfully continuing to fail and refuse to comply with the court's May 4 order.[3] The September 16 order stated that the company could purge itself of civil contempt by:

> (a) Fully complying with and obeying this court's judgment of May 4, 1977, by, upon request, bargaining collectively in good faith with the union as the exclusive representative of [the company's] employees in the appropriate unit, and, if an understanding is reached, embodying such understanding in a signed agreement, provided, however, that such agreement may be made subject to termination should the United States Supreme Court ultimately decide that [the company] was not obligated to recognize and bargain with the union.
>
>
>
> (b) Proceeding with the officials of the union to set an initial meeting date, not to exceed ten days from entry of this order, and thereafter proceeding to bargain upon consecutive days during regular business hours until all contract proposals on mandatory and lawful subjects have been considered and actions taken in relation thereto.

The order further provided:

> 3. That in order to assure against further violations of this court's judgment, this court assesses against [the company] a prospective fine in the amount of one hundred dollars ($100.00) per day if compliance with this order has not been commenced within seven (7) days of the date of this order.
>
> On further motion by the Board the court will take such other and further action and grant such other relief as appears just, reasonable, and necessary at that time.

See Special Master's Findings of Fact and Conclusions of Law, *reprinted at* Appendix (A) 1, 2.

B. *Events From September 1977 to June 1978*

Upon issuance of the court's contempt and purgation order, the company's attorney, Richard Brackhahn, sought to arrange a bargaining session with the union within ten days.[4] Because the union

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[2] *See also id.* at 1.

[3] *See id.* at 2.

[4] Brackhahn represented the company throughout the NLRB and court precedings, and participated in the negotiations with the union. The company was also represented by John Jolly, its Sales and Production coordinator. Both Jolly and Brackhahn conferred with the Ridgway plant manager, Charles McGuire; in developing the company's bargaining position. The union was represented primarily by Elmer Ferris, a staff representative of the American Federation of Grain Millers, *Id.* at 4.

Except where otherwise noted, our description of the events that took place between September 1977 and December 1978, described in Parts I-B and I–C of this opinion, are based on the Master's findings of fact. Because we remand so that the Master may reconsider the evidence in light of the proper standard of proof, some of these findings may change. As the discussion in Part II *infra* should reveal, our decision in this case does not turn on any of these findings of fact; we remand because we believe the Master misapplied the law.

Our description of the events that took place between September 1977 and December 1978, contained in Parts I–B and I–C of this opinion, is based primarily on the Master's findings of fact. In several instances we also refer to evidence that was not discussed in the Master's report; each of these instances is noted. The concurring opinion criticizes our descrip-

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was unable to meet within that time, the parties agreed to begin negotiations on September 30, 1977. The parties later agreed that, at least initially, they would not meet on consecutive days as provided by the order.[5]

At the September 30 meeting the union presented at six-page contract proposal covering a variety of economic and noneconomic matters. Several of these matters were discussed. The parties first considered the union's proposal that departmental seniority based upon an employee's continuous length of service govern layoff's and recalls,

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and that plantwide seniority based upon length of service determine "bumping rights." [6] The company stated that it would prefer a seniority system based upon the ability of the employees. The parties also discussed the union's proposal that the contract include a grievance procedure culminating in binding arbitration, and that it contain a no strike/no lockout clause. The company stated that it had no objection to the principle of binding arbitration. Finally, although the union's proposal was silent on this issue, the parties discussed the length of the contract. The company proposed a three-year term; the union did not object.[7]

Further negotiating sessions were held on October 10 and 11, 1977. The union made a wage proposal, asking for across-the-board increases for all employees of 35 cents per hour in the first and second years, and 30 cents in the third year. The company rejected this proposal, claiming that it would place the company in a noncompetitive situation and might lead to a cutback in operations at the Ridgway facility. At the close of the negotiating session the company requested a break of four to five weeks so that it could prepare a counterproposal. The union agreed to the delay.[8] There is some evidence suggesting that the company had already prepared a proposal, and that its request for a postponement was not made in good faith.[9]

The next negotiating session was held on November 17, 1977. The company presented a full counterproposal, the terms of which were quite disadvantageous to the union. The proposal included (1) a management rights clause reserving to the company all "inherent rights" except those specifically contracted away;[10] (2) three-year wage increases for current workers by name rather than job classification,[11] (3) a clause giving the company the right unilaterally to grant pay at higher rates to current or newly-hired employees; (4) a clause reserving to the company the right to set wage rates for new or changed jobs; (5) 54 rules by which employees could be disciplined; (6) a no strike/no lockout clause with individual union officer liability in the event of illegal union activities; and (7) a clause stating that for purposes of layoff and recall seniority would be determined by the company on the basis of an employee's physical and mental fitness, ability to do the job, and experi-

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tion, complaining that we have embarked "upon a lengthy voyage of factfinding unjustified by anything other than philosophical predilection." Concurring opinion (conc'g op.) at———. It proceeds to argue that we have acted in apparent disregard of the rule that a Special Master's findings of fact may be set aside only if "clearly erroneous." *Oil, Chemical & Atomic Wkrs Int'l Union v. NLRB*, 547 F.2d 575, 580 (D.C.Cir. 1976), *cert, denied*, 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977). *See* conc'g op. at 2. The concurrence misreads our opinion. We do not at this time parport to review the Master's findings of fact, which we concede could ordinarily be overturned only if clearly erroneous. Nor do we intend to engage in independent factfinding. Instead, as we explain *infra*, we simply point out that the Special Master committed several errors of law. The most important of these errors was his decision to impose a more rigorous burden of proof on the NLRB than was justified. Clearly, this error may have had an impact on his findings of fact. Under the circumstances, we do not believe that it is inappropriate to refer to evidence not specifically described in the Master's report. Of course, our description of the case is in no way binding on the Special Master, who must reconsider his original findings of fact, on remand, in light of the proper burden of proof.

[5] More specifically, they agreed not to meet on consecutive days to that the company would have an opportunity to study the union's first contract proposal, and so that the company and the union could exchange information on several matters that would be the subject of bargaining. *Id.* at 5.

[6] *Id.* at 6. A "bumping right" is the right of an employee whose department has been shut down to take the job of a less senior employee in another department.

[7] *Id.* at 6–7.

[8] *Id.* at 8.

[9] The document presented to the union on November 17 contained proposals very similar to those set forth in another document introduced as evidence at the hearings before the Special Master. The latter document contained language stating that the company's proposals were subject to "automatic termination" in the event of Supreme Court action favorable to the company. *See* NLRB Exhibit (BX) 58 at 1. The Supreme Court denied the company's petition for a writ of *certiorari* to review the May 4, 1979 contempt adjudication on October 3, 1977. Thus it would seem that a counter-proposal had been prepared before October 3.

[10] *See* Special Master's Findings of Fact and Conclusions of Law at A 8.

[11] These offers ranged from a high of 15 cents per hour in the first year, 25 cents in the second year, and 20 cents in the third year for some employees, to a low of 10 cents in the first two years and 5 cents in the third year for others. *See* BX 24 at Appendix A. The individuals who were to receive the highest raises were all then earning the legal minimum wage, and the proposed increases were equal to the projected increases in the legal minimum. *See id.*; Transcript (Tr.) 83.

ence and continued length of service. Despite the company's earlier statement that it had no objection to the principle of binding arbitration, its proposal also called for a grievance procedure culminating only in nonbinding arbitration.[12]

After receiving the company's counterproposal, the union drew up a second proposal that bridged some of the gaps between the company and union positions. This posposal adopted much of the language of the counterproposal, and made significant concessions. In particular, on the question of seniority the union proposed that plantwide seniority based on length of service be used for layoffs and recalls, but that employees retained or recalled must also have the qualifications necessary to perform the work in question.[13] The union further stated that it would agree to allow the company to use temporary employees for as long as 90 days without the accrual of any seniority rights.[14]

The union's second proposal and the company's counterproposal were discussed at meetings held on November 29 and 30, 1977. Although seniority, grievance procedures, union security, management rights, use of temporary employees, and distribution of overtime were discussed at length, no agreement was reached on these matters. Agreement was reached on several minor issues, such as posting of seniority lists.[15] At the November 30 meeting company attorney Brackhahn stated that he would like to postpone further negotiations until January because illness in his family. The union stated that it would accept this delay.[16]

Although no meetings were held during December, several significant events occurred. First, the company decided to withhold an annual pay increase that it had given to its Ridgway employees during previous Decembers. The company justified this action on the ground that pay raises were barred while negotiations were in progress. When employees asked the plant manager, Charles McGuire, why they had not received raises, he told them that wages were "frozen" as a result of the union negotiations.[17] He further stated that "if the Union was not here [at the Ridgway plant] there would be a raise as normal, as the Company has always given them." [18]

The second event involved a letter sent by company attorney Brackhahn to plant manager McGuire, informing him of the status of the negotiations.[19] In this letter Brackhahn indicated that the company had adopted a rigid negotiating position. He stated that "no agreement has been reached on employees' wages" or on "employee insurance or hospitalization protection," because the union's position "remained economically unsound" and the company negotiators were "not about to agree to [the union's] position on these and many other issues discussed." [20] The letter further stated that the union's request for two 15-minute break periods was "ridiculous," that union membership would never be a condition of employment at the plant, and that the company would insist that all 54 work rules contained in its counterproposal be included in any contract.[21] McGuire passed the letter on to his supervisors, some of whom permitted the employees to read the letter. In addition, a handwritten version of the letter, copies by one of the employees, was circulated.[22]

submitted to the NLRB a copy of the letter which differed in several material respects from the handwritten version. Brackhahn's copy suggested that the company's opposition to union demands was not rigid, and in general cast the company's bargaining position in a more favorable light.[23] It now appears that the copy submitted to the NLRB by Brackhahn was a fabrication and that the handwritten version is accurate.[24]

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[12] *See* Special Master's Findings of Fact and Conclusions of Law at A 8 (describing company counterproposal).

[13] *Id.* at 9. Further concessions were made with respect to shift differentials, paid vacations, and probationary periods.

[14] *Id.* The company's freedom to use temporary employees was an important issue, since operations at the Ridgway facility were seasonal in nature. *See id.* at 20.

[15] Agreement was also reached on shift differentials and the circumstances under which seniority would be considered to be broken. *Id.* at 9.

[16] *Id.* at 10.

[17] *Id.*

[18] *Id.* Prior to December Brackhahn had informed the union representative by letter that the company would not make any wage increase "that the law prohibits." BX 30.

[19] McGuire became concerned that Brackhahn and the other company representatives had made substantial concessions at the bargaining table. Brackhahn wrote the letter to reassure McGuire about the status of negotiations. *See* Special Master's Findings of Fact and Conclusions of Law at A 10-11 n.6.

[20] *Id.*

[21] *Id.*; BX 50 (copy of letter).

[22] Special Master's Findings of Fact and Conclusions of Law at A 10-11 n.6. Distribution appears to have been encouraged by Brackhahn. The letter contains this sentence. "I am hopeful that you will assure these employees who have come to you and asked about what is going on in the meetings, that they have been deceived." BX 50 at 2.

Two more bargaining sessions were held in early January 1978, but little progress was made. At those meetings the company said that it would be unable to meet during February because one of its negotiators would be away on a business trip.[25] Additional sessions were scheduled for January 16, 17, 23, and 24. Because of a snowstorm, however, the first two meetings were cancelled. At the sessions on January 23 and 24 the union continued its efforts to find common ground. It offered a third contract proposal which incorporated the minor agreements that had been reached at prior meetings, and which made significant concessions in the area of management rights, wages, holidays, and paid vacations. With respect to wages, the union sought a first-year increase that would equalize wages for employees in five job classifications, and across-the-board increases of 20 and 25 cents per hour in the second and third years of the contract.[26] The company rejected this proposal, stating that the wage increase was still too high. The company further stated that it was dissatisfied with the union's proposed grievance procedure. The company did agree to several minor proposals, such as a clause setting the time for distribution of paychecks.[27] No other significant agreement was reached, however. The company continued to insist that the union accept the major provisions of its November 1977 counterproposal.[28]

At both the January 23rd and January 24th meetings the union stated that it would like to meet throughout the week. The union also suggested that the company find a substitute for the representative who would be away during February, so that negotiations could continue through that month. The company rejected both suggestions and stated that it would not meet again until March. The union felt that the company was taking advantage of its acquiescence in previous delays, and threatened to complain to the NLRB and to terminate negotiations. Although negotiations were not terminated, the union did subsequently complain to the NLRB.[29]

On March 10, before the next negotiating session was held, a few employees who were disaffected with the union asked plant manager McGuire if they could call a plantwide meeting to discuss withdrawing support from the union.[30] McGuire allowed a meeting to take place on paid company time, even though this was in contravention of past practice and in violation of the work rules contained in the company's 1977 counterproposal.[31] The meeting, which lasted about 30 minutes, failed to produce a vote to oust the union.[32]

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Bargaining sessions were held on March 16th and 17th. The company stated that its Ridgway facility was in "bad shape" economically.[33] Seniority, wages, holidays, and paid vacations were discussed, but no progress was made. The union asked for consecutive-day bargaining, but the company refused, claiming that such meetings were unnecessary. It stated that it would meet again on April 5, 6, and 7, at which time it would present a final proposal to the union. The union agreed.[34]

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[23] *Compare* BX 50 *with* BX 48. For example, the Brackhahn version omits the sentence suggesting that McGuire should share the contents of the letter with employees, *see* note 22 *supra*.

[24] The Master never explicitly found that the Brackhahn version was a fabrication. He stated only that the handwritten version "differs in material respects from the original letter claimed to have been written by Brackhahn to McGuire * * *." Special Master's Findings of Fact and Conclusions of Law at A 11 n.6. However, in describing the contents of the letter the Master quoted from the handwritten version. *Compare id.* with BX 50. This strongly suggests that he believed the handwritten version was accurate.

[25] Company representative Jolly stated that he had to go on an important business trip during February. Special Master's Findings of Fact and Conclusions of Law at A 11. Jolly did not actually depart until February 7; he returned on February 24. Tr. 852–859. After his return neither he nor Brackhahn contacted the union until after receiving a letter from the union representative, dated March 2, requesting that arrangements be made for the next meeting. A 1; *id.* at 14; BX 34; Tr. 1014–1015. *See* also note 29 *infra*.

[26] Special Master's Findings of Fact and Conclusions of Law at A 12.

[27] The company also agreed to the union's proposed "recognition" clause, its "no-discrimination" clause, and a clause providing that the union would be notified when employees were given disciplinary warning slips. *Id.* at 12.

[28] *Id.* at 12–13.

[29] *Id.* at 13–14 When the union representative threatened to terminate negotiations, Brackhahn told him to "sleep on it." *Id.* This comment suggests that the company did not take the union's threats seriously. The Master found, however, that the company relied on the unions representative's remarks about terminating negotiations. According to the Master, this explains why no further arrangements for meetings were made, *see* note 25 *supra*, until after the union requested a resumption of contract negotiations in a letter dated March 2, 1978. *Id.* at 14.

[30] These employees were apparently upset because they had not received their December raises. *See* BX 49 at 236–247.

[31] *See id.*; Tr. 1106–1114, 725–729. McGuire also ordered his supervisors to watch the plant gates so that no company or union representatives could enter the plant while the meeting was in progress. BX 49 at 236–246; Tr. 1106–1114, 725–729. Plant supervisor McGuire claims he was unaware of the purpose of the meeting. Tr. 1076–1077.

[32] Special Master's Findings of Fact and Conclusions of Law at A 14.

[33] *Id.*

At the April 5th meeting the union and the company agreed on the number of holidays, on insurance and hospitalization plans, and on a pension plan. At the April 6th meeting the company presented a proposed seniority list, which ranked all current employees according to ability, experience, and length of service. This seniority proposal was tied to a new wage proposal, which was slightly better than the company's first offer of November 1977.[35] The union responded on April 7th by presenting a new wage proposal of its own. This proposal, which demanded less than the January proposal, called for increases on the basis of employee job classifications in the first year; small across-the-board increases would be made in the second and third years.[36] The company conceded that the union had "come a long way," but rejected the proposal.[37] It further stated that if agreement could not be reached on wages, it would not discuss any other union proposals. After a long discussion, the company claimed that it had nothing further to offer and wanted to adjourn for two weeks. The union demanded that the company make a final offer on wages at that time.[38]

The next meetings were held on April 19th and 20th. A Federal Mediator attended at the union's request. At the April 20th meeting the union suggested a system of "classification" seniority. Under this system layoff and recall would be determined on the basis of tenure within a designated job classification. Bumping rights would be based on plantwide hire dates and ability to perform the work. No agreement was reached.[39]

Because the Mediator was unavailable, no sessions were held during May.[40] The parties met again with the Mediator on June 19th, 20th, 21st, and 22nd. The company offered a slight change in its position on seniority. It drew up a new seniority list which grouped all present employees into separate departments and provided for department layoff and recall in accordance with the previous managerial ranking of employees. The union stated that it would accept this system if the company would agree to base bumping rights upon the employees' hire dates and ability to perform the work.[41] The company refused stating that it would not allow for unilateral ranking of the employees by management.[42] After several days of discussion devoted almost solely to the seniority issue, the Mediator declared an impasse.[43] The union wished to continue meeting, but the company withdrew, claiming that seniority was the key to resolution of all other major issues.[44]

C. *Events From June 1978 to December 1978*

The union continued to request further meetings, but the company stated that it would not meet again unless the union would agree to its position on seniority.[45] In late September 1978 the company withdrew recognition from the union on the ground that it had a good faith doubt as to the union's majority status. This claim was based upon a petition signed by a majority of the Ridgway employees to the effect that they no longer wanted the union to represent them.[46]

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[34] *Id.* at 14–15.

[35] A new vacation proposal was also tied to the seniority proposal. This vacation proposal offered less than the November 1977 vacation proposal. EX 24 at 13–14; BX 30; Tr. 1033–1038.

In his report the Master found that during the April 5th and 6th negotiation sessions the company "tried to break the impasse over seniority by offering to 'buy off' the seniority issue, *i.e.*, offer more money for wages and have the Union give in on the seniority hiring date position." Special Master's Findings of Fact and Conclusions of Law at A 15. He further found that "the Union refused to talk about it * * * ." *Id.* The NLRB now disputes this finding. It argues that the "buy off" overture was actually a reference to the new seniority-wage-vacation proposal. Thus the union did not unreasonably refuse to consider a compromise. *See* NLRB brief at 28 n.35.

[36] Special Master's Findings of Fact and Conclusions of Law at A 15.

[37] *See* Tr. 202–204; BX 16.

[38] Special Master's Findings of Fact and Conclusions of Law at A 15.

[39] At these meetings the negotiators agreed that the major unresolved issues were seniority and wages. *Id.* at 16.

[40] *Id.*

[41] The union also submitted a list showing each employee's qualifications to perform various plant jobs, so that their bumping rights would be clear. *Id.* at 17.

[42] *Id.* at 16–17.

[43] *Id.* at 17. As the Special Master seems to have recognized, *see id.* at 22, the Mediator's declaration that the parties were deadlocked is not controlling on the question whether theare was a *bona fide* impasse that terminated the parties duty to continue negotiations. That question is partly legal in nature, the Mediator's finding was simply evidence that such an impasse existed. See note 55 *infra* (discussing *bona fide* impasse issue).

[44] Special Master's Findings of Fact and Conclusions of Law at A 17.

[45] *Id.*

[46] *Id.* at 17–18.

In early October 1978 the company granted a wage increase averaging 20 cents per hour to the employees of the Ridgway facility. This wage adjustment was intended in part to compensate employees for the company's failure to grant a wage increase in December 1977. The average raise exceeded the highest amount offered by the company [47] to the union during negotiations. Two of the employees who were responsible for circulating the anti-union petition were given the largest wage increases.[48] Additional raises ranging from five to six percent were granted in December 1978 in accordance with the company's established practice.[49]

D. *Second Contempt Proceeding*

On September 22, 1978, two days before it withdrew recognition from the union, the company asked this court to dissolve the September 16, 1977 contempt and purgation order on the ground that negotiations had reached a *bona fide* impasse.[50] The NLRB responded to this motion by filing an opposition statement and by moving for another civil contempt adjudication. In its motion the NLRB claimed that the company had violated the September 16, 1977 contempt and purgation order by failing to bargain with the union in good faith and by failing to meet with the union at reasonable intervals during the period September 30, 1977 through June 22, 1978. It further alleged that the company had violated the court's order by refusing to meet with the union after June 22, 1978 and by withdrawing recognition from the union. It asked this court to assess fines and to increase prospective fines.[51]

In March 1979 this court appointed a Special Master to hear evidence and make recommended findings of fact and conclusions of law with respect to the company and NLRB motions. The Master conducted several hearings in September 1979.[52] He issued his report on December 16, 1980.[53] The Master found that the company had bargained in good faith throughout the period September 16, 1977 to June 22, 1978. He rejected the NLRB's claim that the company had attempted to undermine the union by (1) repeatedly delaying negotiations; (2) withholding the annual wage increase; (3) allowing employees to read the letter from Brackhahn to McGuire; and (4) permitting the anti-union meeting to be held on paid company time.[54] The Master also found that a *bona fide* impasse existed as of June 22, 1978, and that the company therefore properly refused to continue bargaining with the union.[55] Finally, he found that upon receiving the anti-union petition the company had reasonable grounds to doubt the union's majority status and properly withdrew recognition.[56]

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[47] *Id.* at 18.

[48] See Tr. 1027–1032, 1082, 1112; BX 54; Respondent's Exhibit (RX) 19.

[49] Special Master's Findings of Fact and Conclusions of Law at A 18.

[50] *Id.* at 3.

[51] *Id.*

[52] *Id.* at 3–4. Hearings were held on September 17–21 and September 26, 1979.

[53] *Id.* at 1.

[54] *Id.* at 19–22.

[55] *Id.* at 22. When parties have bargained in good faith but have reached impasse on all mandatory issues, the obligation to continue bargaining ends. *See e.g., NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 48 (5th Cir. 1974); *see also NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 881 (9th Cir. 1978). The NLRB offered two arguments in support of its claim that there was no *bona fide* impasse. First, it claimed that the company had not bargained in good faith, and that the courts will not recognize the existence of an impasse in the absence of good faith. Second, it argued that even if the company had bargained in good faith, there was no real impasse since there were many open issues at the time of the last meeting. The parties were deadlocked only because the company refused to meet again until the union accepted its position on seniority. *See* NLRB brief at 52–54.

The Master rejected these claims. As we have seen, he believed that the parties had bargained in good faith. Moreover, the parties were deadlocked. The Mediator had found that the parties negotiated to an impasse on the issues of seniority and wages. Moreover, "[s]ubsequent correspondence indicates that both the Company and the Union refused to budge on their respective positions." Special Master's Findings of Fact and Conclusions of Law at A 22. Thus the Master concluded that the company did not wrongfully refuse to continue bargaining with the union. He cited *NLRB v. Tomco Communications, Inc., supra*, 567 F.2d at 881, which holds that when "a single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement," the parties' duty to continue negotiation to impass on all mandatory issues is suspended.

We have some doubts about the Master's conclusion that further bargaining would have been fruitless. Although the parties probably were deadlocked on the seniority and wages issues, it seems that they could have continued bargaining on a number of other issues, such as grievance procedures and arbitration. Negotiations terminated at least in part because of the company's intransigence. The Master should reconsider this issue in reviewing his findings of fact.

[56] The NLRB attacked the company's decision to withdraw recognition, arguing that when a union's representative status is based on Board certification, as in this case, there is an irrebuttable presumption that the union's majority support continues for a reasonable period, usually a year. See NLRB brief at 52 (*citing NLRB v. Burns Security Services*, 406 U.S. 272, 279 n.3, 92 S.Ct. 1571, 1578 n.3 32 L.Ed.2d 61 (1972)). The one-year certification period begins on the date the employer commences good faith bargaining. Here, claimed the NLRB, the company had not bargained in good faith. The Master rejected this argument. As we have

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The Master concluded by recommending that the NLRB's motion for a further contempt order be denied and that the company's motion to dissolve the prior contempt order be granted.[57] The NLRB filed exceptions.

II. DISCUSSION

A. *The NLRB's Burden of Proof*

At the outset of the legal discussion contained in his report the Special Master stated that, to meet its burden of proof, the NLRB is "required to produce clear and convincing evidence in support of its allegations of contemptuous conduct * * *."[58] Despite this reference to the clear and convincing evidence standard, it appears that the Special Master actually imposed a far heavier burden of proof on the NLRB. Later in his report he suggested that the Board must prove its case beyond a reasonable doubt: he stated that, "if there is ground to doubt the wrongfulness of the conduct, the Company should not be held in contempt."[59] The Master also stated that "the proof must demonstrate that there existed a wilful and deliberate disregard of a court decree."[60] As we explain below, the Master applied the wrong standard of proof; the NLRB should not have been required to do more than produce clear and convincing evidence in support of its allegations.

As a general rule, the "reasonable doubt" standard of proof and the "willfulness" requirement are applicable only in criminal contempt proceedings.[61] In civil contempt proceedings the clear and convincing evidence standard applies[62] and the failure to comply with the court decree need not be intentional.[63] The explanation for this distinction lies in the different purposes of criminal and civil contempt. Criminal contempt is used to punish intentional misconduct.[64] Thus the procedural safeguards that attend any criminal proceeding, including the reasonable doubt standard of proof, come into play. In addition, the recalcitrant party's state of mind is a central issue. Civil contempt, on the other hand, is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of noncompliance.[65] Thus criminal procedure safe-

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seen, he concluded that the company did bargain in good faith for roughly one year after the bargaining order was issued. He went on to note that a disaffection petition signed by a majority of the employees is usually sufficient grounds to withdraw recognition. *See* Special Master's Findings of Fact and Conclusions of Law at A 23 (*citing NLRB v. Alterman Transport Lines, Inc.*, 587 F.2d 212, 228 (5th Cir. 1979)). Assuming the Master's good faith determination was correct, *see* Part II–B *supra*, we agree with his conclusion on this issue.

[57] *See* Special Master's Findings of Fact and Conclusions of Law at A 24.

[58] *Id.* at 19. *See also id.* at 3, 24 (other references to "clear and convincing" standard).

[59] *Id.* at 19. The Master never expressly stated that he intended to apply the criminal standard of proof. Certainly, however, his report is ambiguous on this point. Because of this ambiguity, we cannot affirm his findings.

[60] *Id.* (*citing NLRB v. Laney & Duke Storage Warehouse Co.*, 424 F.2d 109, 113 (5th Cir. 1970)).

[61] *See In re Winn-Dixie Stores, Inc.*, 386, F.2d 309, 313 (5th Cir. 1967) (in a criminal contempt proceeding "proof must show a knowing, willful and intentional violation beyond a reasonable doubt"); *Green v. United States*, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1957) (applying reasonable doubt standard); *Michaelson* v. *United States*, 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162 (1924) (same); *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1183 (3d Cir. 1976) (reasonable doubt standard applies in criminal contempt proceedings); *see also Mullaney v. Cilbur*, 421 U.S. 684, 699–701, 95 S.Ct. 1881, 1889–1891, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

[62] *See, e. g.*, NLRB *v. Alterman Transportation Lines, Inc.*, *supra* note 56, 587 F.2d at 221–222; *NLRB v. Decaturville Sportswear Co.*, 518 F.2d 788 (6th Cir.), *cert. denied*, 423 U.S. 913, 96 S.Ct. 217, 46 L.Ed.2d 141 (1975); *Stringfellow v. Haines*, 309 F.2d 910, 912 (2d Cir. 1962); *Telling v. Bellows-Claude Neon Co.*, 77 F.2d 584 (6th Cir.), *cert. denied*, 296 U.S. 594, 56 S.Ct. 108, 80 L.Ed. 420 (1935).

[63] *See, e. g., McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949); *Oil, Chemical & Atomic Wrkz. Int'l Union v. NLRB, 547 F.2d 575, 581 (D.C. Cir. 1976), cert. denied*, 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977); *Screw Machine Tool Co. v. Stater Tool & Engineering Corp.*, 480 F. 2d 1042, 1044 (6th Cir. 1973); *Hodgson v. A–1 Ambulance Service, Inc.*, 455 F.2d 372, 374 (8th Cir. 1972); *NLRB v. Fairview Hospital*, 443 F.2d 1217, 1220 (7th Cir. 1971); *NLRB v. Crown Laundry & Dry Cleaneres, Inc.*, 437 F.2d 290, 293 (5th Cir. 1971); *NLRB v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1062 (8th Cir. 1970), *cert. denied*, 401 U.S. 925, 91 S.Ct 883, 27 L.Ed.2d 829 (1971); *Doe v. General Hospital of D.C.* 434 F.2d 427, 431 (D.C., Cir. 1970). *See generally* 3 C. Wright, Federal Practice and Procedure § 705 (1969); Moskovitz, *Contempt of Injunctions, Civil and Criminal*, 43 Colum. L.Rev. 780, 818–819 (1943); Comment, *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L.J.83 (1947).

[64] *See, e. g., United States v. United Mine Workers of America*, 330 U.S. 258, 302, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

[65] *See, e. g., Shillitani v. United States*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *McComb v. Jacksonville Paper Co.*, *supra* note 63; *McCrone v. United States*, 307 U.S. 61, 59 S.Ct. 685, 83 L.Ed 1108 (1939); *United States v. Spectro Foods Corp.*, *supra* note 61, 544 F.2d at 1183 (distinguishing civil and criminal contempt); *See generally* Comment, *The Coercive Function of Civil Contempt*, 33 U.Chi.L.Rev. 133 (1965).

guards are not applicable.[66] Moreover, the intent of the recalcitrant party is irrelevant.[67]

The Master never disputed these general principles. He noted, however, that this is the third stage of a three-stage civil contempt proceeding.[68] Such proceedings involve (1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding the recalcitrant party in contempt and threatening to impose a specified penalty unless the recalcitrant party purges itself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.[69] The Master apparently conceded that the clear and convincing evidence standard should be applied at the second stage, and that no showing of willfulness would be necessary. He suggests, however, that the third stage is punitive in nature since a fine may be assessed.[70] Thus the wrongfulness of the recalcitrant party's conduct must be shown not just by clear and convincing evidence, but beyond any ground for doubt.[71] Moreover, the party's state of mind is crucial.[72]

These conclusions as to burden of proof are erroneous. The third stage of three-stage contempt proceedings does not lose its civil character simply because a penalty may be imposed. The third-stage proceeding is part of the process by which the court obtains compliance with its decrees; it supports the second-stage contempt and purgation order. At the second stage the recalcitrant party is put on notice that unless it obeys the court's decree and purges itself of contempt it will be fined or face other sanctions. At the third stage the court determines whether the party has fulfilled the purgation conditions. If it has, it escapes the threatened penalty; if it has not, the penalty is imposed.[73] To hold that the third-stage proceeding is punitive or criminal would be to hold that a court may never bring about compliance with its orders by imposing prospective penalties in civil proceeding.[74]

In fact, we have already rejected the claim that the third stage of three-stage contempt is criminal in nature, *Bhrd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 380 F.2d 570 (D.C. Cir.), *cert, denied,* 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967).[75] Our reasoning in that de-

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[66] *See, e. g., Brhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 380 F.2d 570, 578–579 (D.C.Cir.), *cert. denied*, 389 U.S. 327, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967); *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1273 (9th Cir. 1976).

[67] *See, e. g., McComb v. Jacksonville Paper Co., supra* note 63, in which the Supreme Court stated:

> Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. * * * Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. * * *

336 U.S. at 191, 69 S.Ct. at 499. (citations and footnote omitted).

[68] *See* Special Master's Findings of Fact and Conclusions of Law at A 19 n.10. He stated:

> This proceeding is in the third stage of civil contempt where the exaction of penalty is determined and willfulness is required. It is not similar to the second stage of civil contempt where only a threat of penalty is made and willfulness is not a requirement. O.C. & *Atomic Workers Int. Union, AFL–CIO v. N. L.R.B*[,] *547 F.2d 575, 581 (D.C. Cir. 1976), cert. denind,* 431 U.S. 966 [97 S.Ct. 2923, 53 L.Ed.2d 1062] (1977).

As further support for his decision to impose a willfulness requirement the Special Master cited NLRB v. *Laney & Duke Storage Warehouse Co., supra* note 60, 424 F.2d at 113. *see* Special Master's Findings of Fact and Conclusions of Law at A 19.

[69] *See Oil, Chemical & Atomic Wkrs. Int'l v. NLRB, supra* note 63, 547 F.2d at 581; O. Fiss, Injunctions 763–764 (1972) (discussion three-step contempt).

[70] *See note 68 supra (quoting* Special Master).

[71] The reasoning behind his decision to require the NLRB to prove the wrongfulness of the company's conduct beyond any ground for doubt is actually somewhat unclear. As we stated earlier, his report is ambiguous on this point; elsewhere he states that he is applying the clear and convincing evidence standard.

[72] See note 68 *supra* (*quoting* Special Master).

[73] Criminal contempt is often distinguished from civil contempt on the ground that it has as its principal purpose vindication of judicial authority. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911). It might be argued that the third-stage proceeding is criminal, because the court is acting to vindicate its authority. But vindication of judicial authority is also present to some degree in civil proceedings. *See Juidice v. Vail*, 430 U.S. 327, 335–336 & n.12, 97 S.Ct. 1211, 1217 & n.12, 51 L.Ed.2d 376 (1977); *Shillitani v. United States, supra* note 65, 384 U.S. at 369–371, 86 S.Ct. at 1534–1536. "The civil nature of the contempt is not turned criminal by the court's efforts at vindicating its authority, an interest which may be implicated in either civil or criminal proceedings." *United States v. Wendy*, 575 F.2d 1025, 1029 n.13 (2d Cir. 1978); *see also United States v. Work Wear Corp.*, 602 F.2d 110 (6th Cir. 1979).

[74] *See Hoffman v. Beer Drivers & Salesmen's Union Local No. 888, supra* note 66, 536 F.2d at 1273:

> [I]nevitably, wherever a compliance fine is assessed and an opportunity given to purge, the failure to purge will bring about a due date. The due date occurs because the actor has failed to use the key to the jail which the court provided. * * * The occurrence of the due date does not transform civil proceedings, whose sole aim is to secure compliance, into a criminal proceeding. Were it otherwise, compliance with laws or orders could never be brought about by fines in civil contempt proceedings. Always the final order requiring payment will follow the act or omission which constitutes the failure to purge.

[75] As support for his decision the Master cites another case decided by this court, *Oil, Chemical & Atomic Wkrs. Int'l Union v. NLRB, supra* note 63, 547 F.2d at 581. *See* note 68 *supra*. In that case we were confronted with the question whether there was an intent requirement in a second-

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cision turned on the relationship between the second-and third-stage proceedings:

> [T]he fine-imposing [*i. e.,* second-stage] proceeding, to coerce compliance, set a *future* performance date. A later assessment of the fines so imposed, upon a showing of non-compliance, is not sufficient to require the classification of such an assessment as separately punitive. * * * Because a question of fact must be determined at this assessment [*i. e., third-stage*] proceeding (that of non-compliance by the specified performance date), the proceeding does not necessary become a punitive, criminal action wherein the recalcitrant party must be afforded the procedural safeguards of a criminal contempt charge.

380 F.2d at 578–579 (emphasis in original; foot-note omitted).[76] We indicated that the third-stage proceeding is neither criminal nor punitive in nature. *Accord, Hoffman v. Beer Drivers & Salesmen's Union Local No. 888,* 536 F.2d 1268, 1273 (9th Cir. 1976). *See also United States v. Work Wear Corp.,* 602 F.2d 110 (6th Cir. 1979); *United States v. Spectro Food Corp.,* 544 F.2d 1175, 1183 (3d Cir. 1976).[77]

Because third-stage proceedings remain civil in character, neither the reasonable doubt standard nor the willfulness requirement are applicable; only the clear and convincing evidence standard should be employed. The Master's decision to impose a more rigorous burden of proof in this case may have had a substantial impact on his findings of fact and conclusions of law. It is quite possible that his decision would not have been in favor of the company if he had not required the NLRB to show that the company had acted in "wilful and deliberate disregard" of the contempt and purgation order and that the company's conduct was wrongful beyond any ground for doubt.[78]

For example, as we stated in Part 1–D *supra,* the Master found that the NLRB had failed to substantiate its claim that the company had attempted to undermine the union during the period September 1977 to June 1978.[79] If a less rigorous standard of proof had been applied, his conclusion might have changed. The NLRB was able to point to a substantial body of evidence in support of its position. First, the company withheld the annual wage increase in December 1977; moreover, the plant manager told employees that they would have received the increase if it were not for the union's presence. We suggest below that the company may not have been free to withhold the incerase. *See* Part II-B *infra.* If it was not, then its action and the plant manager's explanation are

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stage proceeding. After observing that we were not dealing with criminal contempt or with the last stage in three-stage contempt proceedings, we held that there was no intent requirement. We reasoned that the purpose of a motion for civil contempt, at least at this second stage, "is not to punish intentional misconduct, but rather to enforce compliance with an order of the court and to remedy any harm inflicted on one party by the other party's failure to comply." 547 F.2d at 581 (*quoting Doe v. General Hospital of D.C., supra* note 63, 434 F.2d at 431). The Master apparently believed that this holding implies that a different standard applies at this third stage. We disagree. We merely suggested that third-stage proceedings can be distinguished from second-stage proceedings. We did not expressly confront the question whether a different standard applies. Here we do confront that question, and conclude that the same standard applies since the purpose of the third-stage proceeding is also to enforce compliance.

[76] In *Brotherhood,* the amount of the fine that would be assessed in the third stage had been determined at the second stage. Here, on the other hand, the second-stage order says only that $100 will be assessed every day if bargaining did not commence within seven days, and that the NLRB would be able to move for further penalties. *See* text at note 3 *supra.* The $100 per day fine is no longer applicable. Thus the precise nature of the sanction to be applied at the third stage is uncertain. We do not think this difference is sufficient to distinguish the cases, however. What is important is that at the second stage the recalcitrant party was told that unless it complied with the terms of the court's order it would face sanctions.

[77] The Master also cites a Fifth Circuit case as support for his decision to impose a willfulness requirement. *NLRB v. Laney & Duke Storage Warehouse Co., supra* note 60,424 F. 2d at 113. See *See test* at note 60 *surpa.* We choose not to follow that case. We note that the Fifth Circuit itself, in a case decided subsequent to *Laney & Duke,* stated, "The absence of wilfulness on the part of the Company from civil contempt. The crucial issue in civil contempt proceedings, as distinguished from criminial contempt, is not the employer's state or mind but simply whether the Court's order was in fact violated." *NLRB V. Crown Laundry & Dry Cleaners, Inc., supra* note 63, 437 F.2d at 293. In more recent Fifth Circuit cases a willfulness requirement has not been mentioned, *NLRB v. J. P. Stevens & Co.,* 538 F.2d 1152, 1162 (5th Cir. 1976); *NLRB v. Alterman Transport Lines, Inc., supra* note 56, 587 F.2d 212.

[78] Below we summarize several findings of fact that might have been affected by the Master's failure to apply the proper burden of proof. There also the concurrence suggests that we are engaging in illicit fact-finding. *See* conc'g op. at 1147–1175; *see also* note 4 *supra.* Again, we believe that the concurrence misreads our opinion. We merely point out that if the Master had employed the appropriate, less rigorous, burden of proof, many of his factual conclusions might have changed. Because of this possibility, a remand is necessary.

[79] Of course, an employer who purports to bargain in good faith but who is engaged in efforts to denigrate and undermine the union is not fulfilling its obligations under the federal labor law. *See General Motors Acceptance Corp. v. NLRB,* 476 F.2d 850, 855 (1st Cir 1973); *Continental Insurance Co. v. NLRB,* 495 F.2d 44, 48 50 (2d Cir. 1974); *A. H. Belo Corp. v. NLRB,* 411 F.2d 959, 968, 970 (5th Cir. 1969), *cert. denied,* 396 U.S. 1007, 90 S.Ct. 561, 24 L.Ed.2d 498 (1970).

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strongly indicative of bad faith.[80] Second, the company repeatedly delayed negotiations, despite the union's objections; its justifications for these delays were often quite flimsy.[81] The company's refusal to accede to union requests for more meetings is not consistent with the spirit of the September 16, 1977 contempt order.[82] Third, the company permitted and may even have encouraged disaffected employees to hold an anti-union meeting on paid company time, even though such meetings were contrary to company policy.[83] Fourth, employees were shown the letter from Brackhahn to McGuire stating that the company would not give in to the union on several key issues. Management may have hoped that the letter would convince employees that further support of the union was futile. Finally, the company attempted to submit a fabricated, less damaging, version of the letter to the NLRB and the Master;[84] certainly, this action is probative on the question of bad faith.

We remand so that the Master may reconsider his decision in light of the proper standard of proof. He need not conduct a new hearing; the correct standard may be applied to the existing record.

B. *Legal Principles to be Applied in Determining Whether Bargaining was in Good Faith*

In addition to our conclusion that the Master imposed an unduly, heavy standard of proof on the NLRB, we find that he may not have applied the proper legal principles in determining whether the company bargained in good faith.

1. *Relevance of terms of company's counter-proposals*

Before examining the facts to determine whether the company had bargained in good faith, the Master stated that the evidence must be viewed as a whole, and that the company's intent must be determined from the "totality of circumstances." [85] He also observed that "[i]n general, the obligation to meet and confer in good faith does not compel the parties to agree on a proposal or yield concessions and '[a]damant insistence on a bargaining position * * * is not in itself a refusal to bargain in good faith.' " [86] And he stated that "[t]he right to Union representation * * * does not imply the right to a better deal." [87]

The Master has not misstated the law: the company was not required to make concessions or to yield any position fairly maintained. However, it was under an obligation to make a sincere, serious effort to adjust differences and to reach and an acceptable common ground. *See NLRB v. Insurance Agents' Union,* 361 U.S. 477, 485, 80 S.Ct. 419, 425, 4 L.Ed.2d 454 (1960); *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956); *Sign & Pictorial Union Local 1175 v. NLRB,* 419 F.2d 726 (D.C. Cir. 1969); *A.H. Belo Corp. v. NLRB,* 411 F.2d 959, 969 (5th Cir. 1969), *cert. denied,* 396 U.S. 1007, 90 S.Ct. 561, 24

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L.Ed.2d 498 (1970). In determining whether the company fulfilled this obligation, the terms of its bargaining proposals may be examined. Rigid adherence to disadvantageous proposals may provide a basis for inferring bad faith. If a company insists on terms that "no 'self-respecting union' could brook," *Vanderbilt Products, Inc. v. NLRB,* 297 F.2d 833 (2d Cir. 1961), it may not be fulfilling its obligation to bargain. *See United Steelworkers of America v. NLRB,* 441 F.2d 1005, 1010 (D.C. Cir. 1970), *cert. denied sub nom. Florida Machine & Foundry Co. v. NLRB,* 409 U.S. 846, 93 S.Ct. 50, 34 L.Ed.2d 87 (1971) (insistence upon "a particularly disadvantageous proposal" may be basis for inferring "some degree of bad faith"); *NLRB v. Strauss*

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[80] *See* Part II–B *infra; see also A.H. Belo Corp. v. NLRB, supra* note 79, 411 F.2d at 970 (statements by employer that wage increases were not given because of negotiations with union constitute evidence of bad faith).

[81] *See* text and notes at notes 9, 25, 29, 34.

[82] That order required the parties to engage in consecutive-day bargaining. *See* text at note 3 *supra.* It is true that at the outset the parties agreed they would not meet every day. It is also true that the union acquiesced in most of the company's requests for postponements. Nonetheless, we believe that the contempt order imposed some obligation on the company to make a special effort to meet frequently. It is well established, of course, that dilatory tactics constitute evidence of bad faith. *A.H. Belo Corp. v. NLRB, supra* note 79, 411 F.2d at 968; *International Brhd. of Elec. Wkrs. v. NLRB,* 499 F.2d 542, 543 (D.C. Cir. 1974).

[83] *See* text and notes at notes 30–31 *supra.*

[84] *See* text and notes at notes 23–24 *supra.*

[85] Special Master's Findings of Fact and Conclusions of Law at A 19.

[86] *Id.* at 19–20 *(quoting Chevron Oil Co. v. NLRB,* 442 F.2d 1067, 1072 (5th Cir. 1971)) (brackets and ellipsis in original).

[87] *Id.* at 20 *(quoting NLRB v. Tomco Communications, Inc., supra* note 55, 567 F.2d at 877) (ellipsis in original).

& Son, Inc., 536 F.2d 60, 64 (5th Cir. 1976); *NLRB v. Reed & Prince Manufacturing Co.*, 205 F.2d 131, 134 (1st Cir. 1953).[88]

The Master nowhere explicitly recognized that adherence to a disadvantageous proposal may constitute evidence of bad faith. This principle would seem to be of particular relevance here. As the Master's own findings of fact reveal, the company's contract proposals were quite harsh. The initial proposal would have given the company virtually unilateral control over hiring and discipline of employees, their layoff and recall, and the amount of their conpensation. The company also insisted on a no strike/no lockout clause, without the normal *quid pro quo* of binding arbitration.[89] During the course of negotiations the company's position changed only slightly. It did make relatively insignificant concessions on a number of issues. For example, its final wage proposal was somewhat better than the first. However, all wage offers were limited to named, current employees; the company refused to make an offer keyed to job classifications.[90] Moreover, the company never budged from its position that a seniority system would be unacceptable unless it was based on management's ranking of employees.[91]

We do not mean to hold that the company's proposals could not be justified. The Master does state that the company was in poor financial health and "could afford only a modest wage agreement." [92] He also suggests that the company insisted on a seniority system based on the ability of the worker because it wished to ensure that capable workers would not be laid off during nonpeak periods.[93] But these explanations are not fully satisfactory. The fact that the company could afford only a modest wage agreement does not explain why it could not key its wage offer to job classifications.[94] Moreover, the union's final seniority proposal explicity recognizes management's desire to retain capable workers.[95] The record as it now stands suggests that the Master may not have recognized that unjustified adherence to an unfavorable proposal may constitute evidence of bad faith. Thus, on remand, the Master should give express attention to this possibility in reviewing his conclusions.

2. *Significance of decision to withhold annual wage increase*

The Master rejected the NLRB's claim that the company's decision to withhold the annual wage increase was an act indicative of bad faith. Relying on the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736, 746–747, 82 S.Ct. 1107, 1113, 8 L.Ed.2d 230 (1962), he stated that an employer could not unilaterally continue preexisting discretionary wage increases during the course of negotiations. Here, although the wage increases were customarily granted in December, they were based on discretionary merit criteria. Thus he reasoned that company's decision to withhold the increases until after bargaining had concluded was justified.[96] We are not convinced that the Master correctly applied the principles set forth in *Katz*.

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In *Katz* the Supreme court held that an employer cannot unilaterally change conditions of employment during the course of negotiations with a union; if the company decides to alter a preexisting practice, it must give the union an opportunity to bargain over the change. The Court applied this principle to distinguish between automatic wage increases to which the employer has already committed itself and wage increases that are "in no sense automatic, but [are] informed by a large measure of discretion." 369 U.S. at 746, 82 S.Ct. at 1113. The employer would be required to grant the automatic wage increase unless it notified the union that it wished to make a change in the existing conditions of employment and gave the union an opportunity to bargain over the change. However, the employer could not unilaterally grant a nonautomatic, discretionary wage increase since "[t]here simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice * * *." *Id.* Thus the union could "insist that the company negotiate as to the procedures and criteria for determining such increases." *Id.* at 746–747, 82 S.Ct. at 1113.

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[88] *See also Continental Insurance Co. v. NLRB*, *supra* note 79, 495 F.2d at 48; *NLRB v. Johnson Manufacturing Co. of Lubbock*, 458 F.2d 453, 455–456 (5th Cir. 1972); *A.H. Belo Corp. v. NLRB*, *supra* note 79, 411 F.2d at 968; *Gulf State Canners, Inc.*, 224 NLRB 1566, 1575-1576 (1976).

[89] *See* text and note at note 12 *supra*.

[90] *See* text and notes at notes 11, 35, 37 *supra*.

[91] *See* text at note 42 *supra*.

[92] *See* Special Master's Findings of Fact and Conclusions of Law at A 20.

[93] *Id.*

[94] The argument that it could afford only a modest raise is also undercut by the fact that it granted a substantial pay increase after recognition had been withdrawn from the union. *See text* at notes 47–49 *supra*.

[95] *See* text and notes at notes 39–41 *supra*.

[96] Special Master's Findings of Fact and Conclusions of law at A 21.

As the Master stated in his report, the wage increases in question here contained both automatic and discretionary elements. The record strongly suggests that the practice of granting raises every December was an established benefit expected by the employees. However, the increase was not entirely automatic; the amount of the increase apparently depended on an employee's job classification.[97] Under the circumstances, if the company wished to discontinue entirely the practice of granting annual wage increases, it was required to bargain with the union first; *Katz* requires an employer to consult with the union before changing an existing condition of employment. But even if it did not wish to discontinue the practice of granting annual wage increases, it was required to consult with the union. The company could not unilaterally determine the size of the increase that each employee would receive; it would be required to bargain over this discretionary element.[98]

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On the basis of the record as it now stands, we cannot determine whether the company fulfilled its obligations under *Katz.* The Master notes in his report that the company informed the union by letter that it would withhold the December wage increases.[99] In fact, the letter stated that the company would not make any wage increases during the bargaining process "that the law prohibits."[100] We do not believe that by making this vague statement the company satisfied its duty to consult with the union. Indeed, the letter is misleading. The law does not prohibit wage increases during bargaining. It simply requires consultation with the union.[101] On remand the Master should reconsider his conclusion that the employer's action was justified. If it was not, then the company's action may be evidence of an attempt to undermine the union, and indicative of bad faith.[102] The Master should direct his attention to the precise nature of the annual wage increase. He should also consider whether the company took any action other than sending the letter that might have fulfilled its obligation to bargain.

III. CONCLUSION

We remand this case so that the Special Master may supply the proper standard of proof in determining whether the company violated the September 16, 1977 contemp and purgation order. The Special Master should also give special attention to the question whether the company's adherence to disadvantageous proposals supports an inference of bad faith. Finally, he should reconsider his finding that the company properly withheld the December 1977 wage increase. If the Master concludes that his initial determination was incorrect and decides in favor of the NLRB, he should make recommendations as to appropriate sanctions.

Remanded to the Special Master with instructions.

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[97] *See* Tr. 1104–1106.

[98] *See General Motors Acceptance Corp. v. NLRB. supra* note 79, 476 *See General Motors Acceptance Corp. v. NLRB. supra* note 79, 476 F.2d at 854 (reaching similar conclusion where annual wage increase contained both automatic and discretionary elements); *NLRB v. United Air-* tained both automatic and discretionary elements); *Int'l Union. craft Corp.*, 940 F.2d 1105, 1109–1111 (2d Cir. 1973) (Same); *United Automobile etc. Wkrs v. NLRB.* 455 F.2d 1357, 1365–1366 (D.C.Cir. 1971) (same); *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970); (same). *See also Oneita knitting Mills, Inc.*, 205 NLRB 500, 500 n.1 (1973):

> An employer with a past history of merit increase program neither may discontinue that program * * * nor * * * any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected * * *. What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amount or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Where the company wishes to continue the practice of granting partly discretionary wage increases, it may do so during the bargaining period without violating the labor laws so long as it is willing to confer with the union if the wages are questioned. In other words, it need not bargain *before* it grants the raise. *See General Motors Acceptance Corp. v. NLRB. supra* note 79, 476 F.2d at 854; *See also H. Fletcher Co.*, 131 NLRB 474 (1961), *enforcement denied on other grounds.* 298 F.2d 594 (1st Cir. 1962); *Southshore Packing Corp.*, 72 NLRB 1116 (1047).

[99] Special Master's Findings of Fact and Conclusions of Law at A 21

[100] *See* BX 30 (letter).

[101] The company could have simply continued its practice of granting annual wage increases in December. So long s it was willing to bargain if the union objected to the raises, it would have fulfilled its obligations under *Katz. See* note 98 *supra.*

[102] In *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), the Supreme Court was concerned with the question whether the decision to withhold or grant a wage increase during the court of bargaining was an unfair labor practice under § 8(a)(5) of the National Labor Relations Act. Elsewhere, however, it has been recognized that a decision to withhold or grant a wage increase may be evidence of bad faith *See, e.g., General Motors Acceptance corp. v. NLRB. supra* note 79, 476 F.2d at 855.

TAMM, Circuit Judge, concurring in the result: Because I believe that the Special Master apparently applied an erroneous standard of proof, I concur in the result reached by the court.

Examination of the majority opinion, however, leads me to wonder why this court went to the trouble of selecting a Special Master in the first place. The majority opinion embarks upon a lengthy voyage of factfinding unjustified by anything other than philosophical predilection. If the majority desires to engage in such factfinding than it should sit as the Special Master sat, sorting through all of the documents submitted, observing the demeanor of the witnesses, and listening to all of the testimony in the *six days* of hearings that were conducted. Only then would this court's factfinding be of an acceptable level of quality. Until then, however, this factfinding appears as little more than an inspired exercise in legerdemain. *See generally* Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being avoided?*, 59 Wash.U.L.Q., 409 (1981). *See also* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn.L.Rev. 751 (1957).

I list below only a few examples of such sleight of hand in which the majority opinion either seriously questions the Master's findings of fact or *sua sponte* makes its own findings and draws its own inferences—without recognizing the existence of any *standard of review* governing our disposition of this case.

1. Maj. op. at 1177 note 9 and text accompanying: a finding that the Company's proposal had been prepared prior to the negotiating session held on October 10, 1977 and an inference of bad faith.

2. Maj. op. at 1178–1179 notes 22–24, at 1187 note 84 and text accompanying: a finding that the Company submitted a fabricated letter to the NLRB and an inference of bad faith.

3. Maj. op. at 1180 note 35: with reference to Union action at the April 6th meeting, apparent adoption of the NLRB's perspective over an explicit finding to the contrary by the Master. ¶ 15, Appendix at 15.

4. Maj. op. at text accompanying note 81: a finding that the Company's justification for delays "were often quite flimsy." Among the reasons credited by the Special Master in his findings included a family illness, maj. op. at 1178, a snowstorm, *id.* at 1178–1179, the absence of a Company negotiator for business reasons, *id.* at note 25, and the absence of the Federal Mediator, *id.* at 1180–1181. Moreover, the Union agreed to almost *all* of these delays.

The majority has apparently forgotten what this court stated only five years ago: "a court must accept the findings of fact of a master unless 'clearly erroneous.'" *Oil, Chemical & Atomic Workers International Union v. NLRB*, 547 F.2d 575, 580 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977). This proposition has found universal acceptance by the courts in the precise context before us, that of a reference by the court of appeals of a master of a labor relations matter. *E. g., NLRB v. Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 19 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070, 99 S.Ct. 839, 59 L.Ed.2d 35 (1979); *NLRB v. Sequoia District Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977); *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 14 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct 1240, 55 L.Ed.2d 765 (1978); *NLRB v. John Zink Co.*, 551 F.2d 799, 801 (10th Cir. 1977); *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1160 (5th Cir. 1976). Were we examining an an ill-reasoned, arbitrary report, I might perhaps be able to understand the majority's engaging in role substitution. The report submitted by the Special Master is anything but arbitrary, however; instead, it is a thorough, balanced examination of the facts in this case, complied after six days of hearings and submission of numerous documents and briefs. I can discern no justification, therefore, for the majority's failure to adhere to the principles of review previously adopted by this court.

The majority stumbles even as its moves from its unusual factfinding capacity to its ostensibly more practiced role as expounder of law. In Part II B(1), for example, the majority advises the Master to take note of the principle that bad faith may be inferred from intransigent adherence to disadvantageous proposals. Certainly, examination of the substances of the parties' proposals is not forbidden, and, in certain circumstances, bad faith may be inferred therefrom. *See, e.g., NLRB v. F. Strauss & Son, Inc.*, 536 F.2d 60 (5th Cir. 1976) (withdrawal of offer for three-year contract term and substitution of nine-day term). Courts, as well as the

Board, must be very careful, however, not to dictate terms to the parties. *United Steelworkers of America v. NLRB,* 441 F.2d 1005 (D.C. Cir. 1970), *cert. denied,* 409 U.S. 846, 93 S.Ct. 50, 34 L.Ed.2d 87 (1971). "Adamant insistence on a bargining position, then, is not in itself a refusual to bargain in good faith." *Chevron Oil Co. v. NLRB,* 442 F.2d 1067, 1072 (5th Cir. 1971). The employer is only obligated to make "*some* reasonable effort in *some* direction" at the bargaining table. *NLRB v. Reed & Prince Manufacturing Co.,* 205 F.2d 131, 135 (1st Cir). *cert. denied,* 346 U.S. 887, 74 St.Ct. 139, 98 L.Ed. 391 (1953). As one commentator has noted,

> courts have been particularly scrupulous in reviewing Board findings of bad faith when rooted in an examination of the positions espoused by the parties, even
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> when in the context of other indicia of had faith * * * [I]n those cases in which the Board has based a finding of bad faith upon the employer's substantive position at the bargaining table, the employer is insisting upon a set of terms which would place the employees and the union in a worse (or no better) economic position than had there been no contract at all * * * Moreover, this is usually accompanied by a refusal to offer serious and specific reasons for the employer's position or by an admission * * * that certain requests of significance for the union could be granted at no additional cost to the employer.

Gorman, Labor Law 489 (1976). On the basis of this standard, the Master should examine all of the circumstances, not merely the terms of the parties' proposals. He must then make a second and independent decision on whether the Board had met its burden of presenting clear and convincing evidence that the Company has in fact violated this court's order by failing to make "*some* reasonable effort in *some* direction at the bargaining table." *NLRB v. Reed & Prince Manufacturing Co.,* 205 F.2d at 135.[1]

The majority opinion also questions the Master's conclusion that the Company's failure to continue the granting of discretionary merit wage increases while holding negotiations with the Union complied with *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). The majority's focus in this discussion is unhelpful, however, until its conclusion. At that point, the majority opinion admits that the crucial question is whether the Company's action was "an attempt to undermine the union, and indicative of bad faith." Maj. op. at 1190. As *the cases relied upon by the majority* make clear, bad faith cannot be presumed from a failure to comply with *Katz. General Motors Acceptance Corporation v. NLRB,* 476 F.2d 850, 854 (1st Cir. 1973); *NLRB v. United Aircraft Corp.,* 490 F.2d 1105, 1111 (2d Cir. 1973) (the company failed to "produce evidence that fear of violating the law by granting the increase was the actual motive for withholding it."). Thus, should the Master once again come to the factual conclusion that the "Company decided to withhold the December 1977 raises under the belief that it was barred from granting such discretionary merit increases while the bargaining was in process," ¶ 9, Appendix at 10, this court could not conclude that this decision constituted evidence of bad faith unless it found such a factual finding clearly erroneous.

The application of an improper standard of proof by the Special Master requires this court to reverse and remand for the Master's reevaluation. It does not require, however, either an intrusion into the Master's factfinding functions or an attempt to indicate in no uncertain terms the "'proper" result to be reached upon remand. Respect for this court as an institution should, however, preclude the Special Master from believing that the court has today exercised its power in a demand that the Master reverse himself.

Therefore, although I fail to see any justification for the court's order that the Master make new findings of fact, it has so ordered. The Master may well want to hold further hearings. I urge the Special Master, however, to exercise his independent judgment and to reach a result in harmony with the law as well as the facts, the latter of which, at the least, this court is clearly less familiar with than is the Special Master.

NLRB v. Arrow Molded Plastics, Inc.

653 F.2d 280 (6th Cir.), July 13, 1981—243 NLRB 1211

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[1] Furthermore, although I realize that "each case is unique and generalization hazardous," Gorman, Labor Law 489 (1976), the Master should take due cognizance of *NLRB v. Crockett-Bradley, Inc.,* 598 F.2d 971 (5th Cir. 1979), a case that resembles the one before us in a number of respects.

On petition to enforce Board Order

Before **Weick**, **Keith** and **Jones**, Circuit Judges

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Nathaniel R. Jones, Circuit Judge: The National Labor Relations Board (the Board) seeks enforcement of its order directing Arrow Molded Plastics, Inc. (Arrow) to bargain in good faith with Local 146, United Food and Commercial Workers International Union, AFL–CIO (the Union), even though the Union failed to obtain a majority vote in its representation election. The board also ordered Arrow to cease and desist from continuing certain unfair labor practices. We hold that Arrow's unfair labor practices were not so pervasive as to undermine the Union's previous card majority, impede the election process and to interfere with the employees' freedom to select a bargaining representative. Therefore, enforcement of the Board's cease and desist order is granted and enforcement of its bargaining order is denied.

I.

Arrow, an Ohio corporation, manufactures and sells injection-molded plastic products. In August 1977, the Union conducted an organizational compaign at Arrow's Napoleon, Ohio plant. A clear majority of Arrow's production and maintenance employees signed authorization cards. Consequently, Arrow petitioned for a representation election. The Board scheduled the election for October 21, 1977.

In September 1977, William Brock, an Arrow vice president, hired James Cavanaugh, a personnel consultant. Cavanaugh devised a plan to hold several pre-election meetings with Arrow's employees. The purpose of these meetings was to solicit employee grievances, in recognition that "there was a union knocking at the door." On several occasions, the employees of all three shifts attended the meetings.

At the first meeting, Cavanaugh informed the employees that he wanted to confer with them individually. During these individual conferences, he elicited their answers to a single question: "If tomorrow morning when you awakened you were the president of this company, what would you do?"

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Cavanaugh and Brock conducted the remaining group meetings. Cavanaugh told the employees that he had prepared a report summarizing the information gathered from the individual interviews. In view of the forthcoming election, Cavanaugh stated that the contents of the report could not be revealed because "no promises, direct or indirect" could be made. Additionally, Cavanaugh recommended the installation of a "hot box" so that the employees' suggestions could be "answered" if possible. Furthermore, in response to employee inquiries of wage increases, Cavanaugh stated that Arrow's policy was to pay equal or greater wages than those paid "in our area for similar work by similar companies." Cavanaugh added that if the Union lost the election, it would take about ten days to get a raise, but if the Union won it could take six months to a year to obtain wage increases.

During these meetings, Brock also made several representations to the employees. First, an employee asked whether Arrow would meet with shift representatives if the Union lost the election. Brock replied that a reinstitution of the shift representative system was an alternative to union representation. Second, an employee questioned Arrow's disciplinary policies for absenteeism. An employee (Pearl Pinney) had been reprimanded for being absent when in fact she was on leave. Brock responded that Pinney's reprimand probably should not have been written and he would "look into it." Third, an employee queried the condition of the lunchroom. Brock stated that Arrow wanted to redecorate the lunchroom but that the pending election prevented the redecoration. Nevertheless, prior to the election, renovating materials including metal stripping, ceiling tile, paint and new carpeting were displayed in the lunchroom. Shortly after the election, the employees' lunchroom was completely redecorated and reequipped with new appliances. Fourth, Brock and Cavanaugh responded favorably to employee requests for tuition reimbursement for nursing school and "basket weaving" courses even though the company handbook permitted reimbursement only for "Company recommended education and special instruction courses."

On or about October 13, one of the three shift inspectors quit. Arrow's express policy for filling such vacancies is that "seniority shall control provided qualifications are equal." An employee with superior qualifications and seniority applied for the position. Arrow's superintendent informed the applicant that "if we didn't have this union business, we wouldn't have all of these problems." Until the vacancy was filled, the other two shift inspectors had to work 12-hour days. After the Union lost the election, the applicant was promoted to fill the vacancy.

On October 21, 1977, the Board conducted the representation election. The Union lost the election by nine votes. No ballots were challenged by either party.

On December 21, 1978, an Administrative Law Judge (ALJ) found that the aforementioned conduct as well as Arrow's maintenance of an unlawfully broad, no-solicitation, no-distribution rule [1] constituted unfair labor practices in violation of section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. § 151, *et seq.* Because Arrow's pre-election misconduct interfered with its employees' freedom of choice, the ALJ ordered Arrow to bargain collectively with the Union. The Board affirmed.[2]

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II.

Section 7 of the Act guarantees employees the right to freely select union representation. Section 8(a)(1) of the Act secures employee organizational rights by making it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights.

Arrow interfered with the employees' exercise of their Section 7 rights by improperly soliciting grievances before the election, by making certain promises and granting benefits, and by withholding benefits and threatening employees.[3] Additionally, Arrow maintained an overly broad no-distribution rule during the organizational campaign.

a. Grievance Solicitation.

Grievance solicitation during the pre-election period is not a *per se* violation of Section 8(a)(1) of the Act. It is an unfair labor practice, however, to solicit employee grievances where the solicitation is accompanied by the employer's express or implied suggestion that the grievance will be resolved or acted upon only if the employees reject union representation. *NLRB v. Delight Bakery, Inc.*, 353 F.2d 344 (6th Cir. 1965); *Reliance Electric Co.*, 191 NLRB No. 1 (1971), *enf'd.* 457 F.2d 503 (6th Cir. 1972). In this case, Arrow initiated unprecedented meetings with its employees to solicit grievances. Arrow went beyond mere solicitation: it undertook affirmative steps to resolve those grievances at times and under circumstances which are highly questionable. In fact, this kind of interference in the election process is impermissible. *NLRB v. Rich's of Plymouth*, 578 F.2d 880 (1st Cir. 1978).

b. Granting and Withholding Benefits.

We agree with the Board that Arrow's conduct in granting and withholding benefits in order to discourage union activity is proscribed by Section 8(a)(1) of the Act. "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 460, 11 L.Ed.2d 435 (1964).

The record is replete with instances of promises made with the intent to reverse the Union's previous card majority. Cavanaugh's promise of wage increases commensurate with Arrow's competitors was expressly contingent upon the Union's defeat at the representation election. Cavanaugh suggested the installation of a "hot box" so that employee suggestions could be "answered." Brock offered the shift representation system as a substitute for union representation. Brock promised to "look into" reprimands, redecorate and reequip the lunchroom, and reimburse employees for non-job-related education. Also, Arrow withheld an employee's promotion because of the "problem" caused by "this union business." Despite Arrow's disclaimer, promises were made and benefits were granted and withheld for no other reason than to forestall unionization of the Napoleon plant and to interfere in the election process.

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[1] The employee handbook described the following as a disciplinary offense:

> Distributing literature, written or printed matter of any description on company premises without the specific approval of management.

It is undisputed that this rule was not enforced during the election campaign.

[2] However, one Board member dissented from the determination that Brock's promise to "look into" an allegedly improper reprimand was an unfair labor practice.

[3] Though the employer's free speech right to communicate its views to its employees cannot be infringed upon by a union or by the Board, such right to free speech is not absolute. Threats of reprisal or force or promise of benefit do not constitute protected speech within the meaning of section 8(c) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547 (1969). "Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in section 7 and protected by section 8(a)(1) and the proviso to section 8(c)." *Id.* Consequently, Arrow's granting and withholding benefits during its grievance solicitation cannot fall within the purview of section 8(c) protected speech.

c. No-Distribution Rule.

It is well settled that Section 7 of the Act guarantees employees the right to distribute union literature on their employer's premises. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945). A company rule which precludes solicitation and distribution of union literature at any time, including during nonworking hours in nonworking areas, is presumptively unreasonable. *Id.* at 804–805, 65 S.Ct. 988–989; *Eastex, Inc. v. NLRB*, 437 U.S. 566, 570–571, S.Ct. 2505, 2514–2514, 57 L.Ed.2d 428 (1978). Special circumstances must be demonstrated to justify such a rule. In this case, no such circumstances were present. Therefore, Arrow violated Section 8(a)(1) of the Act by its maintenance of an unlawfully broad no-distribution rule during the organizational campaign.

III.

Arrow vigorously objects to the Board's imposition of a bargaining order. The Board attempted to justify the bargaining order on the grounds that Arrow's unfair labor practices were so pervasive as to erode the Union's previous card majority and to render the conventional remedy of a rerun election ineffective. We disagree.

The issuance of a bargaining order is a severe remedy which is properly utilized in only two situations: either "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices * * * [or] in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–614, 89 S.Ct. 1918, 1939–1940, 23 L.Ed.2d 547 (1969). However, bargaining orders will not be enforced to remedy minor or less extensive unfair labor practices. *Id.* at 615, 89 S.Ct. at 1940. The reason for this result is that this latter category of unfair labor practices only marginally and temporarily impact on the election machinery. In that event, a fair rerun election is the preferred method of securing the employees' Section 7 rights.

It is equally inappropriate to enforce bargaining orders where the Board's rationale for the order was conclusory, *NLRB v. Essex Wire Corp.*, 496 F.2d 862 (6th Cir. 1973); *NLRB v. Eastside Shoppers, Inc.*, 498 F.2d 1334 (6th Cir. 1974); [4] or where the "classic tactics of discharge and widespread discrimination against the harassment of union sympathizers were not present * * * [and] (t)he unfair labor practices which occurred were of the kind whose effect would quickly dissipate," *Donn Products, Inc. v. NLRB*, 613 F.2d 162, 166 (6th Cir.) *cert. denied* 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980); or where a single unfair labor practice does not sufficiently undermine the election process. *A to Z Portion Meats, Inc. v. NLRB*, 643 F.2d 390 (6th Cir. 1981).

Applying these principles we are compelled to hold that the Board's decision to issue a bargaining order was not supported by substantial evidence on the record as a whole. We cannot minimize or ignore Arrow's improper grievance solicitation before the election, or persistent promises, grants and withholding of benefits, or unlawful no-distribution rule. Nevertheless, Arrow's misconduct fell far short of actual or threatened antiunion plant closures, disciplinary discharges, and employee surveillance which characterizes the cases in which this Court has enforced bargaining orders. Additionally, the passage of time since the first election militates in favor of a rerun election. Under these circumstances, a bargaining order is not warranted.

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[4] *Accord, NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980); *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *NLRB v. Penninsula Ass'n. for Retarded*, 627 F.2d 202 (9th Cir. 1980).

Accordingly, the application of the Board for enforcement of its order is GRANTED in part and DENIED in part.

NLRB v. Medallion Automotive Systems, Inc.

652 F.2d 683 (6th Cir.), July 13, 1981—249 NLRB 938

On petition for summary judgment

Before LIVELY, Circuit Judge, and HARRY PHILLIPS and PECK, Senior Circuit Judges

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This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against respondent, Medallion Automotive Systems, Inc., Perrysburg, Ohio, its officers, agents, successors, and assigns, enforcing its order dated May 30, 1980, in Case No. 8–CA–13167, and the Court having considered the same.

It is hereby ORDERED that respondent, Medallion Automotive Systems, Inc., its officers, agents, successors, and assigns, shall abide by said order as follows:

1. Cease and desist from:

(a) Discontinuing to make payments to the Toledo Area Industrial Fund Life Insurance Plan and to the Aetna Dental Plan as required by its collective-bargaining agreement with the Union.

(b) Failing and refusing to meet with the Union as requested for the purpose of discussing and resolving outstanding grievances pursuant to the terms of the current grievance procedure contained in the current collective-bargaining agreement and for the purpose of bargaining over the effects of the closure and cessation of its warehouse operations.

(c) Refusing to bargain collectively with the Union concerning rates of pay, wages, hours, and other terms and conditions of employment. The bargaining unit is:

> All production, warehouse, and maintenance employees employed at the Employer's warehouse located on D Street, Willis Day Park, 30335 Oregon Road, Perrysburg, Ohio 43551; excluding all office clerical employees, engineering department employees, laboratory department employees, research department employees, technical employees, and all professional employees, guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make all payments owed to the Toledo Area Industrial Fund Life Insurance Plan and to the Aetna Dental Plan as required by the collective-bargaining agreement with the Union.

(b) Make whole its employees by paying those employees who were laid off when respondent terminated its warehouse operations normal wages plus interest for the period and in the manner set forth in the section of this decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(d) Upon request, meet with the Union for the purpose of discussing and resolving outstanding grievances pursuant to the terms of the current grievance procedure

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contained in the current collective-bargaining agreement with the Union and for the purpose of bargaining over the effects of the closure and cessation of its warehouse operations.

(e) Mail an exact copy of the attached notice marked "Appendix" to International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local No. 12, and to all employees who were employed at its former place of business on D Street, Willis Day Park, 30335 Oregon Road, Perrysburg, Ohio, at the time of its closure. Copies of said notice, on forms provided by the Regional Director for Region 8, shall be mailed immediately upon receipt thereof, as herein above described.

(f) Notify the Regional Director for Region 8, in writing, within twenty (20) days from the date of this order, what steps respondent has taken to comply herewith.

Simpson Electric Company, a Division of American Gage and Machine Company, Inc. v. NLRB

654 F.2d 15 (7th Cir.), July 15, 1981—249 NLRB 148

On petition to review and cross petition to enforce Board Order

Before BAUER, Circuit Judge, NICHOLS, Judge,* and WOOD, Circuit Judge

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NICHOLS, Judge: This case is a petition for review and cross-petition for enforcement of an order of the National Labor Relations Board (NLRB). Simpson Electric Company (Simpson), is a division of American Gage and Machine Company, Inc. It operates 10 plants in various parts of the country, but the present controversy concerns only the one at Elgin, Illinois. The business is the manufacture of electrical parts and components. There is no known organization drive now at the Elgin plant, but Simpson objects to doing what it is currently still under NLRB orders to do, namely, to post a notice that it will not again commit the unlawful and unfair labor practice of attempting to influence an organizing campaign by granting a wage increase shortly before a representation election. Simpson denies it granted the admitted increase with any improper motive. The NLRB found to the contrary, but we hold that its finding lacks the support of substantial evidence. Therefore we deny the petition for enforcement and grant the petition for review.

The chronology of the case is significant. On June 6, 1978, the International Brotherhood of Electrical Workers (Union), commenced an organizing campaign among Simpson's employees. On October 25, 1978, the NLRB conducted a representation election which the Union won. Simpson, however, protested unfair practices by the Union, and before November 17 learned informally that the NLRB agreed, and that the election would have to be run again. On November 17 Simpson announced increases in wages, fringe benefits, and health insurance, to be effective in all of its plants, including the nine others not involved in any organizing activity. Plans for the increase were budgeted and already in the works before the first election. Besides this, Simpson explains the timing as due to its well-informed anticipation of an increase in the federal minimum wage, which would benefit many of the same employees, and to the fact that an increase at recurrent intervals had become its regular practice. The NLRB Administrative Law Judge (ALJ) refutes this latter explanation on the ground that in prior years the mix of the benefits was different, a difference we deem very irrelevant. We may take judicial notice that inflation was raging on the pertinent dates, as it still is, and employees expected wage and benefit adjustments at least annually merely to stay where they were. It is not found that Simpson's employees felt overwhelmed by any unexpected shower of largesse. In fact, there is no direct evidence as to what the employees of Simpson's Elgin plant thought about it.

The NLRB seems to think Simpson should have delayed the increase past the Christmas season, not only at Elgin, but also at its nine plants not involved in the organizational drive. The unfairness of this solution to non-Elgin employees who were mere bystanders, if that, in the dispute, would have made it indefensible. *Delchamps, Inc. v. NLRB*, 588 F.2d 476 (5th Cir. 1979). On the other hand, to have delayed the increase at the Elgin plant alone certainly would have exacerbated a resentment of Elgin employees at this invidious discrimination. Whether their resentment would have been directed at Simpson, the Union, or the NLRB are matters for interesting speculation and possibly the answer would depend on how well they were informed as to the reasons for the delay. It would seem the Union could have been spared from at least sharing in the resentment only if the employees were kept in ignorance of the reasons for the delay

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and attributed it to the employer's whim. Some think or assume that the minds of employees are so easily manipulated and so easily kept in ignorance that they will think anything they are told to think. In the real world, employers and unions both find this difficult.

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*The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

Simpson also says on November 17 it had not learned when the rerun election would occur and had recommended a cooling off period of 90 days.

On November 30, however, the NLRB announced that the rerun election would take place on December 21. Asked why if the NLRB thought the vote would be tainted by the wage announcement, it did not set the election at a later date, counsel responded this would have been to reward the wrongdoer. As further explained, Union organizing campaigns have a certain momentum which is interrupted only at the Union's disadvantage. Therefore, a delay in the election would make the Union's task more difficult. What this explanation fails to account for is that the Union's wrongdoing was the reason why a new election was necessary. On the other hand, whether the employer was also a wrongdoer is the very matter we are to determine. The explanation, therefore, assumes the answer and is a complete logical fallacy. We are given no rational reason why, if the rerun election was expected to be tainted, it was not set at a later date so the taint could clear away.

The law is clear that an employer commits an unfair labor practice prohibited by Section 8(a)(1) of the National Labor Relations Act if he announces a pay increase or withholds one with intent to influence an ongoing organizing drive or representation election. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 459, 11 L.Ed.2d 435 (1964). *See NLRB v. Gruber's Super Market, Inc.*, 501 F.2d 697, 709 (7th Cir. 1974); *NLRB v. Furnas Electric Co.*, 463 F.2d 665, 669 (7th Cir. 1972); *NLRB v. Drives, Inc.*, 440 F.2d 354, 363 (7th Cir. 1971); *Texaco, Inc. v. NLRB*, 436 F.2d 520, 524 (7th Cir. 1971).

This rule is easier to state than apply, for an employer who means to influence an election will rarely say so, and his intent must be determined by weighing the credibility of his denial against the attendant facts and circumstances he invites attention to. *See NLRB v. Frantz and Company*, 361 F.2d 180, 183 (7th Cir. 1966), where this court considered "substantial evidence on the record as a whole" in upholding the board's determination that the wage increase in question was granted to discourage employees from supporting the union. It is necessary to look to the evidence "as a whole" to determine whether a wage increase is an unfair labor practice, *NLRB v. W.T. Grant Co., 208 F.2d 710, 712 (4th Cir. 1953).*

The employer is not required to defer implementation of plans for benefit increases made before the Union drive and happening to come to fruition during its continuance. *Pedro's Inc. v. NLRB*, ——— F.2d ——— (D.C.Cir. April 13, 1981). The employer is in somewhat of a dilemma since the consequences of a decision to pay a planned increase, or defer it, may alike be the basis of an unfair labor practice holding if his own assessment of the purity of his motives is not shared by the NLRB. *J.J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981), invites attention to the dilemma an employer encounters if plans to improve employee benefits happen to come to fruition when an NLRB election is about to occur. The court concludes that an employer who withholds an increase shall be protected if he does not capitalize on the situation, if he acts on advice of counsel, etc. While the NLRB here thought the employer did capitilize on the increase, the facts reflect no more than an effort to inform the employees of what would be coming their way. This without more we do not consider capitalization.

During the continuance of the current inflation it would appear probable that the grant of an increase, at least within the rate of inflation, would have a minimal emotional impact upon the employees, unless the employer's propaganda invited employees' attention to its alleged bearing on the Union drive rather expressly. The denial of one, if persisted in, would have correspondingly a maximum effect, propaganda or no propaganda. Accordingly, we believe that a grant of benefits, according to a regular time pattern, not exceeding the rate of inflation, and without special propaganda, should be viewed as a neutral act, regardless of any mere time relation to an organizing campaign, as long as inflation continues. Inflation is something the trier of fact, the ALJ, wholly failed to take into account, and in face of it his reasons for disbelieving the employer's denials seem inadequate, arbitrary, and irrational. *Cf. Delchamps, Inc. v. NLRB*, *supra.* Our view is that routine unexploited wage and benefit increases within the rate of inflation, as here, should be viewed for section 8(a)(1) purposes as the same as no action in a condition of stable currency value. The employer also urged it was concerned by an excessive rate of turnover. The

ALJ views this as inconsistent with the other reasons already given, but it is hard to see why. He says it was not a new situation and Simpson had lived with it for some time. Of course one might live with a cancer for some time, but this would not mitigate the seriousness of one's concern when one finally went to the doctor.

The foregoing would suffice to raise serious questions in our minds about enforcing the order even if the NLRB's setting the date of the election, actually only after announcement of the increase, had instead occurred before. In that event, the decision might be close. As the facts were, the employer could not know the election was imminent. The subsequent choice of an election date convinces us the NLRB either did not really think the increase would seriously influence the representation election results or else acted for improper purposes. We do not draw adverse inferences about NLRB motives as readily as it does about Simpson's motives, despite the implausibility of the explanation offered. We presume it acted in entire good faith. But we believe it may have been influenced to an impermissible extent by a desire to punish Simpson for its presumption in granting a pay increase at the wrong time, and would do so by creating for the Union a heads I win, tails you lose situation, by running a tainted election. If the Union won the election, the result would stand. If it lost, the election would be repudiated and the membership drive could continue unabated. We think the singling out of Simpson as the sole wrongdoer to be punished this way was unwarranted and improper, and as a prophylactic measure, we might well decline enforcement of the order even if otherwise warranted, to express our disapprobation of this procedure. This is the more indicated, since the Union has lost a third election and the only nonmoot issue is whether Simpson should post the prescribed notice. It was clearly unfair to Simpson employees not desiring Union representation to invite them to vote in an election when the NLRB would (unknown to them) nullify their votes if they proved to be in a majority, but effectuate a pro-union majority vote if that were to occur.

The ALJ's decision adopted by the board entirely fails to address either the employer's lack of knowledge of when the election would occur, as bearing on the employer's good faith, or the NLRB's selection of the closest possible election date as bearing on the genuineness of its belief that the election would be tainted and not reflective of the employees' true wishes.

Accordingly, in view of all circumstances, the petition for review is granted and the petition for enforcement is

Denied.

NLRB v. Howard Johnson Company d/b/a Howard Johnson Distribution Center

650 F.2d 741 (5th Cir.), July 16, 1981—248 NLRB 539

On petition to enforce Board Order

Before Ainsworth, Garza and Sam D. Johnson, Circuit Judges

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Per Curiam. This case is before the Court on application of the National Labor Relations Board (the Board) pursuant to section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* for enforcement of its order issued against Howard Johnson Company, d/b/a Howard Johnson Distribution Center (the Company) on March 17, 1980.[1] The Board found on the General Counsel's motion for summary judgment that the Company had refused to bargain with the Dallas General Drivers, Warehousemen and Helpers Local 745 (the Union) in violation of section 8(a)(5) and (1) of the Act, and ordered the Company to bargain with the Union.

In opposition to the Board's petition for enforcement, the Company argues that the Regional Director failed to conduct a full investigation of the Company's objections to the underlying certification election, and that the Board abused its discretion in refusing to remand the case to the Regional Director for further investigation, thus rendering the certification invalid. Specifically, the Company argues that the Board agent investigating the Company's objections failed to interview two company witnesses—General Manager of Distributions Bowerfind and Distribution Center Manager Ken Schultz, and that the testimony of these witnesses would have supported the Company's allegations that the Union made false and misleading campaign statements to employees and coerced employees prior to the elections.

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[1] The Board's decision and order is reported at 248 N.L.R.B. No. 45.

The Board based its refusal to remand the certification proceeding to the Director for further investigation on the ground that, even assuming that the alleged manner in which the investigation was conducted justified the Company's failure to present affidavits of Bowerfind and Schultz to the Board agent, the agent's conduct in no way precluded the Company from demonstrating *to the Board* that such testimony, if presented, would have supported its

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objections. Consequently, the Board held that "regardless of the nature of the investigation here, the employer, in seeking to have the Board overrule a regional director's recommendation, was still required, under established Board policy, to supply *the Board* with specific evidence tantamount to an offer of proof, which *prima facie* would warrant setting aside the election before the Board will direct a hearing or require the Regional Director to pursue the investigation further. Regency Electronics, Inc., 198 N.L.R.B. 627 (1972); Bufkor-Pelzner Division, Inc., 169 N.L.R.B. 998 (1968)" (emphasis in original).[2] Consequently, the Board concluded that the Company's exceptions were "insufficient to justify remanding this case since they do not specify the disagreement with the Regional Director's findings of fact and they do not provide any indication of what the employer's witnesses might testify to, were they permitted to testify, which would contradict the Regional Director's findings." (footnote omitted).

It is beyond peradventure that "the burden is on the employer to demonstrate that the election was not fairly conducted." *Contract Knitter, Inc. v. NLRB,* 545 F.2d 967, 971 (5th Cir. 1977). This burden is a heavy one, and the objecting party must present "specific evidence" which on its face would warrant setting aside the election. *NLRB v. Singleton Packing Corp.,* 418 F.2d 275, 280 (5th Cir. 1969), *cert. denied,* 400 U.S. 824, 91 S.Ct. 47, 27 L.Ed.2d 53. Examination of the record leads this Court to conclude that the Board did not abuse its discretion in refusing to remand the representation proceeding to the Regional Director for further investigation of the Company's objections in this case. First, it is significant to note that the Board agent did interview the witnesses that the Company designated in its formal objections as witnesses supporting its disagreement with the Regional Director's findings, and that neither Schultz nor Bowerfind was so designated by the Company. Even more significant is the fact that the Company failed to indicate how these management officials could have had personal knowledge of misrepresentations which were alleged to have been made to employees, and failed to indicate in even the most general terms what testimony those witnesses would have provided to contradict the Director's findings.[3] Inasmuch as the Company's exceptions failed to specify the disagreement with the Regional Director's findings, and failed to provide any indication of what the Company's witnesses might testify to, were they permitted to testify, the Board's adoption of the Regional Director's findings without further investigation of the Company's objections was not an abuse of discretion in this case, and consequently does not invalidate the certification.

We have examined the Company's remaining arguments and find them to be without merit. Consequently, the Board's application for enforcement of its order is application for enforcement of its order is granted.

ORDER ENFORCED.

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[2] Member Murphy dissented, based on her view that once an objecting party has alleged specific objectionable conduct and provided the names of witnesses "it [is] incumbent upon the Region to interview the individuals named by the Employer to determine the merits of the objections, and the failure of the Regional Director to have done that constitutes an abuse of discretion."

[3] The Company's objections simply stated that the two management officials would give "testimony in excess of that given by the rank-and-file employees relating to the misrepresentations, and their testimony would have been in direct contradiction to the alleged facts cited in the Regional Director's report on Objection 2 raising crucial and important credibility issues."

Electronic Components Corporation of North Carolina v. NLRB, 546 F.2d 1068 (4th Cir. 1976), relied upon by the Company, is inapposite. In that case, the employer provided the investigating agent with specific information concerning the substance of the proffered witnesses' testimony, and, equally important, the agent failed to conduct any investigation whatsoever.

NLRB v. Maine Caterers, Inc.

654 F.2d 131 (1st Cir.), July 16, 1981; certiorari denied 455 U.S. 940–251 NLRB 505

On petition to enforce Board Order

Before Coffin, Chief Judge, Campbell and Breyer, Circuit Judges.

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Breyer, Circuit Judge: The sole issue in this case is whether a group of "driver-salesmen" are employees or independent contractors. The National Labor Relations Board found that they were employees. We agree and enforce the Board's order.

The respondents are two closely related industrial caterers. One of them, Maine Caterers, Inc., makes meals, sandwiches, coffee, and similar items for sale at industrial plants during lunchtime and coffee breaks. The other respondent, W. H. Maine, Inc., leases trucks and customer routes to driver-salesmen who sell Maine Caterers, Inc. products. These driver-salesmen voted nine to one to be represented by a union. The Board found that, for purposes of collective bargaining, the two companies constituted one employer ("Maine"),[1] and it ordered Maine to bargain. We find sufficient evidence in the record to support the Board's conclusion.

The result in this case flows directly from two of our cases: *Seven-Up Bottling Co. v. NLRB,* 506 F.2d 596 (1st Cir. 1974), and *NLRB v. Amber Delivery Service, Inc.,* 651 F.2d 57 (1st. Cir. 1981). Most recently in *Amber* we stated the relevant principles of law as follows:

> It is well-established that general principles of agency law govern the distinction between employee and independent contractor for purposes of the Act. *E. g., NLRB v. United Ins. Co.,* 390 U.S. 254, 256 [88 S.Ct. 988, 989, 19 L.Ed.2d 1083] (1968); *Seven-Up Bottling Co. v. NLRB,* 506 F.2d 596, 597 (1st Cir. 1974). The House Report on the legislation specifically excluding "independent contractor" from the definition of "employee" outlined this distinction as follows:
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> > "Employees" work for wages or salary under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits.
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> H.R.Rep.No.245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 309 (1948). Thus the Board, in applying the common law test of independence, has looked to the right of control: whether the putative employer has the right to control not only the results sought but also the means by which those results are achieved. *E. g., Merchants Home Delivery Service, Inc. v. NLRB,* 580 F.2d 966, 973 (9th Cir. 1978); *Seven-Up Bottling Co. v. NLRB,* 506 F.2d at 597–98; *New Syndicate Co.,* 164 N.L.R.B. 422, 423 (1967). It has also looked to the risk of loss and opportunity for profit and to the degree of "proprietary" interest in, for example, a route or dealership. *E. g., Brown v. NLRB,* 462 F.2d 699, 705 (9th Cir.), *cert. denied,* 409 U.S. 1008 [93 S.Ct. 441, 34 L.Ed.2d 301] (1972); *El Mundo, Inc.,* 167 N.L.R.B. 760, 761 (1967); R. Gorman, Basic Text on Labor Law 30 (1976). The determination of "independence", however, ultimately depends upon an assessment of "all of the incidents of the relationship * * * with no one factor being decisive." *NLRB v. United Ins. Co.,* 390 U.S. at 258, 88 S.Ct. at 990, *see* Restatement (Second) of Agency § 220 (1957). Our task on review is to ascertain whether the Board's evaluation of such factors is "supported by substantial evidence when viewed in light of the entire record, including the evidence opposed to the Board's position." *Seven-Up Bottling Co. v. NLRB,* 506 F.2d at 600. So long as the Board's position represents a "choice between two fairly conflicting views", it should be enforced even if this court "would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed.2d 456 (1951), *quoted in NLRB v. United Ins. Co.,* 390 U.S. at 260 [88 S.Ct. at 991].

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Id., at 60–61.

There is considerable evidence here that Maine has the "right to control not only the results sought but also the means by which those results are achieved". *Id.*, at 61. The salesmen are first trained as salaried drivers. Henry Maine, one of Maine's owners, shows them "exact procedures" for running a Maine catering truck. These include the time to appear at each stop, the method of display, the manner to use with customers, and the proper method of driving. After training, the driver is no longer salaried, but Maine continues significant supervision. Maine does not allow use of the truck for other than serving Maine customers. Maine may add or subtract particular customers to or from a driver's route. Maine coordinates the time of serving any added customers with the driver's existing schedule. Maine supervises the driver's schedule. Maine supervises the driver's maintenance of the truck and its cleanliness. There is evidence that, at times, Henry Maine accompanies a driver on his route, checking the driver's stops and times, the driver's prices, the manner of food display, and the way in which the driver presents himself to the customers. Henry Maine has at times visited customers to settle problems. The written contract between the driver and Maine requires the driver to serve his entire route each business day and forbids him from deviating from the route or omitting services. It forbids him from serving anyone other than Maine's customers. It requires him to buy all "food, beverages, supplies and sundries" from Maine. And, Maine's interest in the manner of route service is enforced by the fact that the contract allows Maine (as well as the driver) to terminate the contract for any reason upon thirty days notice.

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[1] Both companies are owned and controlled by William Maine with the assistance of his brother, Henry. Respondents have not challenged the Board's finding that Maine Caterers, Inc. and W. H. Maine, Inc. constitute a single employer for purposes of Board jurisdiction. *See Radio & Television Broadcasting Technicians, Local 1264 v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965). For convenience, respondents are collectively referred to as "Maine".

If one looks to "the degree of 'proprietary' interest in * * * a route," *id.*, one finds that the driver has no interest whatsoever in his route. All routes are the property of Maine. Any additional customers found by the driver become the property of Maine. And, under the contract, should the driver leave Maine's service, he could not engage in industrial catering in Rhode Island for two years.

The major difference from *Amber* arguably lies in the area of "risk of loss and opportunity for profit". Unlike in *Amber,* the drivers here allegedly sell at prices set, not by Maine, but by themselves. They buy their supplies from Maine and resell them; thus they bear the risk of bad debts, spoilage, and theft. Moreover, their compensation comes from the difference between their purchase price and their resale price. Maine does not pay them salaries or provide fringe benefits or withhold taxes or social security. The drivers also have the right to hire substitutes—though there is evidence that the substitutes had to meet with Maine's approval.[2]

These factors are not controlling, however, for two reasons. First, there is evidence that the drivers' control of prices was limited. The contract provides that the driver "shall set the products purchased by him at reasonably competitive prices as suggested by [Maine] from time to time". Maine prints menus with prices, which are distributed to customers and posted on the trucks. Since a customer may be served by more than one driver-salesman during the course of the day, Maine is particularly interested in keeping prices uniform. Henry Maine has told at least one driver to reduce a price that he was charging on an

item. Driver Michael J. Grady testified concerning Henry Maine's supervision and the "strongly suggested" prices:

> Sometimes [Henry Maine] would come along with me because I would ask him to come along. And, other times he would request it for what appeared to me to be supervisory reasons, such as: he would stand there and he would check my totals—if I was totaling a particular group of food that a customer was buying. He would sample my food. Check my appearance and make sure my truck was in proper operating procedure. He would make suggestions as to how I should improve it or change my operation around.
>
> Q. Did he ever tell you that you were charging too much for your goods?
>
> A. At times * * *
>
> * * * * *
>
> Q. Now, can you explain to us, in your own mind did you feel that these suggestions were such that if you didn't follow them, you might be terminated?
>
> (After an objection, which was overruled.)
>
> A. Yes.
>
> Q. Why did you feel that way?
>
> A. Because of a combination of—it was strongly suggested and you would go along with the sug-

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[2] And in both cases the contract provides that no employer-employee relationship exists.

gestion. If you don't go along with the suggestions—okay?

You run into a certain problem—it would always exist.

In other words, you would feel—I would feel, personally, like you were running into a confrontation constantly if you didn't do that.

In particular circumstances, if I objected strongly to a particular price or something—then personal conversations that existed on a day to day basis would cease—if that's clear?

Second, and more important, here, unlike in *Amber* and *Seven-Up,* the drivers did not own their trucks.[3] They leased the trucks, paying for their gasoline and other maintenance. In *Amber* and *Seven-Up,* we found the fact of truck ownership a significant (though not in itself controlling) factor suggesting independent contractor status. This is not surprising, for a driver who owns a truck has more than his own labor at risk—he also has a capital investment. And, this investment gives him somewhat greater independence (in terms of his ability to find work elsewhere) than were only his own labor at stake. The fact of nonownership alone, tending to support a finding of "employee", more than outweighs any minor differences that Maine contends cut in the other direction.[4]

On the basis of this prior authority, the order of the Board is

Enforced.

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[3] The trucks bear the inscriptions "Serviced by Maine Caterers" and "operated by [driver's name]".

[4] Maine seeks to distinguish *Seven-Up* on the grounds that, in contrast to this case, the contracts in *Seven-Up* were oral, Seven-Up billed customers directly, many Seven-Up drivers wore uniforms, Seven-Up set sales quotas, Seven-Up had meetings to discuss sales, Seven-Up conducted surveys to evaluate the distributors, and Seven-Up controlled the size of the territories. The record suggests that as to many of these items, the differences between Seven-Up and Maine are small. As to the others, we believe any differences are outweighed by the fact that in *Seven-Up,* many drivers owned their own trucks, yet we still upheld a Board finding of "employee" status. Here the drivers do not own their trucks.

NLRB v. Frederick's Foodland, Inc. d/b/a Bucyrus Foodland North and Bucyrus Foodland South

655 F.2d 88 (6th Cir.), July 17, 1981—247 NLRB 284

On petition to enforce Board Order

Before ENGEL, KENNEDY and MARTIN, Circuit Judges

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PER CURIAM: This case is before us on the Board's petition for enforcement of its order against Frederick's Foodland, Inc., which operates two retail grocery stores in Bucyrus, Ohio. In March 1977, one of the two stores was destroyed by fire. It was reopened in March 1978; in the interim, employees of the two stores were combined in the one operating store, and about 25 of the roughly 85 employees were laid off by seniority.

On November 14, 1977, the Union[1] began its organizational campaign with a meeting at the home of employee Jane McClintock. Shortly thereafter a representation petition was filed, and a hearing was held on December 13, 1977. The parties stipulated that 5 of the laid-off employees should vote in the upcoming election, resulting in a two-store bargaining unit of 49 employees. By December 14, 26 of those employees had signed authorization cards. On January 5, 1978, a representation election was held, which the union lost by a vote of 28 to 18, with 2 challenged ballots. The Board then filed numerous objections and unfair labor practice charges against the Company.

The Board found that the Company committed numerous violations of § 8(a)(1) of the National Labor Relations Act. Among the violations were coercive interrogations of employees, solicitations of grievances from employees, creating the impression of surveillance of union activities, communicating to employees that their support of the Union would be futile, promising benefits to employees to discourage support for the union, and granting an across-the-board wage increase shortly before the election in order to induce the employees to vote against the Union. The Board further found that the Company violated § 8(a)(3) and (1) of the Act by reducing the scheduled hours of employees McClintock and Shafer. Finally, the Board found that the union attained majority status on December 14, 1977, and that the granting of the wage increase without bargaining violated § 8(a)(5) as well as § 8(a)(1) of the Act.

The Board's order requires the Company to cease and desist from engaging in the unfair labor practices, to make whole employees McClintock and Shafer for any loss of earnings by reason of the unlawful reduction of their scheduled work hours, and to post the customary notices. Due to the serious and prevasive impact of the unfair labor practices, the Board further ordered the Company to recognize and, upon request, bargain collectively with the union as the exclusive representative of the employees.

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[1] Retail Clerk's Union 31, a/w United Food and Commerical Workers International Union, AFL-CIO

On appeal the Company contends that the Board's findings are not supported by substantial evidence and that the facts of this case do not justify the issuance of a bargaining order.

Most of the testimony upon which the ALJ based his factual findings was disputed. It is the function of the ALJ to make credibility determinations. *N.L.R.B. v. Franklin Property Co., Inc.*, 617 F.2d 447 (6th Cir.), *cert. denied*, ——— U.S. ———, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980). Because the factual findings adopted by the Board are supported by substantial evidence in the record, they cannot be distrubed on appeal. 29 U.S.C. § 160(e).

In challenging the Board's finding of a § 8(a)(5) violation, the Company contends that the Union never achieved majority status. The Company argues that Bill Judy and Bill Wilburn were improperly excluded from the unit, and that Scott Oriens was improperly included. The proper unit, it concludes, included 50 employees, of whom only 25 had signed authorization cards on December 14, 1977. We disagree.

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The Board's findings with respect to Judy and Wilburn are supported by the evidence. Because they were properly excluded from the unit, the union achieved a card majority regardless of the status of Oriens. Finally, at least with respect to the § 8(a)(5) violation in issue here, the Company's contention that the unit must include all of the laid-off employees is without merit in light of its stipulation that only five of those employees had a reasonable and imminent expectation of recall.

The company's final contention is that the Board's issuance of a bargaining order is not justified. We agree. This court has refused to enforce bargaining orders in cases where the unfair labor practice would not, in our opinion, prevent a fair election. *N.L.R.B. v. Naum Brothers*, 637 F.2d 589 (6th Cir. 1981). Viewing the record as a whole, we hold that the Board's decision to issue a bargaining order is not supported by substantial evidence. Factors contributing to our decision are the large increase in the number of employees in the unit due to the reopening of the second store, the passage of time since the first election, and the nature of the unfair labor practices found by the Board. Although there is sufficient proof in the record that those findings should not be disturbed, we believe that in the context of this case the violations cannot be deemed so pervasive and outrageous as to warrant a bargaining order under *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, S.Ct. 1918, 23 L.Ed.2d 547 (1969).

Accordingly, the application of the Board for enforcement of its order is granted in part and denied in part.

Season-All Industries, Inc. v. NLRB

654 F.2d 932 (3d Cir.), July 17, 1981; rehearing denied September 15, 1981—250 NLRB 1284

On petition to review Board Order

Before ADAMS and GARTH, Circuit Judges, and DUMBAULD, District Judge*

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GARTH, Circuit Judge: Once again we are asked to review the denial of a hearing by the Regional Director of the National Labor Relations Board when grave assertions are made by the company that the "laboratory conditions" of a representation election were violated by actions of a union agent.

We have recently addressed different aspects of this subject in *Anchor Inns Inc. v. NLRB*, 644 F.2d 292 (3d Cir. 1981); *Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000 (3d Cir. 1981); and *NLRB v. Campbell Products Dept.*, 623 F.2d 876 (3d Cir. 1980). In *Zeiglers* we reviewed the election process *after* an evidentiary hearing had been held to investigate irregularities. In *Anchor Inns*, we reviewed the election process where an evidentiary hearing had been sought by the company and denied. In *Campbell*, no evidentiary hearing was required because the Board assumed the truth of Campbell's contentions.

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*Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Here, Season-All seeks an evidentiary hearing to examine the conduct and status of one of its employees (Sadler) who it asserts was a union agent and whose electioneering activities, Season-All claims, influenced co-workers outside the polling place while they were waiting their turn to vote.

The Regional Director conducted only an *ex parte* investigation despite the company's assertion that Sadler was a union agent and had identified himself with the union by saying that he was there "for the union, to keep management away from the polling area."

The Board sustained the Regional Director's refusal to investigate Sadler's status and issued and order directing Season-All to bargain with the union. Consistent with our recent pronouncements, we grant Season-All's petition, deny the Board's cross-application for enforcement and remand the case to the Board for an evidentiary hearing.

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I.

Season-All Industries, Inc. produces thermal windows and doors. At issue in this case, is the representation of Season-All's employees by the International Association of Machinists and Aerospace Workers, AFL—CIO (IAM).

A petition seeking a representation election was filed with the Board on April 2, 1979 by District Lodge No. 63 of the IAM. The election was held on June 29, 1979 and the relevant results were tabulated as follows:

Approximate number of eligible voters	79
Votes cast for IAM	36
Votes cast for [other unions]	9
Votes cast against participating labor organizations	25
Valid votes counted	70
Challenged ballots	5

Challenges are sufficient in number to affect the results of the election.

After the election, on July 5, 1979, Season-All filed objections to the conduct of the election. Season-All objected that "[a]n agent of the International Association of Machinists and Aerospace Workers engaged in electioneering outside the polling place." Season-All also alleged that Sadler urged waiting voters to vote for the union; that Sadler harassed female employees whom he felt were not favorably disposed to vote for the union; and that Sadler, by declaring that a company officer was improperly present at the polling area, implied to the voters that the company was engaged in wrongful conduct. The company charged that Sadler conducted his electioneering for a substantial part of the one hour period allotted for voting and within a few feet of the room where voting was taking place. In support of its objections, the company submitted affidavits of Thomas Mittlehauser, the assistant to the company's Industrial Relations Director. The charges in the affidavits supported the objections filed by the company and, among other things, claimed that Sadler had stood outside the polling place for some time and had told Mittlehauser in a loud voice that he, Mittlehauser, was not permitted near the voting place because of his position with the company.

After an *ex parte* investigation the Regional Director issued a Supplemental Decision on Objections and Challenges. He found that "Sadler was a rank-and-file employee and an eligible voter. * * * [and] held no position of any kind for the [union] * * *." (133a) The Regional Director "conclud[ed] that Sadler's conduct * * * can in no way be attributable to the Petitioner," although he conceded that "[i]n *Milchem, Inc.*, 170 NLRB 362 [other courts and the Board most often cite this case as *Milchem, Inc.* although it was originally reported as *Michem, Inc.* Because many of the cases to which we refer cite the case as *Milchem*, we will use that nomenclature throughout this opinion.], the Board held that in situations where a *party to the proceeding* in cases of electioneering which is more than *de minimis* at the polling place while voting is in progress, the Board will find such electioneering to be *per se* a basis for setting aside an election." (134a) He distinguished *Milchem*, however, by stating that in *Milchem*, the "conduct complained of was engaged in by an agent of the union * * *" *Id.*

The Regional Director described the testimony concerning Sadler as follows:

> All of the alleged objectionable conduct attributed to the alleged agent of the Petitioner relates to conduct of a rank-and-file employee, Ray Sadler. Sadler was an eligible voter.
>
> The election was held in an enclosed conference room at the Employer's facility, entered

through a doorway. The voting period was from 11 a.m. to 12 noon. The corridor where employees were waiting in line to vote was located outside the doorway of an office area located between the corridor and the conference room. According to Thomas Mittlehauser, the Employer's assistant to the industrial relations director, he found it necessary to walk by the employees waiting in line to vote on his way to the nurse's office shortly after the polls opened; that on his way to the nurse's office, he noticed Sadler standing in the corridor, but not in the line of waiting voters; that on

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his return from the nurse's office, approximately 5 to 8 minutes later, he saw Sadler standing in the same position as previously; and that on this occasion, Sadler said to him, "What are you doing here, you have no right to be here, you are management," to which Mittlehauser responded "that he had been busy treating an employee and was on his way back to his office," and that Sadler then merely shrugged his shoulders. According to Mittlehauser, he also saw Sadler converse with some of the other employees in the line, but he did not know what Sadler said to such employees. According to one employee, she saw Sadler standing in the corridor greeting employees, such as saying "hello" or "how are you"; that one of the voters asked Sadler where his button was and that Sadler replied "it's against the law to wear them but we all know who to vote for." According to another employee, Sadler, while standing in the corridor, said to her, "thanks for coming to vote" to which she replied "so you think"; that Sadler shook the hand of an employee who had already voted and said "congratulations"; and that when someone asked Sadler why he was standing where he was, Sadler replied that he was there "for the Union, to keep managemen [sic] away from the polling area" and that he "did not want management to intimidate us." According to the same employee, Sadler talked to various employees in the line to say hello and "small talk" and that while he said things about the Union, she could not recall the specifics. A third witness waiting in line to vote, whose supervisory status is in dispute, states that Sadler got in line behind her; that as a voter passed the waiting line after voting that person said "we may get a vacation out of this" to which the witness replied to no one in particular, "perhaps an extended one"; that Sadler then said "I'm glad she brought that up because we will use it against her later; we will use that against them later"; that Sadler then said there will be no more favoritism that some people get raises and some don't; and that Sadler continued conversing with voters while in the line but that she paid no attention and did not know what was said. All of the above three witnesses are females. Except as set forth above, the investigation did not disclose any other remarks attributed to Sadler pertaining to the election. The estimates of the witnesses as to the length of time that Sadler was in the polling area ranges from 10 to 20 minutes. The estimates of the witnesses as to where Sadler stood while making his remarks ranges from 10 feet from the entrance to the polling place to 40 feet from the entrance to the polling place.

According to Sadler, he stepped out of the voting line when he saw Mittlehauser come back past the voting line and told Mittlehauser that he was violating the rules, that he was not supposed to be there and asked Mittlehauser to leave; that he then waited for the end of the line to reach him, there being approximately 25 people in line, and that when the end of the line reached him, he got back into the line, voted, and left the polling area. According to Sadler, while he thanked people for voting as they left the polling area, he did not thank anyone for voting any particular way, did not say congratulations" to anyone, and did not say "that we would use anything" against anyone. While agreeing that he stated that management was not supposed to be in the area and that he was watching out for violations after the Mittlehauser incident, he denies that he told anyone that he was "there for the Union to keep management away from the polling area." (131a–132a)

Evaluating this conduct according to the Board's standards for union *adherents,* i. e. non-parties as opposed to union agents, the Regional Director found that the conduct at issue did not substantially impair the employees' exercise of a free choice in light of all the surrounding facts and circumstances. Viewing "the evidence in the light most favorable to the Employer" the Regional Director found "that Sadler's conduct did not interfere with the results of the election." (135a) The Regional Director went on to order a hearing limited "to the issues raised by the challenges to" four of the ballots cast in the election. (137a)

Three days later, Season-All filed a motion with the Board seeking to have the Board reconsider its decision. Season-All stated that "[c]ertain of the factual conclusions set forth in the Supplemental Decision constitute findings of fact with respect to conflicting evidence, which findings should not be made absent a full hearing." (139a) Season-All contended that a proper investigation of the case, including a full hearing, would disclose that Sadler was one of four members of the in-shop union organizing committee and that his position was well known to the other employees. Moreover, Season-All argued that under the Board's decision in *Pastoor Brothers, Inc.*, 223 NLRB 451 (1976) the conduct of Sadler established that he should be considered a union agent if he so represented himself to the employees.

On October 1, 1979, the Regional Director denied Season-All's motion for reconsideration. The Board affirmed this ruling on November 13, 1979. On April 3, 1980 the IAM was certified as the representative.

After Season-All refused the IAM's request to bargain collectively, the Regional Director issued a complaint and notice of hearing on May 12, 1980. Season-All filed an answer on May 22, 1980 in which two of its objections centered on Sadler's status and conduct and the NLRB's failure to hold a hearing concerning those issues. It also objected to having its computer programmers included in the bargaining unit as it claimed they were professionals within the terms of 29 U.S.C. § 159(b)(1).[1] Its fourth objection pertained to a managerial employee, who, it alleged, was improperly included in the bargaining unit. This last objection was subsequently abandoned at oral argument.

The General Counsel then moved for summary judgment which was granted by the Board.

II.

Although Season-All continues to press its objection that its computer programmers were improperly included in the bargaining unit, Season-All's primary complaint focuses on the Regional Director's refusal to grant an evidentiary hearing with respect to Sadler's status and conduct. Because we conclude that this latter objection is well-founded, we will vacate the decision of the Board and remand the case for a hearing and a factual determination with respect to Sadler's affiliation with the union committee and his activities.

A.

As the Regional Director explained in his supplemental decision, the Board established a *per se* rule, as long ago as 1962, in *Milchem, supra,* that electioneering by a party to an election while the election is being held requires that the election be overturned.

In *Milchem,* the secretary-treasurer of the union had stood for several minutes near the line of employees who were waiting to vote. While there, he engaged them in conversation which he stated concerned only the weather and like topics. The Board, while acknowledging the innocuous character of these conversations nevertheless held that "sustained conversation with respective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct, which, in itself, necessitates a second election." *Milchem, supra* at 362. The Board went on to explain the basis for this holding. It stated:

> Careful consideration of the problem now convinces us that the potential for distraction, last minute electioneering or presssure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations. The final minutes before an employee casts his vote should be his own, as free from in-

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[1] 29 U.S.C. § 159(b)(1) reads in relevant part:

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the union appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided* the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit • • •

> terference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter. The difficulties of recapturing with any precision the nature of the remarks made in the charged atmosphere of a polling place are self-evident, and to require an examination into the substance and effect of the conversations seems unduly burdensome and, in this situation, unnecessary. Finally, a blanket prohibition against such conversations is easily understood and simply applied.
>
> This rule is nothing more than a preventive device to enforce the ban against electioneering in polling places normally applied in political elections and in our representation elections. It serves the same purposes of maintaining order and permitting voters to consult their own consciences without interruption. Additionally, by attaching a sanction to its breach, the rule assures that the parties will painstakingly avoid casual conversations which could otherwise develop into undersirable electioneering or coercion. In our view, the restriction here established gives every promise of having a salutary effect on the conduct of elections and offers no likelihood of abridging the rights of the parties concerned.
>
> We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles." We trust, however, that the parties to the elections, in order to obviate the sometimes troublesome task of defining what is to be considered trifling, will take pains to assure complete compliance with the rule by instructing their agents, officials, and representatives simply to refrain from conversing with prospective voters in the polling area.

170 NLRB 362–63.

The Regional Director sought to distinguish *Milchem* by stressing the fact that, in *Milchem*, it was undisputed that it was an officer of the union—"a party to the election"—who was the offending individual. (134a) The Regional Director, in his decision, then stated:

> Inasmuch as I have found that Sadler was not an agent or representative of the Petitioner, I conclude, therefore, that there is no basis under the above-cited cases [e. g. *Milchem, Pastoor, supra*] for setting aside the election on a per se standard, since the conduct involved was not engaged in by a party to the election. (135a)

Significantly, he did not comment on the conflicting evidence as to Sadler's *status*.[2] Indeed, the Regional Director's findings as to Sadler's status, while acknowledging the company's assertion that Sadler claimed to have been "there for the Union to keep

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management away from the polling area," (135a), does not indicate the evidence on which these findings of "non-party" were predicated. His decision continued:

> As previously indicated, Sadler was a rank-and-file employee and an eligible voter. Although Sadler wore a Petitioner button, he held no position of any kind for the Petitioner, nor had he been designated to act for the Petitioner in any way. He was not an officer of the Petitioner, was not a member of any committee of the Petitioner and had not been designated to act as an election observer by the Petitioner. The investigation failed to disclose any evidence that Sadler had been required by the petitioner to police the area where the voters were waiting in line to vote and, indeed, the investigation failed to establish any evidence that the petitioner was even aware of Sadler's actions.
>
> In these circumstances, I conclude that Sadler was not an agent of the Petitioner, noting particularly that he held no position of any kind with the Petitioner, had not been designated by

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[2] The Regional Director did acknowledge that the record before him contained conflicting evidence as the Sadler's comments. We observe that the comments allegedly made by Sadler in the present case are far more egregious in content than the innocent conversations held in *Milchem, Inc.*, 170 NLRB 362 (1962), which nevertheless resulted in the *Milchem* election being vacated.

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> the Petitioner to act for it and that the Petitioner in no way authorized, condoned or was even aware of Sadler's activities. A rank-and-file employee's adherence to or preference for a labor organization is not sufficient to constitute such person an agent of a labor organization. Consequently, I conclude that Sadler's conduct, in question here, can in no way be attributable to the Petitioner

(133a–34a).

In both *Anchor Inns, Inc. v. NLRB,* 644 F.2d 292 (3d Cir. 1981) and *NLRB v. Campbell Products,* 623 F.2d 876 (3d Cir. 1980), this court held that "[a] party is entitled to an evidentiary hearing where its objection raises substantial and material issues of fact * * *. As a corollary, no hearing is necessary where the Board assumes the truth of the party's contentions, and then rules as a matter of law that, assuming the facts alleged, the challenged conduct does not warrant setting aside the election." *Anchor Inns, supra,* p. 296 quoting *NLRB v. Campbell Products Dept.,* 623 F.2d 876, 879 (3d Cir. 1980).

"In *Campbell Products,* the employer alleged that a union supporter had been electioneering during the course of balloting. The Board assumed the allegation to be true and, relying on the traditional distinction drawn between activities undertaken by the *parties* to an election and those undertaken by *rank and file employees,* overruled the objection." *Anchor Inns, supra,* at 296 (emphasis supplied). The *Campbell* court focused not on the electioneering objection presented by Campbell, but rather on a second objection raised by Campbell which alleged that the Board had failed to adhere to its own policy and precedents by failing to consider the company's objection which had been filed beyond the five day period specified in the Board's regulations. In *Campbell,* therefore, while we overruled the Board with respect to Campbell's second objection, we upheld the Board's action in rejecting the electioneering complaint. We did so, because in *Campbell,* no question was ever raised as to the status of the employee—i. e. whether he was a mere employee, or a union agent, and of equal importance the Board had in fact "assume[d] the truth of [Campbell's] contentions" that the offender was no more than an employee. 623 F.2d at 879.

Here, however, the circumstances are dramatically different from those which we confronted in *Campbell Products.* In the present case, Season-All has asserted that Sadler was a union *agent* and that as a union agent he was electioneering during the balloting and this assertion was never assumed to be true by the Regional Director.

Similarly in *Anchor Inns,* a precedent in this Circuit directly on point, one of the company's compliants which led us to remand for a hearing, was that the status of the offending employee as a union agent had not been assumed as true and no hearing had been held by the Regional Director to resolve that issue. Thus, *Anchor Inns's* observations are instructive in this case. As we observe there:

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> In *NLRB v. Claxton Manufacuring Co.,* 613 F.2d 1364 (5th Cir. 1980), the Board, as in the case at bar, apparently believed that it was not required to decide whether the objector's affidavits raised substantial and material issues that prima facie warranted setting aside the election. Rather, the Board concluded that it might await the results of the regional direstor's ex parte investigation and credibility determinations before deciding whether a hearing might be warranted. The Fifth Circuit rejected such a procedure and declined to enforce the bargaining order. 613 F.2d at 1373. We find the Fifth Circuit's approach persuasive in this case. It would of course serve no useful purpose to require the Board to hold hearings when the evidence proffered will not affect the validaity of the election. However, in order to give the objecting party the full benefits of its statutory and Constitutional hearing rights it is necessary that at some point the Regional Director or the Board, in determining the substantiality and materiality of the factual issues raised by an objection, assume that the allegations contained in that objection are true. This was not done in the case at bar. Had the allegations been taken as true, they may have warranted setting aside the election.

644 F.2d at 296.

Here, the Regional Director did not assume the truth of Season-All's allegation that Sadler was a union ageant. Rather the Regional Director "substituted 'facts' gleaned from his *ex parte* investigation for the Company's allegation." *Id.* at 297. His finding that Sadler "held no position of any kind for the [union], nor had he been designatead to act for the [union] in any way," completely controverted Season-All's allegations. Thus, the findings which are reported in his decision not only are unsupported by evidence of record, but are even more seriously flawed, in that Season-All was precluded from participating in an evidentiary hearing at which it could examine Sadler and other witnesses and present its evidence and arguments.

The record clearly discloses that Season-All's initial objection to the election asserted that Sadler was an agent of the union. Paragraph four of Season-All's objection reads

> 4. During a substantial part of the period designated for voting, Roy Sadler, an agent of the International Association of Machinists and Aerospace Workers ("Petitioner"), engaged in electioneering activities in the corridor within a few feet of the door of the conference room in which voting was taking place.

Moreover, Season-All claimed that Sadler urged waiting voters to vote for the union; that he badgered employees whom he felt were not favorably disposed towards the union; that he influenced voters; that he implied that the company was engaged in wrongful conduct and that he conducted his electioneering outside of the entrance to the polling room for a substantial portion of the time allotted for voting. These charges were supported by affidavits filed both before and after the Regional Director's decision. While it is true that the affidavits filed prior to the decision did not specifically assert that Sadler was a union agent, Season-All's filed objections consistently maintained that Sadler was an agent of the union. Indeed, an affidavit filed by Season-All's industrial relations director subsequent to the union's certification and in response to the June 6, 1980 motion of the General Counsel for summary judgment, stated unequivocally that Sadler, together with three other named individuals, as a committee "repeatedly presented itself to Season-All management as having some connection with the [union]." (322a)

We recognize that this latter affidavit was not before the Regional Director prior to his refusal to hold a hearing on the company's charges. However, the assertions made by Season-All in its efforts to obtain an evidentiary hearing were more than sufficient under the standard announced in *Anchor Inns, supra,* to "prima facie warrant setting aside the election." *Anchor Inns* at 296. The following standard announced in *Anchor Inns* was satisfied in full by Season-All:

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> In order to obtain an evidentiary hearing, the objector's proffer of evidence must prima facie warrant setting aside the election. The proffer may not be conclusory or vague; it must point to specific events and specific people.

Id. at 296. *Cf. Vitek Electronics, Inc. v. NLRB,* 653 F.2d 785, at 794–795 (3d Cir. 1981).

Season-All's proffer was neither conclusory nor vague. It referred to specific events (time, place and conversations) and specifically identified Sadler as the person whose conduct was being challenged.

Our conclusion in this respect is buttressed by the Fifth Circuit's decision in *NLRB v. Carroll,* 636 F.2d 111 (5th Cir. 1981). There, as here, electioneering took place while employees were waiting to vote.[3] The electioneering activities were conducted by two former Carroll employees. There, as here, the Board contended that the electioneering that occurred was not improper because the *Carroll* employees were not agents of the union and thus their conduct could not be attributed to the union. The court's response put that argument to rest:

> It is well settled that acts not attributable to the union warrant setting aside the election if the acts disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election. *NLRB v. Claxton Manufacturing Co.,* 613 F.2d 1364, 1371 (5th Cir. 1980). In *Home Town Foods, Inc. v. NLRB,* 379 F.2d 241 (5th Cir. 1967), this court stated:
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> > We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. "The important fact is that such conditions existed and that a free

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[3] *NRLB v. Carroll,* 636 F.2d 111, 113 (5th Cir. 1981), also held that

> Once the polls opened, the employees waiting outside in line to vote became a part of the polling place, and were entitled to the safeguards against interference espoused by *Milchem.*

We agree, for just as the court in *Carroll* found, we do not regard protection from interference to be reserved for only those employees who have gained access to the actual polling place. Voters, in the last few moments before voting, must be "as free from interference as possible." *Milchem, Inc.,* 170 NLRB 162–63 quoted in text, *supra* p. 937.

> > election is hereby rendered impossible." *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953).
>
> 379 F.2d at 244.

636 F.2d at 113.

Carroll, recognizing that Board policy prohibited electioneering "at or near the polls," denied enforcement of the Board's order. Our reading of *Carroll* indicates that the Fifth Circuit does not restrict the *per se* rule of *Milchem* to parties but holds that even a *non-party* who disrupts the voting procedure or destroys the atmosphere necessary to the exercise of a free choice in an election, warrants the setting aside of the election.[4] We agree that in establishing and maintaining the "laboratory conditions" conducive to an election, no conduct disruptive or destructive of the exercise of a voter's free choice can be tolerated, regardless of whether the actions are those of a union agent or a mere employee. However, the failure to afford a hearing to Season-All in this case precludes us from making the determinations which compelled the *Carroll* court to set aside the election there. It was the same failure to hold a hearing after a *prima facie* case had been established by the employer in *Anchor Inns,* that prompted the court there to remand for an evidentiary hearing to resolve the essential issues bearing on the fairness of the *Anchor Inns* election.[5] Thus, both

precedent and logic compel the same result in this case where Sadler's conduct and status have been disputed and put in issue by Season-All, but have never been the subject of an evidentiary hearing and therefore have never been properly resolved.

B.

Season-All also objected to the Board's determination that its computer programmers were not professional employees as that term is defined in 29 U.S.C. § 152(12).[6] If the computer programmers were professional employees, they could not be included in a bargaining unit with non-professional employees unless a majority of such professional employees were to vote for inclusion in such a unit. See 29 U.S.C. § 159(b)(1) quoted *supra* at p. 936 n.1. No such separate election was ever held because the Board concluded that the computers were not professional employees.

The hearing held on April 17, 1979 resulted in an opinion of the Regional Director dated May 16, 1979, which was affirmed by the Board. That opinion states in relevant part:

> The record discloses that computer programming requires special education or training above the high school level of at least two years. However, the Employers does not require a four-year

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[4] To the extent that *Carroll* interprets Claussen Baking Co., 134 NLRB 111 (1961), as requiring an election to be set aside whenever *any* electioneering takes place. *Carroll's* holding may be read as more far reaching in this respect than the decisions thus far in this Circuit. *Cf. NLRB v. Campbell,* 623 F.2d 876, 879 n.2 (3d Cir. 1980). Regardless of the reach of *Carroll,* under the circumstances of this case, we are constrained to follow the precedent of *Anchor Inns, Inc. v. NLRB,* 644 F.2d 292 (3d Cir. 1981).

[5] The dissent, while acknowledging that *Anchor Inns* establishes the governing legal standard for determining when the Board should conduct an evidentiary hearing (dissenting op. typescript at 1) apparently views the allegations in that case differently than do we. The dissent asserts that "*Anchor Inns* requires more substantial evidence than [Season-All provided] on the question of Sadler's status." Dissenting op. typescript at 3. Our reading of *Anchor Inns* persuades us that there is no difference in either the content or the quality of the allegations in the two cases.

In *Anchor Inns,* as here, the company filed objections to the Regional Director's report claiming that an evidentiary hearing on the objections should have been had. In addition to the objections made to the remarks of the alleged agent, Anchor Inns complained that:

> it should not have been held responsible for failing to produce evidence of Victor's *agency status* with the union. The strictures of Secion 8(a)(1), it was argued, precluded [Anchor Inns] from engaging in the type of investigation that would produce competent evidence of an agency relationship.

644 F.2d at 294–95 (footnote omitted, emphasis supplied)

Anchor Inns also asserted that even if Victor was not a union agent, his conduct tainted the election process. Similar allegations were made in Season-All's objections and are discussed in text above.

Thus, to the extent that *Anchor Inns* determined that an *ex parte* investigation by the Regional Director was insufficient in the face of specific allegations of misconduct by an alleged union agent, we can discern no differences between *Anchor Inns* and this case. Nor does our direction that an evidentiary hearing beheld in any way implicate the teaching of *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (dissenting op. typescript at 1). We do no more here than require adherence to the Board's own policies which require an evidentiary hearing when objections raise substantial and material issues of fact. *See Anchor Inns* at 296.

[6] The term "professional employee" means—

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgement in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

> college degree and it is in business education with four courses relating to computer programming. The other two programmers attended one or two year technical schools which prepared them as trainees. The record further reveals that substantial additional time is required before a trainee becomes fully qualified as a programmer.
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> The record reveals that pursuant to a request for information from any of the employer's departments, the programmers develop computer programs to extract the information from the computer in a useable form. The record indicates that the information of such programs requires the exercise of judgment and the programs are developed without supervision
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> * * * * *
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> While knowledge of the type of described in [29 U.S.C. § 152(12)(a)(iv) quoted at footnote 5, *supra* might be desirable for a programmer to have, it is clear that their work does not require it. Further, the record fails to establish that the computer programmers are engaged in other than pure programming activities. Accordingly, inasmuch as the Employer's computer programmers do not satisfy all of the requirements of Section 2(12), I find that they are not professional employees as defined by that Section of the Act. At best, the computer programmers are technical employees. Inasmuch as the parties have agreed to include technical employees, I find that the Employer's computer programmers are appropriately included in the unit.

85a–86a (footnotes omitted).

While the Board has previously determined that a system analyst with wide discretion and significant amounts of technical training might be considered a "professional employee" in certain situations, *see e. g. Aeronca, Inc.,* 221 NLRB 326 (1975), it has generally considered computer programmers to be technical and thus non-professional employees. *See e. g., Westinghouse Electric Corp. v. NLRB,* 440 F.2d 7, 9–10 (2d Cir.) *cert. denied,* 404 U.S. 853, 92 S.Ct. 93, 30 L.Ed.2d 93 (1971); *U.S. Postal Services,* 210 NLRB 477, 488 (1974); *Computer Systems, Inc.,* 204 NLRB 255 (1973).

Here, the Board's factual determination that the computer programmers are not "perfessional employees" is "supported by substantial evidence on the record considered as a whole" 29 U.S.C. 160(f), and giving our usual deference to the Board's expertise in a classification context, we conclude that the Board did not err in its ruling. *See NLRB v. McQuaide, Inc.,* 552 F.2d 519, 532–33 (3d Cir. 1977); *Mon River Towing, Inc. v. NLRB,* 421 F.2d 1, 5 (3d Cir. 1969). But *see* Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results,* 94 Harv.L.Rev. 1713 (1981).

III.

Having determined that Season-All was improperly denied an evidentiary hearing with respect to Sadler's status and conduct, we will grant Season-All's petition for review; we will deny the Board's cross-application for enforcement of its August 1, 1980 order; and, we will remand the case for an evidentiary hearing and for further proceedings consistent with this opinion.

Costs will be taxed against the respondent.

ADAMS, Circuit Judge, dissenting: I agree with the majority that our recent decision in *Anchor Inns, Inc. v. NLRB,* 644 F.2d 292 (3d Cir. 1981), establishes the governing legal standard for determining when the Board should conduct an evidentiary hearing concerning allegations of election misconduct. I believe, however, that in this case Season-All did not satisfy the threshold requirement of *Anchor Inns.*

According to *Anchor Inns,* unsubstantiated allegations by the party objecting to an election will not suffice to compel the Board to undertake a hearing. Rather, "to obtain an evidentiary hearing, the objector's proffer of evidence must prima facie warrant setting aside the election. The proffer may not be conclusory or vague; it must point to specific events and specific people." 644 F.2d 292, 296.

Although hearings generally serve a useful purpose, requiring a hearing in the absense of a factual predicate warranting such an inquiry provokes unnecessary delay in the administrative process at the expense of the choice of a majority of the workers. Furthermore, we must be mindful of the admonition by the Supreme Court in *Ver-*

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mont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978), that "absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure." Under the majority opinion, the Board's rule that there should be a hearing only when the objecting party specifically substantiates its allegations is, in effect, abrogated. In its stead the majority would substitute a court-crafted rule that there must be a hearing even when the allegations are vague and unsupported.

The issue on which Season-All requests a hearing involves Sadler's status with the union.[1] Thus, under *Anchor Inns*, we must ascertain whether the employer proffered "substantial and material" evidence that Sadler was a union agent. The offerings by Season-All on this issue are, at best, conclusory and vague, and they fall short of being substantial. In its complaint, Season-All contended that "Sadler, *an agent* of the [IAM], engaged in electioneering * * *." (emphasis added). The employer then detailed the content of the statements that purportedly constituted electioneering. As to the allegations of union agency, the critical issue in this appeal, the company merely came forward with a single, vague item of evidence to support the claims of union agency. Season-All asserted that Sadler stated he was at the polling place because he was for the union."[2] This enigmatic statement suggests that Sadler held a position with the union.

The majority concludes that Season-All satisfied the requirements in *Anchor Inns* of concreteness and substantiality when it "referred to specific events (time, place and conversations) and specifically identified Sadler as the person whose conduct was being challenged." Maj. op., typescript at 940. But, these allegations by Season-All pertain only to the question of whether Sadler's comments were coercive; they are not apposite to the question of Sadler's position within the union.

All that Season-All offered on this crucial issue were the cryptic statement adverted to earlier and the conclusory allegation that Sadler was an agent. To warrant a hearing on the question of Sadler's status, *Anchor Inns* requires more substantial evidence than this. Also relevant here is the observation in *Anchor Inns* that "it would of course serve no useful purpose to require the Board to hold hearings when the evidence proffered will not affect the validity of the election." 644 F.2d at 296. The proffered evidence—that Sadler said he was "for the union"—is not of sufficient import to affect the election certification. Moreover, after an investigation the Regional Director found no evidence that Sadler either held a position with the union or had been designated by the union to police the polling area.

When the evidence produced by Season-All in the present case is measured against the substantiality requirement of *Anchor Inns*, it appears that the Board did not err when it declined to hold a hearing on the question of Sadler's union position. Inasmuch as I am bound by *Anchor Inns*, decided only a few months ago, I respectfully dissent from the portion of the majority opinion that directs the Board to hold a hearing.

United Parcel Service v. NLRB

654 F.2d 12 (6th Cir.), July 17, 1981—247 NLRB 861

On petition to review Board Order

Before Weick and Keith, Circuit Judges, and Porter,* District Judge

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This case is before the court on petition of the United Parcel Service for review of an order of the NLRB issued against it on February 5, 1980, and reported at 247 NLRB No. 134. The Board has filed a cross-petition for enforcement of this order.

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United Parcel Service Company is an interstate common carrier engaged in motor freight transportation and delivery. It has a facility at Roseville,

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[1] The NLRB rule advanced in *Milchem, Inc.*, 170 NLRB 362, would apply only if Sadler is found to have been a representative of the union. In *Milchem* it was undisputed that the person who made the allegedly improper remarks was a union official, so the Board devised a rule to cover statements by parties to the election. This rule is largely inapposite to the narrow procedural issue presented in this case, because the inquiry into Sadler's union status is distinct from and preliminary to any consideration of *Milchem*.

[2] As the majority correctly points out, it was not until the unfair labor practice proceedings, a year after the election, and well after the Board had considered the need to hold a hearing, that Season-All, in objecting to the General Counsel's motion for summary judgment, alleged for the first time that Sadler had held himself out to the company as a member of a union committee, even though he was not on the Official list of union representatives. (A.324).

*Hon. David S. Porter, Senior District Judge for the Southern District of Ohio, sitting by designation.

Michigan for transshipping parcels. The union represents the company's employees at this and at other terminals.

One of the trucks or tractors delivering parcels to the company's Roseville facility is known as the Mount Pleasant Trailer. On arrival, this trailer, which has a sliding or roll-top back door, is routinely parked on the level near the loading dock while the driver breaks the seal, opens the door and checks the position of the load. The door is always open as the driver starts backing the trailer down to the platform-dock for unloading.

The dock is about six feet above ground level. The platform about two feet wide and three feet from the ground is immediately adjacent to the dock. When parked for unloading, the back bumper of the Mount Pleasant Trailer rests against the foundation of the plaform. Above the bumper, there is a "well imprint" appropriately six to eight inches wide between the trailer and the platform.

The ground slopes downward to the dock platform and, on occasion, the sliding door of the Mount Pleasant Trailer shuts as the truck is backing up. When this happens, an unloader generally opens the door at the dock-platform. This requires the employee to step onto the platform, bend over and reach down into the well area to pull up the door. Because of the cramped space, maneuverability is limited. The evidence below showed that paackages have fallen from the Mount Pleasant Trailer as its door was being reopened at the dock, and several times an employee has been hit by these packages. The maximum weight of individual packages transported from the trailer is about 50 pounds. The average weight of the packages is about 10 to 15 pounds, and ordinarily the trailer is filled to about 20% of its capacity.

On January 3, 1979, the Mount Pleasant Trailer arrived at Roseville late and neither Katherine Carette, a pre-load supervisor, nor any of the loading dock employees on duty saw the driver break the seal and unlock the door of the trailer. Employees Aiello, Gregory Pozel and William Lowery first saw the trailer as it backed up to the dock with its door shut. After the trailer came to a halt, Carette directed Aiello to open the door; he refused on the grounds that it was sealed and locked and that the opening was "unsafe". Carette examined the trailer from the dock, determined that it was not sealed or locked, and again ordered Aiello to open it. Aiello refused once more, asserting that it was dangerous. At this point Pozel, seeking to avert further conflict, stepped down, reached into the well, unlatched the door and opened it. Aiello assisted in the operation. About an hour after the incident, the night manager and the supervisors summoned Aiello and William Wise, a union committeeman, to the office. The supervisor related that Aiello had refused an order to open the door of the trailer. In his defense, Aiello stated that "he felt it was unsafe for him to open up the door and that he thought he shouldn't do it". At that point, the manager and supervisor gave Aiello a warning notice charging him with "flagrant disobeying of orders". Aiello had earlier been charged with disciplinary warnings by the company and allegedly harassed his female supervisor on previous occasions. The company took the position that the January 3rd incident was a continuation of Aiello's disruptive conduct.

On January 9, Aiello prepared a grievance about the January 3 incident and the disciplinary warning. He was assisted by employee Lowery. The grievance stated:

> A warning notice was issued to me on Wednesday, January 3, on grounds of insubordination, and I wish to disprove this accusation with reasons listed below. According to the union contract, an employee under no circumstances will be required or assigned to engage in any activity involving dangerous conditions of work or danger to a person or property; therefore, on the day in question, I hesitated momentarily to open a trailer door
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> because of the distance between the door and trailer but—(1) proceeded to finish the work required upon opening said door and, (2) was not given the notice until the *end* of the shift after all work had been completed. I would now request that a demonstration be made in order to substantiate my claim that a hazardous situation clearly exists.

By January 11, Divisional Manager Palazzolo knew that Aiello had filed a grievance and telephoned him at home to discuss the grievance. Palazzolo was allegedly upset about the grievance and conveyed this to Aiello's, telling him that "maybe [he] should start looking for another job."

Palazzolo scheduled a meeting with Aiello for the next morning.

On January 11, William Range, a pre-load supervisor, chastised Aiello for talking to employees on duty after he had already clocked out. In the early morning hours of January 12 the night manager arranged a meeting with Aiello, supervisor Range and union steward Washington at which Aiello was charged with excessive talking and ordered him to remain silent throughout the night—not to talk or sing with other employees. Later in the morning, Aiello met as scheduled with Palazzolo. At this meeting the company gave Aiello a second warning notice. It charged him with "flagrant disobeying of orders, second flagrant in a two-week period". Aiello's disobedience consisted of his talking on January 11 and 12. Palazzolo noted that Aiello now had two disciplinary warnings and cautioned that a third would result in automatic dismissal. Palazzolo made it clear that if Aiello did not want to abide by the company's rules he should look elsewhere for work or become self-employed. Aiello protested that the two warnings were unfair and should be removed from his record. He later testified that Palazzolo responded that the warning notices would not be removed but that, if Aiello resigned, other employers would not be advised of the warnings. Aiello refused to resign, and Palazzolo admonished him to be a good employee.

On these facts the Board found that Aiello was engaged in protected concerted activity when he exercised his contractual right of refusing to perform an assigned task which is arguably dangerous and that therefore the company violated Section 8(a)(1) of the Act by issuing a disciplinary warning for such refusal. The Board also found that the company violated Section 8(a)(1) by changing Aiello's working conditions and subjecting him to disparate treatment, issuing a second disciplinary warning based on such disparate treatment and twice threatening to discharge Aiello, all in retaliation for his having filed a grievance protesting an assertedly dangerous job asssignment and a disciplinary warning which resulted from his refusal to execute it.

The Board's order required the company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights. Affirmatively, the order directs the company to expunge from Aiello's employment records the disciplinary warnings of January 3 and 12, 1979, and all references to them, and to post an appropriate notice.

The controlling decision here is *Aro, Inc. v. NLRB,* 596 F.2d 713 (6th Cir. 1979) in which Judge Phillips held:

> For an individual claim or complaint to amount to concerted action under the Act, it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement. *Id.* at 718

We do not find that substantial evidence supports the Board's finding that Aiello refused to perform his duties on January 3 because of a complaint "made on behalf of other employees or at least be made with the object of inducing or preparing for group action." Aiello had a poor record of previous job performance; there was evidence that he refused to perform his work on January 3 solely because of personal

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problems with his female supervisor; and there was evidence that he continued to be a disruptive influence at the plant after the January 3 incident.

Accordingly, the Board's petition for enforcement of its order is hereby denied.

United States Postal Service v. NLRB

652 F.2d 409 (5th Cir.), July 17, 1981—250 NLRB 1195

On petition to review and cross petition to enforce Board Order

Before RUBIN, RANDALL and TATE, Circuit Judges

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PER CURIAM: This case is before the court on petition of the United States Postal Service (the Postal Service) for review of the final order of the National Labor Relations Board (the Board) in *United States Postal Service,* 251 N.L.R.B. No. 33 (1980), and on the cross-application of the Board for enforcement of its order. In its decision in this case the Board found that the Postal Service had violated section 8(a)(1) and (3) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(1) and (3) (1976), by issuing to each of two employees a warning letter that was based in part on the refusal of the employee immediately to return to work at the conclusion of a grievance meeting despite clear directions from his supervisor to do so. The Postal Service argues that the employees' actions were insubordinate and that its warnings were thus proper, but the Board argues that the employees' actions were protected activities under section 7 of the Act, 29 U.S.C. § 157. We find that the Board acted within its authority in determining that the employees' behavior was protected; we therefore deny the petition for review and grant the cross-application for enforcement.

I.

This dispute began with an informal grievance meeting requested by R.P. O'Harrow and Jack Woods, who at the time of these events served as president and vice-president, respectively, of the American Postal Workers Union local at the San Angelo, Texas post office; the meeting took place with John Love and Robert Nichols, both of whom are supervisors at the San Angelo post office. After a heated exchange on a matter not relevant to this appeal, Love ended the meeting and asked O'Harrow and Woods to return to work. The two employees did not immediately return to work, but instead followed Love and Nichols out onto the workroom floor and continued to argue loudly. Love for a second time directed O'Harrow and Woods to return to work but O'Harrow continued arguing and both employees remained on the spot. As Love began to issue a third order to the two employees to return to work, O'Harrow suddenly stopped arguing and both he and Woods returned to their jobs.

Although O'Harrow and Woods did refuse immediately to return to work at the conclusion of the grievance meeting, their refusal was brief and caused no disruption

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among other employees. As the Board characterized their behavior:

> [T]his is not a case where employees adamantly refused to leave the meeting room when asked to pursue their grievance later and to return to work. Nor is this a case in which the employees tried to impede others who sought to leave. Here, the two employees followed the two supervisors back to the workroom floor. At least to this point their only "insubordination," if it can be called such, was in continuing to talk about their grievance as they walked along. When the employees and the supervisors reached the timeclock, Supervisor Love turned and said, "I am giving you a direct order. I want you to go back to work now." After what was by all accounts a momentary hesitation, and apparently before Love had to repeat the order, the two employees complied with it.

251 N.L.R.B. No. 33 at 2–3.

On the following day letters of warning for insubordination were given to both O'Harrow and Woods. Each letter was based in part on the refusal of the employee to return to work at the conclusion of the grievance meeting, and each warned that similar conduct in the future would result in more severe sanctions such as suspension or discharge.

II.

The Board was called upon in this case to reconcile two equally important but conflicting rights. On the one hand is the employee's right to self-organization, which in this case took the form of two employees' participation in an informal grievance meeting. As we stated in *Crown Central Petroleum Corp. v. NLRB,* 430 F.2d 724, 729 (5th Cir. 1970), "the filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by Section 7 [of the Act, 29 U.S.C. § 157]." On the other hand is the employer's right to maintain discipline in its establishment. "An employee may not act with impunity even though he is engaged in protected activity. His rights, derived from Section 7, must be balanced against the employer's right to maintain order in his business by punishing acts of insubordination." *Id. See Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797–98, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945).

This conflict typically arises in cases where an employee has been disciplined for conduct that occurred during the course of the grievance meeting. *See, e.g., NLRB v. Florida Medical Center, Inc.,* 576

F.2d 666, 671–73 (5th Cir. 1978) (employee called administrator "a Mafia director"), *Crown Central Petroleum Corp. v. NLRB, supra* (employee accused a superintendent of lying). The Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance in necessary if grievance meetings are to succeed at all; as we have noted before, "bruised sensibilities may be the price exacted for industrial peace." *Crown Central Petroleum Corp. v. NLRB, supra,* at 731. *See Bettcher Manufacturing Corp.*, 76 N.L.R.B. 526 (1948). In some cases, however, the employee's conduct during the meeting has been found to be so opprobrious or disruptive that the Act's protection must give way to the employer's right to maintain discipline in its establishment. When the employee's conduct during a grievance meeting is "indefensible under the circumstances," the employer may indeed discipline the employee without violating the Act. *NLRB v. Florida Medical Center, Inc., supra,* at 673.

The Postal Service argues on appeal that O'Harrow's and Woods' behavior was in fact "indefensible" and therefore beyond the protection of the Act. *See* 251 N.L.R.B. No. 33 at 5–9 (Penello, M., dissenting). We disagree, for the Board found that the two employees' refusal to return to work was relatively brief and caused no disruption among other employees. We have examined the records as a whole and we find it to support the Board's characterization of O'Harrow's and Woods' behavior. Given this characterization, we cannot quarrel with the Board's conclusion that O'Harrow's and Woods' behavior was not so indefensible as to forfeit the protection of the Act. Cases considering employee behavior during grievance meetings underscore the central role that the Board serves in striking the balance between the employee's right to organize and the employer's rigth to maintain discipline. "Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed." *Crown Central Petroleum Corp. v. NLRB, supra,* at 730, *quoting NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). *See Republic Aviation Corp. v NLRB, supra; Falcon Plastics Division of B—D Laboratories, Inc. v. NLRB,* 397 F.2d 965 (9th Cir. 1968). The Board's conclusion in this case is neither illogical nor arbitrary; indeed, it rests on a reasonable and established policy tht in the context of grievance meetings the Act should be lenient with spontaneous employee insubordination that is not disruptive of other employees. *See, e.g., NLRB v. Florida Medical Center, Inc., supra,* at 673. Accordingly, we defer to the Board's judgment that O'Harrow's and Woods' conduct was not "indefensible."

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The Postal Service does not challenge the wide discretion of the Board in this area, but does point to the unusual context of this case—that is, to the fact that the grievance meeting had aready ended when the "insubordinate" conduct took place. The Postal Service argues that when Love ended the meeting the Act's protection also ceased, i. e., that O'Harrow's and Woods' brief continuation of the argument and refusal to return to work was liable to discipline just as if the protected grievance meeting had never occurred. The Board rejected this argument. As the administrative law judge explained.

> [The Postal Service] has seemingly bifurcated the conduct of O'Harrow and Woods, finding protected that which occurred prior to Love's announcement [of the conclusion of the meeting] and unprotected that which occurred thereafter. Such an argument, however, would enable an employer, by its own whim, to define the nature of protected activity, and I believe such an argument is repugnant to the policies of the Act * * * I believe that the entire conduct of O'Harrow and Woods' * * * was within the *res gestae* of the grievance meeting.

251 N.L.R.B. No. 33 at 11.

We agree with the Board's conclusion that the Act's protection of an employee's conduct during a grievance meeting does not necessarily terminate the instant when the employer ends the discussion. This conclusion is supported by prior decisions of the Board and is eminently reasonable. *See Thor Power Tool Co.*, 148 N.L.R.B. 1379, 1380, 1388, *enforced,* 351 F.2d 584 (7th Cir. 1965); *Bettcher Manufacturing Corp.*, 76 N.L.R.B. 526, 537 (1948). Surely the principals involved in a heated exchange cannot be expected to suppress their emotions at a moment's urging by one who has been their adversary. As the administrative law judge recognized, the Act's protection of employee participation in grievance meetings would be seriouly threatened if the employer could at any emotional and argumentative point during the meeting call an immediate halt to the operation of the Act. We hold therefore that the Board may extend the Act's protection to a cooling-off period of brief duration at the termination of grievance meetings.

Of course, the appropriateness and duration of such a cooling-off period will depend upon the facts of each case, and this determination should be left to the sound discretion of the Board. As noted above, the Board has the primary responsibility for weighing the conflicting rights of the parties to determine whether an employee's conduct in connection with a grievance meeting is protected by the Act; this responsibility is not diminished when the case turns on the termination of the grievance meeting rather than on the employee's allegedly "indefensible" conduct. In this case

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the Board clearly acted within its authority and discretion. We therefore deny the Postal Service's petition for review and grant the Board's cross-application for enforement of its order.

PETITION DENIED and ORDER ENFORCED.

Brockway Motor Trucks, Division of Mack Trucks, Inc. v. NLRB

656 F.2d 32 (3d Cir.), July 20, 1981—251 NLRB 29

On petition to enforce Board Order

Before ADAMS, VAN DUSEN, and ROSENN, Circuit Judges

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PER CURIAM: This proceeding arose as a result of a decision by Brockway Motor Trucks (Division of Mack Trucks, Inc.), in the course of a labor dispute, to close its facility in Philadelphia, without bargaining with the union over the possibility of the closing. The union filed unfair labor practice charges. The National Labor Relations Board (NLRB) concluded that the employer's unilateral action constituted a violation of its duty to bargain under the Act, and ordered Brockway to bargain with the union and to pay the employees back-pay.

The Board petitioned this Court for enforcement of its order, and at the same time Brockway filed a petition for review of the Board's order.

We concluded that the record before the Board did not set forth sufficient information regarding the conditions leading to the decision by Brockway to close the plant in order to enable us to determine whether Brockway had transgressed its duty to bargain. Accordingly, we declined to enforce the order to bargain. In addition, we raised the question whether, even if there were an unfair labor practice, it would be appropriate to require Brockway to bargain, since the Philadelphia plant had, by then, been closed for many months, and the remainder of Brockway's operations had also ceased. We concluded that the NLRB could conduct additional proceedings regarding the matter should it wish to do so. 582 F.2d 720 (3d Cir. 1978).[1]

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The Board did elect to conduct additional proceedings and, as a result, it concluded, once again, that Brockway had committed an unfair labor practice when it closed its plant without discussing the issue with the union. It ordered Brockway to bargain with the union and to pay back wages to the employees for the time between the closing of the Philadelphia location and the termination of the entire business.

Again, the Board filed with this Court a petition for enforcement, and again Brockway filed a petition for review.

While the petitions for enforcement and review were pending, the United States Supreme Court decided the case of *First National Maintenance Corp. v. NLRB,* ——— U.S. ———, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). In it, the Supreme Court concluded that an employer is not required to bargain with the union over its decision "to shut down part of its business purely for economic reasons." *Id.* ———, 101 S.Ct. 2584.

Based on the opinion of the Supreme Court in *First National Maintenance Corp.,* the Board submitted a consent to a decree denying enforcement of the Board's order. At oral argument, held on

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[1] Judge Rosenn dissented on the ground that under the circumstances the employer had not duty to bargain with the union. 582 F.2d 741.

July 7, 1981, counsel for Brockway agreed to the entry of the consent, but sought clarification regarding two items: (1) it requested the Court to make certain that no charge against it of an unfair labor practice would survive the entry of the consent order; and (2) it requested the Court to impose costs against the Board.

In response, the Board assured the Court and Brockway that no unfair labor practice charge against Brockway would survive the entry of the consent order. As to the item of costs, the Board took the position that until Brockway filed a motion for costs there was no matter involving costs before the Court.

After considering the opinion of the Supreme Court in *First National Maintenance Corp.*, the proffer of the consent order, and the representations of counsel, it is hereby ordered that the Board's consent to a decree denying enforcement of the Board's order shall be approved and filed of record; that the petition for enforcement, filed by the Board, and the petition for review, filed by Brockway, shall be dismissed; that the Board is directed to dismiss the unfair labor practice charge against Brockway; that costs are imposed on the NLRB, but the question of amount is reserved until an appropriate motion is filed by Brockway.

NLRB v. Gibraltar Industries, Inc. and Case, Inc.

653 F.2d 1091 (6th Cir.), July 20, 1981; rehearing and rehearing en banc denied October 7, 1981—237 NLRB 798

On petition to enforce Board Order

Before WEICK and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

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ENGEL, Circuit Judge. This case is before the court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), for enforcement of its order issued against respondents, Gibraltar Industries, Inc. and Case, Inc., dated August 24, 1978, and reported at 237 NLRB No. 60. The Board's order required Gibraltar to (1) cease and desist from interfering with employees in the exercise of their Section 7 rights, (2) bargain with the intervenor, International Ladies' Garment Workers' Union ("ILGWU" or "Union"), (3) reestablish operations at Olive Hill, Kentucky, and (4) offer the laid off employees reinstatement and make them whole for any loss of earnings.

This order was based, in part, upon a finding that Gibraltar had violated Section 8(a)(1) of the NLRA by creating the impression that employees' union activities were under surveillance, coercively interrogating employees about union activities and threatening plant closure if the ILGWU succeeded in its organizing campaign, and otherwise interfering with the employees' right to organize. The Board also found that Gibraltar had violated Section 8(a)(5), (3) and (1) by failing to bargain in good faith on wages with the ILGWU, closing its Olive Hill plant and transferring work to a facility located in New York, and insisting that any negotiations regarding the effects of the closure take place in New York, over the phone or through the mail.

At the same time, the Board ordered Case to cease and desist from interfering with its employees'Section 7 rights. The Board required Case to reinstate a discharged employee, Anita Wilburn, with back pay, finding that her termination had been motivated by anti-union animus. All references in her employment record regarding alleged poor work were to be expunged. In addition, the results of a union representation election which Upper South (a local of the ILGWU) had lost were to be reopened and retabulated. Even if the Union did not carry a majority, Case was to bargain collectively with Upper South.

This order was based upon a finding that Case had violated Section 8(a)(1) by threatening its employees with loss of work if the Union prevailed in the election, interrogating employees about their Union activities, and coercing other employees into campaigning against the Union. The Board also found that Upper South had attained majority status in an appropriate unit and that Case's refusal to recognize the bargain with Upper South violated Section 8(a)(5) and (1) of the NLRA.

Three major issues are presented by this appeal. First, did Gibraltar fail to bargain in good faith with the ILGWU and was its subsequent plant closure unlawful under the NLRA? Second, did Case unlawfully discharge Anita Wilburn because of her union support? Third, did Case engage in unlawful anti-union activities, thereby prejudicing the representation election and requiring a bargaining order? Under the law,

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the NRLB's decision must be upheld if there is substantial evidence on the record as a whole to support the Board's findings.

> "[s]ubstantial evidence is more than a mere scintilla." * * * [I]t "must do more than create a suspicion of the existence of the fact to be established. * * * it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 71 S.Ct. 456, 456, 95 L.Ed. 456 (1951) (quoting *Labor Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S.Ct. 501, 505, 83 L.Ed. 660 (1939)).

I.

Gibraltar manufactures sleeping bags and other quilted materials at a facility located in Brooklyn, New York. In early 1976, Gibraltar began manufacturing sleeping bags in a facility located in Olive Hill, Kentucky. Nevertheless, the lions' share of Gibraltar's business remained in New York, where employees had been represented by the ILGWU and the Amalgamated Clothing Workers of America.

Gibraltar's Olive Hill plant consisted of several sewing and quilting machines operated by seventeen employees. During the summer of 1976, the ILGWU began an organizational effort at Olive Hill. On October 12, 1976, the ILGWU was cerfitied as the exclusive collective bargaining representative of a unit of production, maintenance, shipping and receiving employees, pursuant to an election held on October 1, 1976.

Case manufactures clothing at a facility located in Olive Hill. It regularly performs subcontract work for Gibraltar. In 1976, Case employed approximately 200 workers. Early that year, Upper South, a local division of the ILGWU, began an organizational effort at the Case plant. Authorization cards were collected and an election was held on November 16, 1976. The employees cast ninety-four votes for Upper South and ninety-seven votes against; nine ballots were challenged on the ground that the employees were not members of the appropriate unit.

II.

The Board and the Union contend that Gibraltar failed to negotiate in good faith after the ILGWU had been certified as the exclusive bargaining representative of the garment workers at Gibraltar's Olive Hill plant. The Union presented a contract to Gibraltar containing approximately thirty-seven major provisions. Although agreement was had on nearly thirty provisions, Gibraltar and the Union failed to agree on certain "economic items" which included wage rates, overtime policy, piece-work rates, and health care benefits. Contract negotiations lasted over a two month period; however, there were only two actual negotiating sessions. The course of events is summarized in the margin.[1]

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Gibraltar claims it did not refuse to negotiate on "economic terms"; rather, it proposed a "two-year pass," that is, a two-year contract embracing the thirty mutually accepted terms but maintaining current wage and benefit levels. Gibraltar asserts that the nature of its operations (much of it being government contract work obtained on a low bid basis), as well as economic necessity and market conditions required a wage/benefit freeze until enough business could be obtained to sustain profitability. The Board, however, found that the company had not negotiated in good faith, noting Gibraltar's refusal to compromise on the "two-year pass" position and interpreting the company's pre-election activities (for example, interrogation and promise of benefits) as evidence of anti-union animus.

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[1] *October 19, 1976*—The Union delivers its contract proposal to Gibraltar, containing thirty-seven provisions. Gibraltar requests time to study the proposal.

October 27, 1976—The Union and Gibraltar meet and begin negotiations. Agreement is obtained on numerous provisions, but no wage increases.

November 1, 1976—Gibraltar writes the Union regarding additional suggestions and acceptable provisions but remains adamant on wage increases.

December 9, 1976—The Union and Gibraltar again meet, after Gibraltar has laid off employees. Gibraltar expresses its willingness to sign the contract as then negotiated, incorporating existing wage and benefit levels. It suggests a two-year contract with further negotiations after the contract expires. The Union rejects this proposal.

December 17, 1976—Gibraltar contacts the Union indicating no changes in wages are possible. No agreement is reached.

December 20, 1976—Gibraltar writes the Union informing it of the decision to close the Olive Hill plant.

December 21, 1976—The Union writes Gibraltar requesting a negotiating session and additional discussions on the effects of the plant closure.

December 28, 1976—Gibraltar writes the Union proposing to discuss effects in New York.

January 6, 1977—The Union writes Gibraltar suggesting a meeting in Kentucky or other convenient place to discuss effects and requesting information on profits, losses, and other economic data concerning the New York and Olive Hill operations.

January 17, 1977—Gibraltar writes the Union refusing to supply information and again suggesting a meeting in New York or negotiations over the phone or through the mail.

A.

Upon a thorough review of the record as a whole, we cannot find substantial evidence to support the Board's findings. First, Gibraltar's pre-election statements and actions were not violative of the NLRA and do not demonstrate a hostile attitude toward the Union. Rather the record shows that Gibraltar's management viewed unionization as a prelude to increased wages and costs which would in turn prevent the Olive Hill plant from turning a profit. Gibraltar operated a much larger plant in New York, and Mr. Foreman, the president of Gibraltar, believed the Olive Hill work could be performed in New York if a profit could not be earned in Olive Hill. As evidenced by the entire record, Mr. Foreman's attitude was that of a rational businessman concerned about minimizing costs, a particularly relevant concern for a business that is involved in government contracts.

There was no evidence of any personal dislike for unions on Mr. Foreman's part; in fact, Gibraltar was unionized in New York. The record indicates that the company had a history of relationships with both the ILGWU and the Amalgamated Clothing Workers in New York.

Likewise there is no evidence that certain remarks of a subordinate supervisor created an atmosphere of surveillance at the plant. The suspect statements were abbreviated and ambiguous, occurred only twice, and were made privately to one other employee. Furthermore, we find no evidence that Mr. Foreman threatened plant closure or loss of work if the employees unionized; rather, Mr. Foreman's informal comments described the effect of a negotiation stalemate and possible strike on plant operations. In this particular instance, his statements did not transgress the free speech limitations articulated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

The Administrative Law Judge took notice of a local newspaper article wherein Mr. Foreman was quoted as saying he would not be forced by anyone to do anything regarding the operation of the Olive Hill plant. At the administrative hearing, the reporter who interviewed Foreman was uncertain about the conversation and admitted that he had not reported the full context of Foreman's comments. Even if the article is accurate, it is at best ambiguous. The article provides no evidence that Foreman refused to negotiate, but only that he would not be told how to operate his company. These statements followed upon the heels of negotiations during which the company opposed union involvement in setting piece-work rates for government contract bids, in itself not an unreasonable bargaining position.

Finally, the record clearly demonstrates that Gibraltar negotiated and eventually agreed with the Union on many proposals. The Union requested and the company provided information on wage rates, job classifications, vacation policies and benefit programs. Gibraltar even made advantageous proposals on overtime rates. There also was testimony by the principal ILGWU organizer indicating the company's willingness to negotiate. Granted, Gibraltar stoutly resisted Union efforts to increase the basic wage package and to involve the Union in setting piece-work rates. Yet, it was no more unfair under the circumstances for the company to maintain this position than it was for the Union to press its demands. This was hard bargaining, the kind countenanced by the NLRA as an inevitable aspect of labor-management relations. It was not unfair bargaining. *See NLRB v. United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955). *See also McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979); *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420, 424 (6th Cir. 1963). In short, the evidence clearly shows that a bargaining impasse was reached.

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B.

Once negotiations came to an impasse, Gibraltar could temporarily close the Olive Hill plant for bargaining reasons. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965). Furthermore, the company could terminate it business operations for purely economic reasons without transgressing the NLRA. *First National Maintenance Corp. v. NLRB*, ——— U.S. ———, 101 S.Ct. 2573, 68 L.Ed.2d ——— (1981); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959). As we have indicated, the record does not support the Board's finding that Gibraltar was motivated by anti-union animus when it closed its Olive Hill plant; rather, the evidence shows a legitimate business reason (*i. e.*, abandoning a non-profitable operation) for Gibraltar's decision.

However, the Board also found that Gibraltar had failed to negotiate with the Union regarding the effect of closing the Olive Hill plant. Upon review of the record, we believe Gibraltar stood ready and willing to negotiate regarding the effects of its decision to close the Olive Hill plant. On December 20th, Gibraltar wrote Mr. Janis, the principal Union negotiator, expressing a willingness to discuss effects. Given the circumstances, Gibraltar's desire to pursue discussions in New York does not detract from its expressed willingness to negotiate. Since the Olive Hill plant was closed, and both the Union and Gibraltar had their headquarters in New York, we see nothing unlawful or unreasonable with Gibraltar's request. As we read the record, the Union has failed to pursue Gibraltar's suggestion and in fact, has made little or no effort to discuss effects associated with the Olive Hill plant closure. *See NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191, 197 (3rd Cir. 1965).

The Union also claimed Gibraltar violated its duty to bargain by failing to supply information on the company's costs, profits and losses, customer orders and cancellations, and comparative data on the efficiency of the New York and Olive Hill plants. Union representative Janis requested this information by letter after the Olive Hill plant had been closed. Gibraltar refused to comply with this request, asserting that the information was irrelevant to discussions on the effects of the Olive Hill plant closure.

In *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 152–53, 76 S.Ct. 753, 755, 100 L.Ed. 1027 (1956), the Supreme Court stated:

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

However, the Court did not establish a *per se* rule:

> We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

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Id., at 153–54, 76 S.Ct. at 756. Only recently the Supreme Court reaffirmed its decision in *Truitt* that the duty to supply information turns upon the circumstances of each particular case. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314, 99 S.Ct. 1123, 1130, 59 L.Ed.2d 333 (1979). Thus, although the duty to supply information inheres in the obligation to bargain in good faith, this duty is not unyielding or invariable.

In *General Electric Co. v. NLRB*, 466 F.2d 1177, 1182 (6th Cir. 1972), our court held:

> [I]f the *requested* data is *relevant* and, therefore reasonably necessary to a union's role as bargaining agent in the administration of a collective bargaining agreement, it is an unfair labor practice within the meaning of Section 8(a)(5) of the Act for an employer to refuse to furnish the requested data. (Emphasis supplied).

See also NLRB v. Rockwell-Standard Corp., 410 F.2d 953, 957 (6th Cir. 1969); *NLRB v. J.P. Stevens & Co., Gulistan Div.*, 538 F.2d 1152, 1164 (5th Cir. 1976) (information that is relevant and requested must be supplied). And as our court indicated in *NLRB v. Goodyear Aerospace Corp.*, 497 F.2d 747 (6th Cir. 1974), the duty to supply information can be measured by the scope of the obligation to negotiate which, in turn, may depend on the actual state of employer-union discussions at any particular point in time.

At no time during the two month period prior to the Olive Hill plant closure did the Union request information on Gibraltar's profitability. Only after the two parties reached impasse and Gibraltar lawfully ceased its Olive Hill operation did the Union request financial and wage information. Yet, at this point, the information requested was not relevant to discussions on the effects of the Olive Hill plant closure. Since Gibraltar was under no absolute obligation to negotiate with the Union on its decision to close the Olive Hill plant, *First National Maintenance Corp., supra; Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 223, 85 S.Ct 398, 409, 13 L.Ed.2d 233 (1964) (J. Stewart concurring); *Levine v. C & W Mining Co.,* 610 F.2d 432, 438 (6th Cir. 1979); *NLRB v. Acme Industrial Products, Inc.,* 439 F.2d 40, 42–43 (6th Cir. 1971), nor to continue actual contract negotiations once the Olive Hill operations were lawfully terminated, the requested information could not be compelled on these grounds. *Cf. Goodyear Aerospace Corp., supra.*

III.

A.

As for Case, based upon our review of the entire record, substantial evidence supports some but not all of the Board's unfair labor practice determinations.

We do not find substantial evidence to support the Board's finding that Gene Case, the president of the company, coercively interrogated his employees in violation of the NLRA. Mr. Case's inquiries into individual employee sentiment and opinion on the subject of unionization were sporadic, occurred in the general work area, and had no discernible effect on employee actions or attitudes. The ALJ inferred ill-will toward Upper South and individual employees from these isolated events. Such inferences are not supported by the record. Moreover, there was insufficient evidence that Mr. Case knowingly utilized plant supervisors to put pressure on individual employees.

On the other hand, there is substantial evidence for the Board's conclusion that Case had committed an unfair practice by interfering with the union representation election. Mr. Case requested Gibraltar's president, Mr. Foreman, to speak to Case employees about the election procedures. This, in itself, was not improper. Foreman visited the Case plant on three separate occasions to explain election procedures to the same group of employees. One speech occurred in September and another in November, approximately two weeks before the election. A third speech was given the day before the election. However, the evidence demonstrates that Foreman instructed the Case workforce on more than elec-

tion procedures. It is clear that during these speeches Foreman painted a rather glum future for Case employees in the event of unionization. His comments were of a general nature and carried a veiled but strong threat of serious economic repercussions if Upper South won the election. As the ALJ noted, many of his comments were "based on unwarranted hypothetical assumptions." It must also be remembered that Mr. Foreman was well-known to Case employees as one of their company's principal customers. His statements as to the effect of the ILGWU's bargaining demands on Gibraltar's Olive Hill plant tended to characterize unionization as a threat to Case's business and, in turn, to its employees' livelihoods. Such a speech violates the rule established in *Gissel:*

> [A]n employer is free to communicate to his employees any of his general views about unionization or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal of force or promise of benefit." He may even make a prediction as to the *precise effects* he believes unionization will have on his company. *In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control*
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> * * * * *

Gissel, supra, 395 U.S. at 618, 89 S.Ct. at 1942 (emphasis supplied). *See also NLRB v. Southern Electonics Co.,* 430 F.2d 1391 (6th Cir. 1970).

B.

As for Anita Wilburn, we have reviewed the record and find substantial evidence to support the Board's finding of a discriminatory discharge. As noted by the ALJ, Wilburn's work at the Case plant had been satisfactory; in fact, she had been working at Case for approximately six months without any complaint as to the quality of her performance. When Wilburn returned from a period of maternity leave, she became active in the Upper South unionization effort. Mr. Case and another supervisor asked Wilburn about her feelings toward the company and union. We do not find these questions to be unlawful in themselves. Yet, as noted by the ALJ, it was only after Wilburn continued to express her support for the union in the upcoming election (which included wearing a T-shirt which read “Dear Gene: If you bug me, the government will get thee”) that complaints about her work began to materialize. In fact, a few days after Wilburn refused to divulge who had printed the T-shirt she received her first warning. Within a month Wilburn had rapidly received a series of warnings, was suspended, and finally was discharged.

> When the record establishes a prima facie case that “the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.” *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 [87 S.Ct 1792, 1797, 18 L.Ed.2d 1027] * * * (1967).

NLRB v. Armcor Industries, Inc., 535 F.2d 239, 243 (3rd Cir. 1976). *See also NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979). Considering all the circumstances surrounding the discharge, a prima facie case of discrimination was proved, and the ALJ properly determined that there was insufficient evidence of a legitimate motivation for the discharge.

C.

Finally, we must determine whether the Board's bargaining order is appropriate on the record before us. Case has asserted before the ALJ and on appeal that the authorization cards signed by Case employees were invalid since the Union procured these cards by misrepresenting their purpose. We conclude that substantial evidence supports the ALJ's rejection of this claim. In *Gissel* the Supreme Court stated:

> There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and
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> then telling him that the card will probably be used first to get an election.

Gissel, supra, 395 U.S. at 606–07, 89 S.Ct. at 1936. Thus there is support for the Board's conclusion that the authorization cards were valid and indicated majority support for the union.

Nevertheless, as we stated in *Donn Products, Inc., v. NLRB*, 613 F.2d 162, 165 (6th Cir. 1980), “The Supreme Court [has] made it clear * * * that an election remains the preferred method of determining the choice by employees of a collective bargaining representative.” In *Gissel,* the Supreme Court specified two categories of unfair labor practices that could warrant the entry of a collective bargaining order: (1) “ ‘exceptional’ cases marked by ‘outrageous’ and ‘pervasive’ unfair labor practices,” and (2) “less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impeded the election processes.” *Gissel, supra,* 395 U.S. at 613.14, 89 S.Ct. at 1940. In our view, however, the conduct here comes within that “third category of minor or less extensive unfair labor practices, which because of their minimal impact on the election machinery, will not sustain a bargaining order.” *Gissel, supra,* 395 U.S. at 615, 89 S.Ct. at 1940. *See also Donn Products, supra,* 613 F.2d at 165.

The remarks made by Mr. Foreman to Case employes at the three separate meetings do not, on the record before us, rise to the level of an “exceptional case” involving “outrageous and pervasive” conduct.[2] In his decision, even the ALJ stated that standing alone, Foreman's pre-election speeches may not have violated Section 8(a)(1).

However, even if these speeches and the improper discharge tended to impede the election process and fall within the second category of unfair labor practices, such unfair practices must be considered “in terms of their past effect on election conditions and the likelihood of their recurrence in the future.” *Gissel, supra,* 395 U.S. at 614, 89 S.Ct. at 1940. We take this opportunity to repeat and to emphasize the Third Circuit's observation:

> In light of the general and highly desirable practice in industrial relations of selecting bargaining representatives through traditional election processes, a rule requiring the Board to set forth a reasoned analysis justifying a bargaining order under *Gissel* is salutary.

Armcor, supra, 535 F.2d at 244. Our court has consistently refused to enforce bargaining orders where the Board's decision was tantamount to " 'a litany, reciting conclusions by rote without factual explication.' " *NLRB, v. East Side Shopper, Inc.*, 498 F.2d 1334, 1336 (6th Cir. 1974) (quoting NLRB v. *American Cable Systems, Inc.*, 427 F.2d 446, 449 (5th Cir. 1970)). See also NLRB v. *Essex Wire Corp.*, 496 F.2d 862, 863 (6th Cir. 1972). Particularly applicable to this case is our decision in *Donn Products*:

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[2] Although we have upheld the Board's determination that Wilburn was illegally discharged, her discharge did not occur until *after* the election.

> The Board made no findings or detailed analysis as to the residual impact or continuing effect, or the likelihood of recurrence, of any of the unfair labor practices * * *. [C]ourts are not required to enforce bargaining orders based on conclusory statements unsupported by sufficient facts.

Donn Products, supra, 613 F.2d at 166.

The lack of analysis regarding the residual impact of the unfair labor practices is fatal to the bargaining order directed to Case, especially where we have found that the record does not support many of the Board's unfair labor practice determinations. In these circumstances, we believe the purposes of the NLRA and the stability of industrial relations will be served best not by a bargaining order, but by the union seeking another election if so desired. *See Donn Products, supra.* Our decision to uphold the unfair labor practice charges, based upon Mr. Foreman's pre-election remarks and Anita Wilburn's unlawful discharge, as well as the passage of time, should not only deter any possible efforts to subvert the election process, but should fully remove any taint from the prior violations.

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Accordingly, the Board's findings regarding Gibraltar's violations of the NLRA are reversed and enforcement of the entire remedial order against Gibraltar is denied. The Board's findings regarding Case's violations of the NLRA are reversed in part and affirmed in part; those unfair labor practice findings pertinent to Wilburn's illegal discharge and Mr. Foreman's threatening pre-election speeches are affirmed and all other are reversed. The remedial order is partially enforced, to the extent that it requires reinstating Wilburn with appropriate retroactive benefits and relief to make her whole, and expunging her employment record of the warnings, suspension and discharge. The order enjoining Case from further unfair labor practices is enforced to prevent any interference with the employees' exercise of their Section 7 rights. All other aspects of the remedial order, including the bargaining order issued against Case, are denied enforcement.

NLRB v. Highway and Local Motor Freight Employees, Local Union No. 667

654 F.2d 254 (6th Cir.), July 20, 1981—248 NLRB 260

On petition to enforce Board Order

Before WEICK, LIVELY and JONES, Circuit Judges

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The National Labor Relations Board (Board) seeks enforcement of its order which requires Teamsters Local 667 to cease and desist from requiring part-time employees (casual employees) to pay a referral fee when the union does not offer any real referral services and which requires the Local to reimburse the part-time employees for any amounts paid as referral fees after August 22, 1978. The Board determined that the Local violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by charging these fees.

The union and the Memphis area trucking companies are parties to a collective bargaining agreement which provides for either an agency shop or a union shop which would require the casual employees to join the union. In Tennessee the casual employees do not need to join the union because Tennessee is a right-to-work state. Casual employees who do not join the union are not required to pay dues, initiation fees, or assessments. However, they cannot file grievances and do not get the same fringe benefits as full-time employees.

The collective bargaining agreement also provides that the union is the sole source for referrals when an employer needs employees, and states that the employer shall not hire employees unless they are referred by the union. In January 1978, the new president of the union decided to open a referral hall and enforce that portion of the bargaining agreement.

The union officials charged the nonmember casual employees one dollar a month less than union dues for the referral services although they had no idea what the referral hall would cost. The referral service had one clerical employee. She made up two sets of referral lists: one for the casual employees who worked for a specific employer (regular casual employees) and one for employees who would work for any employer on a part-time basis (miscellaneous casual employees). Each type of employee had to pay the referral fee each month to stay on the list. The union did not check to see if the employees were hired, nor did it keep records of the number of referrals. However, it did keep records of the employees who paid the referral fees and it circulated this list to the employers.

The employers did not call the hall for referrals, but contacted the employees directly. In December 1978, the lists of miscellaneous employees were sent directly to the employers by the union; the employers did not call the referral shall for referrals for miscellaneous employees.

On February 22, 1979, a casual employee filed an unfair labor practice charge with the Board. The union discontinued its referral hall several weeks later.

The ALJ determined that the referral fees were excessive and unreasonable, but rejected the General Counsel's contention that the union did not actually operate a referral hall and not provide any referral service.

The General Counsel filed exceptions to the ALJ's decision before the Board. The Board concluded that the General Counsel's exceptions were persuasive and found that the union did not operate a bona fide referral hall. It ordered the union to refund all the referral fees it had collected from the casual employees and ordered it to cease and desist from its unfair labor practices.

In this appeal, the union contends that the pleadings before the Board never raised the issue of whether the referral service was bona fide, and that there was a failure of proof on this issue. We disagree. The union places undue emphasis on the ALJ's statement that: "The only issue in this case is whether or not the fee imposed was unreasonable in amount" and ignores the ALJ's formulation of the General Counsel's position that "no fee is reasonable because Respondent operated no referral hall and performed no service warranting any fee." In addition, at the beginning of the hearing the General Counsel explained that it was his position that there was not a bona fide referral service. The union was sufficiently on notice and the issue was fully litigated at the hearing.

The evidence is more than ample to support the Board's conclusion that there was not a bona fide referral service operated by the union. The union did not receive calls from employers for referrals, nor did it assist employees in being placed in part-time positions with employers. It merely collected the referral fees from the nonmember casual employees; the union's interest in these employees did not go beyond the referral fees they paid.

The order of the National Labor Relations Board is ordered ENFORCED.

Wyman-Gordon Company v. NLRB

654 F.2d 134 (1st Cir.), July 20, 1981—252 NLRB 1206

On petition to review Board Order

Before BOWNES and BREYER, Circuit Judges and WYZANSKI, Senior District Judge*

BREYER, Circuit Judge: Wyman-Gordon Company, the petitioner here, is a Massachusetts corporation headquartered in Worcester. Since 1976, the company has operated a facility in Danville, Illinois, devoted to the manufacture of crankshafts and other metal forgings. In June 1979, the approximately 140 hourly employees at the Danville plant elected to be represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. That success did not come easily to the union; a previous organizational drive conducted in early 1978 had fallen short, and the outcome of the 1979 election was determined by the disposition of challenges to five ballots. In March and April 1979, while the second union campaign was gaining steam, the union filed charges against the company alleging various violations of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3) (1970). After holding seven days of hearings, the ALJ concluded with respect to most of the General Counsel's allegations that the company was guilty as charged. Specifically, he found that the company (1) violated § 8(a)(3) both by discharging Daniel Wilson and by refusing to hire David Stark, in each instance because of the individual's union activities, and (2) violated § 8(a)(1) on thirteen separate occasions by coercively interrogating or threatening eight different employees, and one applicant for employment, with respect to their union involvement. The National Labor Relations Board summarily affirmed the ALJ's decision and order. The company now petitions for review and the Board cross-applies for enforcement.

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*Of the District of Massachusetts, sitting by designation.

I.

The Discharge of Daniel Wilson

We first treat the question of whether the company's discharge of Daniel Wilson violated § 8(a)(3) of the Act.[1] Our reading **138** of the record reveals the following: Wilson joined the company in February 1976 as a security guard. After transferring to the industrial relations office and then returning to his security post, in February 1978 he was accepted as an electrician trainee in the maintenance department. As part of the company's three-year maintenance training program, Wilson was required to complete a course in industrial electricity offered in the fall of 1978 by the Danville Area Community College. The course met for two hours and five minutes twice a week from August 21 through December 17. Wilson initially attended Professor Blackburn's section which met each Tuesday and Thursday at 9:00 a.m. Prompt attendance at this morning class proved inconvenient to Wilson, however, when in September he was transferred to the third shift at the plant. He therefore sought and received permission to attend, beginning on September 26, the afternoon session of the course, taught by Professor Rape on Mondays and Wednesdays at 1:00 p.m. As with all such trainees, the company not only paid Wilson's tuition and provided all necessary books and materials, but also compensated him at his regular hourly rate for all time—whether on-shift or offshift[2]—that he spent in the classroom. For on-shift classes, such compensation included an allowance of fifteen minutes each way for travel to and from the college.

Brock Blinn, a staff assistant in the industrial relations department, supervised all aspects of the training program including the college course work. By letter dated September 18, 1978, he advised the instructors of each of the four trainees studying at the college[3] that the trainees were being paid for their class time, that attendance should be recorded and that he would periodically check the attendance record; he had earlier informed the trainees that they were expected to attend. On January 2 and 3, 1979, Blinn sought to telephone the instructors in order to audit class attendance; the college was on semester break, however, and he was unable to reach them until January 15. On that day, after consulting his attendance book, Rape reported to him that Wilson had been absent from the afternoon class on nine occasions—October 23 and 25, November 1, 6, 8, 20, 27 and 29, and December 4—and that he had been unable to complete a practical wiring exam given near the end of the course.[4] Alerted to the possibility of employee dishonesty, Blinn expanded his investigation by requesting Russell Chaney, then the accounting supervisor at the Danville facility, to determine whether Wilson had been paid for the missed classes. After examining the payroll records, Chaney discovered, and reported to Blinn, that Wilson had received payment for all scheduled classes, at least for the period from September 15 through December.

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[1] Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *" 29 U.S.C. § 158(a)(3) (1970).

[2] In order to gain exposure to all facets of the company's operation, each trainee was required to change his work shift on a monthly basis. Wilson's schedule was as follows: August—day shift (7:00 a.m. to 3:30 p.m.); September—third shift (11:00 p.m. to 7:30 a.m.); October—day shift; November—second shift (3:00 p.m. to 11:30 p.m.); and December—third shift. His classes thus occurred on-shift in August and October, off-shift in September and December, and predominantly off-shift (with a twenty-minute overlap) in November.

[3] In addition to Wilson, three other maintenance department employees—Wes Wheeler, Harold Hinzman, Jr., and Ross Trimmell—were taking courses during the fall 1978 semester. Each of them was studying a different subject.

[4] Wilson also missed the class on November 22. Although Rape apparently made no mention of this absence in his January 15 conversation with Blinn, it was listed in the disciplinary notice which the company submitted to Wilson at the time of his discharge. Consequently, although the record fails to disclose when or from whom, it is evident that the company learned of this tenth absence prior to that date. At the hearing, Rape recalled the November 22 absence because Wilson had been scheduled to take the practical exam on that date. Having been absent on November 20 when the exam times were allocated, he was presumably unaware of this fact. The exam was given to different groups of students on each of four days: November 22, 27 and 29 and December 4. Wilson missed each of these classes and ended up taking (and failing to complete) the exam after class on review day, December 6.

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On January 29, 1979, Blinn and Vernon Gehrke, the general supervisor of the maintenance department, met with Wilson and confronted him with a handwritten list of the absences earlier enumerated by Rape. In the face of conflicting testimony, the ALJ found that Wilson offered various excuses for the cited absences, "including that he was on vacation during part of the semester; that his son was ill; that he had reported late for class on two occasions; and that another class had been cancelled." [5] Wilson admitted missing four or five scheduled classes but protested that he had reported these absences to various company officials and should not have received payment for them. The ALJ also found that Wilson offered to make restitution "for any classes for which he had been paid"—an offer rejected by Blinn and Gehrke.[6]

Following this meeting, Gehrke inquired of Barry Kennedy, a maintenance planner at the plant, whether Wilson had ever reported being absent from class; as Gehrke recollected this conversation at the hearing, Kennedy replied that Wilson "might have told me [about] one or two." [7] Meanwhile, Blinn telephoned Rape and learned that at least one of Wilson's proffered excuses was inaccurate: Rape denied ever having cancelled or postponed a class.[8] Blinn also spoke with Chaney about the circumstances surrounding Wilson's receipt of a twenty-five dollar cash advance as payment for two missed classes. Chaney informed Blinn that, due to an administrative oversight, payment for the schooling of the four trainees for the week ending October 28 had been omitted from their paychecks. Jacque Marbury, the payroll control clerk, had no-

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[5] In his testimony, Blinn recalled Wilson on January 29 explaining his absenteeism on the grounds that (1) he had been on vacation on October 23 and 25 and November 1; (2) his son had been hospitalized on November 6 and 8; (3) he had been late to class on November 27 and 29; and (4) one (unidentified) class had been cancelled on account of a Danville High School football game. Wilson, by contrast, testified that he explained at this meeting that he had missed only four classes: those on November 1, 6 and 8 because of his son's hospitalization, and that on December 4 because of a dental appointment. Gehrke's recollection of this part of the conversation, interestingly enough, largely paralleled that of Wilson, differing only in that he recalled an additional reference to a class cancellation; he made no mention in his testimony of a vacation in October or tardiness in November.

These conflicts in the underlying evidence reveal a regrettable ambiguity in the ALJ's findings on this issue. It appears from the face of his opinion that the ALJ credited Blinn's version of this conversation; his findings correspond most closely to Blinn's testimony, and his reference to the class cancellation suggests that he rejected Wilson's account at least in part. Yet, whether the ALJ's finding that Wilson claimed to have been on vacation "during part of the semester" refers to the October dates, and whether his finding that Wilson claimed to have "reported late for class on two occasions" refers to the end of November—all as Blinn testified—are important but unresolved questions. If Wilson in fact offered these excuses, they were untrue; as we describe below, Wilson was on vacation in early September rather than late October, and he was entirely absent from class on November 27 and 29. The company did introduce into evidence a handwritten sheet on which Blinn, purportedly in reflection of Wilson's comments at the January 29 meeting, had placed the words "vacation" and "late" next to the respective dates in October and November to which he testified. Notwithstanding this evidence, however, we are unable to interpret the ALJ's equivocal findings in this manner. That Gehrke failed to recollect any such comments by Wilson is obviously noteworthy. Moreover, the record reveals that, immediately prior to testifying about his *statements* at the January 29 meeting, Wilson was questioned about his *actions* during the college semester. In addition to reciting his four medically-related absences, he explained that (1) he had missed two classes in September while on vacation; (2) he had been late to at least one September class prior to transferring to the afternoon session; and (3) Rape had cancelled the November 22 class. Consequently, the possibility exists that, in his findings concerning the excuses offered by Wilson at the January 29 meeting, the ALJ did not credit Blinn's testimony concerning the references to a vacation and tardiness, but instead mistakenly incorporated Wilson's version—not of what *was* then said—but of what in fact earlier occurred.

[6] This last finding by the ALJ appears almost as a compromise between Blinn's and Gehrke's recollection—that Wislon had offered immediately and unconditionally repay the cited overpayments—and Wilson's testimony that he had offered only to repay any money that they could prove was owed. Implicit in the ALJ's finding is the suggestion, never explicitly stated, that Wilson on January 29 denied having been aware of his receipt of compensation for missed classes. Although Blinn testified that Wilson never voiced such a denial at this meeting, Wilson in his testimony suggested that he did, at least implicitly.

[7] At the hearing, Kennedy was questioned only about whether Wilson had in fact reported any absences to him, not about his reply to Gehrke on this question. In his testimony, he indicated that Wilson had informed him of one absence because of his son's hospitalization and had complained of difficulties in attending the morning class while working the third shift in September. Wilson, by contrast, testified that he had reported his absences on November 1, 6 and 8—all due to his son's illness—to Kennedy and his absence on December 4—due to his dental appointment—to Kennedy and two other managers. As discussed below., the ALJ credited Wilson on this issue.

[8] According to his testimony, Blinn at this time also checked, and found to be untrue, Wilson's alleged references to being on vacation in October and being late to class on November 27 and 29. If Wilson in fact voiced these excuses, *but see* note 5 *supra*, they were clearly inaccurate. The evidence was undisputed that Wilson's only vacation during this period occurred in the first week of September. And, Rape testified that Wilson was entirely absent on November 27 and 29. Perhaps more importantly, all students were expected to attend only one of the four classes—November 22, 27 and 29 and December 4—on which the practical exam was administered; had Wilson actually arrived late on two of these dates, he presumably would have been sent home.

tified them of the omission and, in accordance with company policy, had offered them the option of either receiving an immediate cash advance or awaiting an adjustment in their next paychecks. Wilson had opted for the former and, on November 3, had signed a receipt and received a twenty-five dollar cash advance as compensation for his attendance at the October 23 and 25 classes. Blinn, having learned from Rape that Wilson had been absent on these dates, inquired of Chaney whether Wilson had been aware of the reason for the advance. As Chaney explained at trial, he told Blinn that "there was no way [Wilson] could have received the money without knowing what it was for."[9] Based upon this information, Blinn recommended to Donovan that Wilson be discharged for theft. Donovan, a relative newcomer to the company, called the regionl director, James Adams, to inquire about the appropriateness of such a response. Adams indicated that it was the company's policy without exception to terminate employees for intentional misuse of company funds; he described several such instances in the past[10] and assured Donovan that termination was justified in Wilson's case.

On February 2, Donovan, Blinn and Gehrke reviewed the matter and decided to discharge Wilson for violation of the company rules proscribing "stealing in any form" and "conduct that violates common decency and honesty." Wilson was then called to the meeting. As the ALJ found, "[t]he charges against Wilson were reviewed and Wilson again offered to pay for any absences established by [the company] for which he had been paid." This proposal was again rejected and, in accordance with the company's policy, Wilson was temporarily suspended pending discharge. Following this meeting, Blinn requested and received written confirmation of Wilson's attendance record from Rape.[11] On February **141** 6, after being presented with, and refusing to sign, an unsatisfactory performance notice listing ten absences from October 23 through December 4 for which he had been paid, Wilson was officially discharged.

In a dual motive case such as this one, the initial inquiry is whether the Board has made a *prima facie* showing that a "'significant' improper motivation" underlay the discharge decision. *NLRB v. Eastern Smelting & Refining Corp,* 598 F.2d 666, 671 (1st Cir. 1979); *accord, NLRB v. Amber Delivery Services, Inc.,* 651 F.2d 57 at 68 (1st Cir. 1981); *Statler Indus., Inc, v. NLRB,* 644 F.2d 902, 905 (1st Cir. 1981). Although the ALJ did not explicitly make such a finding, we believe he did so implicitly and with the requisite record support. For one thing, Wilson was involved with the union and the company was aware of his involvement. *See e.g., NLRB v. Pilgrim Foods, Inc.,* 591 F.2d 110, 118 (1st Cir. 1978). There was evidence that, from December 1978 through the date of discharge, Wilson was an active participant in the union's organizational effort—distributing literature, soliciting signatures on authorization cards and sporting a union button and sticker on his hard hat. There was also contrary evidence, suggesting that at least until the middle of January Wilson's union involvement was peripheral and covert. But this latter evidence was not credited by the ALJ, and we decline to disturb that determination. In any event, it was uncontroverted that Wilson had overtly demonstrated his sympathies, if not by the time Blinn initiated his investigation, than at least well before the date of discharge; this evidence was sufficient to call the company's motivation into question.

For another thing, there was enough evidence that Wilson's treatment was unusual to suggest that his union involvement figured prominently in the discharge decision. Wes Wheeler, another maintenance trainee studying at the college, was shown to have received payment for two missed classes.[12] Blinn learned of these absences from Wheeler's instructor between January 15 and February 15; upon determining that Wheeler had received payment for them, he notified Donovan and Gehrke. However, notwithstanding the company's professed policy of strictly and consistently punishing employee dishonesty, not only was Wheeler never disciplined for the two paid absences, but the matter was never brought to his attention. The disparate treatment of Wheeler and Wilson in response to seemingly identical offenses is obviously suggestive of improper motivation. Moreover, Wilson offered testimony, credited by the ALJ, that he had informed Kennedy of the four absences on November 1, 6 and 8 and December 4 and had also mentioned to Blinn and another supervisor that he had missed several classes in September. None of these individuals notified the accounting department of Wilson's absences (as Kennedy acknowledged he should have done) in order to permit the necessary payroll adjustments to be made. This laxity contrasts rather sharply with the rigidity of the company's subsequent action, thereby reinforcing the inference that these events provided a convenient pretext for discharging a union adherent.

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[9] Blinn also learned during this time that Wilson had been paid for four additional absences in September prior to his transfer to Rape's class. However, because Wilson had mentioned to Blinn when requesting such transfer that he had "missed some classes," these absences were not considered in the decision to discharge him. Shortly before the hearing, Blinn learned in addition that Wilson had been paid for the two classes missed during his September vacation; these absences of course also played no role in the discharge decision.

[10] Adams cited as examples the theft of twenty dollars worth of a metal alloy and of a fifty-five gallon drum of oil; at trial, he expanded this list to include the theft of a "small" amount of money from a petty cash box and the falsification of a timecard. He also stated that, in each of these cases, the employee had admitted guilt.

[11] Rape's letter, dated February 5, read in part:

> [Wilson] began attending my class on the 27th of September and attended regularly until mid-term (dates 2, 4, 9, 11, 16, 18 of October). He then missed a complete week and from then on his attendance was poor. The dates he attended during the second half of the semester were October 30, Nov. 13 and 15 and Dec. 6. His poor attendance led to a very poor practicle [*sic*] examination and a poor grade for the course.

Wilson received a grade of "D" on the practical exam, a "B" on the final exam, and, along with four other students, a "C" as his final grade—the lowest mark given by Rape.

Since the Board made a *prima facie* case of antiunion motivation, the burden shifted to the company to establish "that it had a good reason, sufficient in itself, to produce the discharge." *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d at 671, *quoted in Statler Indus., Inc. v. NLRB*, 644 F.2d at 905. As we have previously pointed out, this shift does not impose an overall burden upon the company to prove itself innocent of violating the statute. Rather, the company must come forward with evidence to point where no longer does a preponderance of the evidence establish a violation. *NLRB v. Amber Delivery Service, Inc., supra*, slip op. at 22. In this instance, the company met that burden. The simple facts are that Wilson missed sixteen out of thirty-six classes. He kept money paid for attendance. The company believed he missed at least ten. It believed he kept the money knowing it was for classes he had missed. Most of the absences were unreported and unexcused. The company had a strict policy of discharge for dishonesty. And, no other employee had anywhere near so poor a record as Wilson's.

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The ALJ reached a different conclusion in part because he did not follow the *Eastern Smelting* analysis and in part because he focused on the wrong question. He defined the "crux" of the matter as whether Wilson "knowing[ly] accepted and retained" payments for his missed classes. The ALJ said no. He found that the inclusion of school pay in a trainee's paycheck was never specifically identified and that, because of confusion in the company's accounting practices, it was not easily detected. In addition, he concluded that Wilson was unaware of the actual purpose of the cash advance received on November 3, crediting Wilson's explanation that he had understood the cash advance to involve omitted "premium payments." Finally, he noted the absence of any formal mechanism for the reporting of class absences by trainees. His conclusion was that "while Wilson did accept as part of his pay, money for classes not attended, it was not an intentional attempt by him to steal from the Respondent." It followed, the ALJ indicated, that "given all the circumstances set out above, Respondent's overreaction to the matter, resulting in Wilson's termination, was motivated by antiunion considerations."

While we recognize the strong deference due an ALJ on matters of credibility, *see, e. g., NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 69 S.Ct. 1283, 93 L.Ed. 1602 (1949), in this instance the record calls his finding into question. *Cf. NLRB v. Payless Cashway Lumber Store*, 508 F.2d 24, 27–28 (8th Cir. 1974) (rejecting credibility determinations of ALJ and Board). The record indicates that Wilson knew generally that he was being compensated for class attendance. Since he only reported four absences and denied the others, the ALJ's finding that he missed nine or ten implies his knowledge of payment for the others. And, Marbury, the payroll clerk, testified that she specifically explained to Wilson how he would be paid for two of the missed classes (although he denied that he understood this).

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[12] Wheeler's instructor actually informed Blinn that six absences had occurred, but subsequent investigation showed that he had only received payment for two. On October 27, 1978, Wheeler had completed the company's training program and as a result had ceased receiving class payments. He had gained permission, however, to continue attending the course, without compensation, on his own time. Four of the six absences had occurred after this date.

We need not, however, disturb the ALJ's specific factual findings; even if he were correct in concluding that Wilson's receipt of the overpayments was in fact inadvertent, the issue is not Wilson's state of mind but rather that of the company. The "crux" of the matter is whether the company *believed* that he acted dishonestly and whether any such belief was sufficient to cause Wilson's discharge. *See, e.g., NLRB v. South Shore Hosp.*, 571 F.2d 677, 684 (1st Cir. 1978) ("the question is the motive for the discharge, not the actual circumstances"); *NLRB v. Prince Macaroni Manuf. Co.*, 329 F.2d 803, 809 (1st Cir. 1964); *Raytheon Co. v. NLRB*, 326 F.2d 471, 475 (1st Cir. 1964). Upon review of the record, we conclude that any finding that the company did believe, on February 6, 1979, that Wilson acted dishonestly would be unsupported by substantial evidence. Several factors deserve emphasis. First, although the ALJ credited Wilson's testimony that he had been unaware of the reason for the cash advance, the understanding of Donovan, Blinn and Gehrke on this issue at the time of discharge derived solely, so far as the record indicates, from Chaney's comment to Blinn that "there was no way [Wilson] could have received the money without knowing what it was for." There was no evidence to suggest that this statement should have been deemed unworthy of belief. Second, Blinn had ascertained by the end of January that at least one [13] of Wilson's proffered excuses was inaccurate. Finally, although again the ALJ's findings differ with respect to what actually occurred, Kennedy informed the three company officials that Wilson had reported only one of the ten cited absences. Taken together, these factors certainly warranted a belief that Wilson knowingly accepted the overpayments. Given the absence of countervailing evidence, we conclude that Donovan, Blinn and Gehrke did in fact believe that Wilson acted dishonestly.

Of course, there is still the matter of Wheeler who also missed classes but kept his job. In light of the company's failure to discipline or even confront Wheeler concerning his two paid absences, the further possibility exists that the company, once convinced of Wilson's dishonesty, decided to impose an unusually severe sanction in retaliation for his union activities. Two factors convince us otherwise. First, termination is an appropriate and common response to employee dishonesty—both as a general matter of company policy here. That Wilson was discharged, therefore, is not by itself peculiar. Second, the circumstances surrounding Wheeler's case were sufficiently distinct to render termination inappropriate—and thereby distinguish Wilson's situation. The Company had no evidence, comparable to that of the cash advance and the false explanation in Wilson's case, to suggest that Wheeler knowingly accepted the overpayments. The matter was investigated to the point of determining that he had been paid for only two of the six absences reported by his instructor—nowhere near the ten to sixteen paid absences recorded by Wilson. That the company apparently accorded Wheeler the benefit of the doubt and dropped the matter at that point was not unreasonable; a similar approach was taken with respect to four of Wilson's September absences. Thus, we find the different treatment of Wheeler explainable—not by the fact that he was "less of a thief," as the ALJ suggested—but by the dearth of evidence that he was a thief at all. For these reasons, we conclude that the company successfully rebutted the Board's *prima facie* showing.

II.

The Refusal to Hire David Stark

The allegation concerning the refusal to hire David Stark can be treated in less detail. We find substantial evidence for the Board's finding of a § 8(a)(3) violation. In response to a newspaper advertisement for millwrights (defined at the hearing as "sophisticated" mechanics), David Stark submitted an application to Wyman-Gordon's maintenance department in October 1978. At the time he was a journeyman millwright with nine years experience at the neighboring Lauhoff Grain Company. Stark had become actively involved with the local industrial workers union during his years at Lauhoff, having previously held the post of shop steward and executive board member and serving, at the time of his application, as vice-president. The department's hiring process during this period typically involved several stages: (1) a screening interview by an administrative assistant, who prepared a "rating and recommendations" form describing pertinent background data and the interviewer's "gut" evaluation; (2) a review of the materials by Gehrke, the general supervisor, who weeded out those applicants in whom he lacked interest; (3) an additional interview; and (4) a joint decision by Gehrke and Donovan. Stark was given a preliminary interview by Judith Peevler on October 27. Several weeks later he received a standard rejection letter—notwithstanding that an individual with his qualifications, as Gehrke subsequently testified, was "exactly what we [were] looking for."

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[13] And possibly more. See notes 5 & 8 *supra*.

That the company was aware of Stark's union participation is clear. Over Peevler's denial, the ALJ credited Stark's testimony that during his interview he fully described his union activities at Lauhoff in response **144** to her questioning on his subject. This credibility determination, which as noted below was buttressed by other evidence, was well within the "bounds of reason" and thus is controlling. *NLRB v. Savin Business Machines Corp.*, 649 F.2d 89 at 92–93 (1st Cir. 1981). In any event, Donovan himself, by admitting that he knew during this period that the Lauhoff millwrights were organized, acknowledged an awareness—if not of Stark's union leadership—then at least of his union membership. This was sufficient to warrant further inquiry.

Against this backdrop, the company's concessions that Stark was amply qualified for the position, and that applications from comparably experienced individuals were "seldom" received, might alone have satisfied the Board's burden. But the General Counsel introduced, and the ALJ apparently credited, additional evidence of discriminatory motivation. Peevler, according to Stark, also remarked during the interview that the company was a "nonunion shop" and inquired how he felt about working under such conditions. Six current maintenance department employees, who were hired during 1977 and 1978 by Gehrke's predecessor, described similar comments being voiced to them at that time by any of five different interviewers. These accounts were in turn corroborated by Wilson, who worked in the personnel office from August 1976 through the fall of 1977. He stated that interviewers had been instructed to ascertain an applicant's union involvement, determine his attitude toward unions and, in closing the interview, to gauge his reaction to the statement: "We here at Wyman-Gordon choose to operate without the benefit of a union." Significantly, Peevler also worked in personnel during this period and, according to Wilson, consistently engaged in this course of questioning. Finally, in her written evaluation of Stark, Peevler wrote that he "[s]eems to lean toward believing in 3d party intervention"; on the basis of widespread evidence including Peevler's own admission, the ALJ found that the term "third party intervention" was a common reference to unions.[14]

The company's attempt to counterbalance the weight of this evidence was properly found wanting.[15] At the outset, it argued that Stark had applied solely for a supervisory position and thus was outside the statutory safeguards. It is undisputed that Stark expressed interest in such a post. But that such was not his exclusive concern is also evident: his overture to the company derived from an advertisement for millwright positions; he listed "maintenance supervisor or millwright" on his application as the positions desired; and he testified to this effect. The company advanced two additional arguments by way of preliminaries. First, it contended that the timing of any such discrimination was illogical; the union had just lost an election several months earlier and any new campaign was necessarily months away. Second, it pointed to the significant percentage of prior union adherents, both in the department workforce as a whole and in the crop of individuals hired between October 1978 and April 1979. But these arguments prove little. Having just prevailed in a close election, the company might well have been anxious to preserve this balance between pro- and anti-union employees; the margin and outcome—of the second election certainly suggest that such a concern would have been warranted. That the workforce at that time contained numerous union supporters would have amplified this concern.

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[14] Although acknowledging her awareness of this meaning, Peevler explained that she had employed the term as a reference to Stark's retention of an attorney in connection with a worker's compensation claim at Lauhoff.

[15] In this context also, the ALJ (and the Board on review) failed to apply the *Eastern Smelting* analysis. But in contrast to his treatment of the Wilson charge, the omission here was one more of form than of sub-

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And the significance of the subsequent hiring of several former union members is undercut by the ALJ's finding that union sympathies were carefully screened at the interview stage.

With respect to the actual decision on Stark's application, the company made no attempt to justify or explain it but instead asserted that none was made. It speculated that Gehrke overlooked his application because it had mistakenly been attached to that of Ron Parlier, who was interviewed by Peevler on the same day as Stark. In screening applications, Gehrke's practice at that time was not to place individual notations on each, but simply to segregate them into two piles marked "interest" and "no interest." Under the company's theory, Gehrke, after a partial review, placed Parlier's application (and thus Stark's) into the latter pile and returned the entire stack of rejections to personnel for individual processing; the secretary, upon discovering Stark's application in this pile, assumed it had been rejected and acted accordingly. Although not entirely implausible,[16] this theory was not so compelling as to render the ALJ's contrary findings unreasonable—particularly in light of the credited evidence concerning the interviewers' inquiries into union sympathies. For these reasons, we enforce this aspect of the Board's order.

III.

The § 8(a)(1) Allegations

Finally, the ALJ determined that on thirteen separate occasions the company coercively interrogated or threatened various employees regarding their union involvement in violation of § 8(a)(1) of the Act.[17] All of the challenged statements were voiced between late January 1979, by which time the union's second campaign had formally commenced, and the June election. The inquiry under § 8(a)(1) is an objective one which examines—not whether the employer intended, or the employee perceived, any coercive effect—but whether "the employer's actions would tend to coerce a reasonable employee." R. Gorman, Labor Law 132 (1976), *quoted in Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 at 1077 (1st Cir. 1981). A finding of coerciveness, "based as it must be on an assessment of the entire factual context * * *, is one in which we typically defer to agency judgment." *NLRB v. Amber Delivery Service, Inc., supra,* at 67; *accord, NLRB v. Otis Hosp.*, 545 F.2d 252, 256 (1st Cir. 1976); *Corriveau & Routhier Cement Block, Inc. v. NLRB,* 410 F.2d 347, 349 (1st Cir 1969). With one exception, we conclude that the ALJ's findings are supported by substantial evidence.

Seven of the challenged statements were similar in content, involving one of the following variations: that if the employees opted for unionization, (1) bargaining would "begin at zero" and work up; (2) they would start with a "blank piece of paper" with "no pay and no benefits"; or (3) all present benefits would be negotiable and they would stand to lose everything. Whether or not such comments can reasonably be viewed as veiled threats of economic reprisal and withdrawal of existing benefits depends on the entire factual context. The Board itself has so recognized in weighing the analogous statement that bargaining would "begin from scratch." *Compare Wagner Indus. Prods. Co.*, 170 N.L.R.B. 1413 (1968) (comment suggests only that unionization would not automatically result in increased benefits), *with Astronautics Corp. of America,* 164 N.L.R.B. 623 (1967) (comment threatens loss of existing benefits). We see no basis in the record for upsetting the ALJ's findings that these remarks carried a coercive overtone. *See, e. g., NLRB v. Saunders Leasing Systems, Inc.*, 497 F.2d 453, 456–58 (8th Cir. 1974); *NLRB v. Aerovox Corp.*, 435 F.2d 1208, 1211–12 (4th Cir. 1970); *Surprenant Manuf. Co. v. NLRB,* 341 F.2d 756, 761 (6th Cir. 1965).

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stance. Once Stark's account of his interview was credited over that of Peevler, the Board's *prima facie* case was easily established; indeed, the company on appeal has focused almost exclusively on issues pertinent to its rebuttal. The ALJ's discussion of these issues corresponds closely enough to that fact of the *Eastern Smelting* analysis to permit our review (and enforcement) of his decision.

[16] At the same time, Parlier's application materials indicate that he received a second interview on October 30, three days after he and Stark were screened by Peevler. Although never satisfactorily explained at the hearing this fact would appear to undercut the supposition that Gehrke rejected him at the preliminary stage.

[17] Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *." 29 U.S.C. § 158(a)(1) (1970). Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." *Id.* § 157.

Three of the remaining incidents constituted clearcut violations. In the first, an employee was heatedly informed by his supervisors that the workers were "liable to lose pay and benefits" with the advent of a union; that the bargaining process would take "a long time," for the length of which they would receive neither their annual raise nor quarterly cost-of-living allowance; that during a strike the employees could be replaced and not recalled for ten years; and that a strike could be called or dues raised without their "having anything to say about it." Second, two employees together approached their respective supervisors and inquired whether they would be able to change the dates of their vacations if the upcoming election were held during that time. One of the supervisors responded: "Tell us how you are going to vote and we'll let you know about your vacations." The third incident in this group was Peevler's interrogation of Stark during his interview.[18]

Two other statements constituted closer, but nonetheless cognizable, § 8(a)(1) violations. First, in response to an employee's complaint about the lack of flexibility in scheduling vacations, his supervisor remarked that the timing of vacations was company policy about which the union "won't be able to do anything." Although this was a fleeting reference, "even a single oblique remark can be considered unduly coercive in appropriate circumstances." *NLRB v. Amber Delivery Service, Inc., supra,* slip op. at 19. In the circumstances, we believe the ALJ was warranted in discerning a coercive implication that the choice of union representation would be futile. *See, e. g., NLRB v. Kaiser Agric. Chemicals,* 473 F.2d 374, 380 (5th Cir. 1973). The ALJ also found unlawful a single question posed to an employee by his supervisor as to his desire for union representation. The inquiry occurred during, but was unrelated to, a discussion in the supervisor's office regarding the employee's alleged "attitude problem." We find no error.

We do differ, however, with the ALJ's finding of a violation with respect to the final § 8(a)(1) allegation. The full account of this incident consists of the following testimony by the alleged victim: "Ken Lucas asked me how the union was coming along. I told him fine, I was working on it. He stated that I guess this is a free country and turned around and walked away." We think the ALJ should have walked away from this also.

IV.

The Remedial Order

The company's remaining contention is that the final catch-all paragraph of the Board's order—requiring it to cease and desist from "[i]n any other manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act"—is overly broad. Such a broad-based prohibition on future violations can be appropriate in the face of "persistent attempts to interfere with legislatively protected rights by varying methods." *NLRB v. Union Nacional de Trabajadores,* 540 F.2d 1, 11 (1st Cir. 1976), *cert. denied,* 429 U.S. 1039, 97 S.Ct. 736, 50 L.Ed.2d 750 (1977); *accord, e.g., Morgan Precision Parts v. NLRB,* 444 F.2d 1210, 1215 (5th Cir. 1971). We agree, however, that it is unwarranted on the present record. Although the company's unlawful practices were not isolated or fleeting occurrences, neither were they "particularly virulent" in nature.

2T. Kheel, Labor Law § 7.04[2], at 7-144 to -145 (1980). And, the claim upon which the General Counsel has concentrated his attention—Wilson's dismissal—has proven unsubstantiated. In addition, the company's various antiunion practices were directed principally at preventing the union from gaining a foothold. Now that the union has prevailed in this respect, it is reasonable to expect a diminution—if not of the company's antiunion animus—then at least of its unlawful actions. Consequently, while we enforce the more specific provisions of the cease and desist order, we conclude that the catch-all paragraph should be striken. *See generally NLRB v. Savin Business Machines Corp., supra,* 649 F.2d at 93; *NLRB v. Beth Israel Hosp.,* 554 F.2d 477, 483 (1st Cir. 1977), *aff'd,* 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978); *NLRB v. Prince Macaroni Manuf. Co,* 329 F.2d at 812.

Enforcement granted in part.

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[18] That the statutory protections extend to prospective employees is clear. *E. g., NLRB v. Speed Queen,* 469 F.2d 189, 191-92 (8th Cir. 1972); *Lipman, Time-O-Matic, Inc. v. NLRB,* 264 F.2d 96, 99 (7th Cir. 1959); *Lipman, Ruttenberg & Goldstein, d/b/a Ascot Nursing Centre,* 216 N.L.R.B. 680, 681 (1975).

Patsey Bee, Inc. v. NLRB

654 F.2d 515 (8th Cir.), July 22, 1981—249 NLRB 976

On petition to review Board Order

Before ROSS, HENLEY and MCMILLIAN, Circuit Judges

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HENLEY, Circuit Judge: Patsy Bee, Inc. (the Company) petitions for review of an order of the National Labor Relations Board directing Patsy Bee to bargain with the Northwestern District Council of the International Ladies' Garment Workers' Union, AFL-CIO (the Union). The NLRB cross-appeals seeking enforcement of its order. We conclude that there is not substantial evidence in the record to support the order to bargain and deny its enforcement.

This cause arises from an attempt by the Union to organize the employees at the Company's plant. The Union filed a petition with the NLRB on February 23, 1979 seeking a representation election. The election was held on March 27, 1979 with 33 ballots cast for the Union and 38 ballots cast against the Union. On April 2, 1979 the Union filed objections to Company conduct allegedly affecting the outcome of the election.

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The Administrative Law Judge found that certain Company conduct violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). In particular, (1) Company supervisors questioned employees about their involvement in Union activity; (2) supervisors made statements implying loss of employement or denial of benefits for particpation in Union organizing efforts; (3) surveillance or organizing activities was conducted; and (4) a broad rule against distribution of Union literature was implemented. The ALJ also found that certain statements by Company president Bachofer were protected speech under § 8(c) of the Act and did not violate § 8(a)(1).

To remedy the unfair labor practices, the ALJ recommended that Patsy Bee be required to cease and desist therefrom and take certain affirmative action. He concluded, however, that a bargaining order was not warranted in the circumstances, since the evidence had not shown that a second secret ballot could not fairly be held.

The Board adopted in part the ALJ's findings, but held that (1) the statements by president Bachofer were not protected speech and (2) Patsy Bee must be ordered to bargain with the Union. On appeal, Patsy Bee challenges only these two aspects of the Board's order.

The statements of president Bachofer in question here may be summarized briefly:

(1) January 3, 1979: Bachofer told employee Donna Flood that Patsy Bee customers would withdraw their contracts if Patsy Bee workers unionized;

(2) January 9, 1979: Bachofer told employee Pam Burgress that Jantzen and Artex, the two principal purchasers of Patsy Bee textiles, would pull their contracts if the plant went union;

(3) February 21, 1979: Bachofer told employee Jeany Smith that Artex would "definitely pull out" if the plant were unionized;

(4) March 1, 1979: Bachofer told employee Debbie Stotts that given the risk of losing the Jantzen contract the Company could not afford to be unionized.

The ALJ found the Bachofer statements were protected under § 8(c) of the Act, 29 U.S.C. § 158(c). That section provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice * * * *if such expression contains no treat of reprisal or force or promise of benefit.*

(Emphasis added.)

The Supreme Court outlined the extent of the protection afforded to employers by § 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). There the Court said:

> an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey on the basis of

objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection to the First Amendment.

Id. at 618, 89 S.Ct. at 1942 (citations omitted).

This court has noted that under the *Gissel* analysis the employer's constitutionally protected right of free speech may be

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circumscribed when in addressing employees he opposes unionization. *R.J. Lallier Trucking v. NLRB,* 558 F.2d 1322, 1327 (8th Cir. 1977). He must be particularly careful if he "goes further and proposes to predict the adverse effects that unionization may have on his business, his employees, and their incomes or work opportunities." *Id.; accord NLRB v. Intertherm, Inc.,* 596 F.2d 267, 277 (8th Cir. 1979).

The challenged statement of an employer must, of course, be evaluated in context, and the employer's right of free expression must be weighed against the equal right of employees to associate freely for collective bargaining purposes. *Gissel,* 395 U.S. at 617, 89 S.Ct. at 1941–42; *R.J. Lallier Trucking,* 558 F.2d at 1327; *NLRB v. Crystal Tire Co.,* 410 F.2d 916, 918 (8th Cir. 1969). This balancing must take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel,* 395 U.S. at 617, 89 S.Ct. at 1942.

In the present case, the inquiry is whether Bachofer's statements that unionization would result in the closing of the plant were predictions based on objective fact or threats of personal action he would take if a union was formed.

Respondent argues that Bachofer offered no objective facts supporting his statements about the likely consequences of unionization. He did not explain the basis for his statements that Jantzen and Artex would pull out or offer other evidence of the financial status of Patsy Bee. The Board contends that, because Bachofer's statements were unverified, and in light of the Company's other antiunion actions, the intended and understood import of Bachofer's statements was not an objective prediction but a threat of retaliation if the Union was successful.

Petitioner contends that Bachofer's statements were manifestly reasonable and based on the objective fact that Jantzen and Artex were likely to refuse to do business with Patsy Bee if its employees unionized. Petitioner says that Bachofer made it clear that he was not antiunion, but that based on his twenty-five years in the business, the consequences of unionization he had observed at other plants, the attitude of Jantzen and Artex toward unionized companies, and Patsy Bee's shaky financial status he believed unionization would result in the closing of the Patsy Bee plant.

Viewing the record as a whole, we find the inferences drawn by the Board are not supported by the evidence. We find unpersuasive the contention that Bachofer's predictions were based upon "subjective" considerations and as such were impermissible. The evidence, based upon the testimony credited by ther ALJ, showed that Bachofer's predictions reflected probable consequences of unionization beyond his personal control.

Bachofer stated that he was not personally antiunion but that he believed Jantzen and Artex would refuse to do business with Patsy Bee if its employees unionized. This belief was based on the established policies of Jantzen and Artex against contracting with union companies.[1] He further said that Patsy Bee's financial status was precasrious and thus the loss of the Jantzen and Artex contracts would have serious consequences. He discussed the Company's financial health and offered to show interested employees the Company's financial records. Bachofer also noted similar situations he had observed at other plants, including one that had been operated by his father.

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[1] A Jantzen representative who visited the Patsy Bee plant during the Union organizing campaign reaffirmed his company's policy by noting to Bachofer that the Jantzen organization was "one hundred per cent nonunion."

Bachofer made no threats. His statements were not interspersed with antiunion comments. Bachofer suggesterd no retaliation against employees but, as the ALJ noted, postualated only "economic consequences reasonably forseeable as a result of predictable responses of key customers." On the whole, the statements reflects his belief, based upon objective facts, that unionization could have an adverse economic impact on Patsy Bee. In these circumstances, we find the challenged statements were protected speech under § 8(c) of the Act and did not violate § 8(a)(1).

The Company also urges that the Board erred in concluding that a bargaining order should issue. In light of our holding above that Bachofer's statements were permissible, and in view of the absence of substantial evidence that traditional remedies would be inadequate, we decline to enforce the order to bargain.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–15, 89 S.Ct. 1918, 1939–40, 23 L.Ed.2d 547 (1969), the Supreme Court acknowledged two situations in which the Board could issue a bargaining order: (1) where "outrageous" and "pervasive" unfair labor practices preclude a fair and reliable election; and (2) where the union once enjoyed majority status and the unfair labor practices, although less pervasive, "still have the tendency to undermine majority strength and impede the election processes."

In both types of cases the Board is required to consider "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies * * * ." *Id.* at 614, 89 S.Ct. at 1940. Although the Board has initial discretion in framing an appropriate remedy, we have noted that:

> *Gissel* does not mean that the Board may require a bargaining order in every unfair practice case or that a court of appeals may not review an order where abuse of discretion is alleged. Where there exists little or no opportunity for the unfair practice charge to have a pervasive adverse influence upon the employees' sentiment in an election the Board should still revert to the traditional means of democratic ballot.

NLRB v. Regal Aluminum, Inc., 436 F.2d 525, 529 (8th Cir. 1971). *Accord NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420–21 (8th Cir. 1971); *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940, 944 (8th Cir. 1971).

In this case the evidence establishes that the unfair labor practices produced little or no impact upon the employees' allegiance to the Union. *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420–21 (8th Cir. 1971); *Arbie Mineral Feed Co. v. NLRB*, 438 F.2d 940, 943–45 (8th Cir 1971). Most acts found to be unfair labor practices occurred at the outset of the Union organizing campaign. Only three incidents occurred after the Union achieved a card majority.[2] In two of those instances the Board found that comments by Company official suggested antiunion sentiment. In the third, a supervisor threatened an employee with a "permanent layoff." In the context of the three month organizing campaign, the ALJ found that these three isolated incidents had no significant effect on Union strength.

In issuing the bargaining order, the Board relied primarily on its conclusion that president Bachofer's statements were unprotected and constituted "direct threats." No further explanation was offered other than a conclusory statement that "the odds for a free choice in a rerun election are minimal." *Cf. Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 508–12 (7th Cir. 1980) (denying enforcement of a bargaining order were the Board failed to explain its choice of remedy).

Having found Bachofer's statement protected, and in the absence of substantial evidence that the unfair labor practices would impede a fair election, we hold that the Board abused its discretion by issuing a bargaining order. Enforcement is denied and the case remaned to the Board for further proceedings consistent with this opinion.

McMILLIAN, Circuit Judge, dissenting: I respectfully dissent. I would enforce the order of the Board. First, in my view, the Board's characterization of the company president's remarks as threats is supported by substantial evidence in the record as a whole. I do not doubt that the company president sincerely believed that one or two of the company's major customers would cancel their contracts if the union organizational campaign was successful. However, an employer's sincere belief is not enough. "Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–19, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969). Here, the company provided no evidence that unionization would in fact cause the loss of two major customers or that the loss of these customers inevitably would cause the plant to close.

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[2] We assume for purposes of this discussion that the Union did obtain the valid signatures of a majority of Patsy Bee employees.

Second, I share in part the majority's concern that the Board is often too conclusory in ordering collective bargaining. *See NLRB v. Permanent Label Corp.*, 106 L.R.R.M. 2211 (3d Cir. 1981); *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980). *But see NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 470–74 ((3d Cir. 1981) (Gibbons, J., dissenting); *NLRB v. Permanent Label Corp., supra*, ——— F.2d ———, 106 L.R.R.M. at 2221–22 (Seitz, C. J., dissenting); *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980) (banc), (*cert. denied*, ——— U.S. ———, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981); *Chromalloy Mining & Minerals Alaska Division, Chromalloy American Corp. v. NLRB*, 620 F.2d 1120, 1128–33 (5th Cir. 1980). In my view, however, the Board has adequately furnished the court with an articulation of its reasons for imposing a bargaining order in the present case. After reviewing the company's unfair labor practices, the Board concluded that a bargaining order was warranted because of the company's systematic efforts to thwart the right of its employees to organize, the company's intentional interference with the representational election, and the adverse and continuing effect of the company president's threats to close the plant.[1] Because there was a showing that the union at one point enjoyed majority support, I conclude the Board reasonably found the present case was marked by serious unfair labor practices which, although perhaps not "outrageous" and "pervasive," "nonetheless still have the tendency to undermine majority strength and impede the election process," *NLRB v. Gissel Packing Co., supra*, 398 U.S. at 614, 89 S.Ct. at 1940, and therefore appropriately issued the bargaining order.

I would enforce the order of the Board.

[1] "A threat to close the plant, when made in the context of the union organization of the employees, has long been recognized as one of the most potent instruments of employer interference with the right of employees to organize under the National Labor Relations Act." *Chemvet Laboratories, Inc. v. NLRB*, 497 F.2d 445, 448 (8th Cir. 1974).

Bokum Resources Corporation v. NLRB

655 F.2d 1021 (10th Cir.), July 29, 1981—245 NLRB 681

On petition to review and set aside Board Order

Before McWilliams and Logan, Circuit Judges, and Bohanon, District Judge*

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McWilliams, Circuit Judge: Bokum Resources Corp. filed a petition to review, and set aside, a decision and order of the National Labor Relations Board which found that Bokum committed unfair labor practices in violation of section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1976).[1] Specifically, the NLRB found that Bokum refused to bargain with the International Union of Operating Engineers, Local 953, AFL–CIO, and the Labor-

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ers International Union of North America, Local 16, AFL–CIO, which had been certified by the Board as the employees' bargaining representatives following a representation election. By cross-application the Board seeks enforcement of its order.

Bokum is a mining company incorporated in Delaware and engaged in uranuim mining in New Mexico. The bargaining unit here involved is composed of all construction and shaft sinking employees working at Bokum's mine at Marquez, New Mexico, excluding office clerical employees, guards, watchmen and supervisors.

In a consent election in which thirty-four employees were eligible to vote, seventeen voted for the Union and ten voted against the Union. Four votes were challenged, and three eligible employees did not vote. Bokum filed timely objections, claiming that there was Union misconduct which adversely affected the election. Thereafter, the Regional Director of the NLRB conducted an administrative investigation of Bokum's objections in which the parties were allowed to submit evidence. The Regional Director then issued his report, in which he held that Bokum's objections were without merit, and he recommended that the Union be certified. Bokum filed timely objections to the Regional Director's report. On review, the Board adopted the Director's report and certified the Union.

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*Honorable Luther L. Bohanon, United States District Judge of the Northern District of Oklahoma, sitting by designation.

[1] Bokum is charged with violating 29 U.S.C. § 158(a)(1) (1976), which provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of the rights granted by 29 U.S.C. § 157 (1976). Bokum also is charged with violating 29 U.S.C. § 158(a)(5) (1976), which provides that it is an unfair labor practice "to refuse to bargain collectively" with the employees' representative.

Thereafter, Bokum refused to bargain with the Union, which then filed charges of unfair labor practices. Based on the Union's charges, the Regional Director issued a complaint. By answer, Bokum admitted that it had refused to bargain with the Union, and again denied the validity of the Board's certification of the Union. It was in this setting that the General Counsel for the NLRB filed motions to transfer the case to the Board and for summary judgment. The Board ordered the proceeding transferred, and then ordered Bokum to show cause why summary judgment should not be entered. Bokum, by response, reiterated its previously stated objections to the representation election and requested an evidentiary hearing.

The Board granted summary judgment, noting that all of the issues raised by Bokum in the unfair labor practices proceeding had been raised, or could have been raised, in the underlying representation proceeding. The NLRB further found that Bokum, in response to the motion for summary judgment, made no claim that it had newly discovered or previously unavailable evidence, nor did it allege any special circumstances which required a hearing into the fairness of the representation election. Accordingly, Bokum was ordered by the Board to bargain with the Union. The Board's decision and order appear at 245 N.L.R.B. 84 (1979). It is this order which Bokum seeks to have set aside, and which the Board by cross-application asks to have enforced.

In our view, Bokum, under the circumstances, was not entitled to an identiary hearing on its claim of election irregularities, and the unfair labor practice proceeding was ripe for summary judgment. In *NLRB v. Moran Oil Producing & Drilling Corp.*, 432 F.2d 746 (10th Cir. 1970), *cert. denied*, 401 U.S. 941, 91 S.Ct. 941, 28 L.Ed.2d 221 (1976), appears the following pertinent comment:

> The Company argues that summary disposition was improper because, in the unfair labor practice proceedings, it was entitled to an evidentiary hearing on the correctness of the Director's representation determinations. The same contention has been presented to us in the cases of *Meyer Dairy, Inc. v. National Labor Relations Board*, 10 Cir., 429 F.2d 697, *National Labor Relations Board v. Gold Spot Dairy, Inc.*, 10 Cir., 432 F.2d 125, and *National Labor Relations Board v. Jackson Farmers, Inc.*, 10 Cir., 432 F.2d 1042 [*cert. denied*, 401 U.S. 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971)]. We have held that under § 3(b) the Board can delegate its unit determination functions to the regional director; that the decisions of the latter, if not set aside by the Board, are entitled to the same weight as Board determination; and that the limited review provided by 29 CFR § 102.67 applied
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> to Board review of any delegated action of a regional director. The Company does not claim that it has any newly discovered or previously unavailable evidence or that it was foreclosed from presenting any substantial and material evidence at the representation proceedings. Under the authorities cited, the matter was ripe for determination on the motion for summary judgment. 432 F.2d at 748.

See also NLRB v. Ethan Allen, Inc., 596 F.2d 936 (10th Cir. 1979), and *NLRB v. Whitney Museum of American Art*, 636 F.2d 19 (2d Cir. 1980).

Bokum asserts that an election notice which was posted at the Marquez mining operation was faulty. While the notice to which Bojum objects did *not* contain any incorrect information, it failed to state the polling times and place, and the unions involved. The Company contends that the posting of this incomplete notice caused the entire purpose of the election to be frustrated. It is important to note, however, that a notice that *did* contain all the correct information was posted about twelve hours prior to the election. The notice at issue is a printed form which is distributed by the NLRB. In addition to details about the election, the form includes general information about employees' voting rights, including a statement of conduct which is not permitted during a representation campaign.

Further, Bokum made no showing that the election notice about which it complains was posted by the Union or its representatives. Upon the record presented here, one could conclude equally well that the incomplete notice was posted by Bokum's own representatives. As the Board correctly held, conduct not attributable to the opposing party cannot be a basis for setting aside an election. *Bush Hog, Inc. v. NLRB,* 420 F.2d 1266, 1269 (5th Cir. 1969). *See also NLRB v. Sauk Valley Manufacturing Co., Inc.,* 486 F.2d 1127, 1131 (9th Cir. 1973).

Bokum also complains that the election should be set aside because campaign literature distributed by the union was misleading. Bokum does not, however, point to any false information. Rather, the Company states that certain important facts were omitted. The NLRB has applied a liberal rule toward such "campaign propaganda," finding that it has to be seriously misleading to justify setting aside an election. Even if there were a rule requiring complete truthfulness, the campaign literature at issue would meet the standard, since the employer only alleges a "failure to disclose." Affirmative disclosure has never been required. *See Florida Mining & Materials Corp. v. NLRB,* 481 F.2d 65, 68 (5th Cir.), *rehearing denied,* 485 F.2d 687 (5th Cir. 1973), *cert. denied,* 415 U.S. 990, 94 S.Ct. 1588, 39 L.Ed.2d 886 (1974).

Finally, Bokum asserts the election should be set aside on the ground that the Union violated the rule of *NLRB v. Savair Manufacturing Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), by offering discounted Union memberships to employees supporting the Union. The situation here, however, is clearly distinguishable from that in *Savair.* In the latter case, the employees were offered waived initiation fees in exchange for signing "recognition slips" indicating Union support. The waiver of fees was available *only* to those employees signing the slips prior to the election. In contrast, the Board found here that the reduction in fees was available to employees whether they indicated support for or sought to join the Union before or after the election. The situation, therefore, resembles that in *NLRB v. Whitney Museum of American Art* 636 F.2d 19 (2d Cir. 1980), in which the Court of Appeals held that a similar fee waiver was not a ground for setting aside an election.

The petition to set aside the Board's order is denied, and the order of the Board shall be enforced.

Liquor Salesmen's Union Local 2 of the State of New York Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO v. NLRB

Charmer Industries, Inc., Star Industries, Inc., Standard Wine & Liquor Co., Inc., Peerless Importers, Inc. and National Distillers Distributing Co., v. NLRB

Park & Tilford & Motel & Club, Divisions of Knickerbocker Liquors Corp. v. NLRB

664 F.2d 318 (2d Cir.), July 29, 1981; rehearing denied October 5, 1981; certiorari denied May 17, 1982—250 NLRB 293

Before FEINBERG, Chief Judge, and WATERMAN and VAN GRAAFEILAND, Circuit Judges

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FEINBERG, Chief Judge: This case, incredibily, arises out of an alleged unilateral change of work rules in 1975 by six liquor wholesalers ("the companies") in breach of their respective collective bargaining agreements with the union representing their salesmen-employees. The dispute was submitted to an arbitrator, who found that the agreements had not been violated. Dissatisfied with this conclusion, the union succeeded in bringing the case before the National Labor Relations Board, which declined to defer to the arbitrator's award under the policy of deference first announced in Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955). Instead, the Board found that the companies had committed an unfair labor practice and issued a remedial order. Under the circumstances presented here, we conclude that the Board abused its discretion in not deferring to the arbitrator's award, and we deny enforcement of the Board's order.

I. *Prior Proceedings*

The companies are engaged in the wholesale distribution of alcoholic beverages to restaurants, bars, liquor stores, and the like in the New York City metropolitan area. Their salesmen, who work on a commission basis, are represented by petitioner-intervenor Liquor Salesmen's Union Local 2 of the

State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO.[1] The companies' drivers are

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represented by Local 816 of the International Brotherhood of Teamsters, which is not a party to this litigation.

Collective bargaining agreements between the companies and the two unions were due to expire on October 31, 1975; as that date approached, negotiations of new agreements occurred simultaneously, but independently of each other. Under the expiring agreement between the companies and the drivers' union, the drivers bore responsibility for the collection of payment from all C.O.D. customers at the time of delivery. In the closing hours of negotiations over the new agreement, the companies agreed to free the drivers of this task. They did not inform Local 2 of this change, however, and negotiations between the companies and that union did not address the subject of collections before tentative accord on a three-year contract was reached on November 2, subject to ratification by the Local's members.

On November 3, officials of one of the companies, Peerless Importers, Inc., distributed to its salesmen a handwritten directive on the handling of C.O.D. accounts, stating that customers could mail checks or that salesmen could pick the checks up from the customers and bring them to the office, after which the order would be shipped. Caught short by these new procedures, several C.O.D. customers complained to the salesmen when they did not receive their deliveries. The salesmen, in turn, complained to their union about the added burden being placed on them.

By the time of the Local 2 ratification meeting on November 7, the union was aware of the change in collection procedures. At the meeting, the president of Local 2 spoke to the salesmen about the change:

> Without prior discussion with the union, some employees circulated photocopies of a handwritten instruction that salesmen are to pick up C.O.D. payments in the form of checks or otherwise in order to have the orders filled. This is a violation of our contract, and I direct you that this change in our work rules shall not be honored by you until further notice. I instruct you to disregard it, and I will so advise your employer.

With this instruction given, the salesmen proceeded to ratify the new agreement without further consideration of the collection issue.

Shortly thereafter, each of the companies circulated announcements to its salesmen outlining and clarifying the new procedures. With variations from company to company, the new procedures generally encompassed three options. First, customers could mail in checks, with delivery taking place upon receipt; this procedure involved a delay of three days or so. Second, customers could leave signed blank checks with the companies, lessening the delay in delivery though obviously creating other problems of security. Third, customers could give checks directly to the salesmen, who could either bring the checks in immediately or call in the check number and amount, turning in the actual check the next day.

The companies generally took pains to stress the freedom of the salesmen to choose any procedure they wished, asserting that it was the individual salesman's "prerogative" to pick up payment rather than adopt an alternative that involved less of a burden. There was, on the other hand, some evidence of pressure on the salesmen to collect the checks themselves. The salesmen, moreover, argue that economic realities made it essential that they handle the collections personally. Since the business is highly competitive, they point out, an unwillingness by one salesman to pick up payment and thus to permit same-day delivery will simply lead his customer to turn elsewhere. As the arbitrator observed, "[t]he sad fact from the salesman's point of view is that, except for a small number with exclusive rights to a few brands, each salesman generally competes with the salesmen representing other wholesalers, all selling the same brands at the same prices."

On November 12, 1975, Local 2 president Joseph Matranga sent a letter to the companies asserting that the companies had "unilaterally and without notice changed a

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very serious working condition that has existed for many years in the industry and which is raising havoc with the rights of our members in the pursuit of their occupation." The letter claimed that "some or all of the employers have instructed the employees to pick up payment in advance from all customers who are on a Cash or COD basis." Citing the dangers and burden thus imposed, and charging that the employers were violating both the National Labor Relations Act and their contracts, Matranga said he would "be available immediately at my office for an open and frank discussion of this matter in order to avoid a confrontation on this issue." On the same day, however, Matranga wrote the companies' counsel, enclosing a final draft of the new contract and asking him for his approval of the draft so that copies could be prepared for formal signature.

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[1] For convenience, we will refer to petitioner intervenor as Local 2 or the Union.

Replying to the former letter the next day, counsel for the companies suggested that Matranga was "attempting to renegotiate the Teamsters', Local 816 contract," and denied that the employers had changed a working condition unilaterally and without notice. The union's response was prompt: the following day, Matranga filed unfair labor practice changes against one of the companies with the NLRB, alleging that the change in "work rules" constituted an unfair labor practice under sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (a)(5). Soon thereafter, however, the union withdrew the charges and in February 1976 served on the companies a notice of intention to arbitrate, in accordance with the arbitration provision of the collective bargaining agreements. When the companies resisted arbitration, the union reinstated charges against all of them in March 1976, adding a charge of refusal to submit to arbitration. The Board's Regional Director, however, deferred action on the charges pending resolution of the requested arbitration proceedings. The companies' effect to avoid arbitration finally failed on June 1976, when Judge Charles S. Haight, Jr., of the United States District Court for the Southern District of New York denied their motion for a stay of arbitration and granted the union's cross-motion to compel the arbitration. *Charmers Industries, Inc. v. Liquor Salesmen's Union Local No. 2*, 415 F.Supp. 781, 787 (S.D.N.Y.1976).

The arbitration then took place under the auspices of the New York State Mediation Board, culminating in an award by arbitrator Arthur T. Jacobs dated April 7, 1977. In a careful opinion, the arbitrator concluded that "[t]he Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures." He noted, first, that the bargaining agreements contained no provisions governing C.O.D. procedures, so that there had been no violation of the agreements' "direct wording." He also found no violation of "any meaningful concept of past practice," observing:

> In the absence of a past practice clause, arbitrators including this one, and the courts have nevertheless frequently found that past practice was significantly implied in the contractual relations involved and could be used to justify a decision and an award.
>
> I cannot so find here for several reasons which stem from the limitations of the contract. First, the salesmen although called employees are basically independent entrepreneurs (like manufacturer representatives) * * *.
>
> Past practice in the industry did not require the salesmen to collect on their C.O.D. accounts. Present practice is the same. It is the individual salesman who decides for himself whether to do so or not. If he decides to collect, then it is he who is going contrary to past practice and deliberately so. The companies are being consistent. They did not require salesmen to pick up C.O.Ds. prior to November 1, 1975 and they have told the salesmen consistently since that they are not obligated to do so.
>
> In the light of this very special employee status and of the companies' care to emphasize to the salesmen from November 2, 1975 on that whether or not they serviced C.O.D. accounts was entirely

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> their prerogative, it is impossible to find that the companies have been directing or ordering or mandating that the salesmen must service C.O.Ds.

Addressing the union's contention that the salesmen's "prerogative" to collect or not to collect was illusory, since economic reality made collections necessary, the arbitrator stated:

> The Union's argument that the wholesalers are engaging in a "sham," while conceivably true, was not proved by the testimony. The many salesmen who testified only proved what I just described: an industry where although they are

represented by the same Union, each company's salesmen compete against the salesmen of the other wholesalers and as a group they have been unwilling or unable to require all of the Union's members to forego collections on C.O.D. accounts and to force such accounts to pay for their goods by themselves delivering or mailing cash, a money order, or a certified check to the companies.

The union promptly applied to the Board's Regional Director to re-initiate proceedings to consider the charges filed in March 1976. The Regional Director, however, refused to issue a complaint against the companies. Citing the Board's practice under *Spielberg* of deferring to arbitration awards that meet certain conditions, the Director noted:

> In the instant case, there is no evidence that the arbitration proceedings were not fair or regular. Moreover, the evidence indicates that all parties and their counsel participated in the proceedings and the arbitrator was aware of the unfair labor practice issue. While the arbitrator's award may not be the one the Board would issue, where the *Spielberg* standards discussed above are met and the result is not clearly repugnant to the Act, the Board defers to the decision of the arbitrator [citation omitted].

The Director distinguished the decisions cited by the union to justify setting aside the award on the ground that they had not been cases in which an arbitrator's award "deal[t] squarely with the substance of the asserted violations of Section 8(a)(5)." Finally, in declining to issue a complaint, he specifically found that the award was "not clearly repugnant to the policies or purposes of" the NLRB.

Aggrieved once again, the union appealed to the Board's General Counsel, who reversed the Regional Director's decision and instructed him to issue a complaint. The Director did so, and shortly thereafter, the companies moved for summary judgment on the basis of the arbitration award, citing the Board's policy of deference to such awards under *Spielberg*. In an order dated November 14, 1977, the Board denied the motion, giving only the following explanation of its decision not to defer to the award:

> The Board, having duly considered the matter, is of the opinion that Respondents [i.e., the companies] are not entitled to summary judgment * * * for the reason that the Arbitrator's Award which is alleged to be dispositive of the matter demonstrates on its face that the Arbitrator ruled in favor of respondents herein because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter. Hence, his award that the "Employers did not violate their contract with Local 2 when they adopted their present C.O.D. procedures," does not dispose of the unfair labor practice allegations of the complaint.

The Board ordered a hearing before an administrative law judge (ALJ), which took place on March 1978.

While the case was pending before the ALJ, the expiration date of the 1975 contracts approached. We were informed at oral argument that the parties returned to the bargaining table to negotiate new agreements and that the C.O.D. collection procedures were a subject of the bargaining; apparently, the union was unable to persuade the companies to change the practice developed under the 1975 contracts, which has therefore remained essentially unchanged.

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In September 1979, the ALJ issued a 19-page decision in favor of the union—more than a year and a half after the hearing. The ALJ found that the companies had "made unilateral changes with respect to the terms and conditions of employment of [the] employees, and thereby refused to bargain and continue to refuse to bargain in violation of Section 8(a)(5) and (1) of the Act." The ALJ did not directly address the reasoning or conclusion of the arbitrator, asserting only that the Board's refusal to defer to the award was binding on her as the law of the case.

By a decision and order dated June 30, 1980—nine months after the ALJ's decision and more than four and a half years after the events giving rise to the complaint—the Board affirmed the rulings, findings, and conclusions of the ALJ and adopted her recommended order, with certain modifications. The Board's remedy included a general order that the companies cease and desist from refusing to bargain with the union by making unilateral changes in working conditions. At a more concrete level, the Board also ordered the companies to "restor[e] the *status quo ante* to those conditions which obtained prior to November 1, 1975 with respect to delivery schedules and collections of prepayments for C.O.D. orders as they related to the working conditions of Salesmen"; to make the salesmen whole for any lost time or added expense resulting from the change in working conditions; and to rescind any disciplinary action taken against salesmen because of lost commissions or accounts. See Charmer Industries, Inc., 250 N.L.R.B. No. 31 (June 30, 1980).

One month later, the companies petitioned this court for review of the Board's order; the Board cross-applied for enforcement of the order. Local 2, however, had not been idle, filing its own petition for review of the order on July 3, 1980, in the United States Court of Appeals for the District of Columbia Circuit. The union's petition sought review of the Board's failure to address—and thus its implicit denial of—the union's request for attorneys' fees as part of the remedial order. On March 31, 1981, a panel of the District of Columbia Circuit Court exercised its discretion under 28 U.S.C. § 2112(a) to transfer the union's petition to this court for disposition in conjunction with the companies' petitions. *Liquor Salesmen's Union Local 2 v. NLRB*, —— F.2d ——— at ——— ———, No. 80-1746 (D.C.Cir. Mar. 31, 1981).

Thus, after five years and five months, this dispute over an alleged failure to bargain in 1975 came before this court.

II. *The Board's Deference Criteria*

As will be seen below, the only substantive issue we find it necessary to reach in this case is whether the Board abused its discretion in declining to defer to the arbitrator's award.

In furtherance of the national labor policy goal of encouraging the voluntary settlement of industrial disputes through arbitration, the National Labor Relations Board announced in 1955 that it would defer, as a matter of discretion, to an arbitrator's award pursuant to the provisions of a collective bargaining agreement in cases in which "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [National Labor Relations] Act." Spielberg Manufacturing Co., supra, 112 N.L.R.B. at 1082. This policy of deference—the *Spielberg* doctrine—obtained Supreme Court sanction in *Carey v. Westinghouse Corp.*, 375 U.S. 261, 270–72, 84 S.Ct. 401, 408–09, 11 L.Ed.2d 320 (1964).

Over the years, the number and nature of the criteria applied to deference decisions have changed. The concept of "clearly repugnant," for example, has proved elusive, with the Board and courts viewing it sometimes as a test of whether the arbitrator's award was "palpably wrong," see, e. g., International Harvester Co., 138 N.L.R.B. 923, 929 (1962), enf'd sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed.2d 1052 (1964); or not "consistent with Board law," see, e.g., Kansas City Star, Inc., 236 N.L.

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R.B. 866; 869 (1978) (Member Truesdale, concurring); or "arguably * * * not inconsistent with Board policy," see *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980).[2]

In addition, the Board has followed an on-again, off-again requirement that the arbitrator have "clearly decided" the statutory issues involved in the unfair labor practice charge as well as the purely contractual issues presented under the terms of the collective bargaining agreement. One of the union's principal arguments is that this case "presents a classic example of an Arbitrator's refusal to address himself to the issues raised by the unfair labor practice case." The arbitrator, the union asserts, "completely failed to pass on the statutory issue, to wit, that the salesmen can no longer enjoy the same prompt delivery for C.O.D. sales and credit sales without assuming the added burdens of a collection agent; and whether the employers by unilateral action, improperly placed such added burdens on the salesmen in violation of the statute."

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[2] The Board's shifting application of the "clearly repugnant" standard has particularly vexed Member Penello. See, e. g., Atlantic Steel Co., 245 N.L.R.B. No. 107, slip op. at 13 (Member Penello, concurring) (Sept. 28, 1979); Sea-Land Service, Inc., 240 N.L.R.B. 1146, 1151 (1979) (Member Penello, dissenting).

On the "clearly repugnant" controversy, see generally Note, Limiting Deferral Under the *Spielberg* Doctrine, 67 U.Va.L.Rev. 615, 621 (1981) ("The clearly repugnant' standard appears to be more literal than actual, * * * for the Board rarely defers unless the award comports with the Board's opinion as to the proper result [footnote omitted].").

The idea that an arbitration award meriting deference must have considered and resolved statutory as well as contractual issues was elaborated in the Board's decision in Raytheon Co., 140 N.L.R.B. 883 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964). In *Raytheon,* a case involving alleged discrimination in violation of sections 8(a)(1) and 8(a)(3) of the NLRA, the Board implicitly added a fourth criterion to the three set forth in *Spielberg:* it refused to defer to an arbitration award where "the arbitrator did not, and was advised that he could not, even consider evidence that protected concerted and union activities were possible causes for the discharges" that had been the subject of the arbitration. Id. at 886. The *Raytheon* rule was extended in Airco Industrial Gases, 195 N.L.R.B. 676 (1972), to cases in which the arbitration award simply "gives no indication that the arbitrator ruled on the unfair labor practice issue," id. at 677, even if the award contained no express indication that the arbitrator had not considered the statutory issue. The Board went a step further in Yourga Trucking, Inc., 197 N.L.R.B. 928 (1972), holding that the party seeking deference to an arbitrator's award bore the burden of "adduc[ing] proof regarding the scope of matters presented in the arbitration proceeding." Id.

Two years later, the Board reversed itself in Electronic Reproduction Service Corp., 213 N.L.R.B. 758 (1974). Expressly overruling *Airco* and *Yourga,* the Board asserted that henceforth it would assume that an award resolved statutory as well as contractual issues "except where unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same set of facts before two forums, which caused the failure to introduce such evidence at the arbitration proceeding." Id. at 762 (footnote omitted). In *Stephenson v. NLRB,* 550 F.2d 535, 539 (9th Cir. 1977), a panel of the Ninth Circuit, while acknowledging the Board's "laudable" goal, characterized *Electronic Reproduction Service* as "as unjustifiable extension of its deferral policy." *Stephenson* adopted instead the position taken by the District of Columbia Circuit Court in *Banyard v. NLRB,* 505 F.2d 342, 348 (D.C.Cir.1974), adhering to the requirement that the arbitrator have "clearly decided the issue on which it is later urged that the Board should give deference."

Acknowledging the criticism in *Stephenson* and similar decisions, the Board reversed itself once again in Suburban Motor Freight, Inc., 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980), overruling *Electronic Reproduction Service* and returning to the standards set forth in *Airco* and *Yourga.* The Board announced that "we will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." 103 L.R.R.M. at 1114. We assume that *Suburban Motor Freight* validly and accurately describes the Board's current view on this question and is applicable here.

III. *Application of Deference Criteria*

Against this background we turn now to the manner in which the Board applied its deference criteria. As already indicated, the union argues that the arbitrator did not "address" the unfair labor practice issues and therefore the Board properly refused to defer to the arbitration award. It is true that the arbitrator did not, in so many words, find that the companies had refused to bargain over a unilateral change in working conditions, in violation of sections 8(a)(1) and 8(a)(5). Instead he found, as a matter of contract interpretation and in the light of an examination of past practice, that the companies' institution of new procedures after November 1, 1975, did not impose a change in rules. This determination, however, was necessarily dispositive of the statutory issue: if no change in working conditions was imposed, no duty to bargain arose, and no unfair labor practice could have been committed. Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a fact-finder strengthen the case for deference to his findings. Cf. *Stephenson v. NLRB,* 550 F.2d 535, 538 n.4 (9th Cir. 1977). Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement. Thus, we conclude that the Board's "clearly decided" criterion was met in substance in this case.

In addition, this case presents what might be regarded as a congruence of interests, in that the union's claim primarily involves an asserted right affecting the union as a whole—a "group right" to certain working conditions. It is thus not a case in which an arbitrator's award affects rights of individuals or groups not directly party to the arbitration—as, for example, when a dispute arising out of an allegedly discriminatory discharge of an individual employee is brought to arbitration. See, e.g., *Banyard v. NLRB,* supra; cf. *Alexander v. Gardner Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (rejecting a policy of deference to arbitration awards implicating individual statutory rights under Title VII of the Civil Rights Act).

The *Spielberg* criteria for deference would still not be satisfied if the result reached by the arbitrator were found to be "clearly repugnant" to the Act. In this case, however, the Board made no such determination. Indeed, as indicated earlier, see page 322 supra, the Board's Regional Director specifically found that the award was not clearly repugnant to the Act's policies or purposes, and the Board offered no persuasive justification for setting this finding aside. The Board's only rationale for declining to defer was the assertion that the arbitrator had ruled in favor of the companies "because the contract between the parties contained no provisions pertaining to the matters at issue herein, and that it precluded consideration of past practices relating to the matter." It is on this basis, therefore, that the Board's decision must be reviewed. And on this basis, we believe the decision constitutes an abuse of discretion. The Board's rationale is simply incorrect; as the excerpts from the arbitrator's decision set out above indicate, the arbitrator plainly did consider past practice relating to C.O.D. collections, concluding that the companies had not departed from past practice. The arbitrator carefully presented the evidence on which he relied in reaching this conclusion, and while there was undoubtedly evidence to the contrary as well, the

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underlying questions were primarily factual issues that the arbitrator was best situated to resolve. His decision, moreover, was not "clearly repugnant" to the Act, as the Board's Regional Director found in his initial decision to defer. In short, the Board in this case declined to defer to an arbitrator's award that satisfied all of the criteria the Board has set, on grounds that do not withstand even casual scrutiny.

We do not doubt the Board has wide discretion in defining the circumstances under which it will defer to an arbitration award, or indeed in determining whether it will defer under circumstances. The Board is not required by statute to defer; as we have had occasion to note before, "the Board's rules on deference, after all, are self-imposed although it has followed healthy hints from the Supreme Court." *NLRB v. Horn & Hardart Co.,* (2d Cir. 1971) 439 F.2d 674, 679. Once the Board has announced a particular set of rules, however, some constraints necessarily arise to limit its discretion in individual cases.[3] The Board cannot lightly change the rules on a case by case basis. As we said in *Horn & Hardart,*

> We do not suggest that the Board can announce a policy regarding deference to arbitration and then blithely ignore it, thereby leading astray litigants who depended upon it. But it can change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify our calling it abuse of discretion. Id. See also *Roadway Express, Inc. v. NLRB,* 647 F.2d 415, 418–419 (text accompanying notes 4–7) (4th Cir. 1981); *Hawaiian Hauling Service, Ltd. v. NLRB,* 545 F.2d 674, 676 (9th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1061 (1977).

We want it to be clear that we hold no special brief for the conduct of the companies in this case, and we express no approval of their failure promptly to inform the salesmen's union of the changes being made in the 1975 drivers' contract or the companies' dilatory resistance to the union's initial request for arbitration. We are similarly unimpressed with the union's actions, since there is little room for doubt that before it finally accepted the 1975 contract, the union was aware of what had occurred in the companies' bargaining with the drivers; moreover, the union itself sought arbitration and then refused to abide by the result. In addition, it may be that reasonable persons will differ on whether the arbitrator reached the correct result. But all these concerns are secondary: the issue before us is whether we should enforce the Board's order.

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[3] We are aware of the sharp differences of view expressed on this point in the opinions of Judges Rosenn and Garth in *NLRB v. Pincus Brothers, Inc.-Maxwell,* supra, with Judge Garth arguing that the Board is bound by *Spielberg* as a matter of law, and its decisions in individual cases thus reviewable under a standard of legal error. See 620 F.2d at 378–81. Judge Rosenn's view that individual determinations also remain subject to an abuse-of-discretion standard of review appears to have prevailed, however, in the Third Circuit. See *NLRB v. General Warehouse Corp.,* 643 F.2d 965, 970 (3d Cir. 1981).

In this circuit, we have consistently reviewed individual deference decisions for abuse of discretion rather than legal error. See, e.g., *NLRB v. Horn & Hardart Co., supra,* 439 F.2d at 679. Cf. *Lodges 700, 743, 1746, International Association of Machinists v. NLRB,* 525 F.2d 237, 246 (2d Cir. 1975), and *Nabisco, Inc. v. NLRB,* 479 F.2d 770, 773 (2d Cir. 1973), both concerning decisions to defer to arbitration proceedings under the policy set in Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

In this case, the Board did not purport to clarify or revise its announced standards for deference. Strictly speaking, it did not even decide whether the circumstances presented here warranted an exercise of its discretion in deferring to the arbitrator's award. Instead, acting on a motion for summary judgment, it misconstrued the arbitrator's award and, relying exclusively on its misconstruction, "blithely ignored" its own standards.[4] To accept its action in this

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case would render the Board's—and the courts'—laboriously developed standards of deference virtually meaningless, depriving parties to collective bargaining agreements of a reasonabale expectation of finality in properly conducted arbitrations and significantly undermining the value and efficacy or arbitration as an alternative to the judical or administrative resolution of labor disputes.

Although these considerations alone provide ample support for our decision not to enforce the Board's order in this case, we must note in addition the difficulties posed by the nature of the order itself. As indicated earlier, the essential thrust of the order is that the companies bargain with Local 2 over the issue of C.O.D. collections. But as we also indicated earlier, the union and the companies did have an opportunity to bargain over the issue in the course of negotiating the agreements to replace the 1975 contracts when they expired in 1978. The parties were not able in those negotiations to devise rules on collections acceptable to both sides, so that, as we were informed at oral agrument, the practice under the 1978 contracts has remained essentially the same as under the 1975 contracts. Thus, the Board would now, in effect, give to the union the most it could possibly have hoped to obtain in bargaining—a return to the old system of collection or its compensatory equivalent—as an interim measure, while ordering bargaining that has in fact already occurred, although not with results desired by the union. We think that such an order, in so stale a dispute originally caused by the exigencies of simultaneous bargaining with two unions almost six years ago, has a distinct air of unreality about it, and we are left with the conviction that its enforcement would not serve the ends of justice of the purposes of national labor law.

Accordingly, we grant the petitions for review filed by the companies and deny the Board's cross-application for enforcement of its order.

IV. *The Union's Petition*

We turn finally to the union's petition for review of the Board's order insofar as the Board did not act on its request for attorneys' fees as part of the remedy sought. We see no merit in the union's argument that the companies have engaged in frivolous litigation, and we similarly see no basis for concluding that the Board abused its discretion in this connection. The petition is accordingly denied.

NLRB v. A.W. Thompson, Inc.

651 F.2d 1141 (5th Cir.), July 31, 1981

On petition for adjudication of civil contempt

Before Brown, Goldberg and Ainsworth,
Circuit Judges

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Ainsworth, Circuit Judge: In this, our third examination of the difficult collective-bargaining relationship between A.W. Thompson, Inc. (the employer) and Local 826 of the International Union of Operating Engineers (the union), the National Labor Relations Board petitions the court for an adjudication of civil contempt against the employer. The Board claims that the employer, by withdrawing recognition of the union after conducting a poll which showed less than majority support, violated prior orders of this court issued in *NLRB v. A.W. Thompson, Inc.*, 449 F.2d 1333 (5th Cir. 1970), *cert. denied*, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972) ("*Thompson I*") and *NLRB v. A.W. Thompson, Inc.*, 525 F.2d 870 (5th Cir. 1975), *cert. denied*, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 78 (1976) ("*Thompson II*"). The employer claims that the poll, along with other evidence, supported a good-faith doubt as to the union's continuing majority status and thus justified withdrawal of recognition. This court referred the Board's petition to a Special Master and we now have the Master's report before us for consideration. We hold that the employer is in contempt of our prior orders and once again order the employer to bargain in good faith with the union.

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[4] Although we do not reach the merits of the Board's reasoning, we note that the Board expressly rejected the ALJ's finding that the companies had "directly pressured the salesmen to collect C.O.D. payments," and relied instead on its decision in Yellow Cab Co., 229 N.L.R.B. 1329 (1977), for the conclusion that "where an employer knowingly utilizes the force of circumstances to control the conduct of its employees, the failure to control them with direct orders may become legally insignificant." The Board's order in *Yellow Cab*, however, was denied enforcement by the District of Columbia Circuit Court, see *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872–81 (D.C. Cir. 1978). The Board's cursory analysis of this point thus seems nearly as questionable as its construction of the arbitrator's award.

A.W. Thompson, Inc. is engaged in drilling oil and gas wells in the Permian Basin, a 160,000 square mile area of West Texas and New Mexico. In August 1966, Local 826 won a NLRB election and became the collective-bargaining agent for all of Thompson's nonsupervisory employees. In the fifteen years since the union's certification, the parties have signed only three, one-year collective-bargaining agreements. At the expiration of each agreement, the employer has unilaterally withdrawn recognition of the union, claiming a good-faith doubt as to the union's continuing majority support. The withdrawal of recognition after the first two agreements led to NLRB unfair labor practice orders against the employer; both orders were enforced by this court. *Thompson I & II*, *supra*. The third agreement between the union and Thompson was signed on November 30, 1977. At the same time the company was negotiating that agreement with the union, the company was also negotiating with Santa Fe International Corporation for the acquisition of all of Thompson's stock by Santa Fe. Apparently Santa Fe required that Thompson reach agreement with the union before the acquisition became final. Although the acquisition did not change Thompson's corporate identity, Santa Fe has taken control of the company's labor relations.[1]

The employer again refused to bargain with the union upon the expiration of the third agreement on November 6, 1978. The company conducted a poll of employees by secret ballot on November 20 and 21 in which a majority of the employees voted against representation by Local 826.[2] In light of the poll results, the employer withdrew recognition, claiming for the third time a doubt as to the union's continuing majority status. The doubt was based upon the poll and on several other factors similar to those rejected by this court in the 1975 case. The critical issue on appeal is whether the employer met its burden of proving a good-faith doubt as to the union's majority status. On its face, the poll of employees appears to be strong evidence of a loss of union support. The Board maintains, however, that taking the poll itself constituted an unfair labor practice and that the poll thus cannot be used to support the employer's actions.

In order for an employer unilaterally to withdraw recognition of a certified bargaining representative it must show by clear and convincing evidence that it had a good-faith doubt as to union's continuing majority support. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 858–59 (5th Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978). Moreover, the doubt cannot be a mere suspicion; it must be reasonably based on objectively verifiable evidence. *Id.; NLRB v. A.W. Thompson, Inc., supra*, 525 F.2d at 871. The employer cites several factors which led it to suspect that the union had lost its support: the poll of employees, the lack of employee participation in union affairs, employee turnover, failure of the union to process grievances, post notices on bulletin boards, and appoint stewards, absence of employee conversations about the union, and the change of ownership of the company. Except for the poll and the change of ownership, these are the same factors relied upon and rejected by this court in *Thompson II*, and we once again find them insufficient to support a good-faith doubt. These factors are also similar to ones rejected in other cases involving Permian Basin employees where this court examined the nature of the oil-drilling industry and the wide dispersion of employees in the area and concluded that what might seem like union inaction or indifference in a more compact industrial setting was not indicative of lack of union support in this setting. *NLRB v. Hondo Drilling Co.*, 525 F.2d 864 (5th Cir.), *cert. denied*, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 78 (1976); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir.), *cert. denied sub. nom. Brahaney Drilling Co. v. NLRB*, 423 U.S. 1016, 96 S.Ct. 449, 46 L.Ed.2d 387 (1975). Absent verifiable, objective evidence that the change in the ownership of the company's stock changed the employees' attitude about the union, the employer's claim that the ownership change supported a good-faith doubt is just the kind of "unfounded speculation" condemned in previous cases. *NLRB v. A.W. Thompson, Inc., supra*, 525 F.2d at 871; *see also NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 278–79, 92 S.Ct. 1571, 1577–78, 32 L.Ed.2d 61 (1972).

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[1] Brooks Harmon, the attorney handling labor negotiations for the company prior to the acquisition, continues to be the company's chief labor relations spokesman and negotiator.

[2] Apparently there were 172 employees at the time of the poll. The company's tally showed 88 votes against representation, 72 votes in favor of representation, and 4 blank votes. Eight employees did not vote. The Board challenges the eligibility of several of the voters, the exclusion of other voters, and the methods used in conducting the poll. We do not reach those issues in deciding this appeal, however.

The only remaining basis for the employer's doubt is the poll of employees. Al-

though the Board maintains that the poll was inherently unreliable due to procedural defects and errors in the list of eligible voters, the Board does not contend that the poll was not evidence of a loss of union support. Instead, the Board maintains that the poll itself was unlawful and could not support the employer's doubt. The company asserts that the taking and use of a poll of employees is both valid and helpful if it complies with the procedural safeguards set out by the Board in *Struksnes Construction Co.*, 165 NLRB 1062 (1967). *Struksnes* is not entirely on point, however, since in that case the employer sought to poll employees about their union sentiment prior to the initial certification of the union. At that point there is no presumption that the union has majority support as there is after certification, and the burden is on the union rather than the employer to demonstrate the employees' support for the union or lack thereof. Moreover, at the pre-certification stage the congressional policy of encouraging stability of established bargaining relationships does not come into play.

In *Montgomery Ward & Co.*, 210 NLRB 717 (1974), the Board explicitly declined to extend the *Struksnes* rules to post-certification situations, holding that "absent valid objective considerations justifying a belief in the Union's lack of continuing majority status, * * * the [employer] was not legally entitled to seek to undercut the continuing majority status of the Union by itself initiating a poll of employee sentiment." The Board went on to hold that to allow the employer to use the fruits of such a poll to support a withdrawal of recognition would be contrary to the purposes of the labor act. This court discussed *Montgomery Ward* in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). In holding that the employer had met it burden of proving a good-faith doubt the court noted:

> The Company need not have conclusive proof that a majority of employees do not support the Union. Indeed, the only way that it could have garnered such proof was by an employee poll, but that is forbidden unless the employer has "objective evidence to support a good faith doubt of majority status," the same standard used to determine the lawfulness of withdrawing recognition. (Citing *Montgomery Ward*)

584 F.2d at 729.

Notwithstanding the *Randle-Eastern* dictum, we are not convinced that an employer may conduct an employee poll only when it has no actual need to do so, that is, when it already has sufficient objective evidence to justify withdrawal of recognition. Two other circuits, also in dicta, have implied that a noncoercive poll may be taken to gauge employee sentiment. *Pioneer Inn Asociates v. NLRB*, 578 F.2d 835, 840 & n.3 (9th Cir. 1978); *NLRB v. North American Manufacturing Co.*, 563 F.2d 894, 896 (8th Cir. 1977). Neither of these cases discussed *Montgomery Ward*, however, and neither decided under what conditions a poll may be taken. This court has not adopted the *Montgomery Ward* approach and we decline to do so now if it represents, in practical effect, an outright ban on employer-sponsored polls of employee sentiments in regard to a certified union.

It is for the employees alone to decide whether they wish to be represented by a union in the first instance and to decide whether they wish to oust an incumbent union and either replace it with another union or forego union representation entirely. The national labor policy favors employee free choice in such matters. The employer, although an interested party, has a limited role in the representational choice of employees. We appreciate the Board's concern, expressed in *Montgomery Ward*, that polling by employers may undercut a union's majority status and may even subvert the Board's electoral processes.[3]

Nevertheless, polling can be a useful and legitimate tool when the employer's sincere doubt of the union's majority status is based on objective evidence which falls short of that needed to justify withdrawal of recognition. We hold that when an employer "has not engaged in unfair labor practices or otherwise created a coercive atmosphere,"[4] it may, after giving notice to the union, poll the employees for their union sentiment if there is other substantial, objective evidence of a loss of union support (even if that evidence is not sufficient by itself to justify withdrawal) and if the poll meets the procedural guidelines set out in *Struksnes*. This test, which incorporates the safeguards established by the Board in *Struksnes*, is a reasonable accommodation of the employer's interest in testing the union's support an the Board's interest in preventing repeated polls which themselves can be coercive. The substantial, objective evidence must show that the union has lost support. Thus, if a union wins a certification election by a slim margin, that margin itself, or other factors present at the time of certification, cannot be used as evidence of a *loss* of support to justify a poll. The proper test, as we have stated herein, may, in fact, prevent unfair labor practices and reduce the need for Board and court involvement in collective-bargaining disputes. Our test avoids the situation in which an employer must risk unfair labor practice charges (by withdrawing recognition) to find out whether the evidence of loss of support is sufficient to justify that withdrawal. Now, faced with such evidence, the employer can conduct a poll to determine the level of support for the union.

Thompson has not met our test in the present case, however. During the sixteen years in which the union has been the certified bargaining representative of A. W. Thompson's nonsupervisory employees, only three, one-year collective-bargaining agreements have been signed. Upon the expiration of each of the agreements, the employer has withdrawn recognition of the union and taken advantage of the drawn-out nature of Board enforcement proceedings to delay the resumption of good-faith bargaining. Twice before this court has held that Thompson's actions constitute unfair labor practices. *Thompson I & II, supra*. Since the employer has engaged in repeated unfair labor practices, it cannot now under such circumstances properly conduct a poll. In addition, we do not find the other evidence of loss of union support proffered by the employer to be substantial. As we noted in *Thompson II*, the factors cited by the company reflect the nature of the industry and the region more than any union weakness. The only new factor cited by the employer, the purchase of the corporate stock by Santa Fe, certainly tells us nothing about employee sentiment. Unless the employer can show some concrete evidence, not present at the time of initial certification, that the union has lost its majority support, it cannot conduct a poll. Nothing the employer now offers constitutes such evidence.

We therefore hold that the employer's withdrawal of recognition of the union was not justified. The withdrawal thus violates the orders of this court in *Thompson I & II, supra*. Since this is the third time the employer has improperly withdrawn recognition of the union we would normally have no qualms about imposing a schedule of prospective fines against the employer for future violations. However, in light of the change in the ownership of the company, and the assumption of Thompson's labor relations functions by the Santa Fe office, we do not now impose prospective fines. The imposition of such fines is an extraordinary remedy "and should be imposed only where violations have been flagrant and lesser remedies appear likely to fail." *Florida Steel Corp. v. NLRB*, 648 F.2d 233, 240 (5th Cir. 1981). To say the least, it is premature to assume that Santa Fe will not abide by our order and that the contempt remedy is likely to fail.

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[3] As the Board stated in *Struksnes*, "any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." 165 NLRB at 1062. That fear need not have a strong basis in fact for it to have a chilling effect on employee free choice.

[4] *Struksnes Construction Co., supra*, 165 NLRB at 1063.

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It is therefore ORDERED AND ADJUDGED that the respondent, A.W. Thompson, Inc., is in civil contempt for having violated the orders of this court dated April 26, 1972 and November 2, 1976. It is ORDERED that A.W. Thompson, Inc. shall purge itself of civil contempt by:

1. Fully complying with the judgments of April 26, 1972 and November 2, 1976, and each of the provisions of the Board's orders thereby enforced;

2. Notifying the union in writing within 15 days from the entry of this order that it recognizes the union as the exclusive representative of its employees in the designated unit and that, upon request of the union, it will bargain collectively in good faith with the union as the exclusive representative of the company's employees in the designated unit until full agreement or *bona fide* impasse is reached; and if any understanding is reached following such bargaining, incorporating such understanding in a written agreement. In no event shall the company refuse to meet with the union at reasonable times or withdraw recognition from the union as collective bargaining representative without further order of the court;

3. Immediately posting in conspicuous places including all places where notices to employees customarily are posted, for a period of sixty (60) consecutive days, copies of an appropriate notice in the form prescribed by the Board, signed by the company, which states that the company has been adjudicated in civil contempt of court for violating, resisting, disobeying, and failing and refusing to comply with the court's said judgments and that the company will take the action in purgation ordered by the court, and by maintaining such notices and a copy of the contempt adjudication in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced, or covered by any other material;

4. Mailing to each of its current employees and all former employees employed by the company at any time since October 1, 1978, copies of the notice and of the contempt adjudication referred to in the preceding paragraph; and reading said notice to its employees at each rig, by shift, and in the yard, by an appropriate representative of the company;

5. Paying to the Board all costs and expenditures, including counsel fees, incurred by the Board in the investigation, preparation, presentation, and final disposition of this proceeding to adjudge the company in civil contempt, and all costs relative to the Special Master, said amount, unless agreed upon by the parties, to be fixed by the court upon submission by the Board of a certified statement of costs and expenses.

ORDERED AND ADJUDGED.

NLRB v. Ely's Foods Inc., d/b/a Scotto's I.G.A.

656 F.2d 290 (8th Cir.), July 31, 1981—249 NLRB 909

On petition to enforce Board Order

Before GIBSON, Senior Circuit Judge, ARNOLD, Circuit Judge, and MCMANUS, District Judge*

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FLOYD R. GIBSON, Senior Circuit Judge: The National Labor Relations Board (Board) petitions this court for enforcement of its order directing Ely's Foods to bargain with the Retail Store Employees Union and United Food and Commercial Workers International Union. Ely's Foods contests the bargaining order on the grounds that the Board's decision and the record fail to support the remedy of a bargaining order. We enforce the Board's order.

On May 29, 1980, the Board issued a decision and order declaring that Ely's Foods had violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976). The Board adopted the findings and conclusions of the administrative law judge (ALJ). The Board's decision and order and the ALJ's decision are fully reported in *Ely's Foods Inc.*, 249 N.L.R.B. 909 (1980).

Briefly, the factual circumstances surrounding the section 8(a)(1) violations are the following. In January 1979, the unions began a joint organizing effort among the grocery clerks and meatcutters at

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*The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

Scotto's I.G.A. in Brookfield, Missouri. Scotto's is a moderately sized, family-run supermarket owned by Otto Ely and is the only store operated by Ely. On February 2 and 3, 1979, an employee of the supermarket presented to Ely the names of twenty-one grocery employees, out of a total of twenty-eight, who had signed cards authorizing the Retail Store Employees Union to be their bargaining agent. On February 5, the same employee advised Ely that the three meatcutters had agreed to authorize the United Food and Commercial Workers Union to be their bargaining agent.

The ALJ found that Otto Ely, upon being advised of the organizational campaign on February 2, 1979, summoned an employee into his office and interrogated her regarding her union participation and the union activities of others. The following day Ely advised a number of employees that a unionized store would result in more restrictive terms and conditions of employment and that layoffs were possible if he was going to have to pay union wages. On that same day Ely also promised two employees that he would find additional hours of work for them.

On February 6, 1979, the Retail Store Employees Union filed a petition for an election in the grocery clerk unit. The election was scheduled for February 28. On the day before the election, Ely promised an employee a wage increase "when the mess [union election] was over with." Finally, on the morning of the election, Ely threatened a tardy employee with more arduous working conditions while reprimanding him for being one hour late.

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The election was held and the company won. The vote was ten for the union and sixteen against, with two votes challenged. The union filed objections to the election with the Board. The election among the meatcutters was never held. The United Food and Commercial Workers Union, however, also filed objections concerning the conduct of the company with regard to the meatcutters.

In the matter of the meatcutters' union representation, the ALJ found that Pat Burstert, in charge of the meat department, was a supervisor who committed section 8(a)(1) violations. Burstert stated at various times to the meatcutters that Ely would like to enter into a direct agreement with them and that they should pursue such negotiations, either individually or collectively, without regard to a union. Burstert indicated that the meatcutters could expect to receive substantially increased benefits if they did so. Finally, on March 9, 1979, after the grocery clerk union election, Burstert told a meatcutter that three replacements had been hired for their positions. The ALJ construed this to be a direct threat to the meatcutters "that they were to be discharged as a result of their continued union activity." *Ely's Foods Inc.*, 249 N.L.R.B. at 914.

The ALJ and the Board found the above activities to be violations of section 8(a)(1). Ely's Foods does not contest these findings.[1] It contends instead that the bargaining order should not be enforced because neither the Board's decision nor the record contain facts sufficient to support the remedy of a bargaining order.

The Supreme Court, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612, 89 S.Ct. 1918, 1939, 23 L.Ed.2d 547 (1969), reviewed the policy reasons behind issuance of a bargaining order:

> [A] bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign. [Footnotes omitted.]

Ely's Foods, however, argues that a bargaining order is not appropriate because the Board failed to engage in a specific factual analysis of the reasons why a bargaining order remedy was necessary, and there was no showing why a traditional "cease and desist" order would not suffice. *See, e.g., Red Oaks Nursing Home, Inc., v. NLRB*, 633 F.2d 503, 508–09, (7th Cir. 1980); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 215 (2d Cir. 1980); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 119 (1st Cir. 1978). The ALJ in this case, in recommending issuance of a bargaining order, made the following findings:

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[1] Ely's Foods' brief suggests that Burstert was only a "marginal supervisor." Respondent's brief at 22. We agree with the Board and the ALJ that Burstert was a supervisor within the meaning of section 2(11) of the NLRA, 29 U.S.C. § 152(11) (1976). Burstert is in charge of the meat department. The ALJ found that Burstert sets hours for the meatcutters and exercises authority in the area of working conditions. He has also successfully recommended pay raises and reprimands. We must give deference to the Board's determination on this issue. *See NLRB v. Harmon Industries*, 565 F.2d 1047, 1051 (8th Cir. 1977). We conclude that Burstert exercised sufficient "independent judgment" with regard to these work functions to qualify as a supervisor within the meaning of section 2(11). *See id.* at 1049; *cf. NLRB v. Yeshiva University*, 4444 U.S. 672, 682 N.13, 100 S.Ct. 856, 862 n.13, 63 L.Ed.2d 115 (1980) (an employee may be excluded if he has authority over any one of twelve enumerated personnel actions in section 2(11)). *See generally* Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv.L.Rev. 1713 (1981).

> I am convinced that under applicable Board precedent the election in the Retail Clerks unit should be set aside, and I further find that a full and proper remedy requires the issuance of bargaining orders in both units as contended by the General Counsel. The numerous unfair labor practices, found above, particularly those unfair labor practices wherein Respondent, both through Otto Ely and Burstert, promised benefits to employees and threatened employees with layoff and discharge as a consequence of their selecting either Union as their collective-bargaining representative, mandate the conclusion that the possibility of erasing the effects of the aforementioned unfair labor practices by other traditional remedies, and of insuring fair elections, is slight. Under the circumstances it is clear that the desire of the employees, overwhelmingly expressed by their signatures on authorization cards, warrants the imposition of bargaining orders in each respective unit.

Ely's Foods Inc., 249 N.L.R.B. at 914.

Ely's Foods contends that this paragraph constitutes nothing more than a perfunctory conclusion. While we agree that the specific factual findings of the Board and the ALJ with regard to the necessity of a bargaining order were perhaps less than desirable for appellate review and present only a marginal case for bypassing the preferred election procedure, we find that the complete findings of the Board, *see Ely's Foods Inc.*, 249 N.L.R.B. at 913–14, and the record as a whole support issuance of a bargaining order in this case.

In reviewing whether a bargaining order should issue, this court must give "special respect" to the Board's determination. "[T]he Board draws on a fund of knowledge and expertise all its own, * * *." *NLRB v. Gissel Packing Co.*, 395 U.S. at 612 n.32, 89 S.Ct. at 1939 n.32. The Supreme Court, in *Gissel Packing Co.*, outlined the factors the Board should consider in the case of election violations of the type involved in this case:

> The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue (see n.32, *supra*).

NLRB v. Gissel Packing Co., 395 U.S. at 614–15, 89 S.Ct. at 1940.

In examining the bargaining order in this case, we find that the unions clearly had a large majority at the time the authorization cards were signed in early February 1979. Of equal importance is the fact that the store in issue here was family-run, located in a small town. Otto Ely's actions can therefore be expected to have a pervasive effect upon his employees in a limited local labor market. These considerations support the Board's and the ALJ's conclusions that "the possibility of erasing the effects of the aforementioned unfair labor practices by other traditional remedies, and of insuring fair elections, is slight." *Ely's Foods, Inc.*, 249 N.L.R.B. at 914.

In enforcing the Board's order, however, we reiterate the Supreme Court's admonition in *Gisse Packing Co.*, 395 U.S. at 613, 89 S.Ct. at 1939 "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer acts have worn off, the employees clearly desire t disavow the union, they can do so by filing a representation petition."

Enforced.

McMANUS, Chief District Judge, concurring specially: The panel determines to enforce the Board's bargaining order, having elected not to adopt the majority view of the courts of appeal with respect to the specific factual analysis required of the Board in cases such as this. *NLRB v. Jamaica Towing, Inc.*, 602 F.2d 1100 (2d Cir. 1980); *NLRB v. Appletree Chevrolet, Inc.*, 608 F.2d 988 (4th Cir. 1979); *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148 (9th Cir. 1977); *NLRB v. Armcor Industries*, 535 F.2d 239 (3d Cir. 1976); *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973); *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir. 1970). I agree with the result in the case at bar, although I feel that the better approach to these cases is that of the above circuits.

The leading Supreme Court case in this area is, of course, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). There the court sanctioned the imposition of a bargaining order remedy under circumstances as were present here upon findings by the Board that "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614–615, 89 S.Ct. at 1940. In applying this language to the cases before them, the majority of the circuits requires the Board to (1) make specific findings as to the immediate and residual impact of unfair labor practices on the election process; (2) undertake a detailed analysis assessing the possibilities of holding a fair election in terms of any continuing effect of employer misconduct, the likelihood of recurring misconduct, and the potential effectiveness of traditional remedies; and (3) reconcile the issuance of the bargaining order with prior decisions in which no such order was issued. *E.g. Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973).

In addition to the *Gissel* language, these circuits have justified their approach based on their appellate responsibility to review the administrative process. As stated in *NLRB v. Armcor Industries*, 535 F.2d 239, 245 (3d Cir. 1976) (citations omitted):

> Requiring the [Board] to state its reasons enables the reviewing court to 'guarantee the integrity of the administrative process. . . .' It also contributes to the growth and predictability of this important area of labor law. In addition, the 'requirement that the [Board] provide analysis and findings serves as a prophylaxis against an arbitrary exercise of the [Board's] power.'

Lastly, these circuits have indicated that such requirements are consistent with the general principle that an open, free election is the preferred method of establishing a union's representative status, *e.g.*, *NLRB v. Armcor Industries*, 535 F.2d 239, 244 (3d Cir. 1976), as has this circuit. *Ante* at 292.

I am aware of and approve the legal standard of review that requires us to give deference to the Board on these matters. But I suggest that such deference is not warranted where the Board has merely set forth a litany, reciting conclusions by rote without any factual explication. *NLRB v. Yeshiva University*, 444 U.S. 672, 100 S.Ct. 856 (1980) (reliance on conclusions unsupported by factual analysis precludes grant of deference to Board's expertise); *see NLRB v. Pacific Southwest Airlines*, 550 F.2d 1148, 1151–52 (9th Cir. 1977) (Board orders on findings should not be boilerplate); *NLRB v. Kaiser Agr. Chem., Div. of Kaiser A&C Corp.*, 473 F.2d 374 (5th Cir. 1973) (same). However, a thorough, independent review of this record indicates that the bargaining order should be enforced. To send this case back, therefore, would be a wasted effort and delay. *See Peerless of America, Inc. v. NLRB*, 484 F.2d 1108 (7th Cir. 1973). However, I again emphasize that the better procedure, in my view, is the majority approach outlined above.

F.W. Woolworth Co. v. NLRB

655 F.2d 151 (8th Cir.), July 31, 1981; rehearing and rehearing en banc denied September 16, 1981; certiorari denied March 1, 1982—251 NLRB 1111

On petition to review Board Order

Before LAY, Chief Judge, STEPHENSON, Circuit Judge, and LARSON,* Senior District Judge

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*Earl R. Larson, United States Senior District Judge, District of Minnesota, sitting by designation.

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Larson, Senior District Judge: This case began when an employee of F. W. Woolworth Co. (Woolworth), Eric Withers, filed an unfair labor practice charge with the National Labor Relations Board (Board) protesting his discharge by Woolworth. A Board ALJ subsequently decided that this discharge violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), and this decision was later affirmed by the Board. Woolworth filed a petition for review of the Board's decision and order with this Court and the Board followed with a cross-application for enforcement of its order.

Woolworth is a New York corporation that runs a nationwide chain of retail stores. Its merchandise is distributed to its stores from regional distribution centers, one of which is the Mid-Atlantic Distribution Center (MDAC) in Denver, Pennsylvania. MDAC has been the site of several union organizing campaigns, the most recent one in the spring of 1979. On May 25, 1979, a Board representation election was held and the employees voted against union representation.

During the 1979 campaign, Woolworth held three employee meetings on company time in the MDAC cafeteria to deliver speeches conveying its position on unionization. Employee attendance at these meeting was compulsory. No questions were allowed at these meetings although employees were told they could ask questions on the work floor after the meetings.

Eric Withers had been a vocal critic of Woolworth's failure to assign more female employees to the shipping department at MDAC. He viewed the assignment of only two female employees to the shipping department as insufficient and as representing favoritism towards male employees. After the first two employee meetings, Withers asked General Manager John Mede why there were not more women in the shipping department and was told that work assignments were a management prerogative and was asked "who put you up to this?"

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The final employee meeting was begun at 2:30 p.m. on May 24. It was necessary to conclude this meeting by 3:00 p.m. in order to comply with *Peerless Plywood,* 107 N.L.R.B. 427, 33 L.R.R.M. 1551 (1953), which prohibits such meetings within 24 hours of a representation election. When Mede began his speech, Withers interrupted by standing and stating that he wanted to ask a question. Mede told Withers to be seated and Withers sat down for a few minutes. After a few minutes Withers again stood up and again stated that he wanted to ask a question. He was again told to sit down but instead he asked Mede if this was to be another one-sided affair where Mede would "spoon feed" the employees and do all the talking and have the employees do all the listening. This second attempt to ask a question lasted a few minutes and then Withers sat down again. Mede completed the remainder of his speech before 3:00 p.m. After the meeting, on the same day, Withers was informed that he was suspended pending an investigation. Later that day Woolworth sent a mailgram to Withers informing him that he was being discharged for insubordination. The sole basis for the termination was his alleged misconduct at the May 24 meeting.

I. *Jurisdiction*

The jurisdiction of this Court is invoked pursuant to section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), since Woolworth maintains numerous business facilities within the jurisdiction of this Court and thereby transacts business within this Circuit.[1] Although the alleged unfair labor practice occurred in Denver, Pennsylvania, within the jurisdiction of the Court of Appeals for the Third Circuit, Woolworth has obviously chosen this Circuit in order to rely on the decision in *NLRB v. Prescott Industrial Products Co.,* 500 F.2d 6 (8th Cir. 1974).

II. *Concerted Activity*

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157,[2] grants employees the right to engage in "concerted activity" for their mutual aid and protection. Section 8(a)(1) [3] makes it an unfair labor practice for an employer to interfere with an employee's exercise of this right. Woolworth argues that the activity at issue here was not concerted since Withers acted alone. Activity is concerted, however, even where only one employee is involved if the employee is enlisting the support of fellow employees. *See NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977). By pressing for more female employees to be assigned to the shipping department, Withers was seeking to enlist the support of at least some of his fellow employees at MDAC.

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[1] Woolworth has taken advantage of the following provision in section 10(f):

> Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business.

[2] Section 7 provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The Board has held, and we agree, that an employee is engaged in concerted activity when he attempts to ask questions

at a captive audience meeting, convened by management of the subject of unionization, unless the questions are pursuant to a scheme or plan to disrupt the meeting. *See Howell Metal Co.*,———, N.L.R.B. ———, 102 L.R.R.M. 1031 (1980). Woolworth contends that the ALJ made a finding that Withers was engaged in individual, rather than concerted, activity. The finding, however, was that Withers had not taken part in a scheme or plan to disrupt the meeting.[4]

III. *The Unfair Labor Practice*

Where an employer discharges an employee in these circumstances, the Board must balance the employee's right to engage in concerted activity against the employer's right to maintain order and respect. This balancing permits some leeway for implusive behavior on the part of the employee. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). The Board's performance of this balancing test, unless illogical or arbitrary, ought not be disturbed. *Id.*

Woolworth argues that the present case is controlled by *NLRB v. Prescott Industrial Products Co.*, 500 F.2d 6 (8th Cir. 1974), where an employer delivered a captive audience speech to employees pointing out the disadvantages of unionization. At or about the end of the speech, an employee persisted in his attempt to ask a question despite requests by the employer to sit down as there was no question and answer period allowed. After the employer refused to entertain the question several times, the employee and some 20 or 25 fellow employees walked out of the meeting. The employee was subsequently discharged for insubordination.

In *Prescott* this Court adopted the balancing principles of *Thor Power Tool* and in the present case we find the Board's performance of this balancing test neither illogical nor arbitrary. Withers' behavior was implusive; he sat down after his first attempt to ask a question and did not remain standing long following his second attempt. As noted in *Prescott:*

> The Board apparently is enunciating a general principle that insolvent, rough, and intimidating conduct cannot serve as a basis for discharge if that conduct is carried out in connection with the assertion of protected activity under § 7 of the Act and that unless such improper conduct, including threats, intimidations and acts adverse to the operation of the employer's business in "egregious," the same must be accepted as a normal and usual incident of labor-management relationships. 500 F.2d at 11 (quoting *NLRB v. Red Top, Inc.*, 455 F.2d 721, 728 (8th Cir. 1972)).

The conduct here certainly wasn't "egregious"; in fact, Mede was even able to complete his remarks before 3:00 p. m.

Prescott is distinguishable from the case before us in that in *Prescott*, the employee and others walked out of the meeting. The meeting in *Prescott*, and the meeting here, were held on company premises and on company time. Walking out of such a meeting, accompanied by 20 or 25 fellow employees, directly challenges management's right to maintain order and respect and tips the balance in favor of the employer. On the other hand, in Withers' case the reaction of fellow employees was negative, marked by cat calls and even profanity, urging him to sit down and shut up. Withers' interruptions were no threat to Woolworth's interest in maintaining discipline or respect. Further, Withers' inability to receive a meaningful response from Mede concerning his complaint about the assignment of female employees after the first two employee meetings tips the balance in the present case in the other direction. Woolworth's failure to provide a meaningful outlet for the exercise of Withers' right to engage in concerted activity weighs heavily against Woolworth.

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[3] Section 8(a)(1) provides:

It shall be unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title.

[4] In *Prescott* this Court did not reach the question of whether the activity involved was concerted or individual. *See* 500 F.2d at 7.

Accordingly, Woolworth's petition for review and for the setting aside of the

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Board's decision and order is denied and the Board's order is enforced.

St. Anthony Hospital Systems v. NLRB

655 F.2d 1028 (10th Cir.), August 4, 1981—252 NLRB 50

On petition to review Board Order

Before BARRETT and LOGAN, Circuit Judges, and O'CONNOR, District Judge*

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LOGAN, Circuit Judge: St. Anthony Hospital Systems petitions for review of a decision and order of the National Labor Relations Board (NLRB or Board) finding the hospital engaged in unfair labor practices by refusing to bargain with St. Anthony's Federation of Nurses and Health Professionals/AFT/FNHP, CFT, AFL—CIO (the union). The only issues raised on appeal are whether the Board (1) unconstitutionally asserted jurisdiction over the hospital, which is argued to be exempt under the First Amendment from governmental regulation because it is owned and operated by the Roman Catholic Church, (2) erred in ruling that a unit composed only of registered nurses is an appropriate bargaining unit under section 9(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(b), and (3) erred in holding that individuals classified as Staff Nurse I were not supervisors within the meaning of section 2(11) of the NLRA, 29 U.S.C. § 152(11).

St. Anthony Hospital Systems (St. Anthony), consisting of a main or central building and a satellite facility, is a non-profit medical institution owned and operated by the Sisters of the Order of St. Francis, a Roman Catholic Order. In 1979 the union filed a representation petition with the NLRB, seeking certification as the exclusive bargaining representative of all nonsupervisory registered nurses employed by the hospital. Following a hearing at which St. Anthony unsuccessfully challenged the appropriateness of the requested bargaining unit, the Board's regional director issued a direction of election in the registered nurse unit. The Board denied St. Anthony's request for review. A majority of the eligible employees voted in favor of representation by the union, following which the director certified

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the union as the exclusive collective bargaining representative for the hospital's professional registered nurse employees. St. Anthony has obtained judicial review of the unit determination by refusing to bargain with the union. *See Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 139, 91 S.Ct. 599, 600, 27 L.Ed.2d 735 (1971); *Osteopathic Hosp. Founders Ass'n v. NLRB,* 618 F.2d 633, 640 (10th Cir. 1980). in its answer to the complaint issued by the Geneal Counsel of the NLRB, St. Anthony claimed the Board's assertion of jurisdiction was unconstitutional on the ground that the hospital is a religious organization exempt from intrusive governmental regulation under the First Amendment. It also denied that the union was a proper labor organization under the NLRA, challenged the appropriateness of the unit determination, and objected to the inclusion of Staff Nurse I employees in the bargaining unit, claiming they were supervisors within the meaning of 29 U.S.C. § 152(11). The Board granted the General Counsel's motion for summary judgment, ordering St. Anthony to cease and desist from its unfair labor practices and directing it to bargain collectively with the union. The case is before this Court on St. Anthony's petition for review of the Board's order and the Board's application for enforcement. The union is present as intervenor.

The record indicates that St. Anthony failed to object to jursidiction during the representation proceeding and first asserted its First Amendment challenge to jurisdiction in the unfair labor practice proceedings before the Board. Apparently relying on section 102.67(f) of its Rules and Regulations,

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*Honorable Earl E. O'Connor of the United States District Court for the District of Kansas, sitting by designation.

29 C.F.R. § 102.67(f) (1980),[1] the Board determined St. Anthony was not entitled to litigate the constitutional issue which could have been, but was not, raised in the prior representation proceeding. In *NLRB v. Peyton Fritton Stores, Inc.,* 336 F.2d 769, 770 (10th Cir. 1964), we held that while the statutory jurisdiction of the Board may be challenged at any time, "the *facts* upon which the Board determines it has jurisdiction may be challenged only upon timely exception, in the absence of which the Board's findings are not open to attack in the proceeding for enforcement." (Emphasis added.) The Board's non-relitigation rule protects the integrity of the administrative process by requiring a party to develop all arguments and present all available, relevant evidence at the representation proceeding, the first instance in which the Board exercises jurisdiction. It would indeed be a waste of time, money, and effort if an employer could remain silent on this issue throughout the representation-proceeding, refuse to bargain after certification, then ultimately defeat unionization on constitutional grounds asserted for the first time in the ensuing unfair labor practice proceeding. We affirm the Board's determination that the First Amendment issue, having been untimely raised, was not cognizable by the Board in the underlying unfair labor practice hearing. The issue is therefore not properly before this Court on St. Anthony's petition for review. *See Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 162, 61 S.Ct. 908, 917, 85 L.Ed. 1251 (1941). *Cf. St. Elizabeth Community Hosp. v. NLRB,* 626 F.2d 123 (9th Cir. 1980) (First Amendment challenge to jurisdiction was timely only because raised in representation proceeding and not deferred until the enforcement proceedings).

The issues concerning whether the nurses should be a separate bargaining unit and whether those classified as Nurse I were supervisors were raised before the Regional Director and the Board in the representation proceedings and may be reviewed here. *See Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 154, 61 S.Ct. 908, 913, 85 L.Ed. 1251 (1941); *NLRB v. Jackson Farmers, Inc.,* 432 F.2d 1042 (10th cir. 1970), *cert. denied,* 401 U.S. 955, 91 S.Ct. 947, 28 L.Ed.2d 238 (1971). The Board has been granted broad discretion in determining appropriate bargaining units, and its decisions will be set aside only if shown to be arbitrary or capricious. *NLRB v. Dewey Portland Cement Co.,* 336 F.2d 117, 119 (10th Cir. 1964). Hence, it is our function on review to determine whether the Board, when exercising the wide discretion committed to it, has stayed within the purview of the authorizing status. *NLRB v. Groendyke,* 372 F.2d 137, 140 (10th Cir. 1967), *cert denied,* 397 U.S. 935, 90 S.Ct. 944, 25 L.Ed.2d 116 (1970). In granting the General Counsel's motion for summary judgment and affirming the Regional Director's decision, the Board clearly seems to have accepted the director's reasoning, based on *Mercy Hospitals of Sacramento, Inc.,* 217 N.L.R.B. 765 (1975), and *Allegheny General Hospital,* 239 N.L.R.B. 872 (1978), "that a unit restricted to registered nurses is a presumptively appropriate one," and that in the case "the presumption . . . has not been overcome by the Employer's evidence." R.Vol. V at 3244. *See id.* at 3311. Acknowledging *NLRB v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979), the Regional Director and the Board applied a rebuttable presumption that the nurse unit was appropriate. Nevertheless, we believe the opinions clearly do not go far enough in following the congressional directive. *See* R.Vol. V at 3244–45, 3311–12.

On the appropriate unit issue, the case at bar is identical in all significant respects to *Presbyterian/St. Luke's Medical Center v. NLRB,* 653 F.2d 450 (10th Cir. 1981), in which we held the Board's application of the rebuttable presumption both impermissibly shifts the burden of persuasion and violates Congress' directive to avoid proliferation of bargaining units in the health care industry. Our holding in *Presbyterian/St. Luke's Medical Center* is fully applicable to this case. We hold the Board's unit determination, based on the presumption of appropriateness and a duty in the employer to overcome it, improperly relieved the General Counsel of the burden to establish that an unfair labor practice occurred. Because our holding on this issue renders the Board's order unenforceable, we find it unnecessary to address St. Anthony's remaining contention that the Board improperly included Staff Nurse I employees in the bargaining unit.

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[1] 29 C.F.R. § 102.67(f) provides in pertinent part:

> "(f) * * * Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. *Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.*"

(Emphasis added.)

The petition for review is granted. The cross-application for enforcement is denied. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

NLRB v. Silverman's Men's Wear, Inc.

656 F.2d. 53 (3d Cir.), August 6, 1981—250 NLRB 1388

On petition to enforce Board Order

Before Adams, Rosenn, and Higginbotham, Circuit Judges

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Per Curiam: The National Labor Relations Board ("NLRB" or "Board") applies for enforcement of a bargaining order issued to Silverman's Men's Wear, Inc. ("Company" or "Employer"). 29 U.S.C. § 160(e). The order [1] directs the Company to recognize and bargain with General Warehousemen and Employees' Union Local 636 ("Union") as the lawfully certified collective bargaining representative of the Company's employees at its Warrendale, Pennsylvania, warehouse and distribution center. The Company admits refusal to bargain, but defends against the unfair labor practice charge on the ground that the Board's Regional Director should have held a hearing on the Company's objections to the election which led to the Union's certification.[2] Because we believe that one of the objections necessitated a hearing, we deny enforcement.

I.

The bargaining unit at the Company's distribution warehouse in Warrendale consists of 56 employees, 26 of whom were on layoff status at the time of the election. Pursuant to a Stipulation for Certification upon Consent Election, members of the unit voted by secret ballot on May 31, 1979, following approximately two months of campaigning. The Union won, 29 to 23, with two challenged ballots. The employer filed objections to the election, alleging that the Union's conduct in the waning days of the campaign has substantially disrupted the atmosphere of free and fair choice in which elections should be held. Although the Company originally filed five objections, only three have been preserved for our review.

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First, the Employer claimed that the Union's Secretary-Treasurer, Robert Baird, significantly misrepresented to approximately 20 employees present at a meeting on May 25, 1979, the Wage scales the Union had negotiated for its members at neighboring warehouse and distribution facilities. Second, the Company charged that at the same meeting Baird had infected the election atmosphere with religious prejudice and intolerance when he referred to Mark Silverman, a Company vice-president, as a "stingy Jew." Finally, the Employer alleged that Baird and other Union officials had engaged in unlawful electioneering on the day of election.

The Company proffered witnesses in support of its allegations. The Regional Director interviewed these witnesses and, finding the objections to have raised no "substantial and material factual issues," declined to hold a hearing. 29 C.F.R. § 102.69(d) (1880). On the basis of his investigation he recommended that the Board overrule the objections and certify the results of the election. The Board adopted that recommendation.

After the election was certified, the Union demanded that the Company bargain collectively with it concerning the terms and conditions of employment at the Warrendale facility. The Company refused and an unfair labor practice charge was filed. The Board entered summary judgment for the Union, concluding that all of the Company's claims had been fully litigated and resolved during the representation proceedings. 250 N.L.R.B. 1388 (1980). This application for enforcement followed.

II.

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[1] The Decision and Order of the Board on the unfair labor practice charge are reported, *Silverman's Men's Wear, Inc.*, 250 N.L.R.B. 1388 (1980), but the Board's one-page Decision and Certification of representative, *ilverman's Men's Wear, Inc.*, No. 6–RC–8448 (NLRB Feb. 20, 1980), are not.

[2] This issue is properly before us because a valid certification is a prerequisite to the existence of a duty to bargain with an elected union. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 61 S.Ct. 908,85 L.Ed 1251 (1941); *Vitek Elecs., Inc. v. NLRB*, 653 F.2d 785, 787–788 (3d Cir. 1981).

In order to obtain a hearing on its objections to conduct affecting the outcome of a Board-conducted representation election,

> the objector's proffer of evidence must prima facie warrant setting aside the election. The proffer may not be conclusory or vague; it must point to specific events and specific people. On the other hand, an evidentiary hearing is not required when, if all the evidence proffered by the objecting party is accepted as true, no ground is produced which would warrant setting aside the election.

Anchor Inns, Inc. v. NLRB, 644 F.2d 292, 296 (3d Cir. 1981). "[C]ourts will insist on an evidentiary hearing when a party's objection raises substantial and material issues of fact." *Id.* (*citing NLRB v. Campbell Products Department,* 623 F.2d 876, 879 (3d Cir. 1980)). In the instant case, the Regional Director accepted, in support of the Company's objections, statements he obtained during interviews with proferred employees who allegedly witnessed the Union misconduct. As a court we must decide whether this profered evidence raised substantial and material factual issues, so as to require a hearing. *Vitek Electronics, Inc. v. NLRB,* 653 F.2d 785, at 790 (3d Cir. 1981): *NLRB v. Sun Drug Co.,* 359 F.2d 408, 415 (3d Cir. 1966).

With respect to the first objection, alleging material misrepresentations of fact, the Regional Director compared the statements of the Company's "witnesses" with the allegations contained in the objection and concluded that the statements did not support the allegations. As to the second and third objections, unlawful appeals to religious prejudice and Union electioneering at the polls, the Regional Director, assuming the truth of both the statements of the Company-proffered employees and the allegations contained in the objections, concluded that they provided no basis in law for overturning the election.

We have no trouble agreeing with the Regional Director's disposition of the

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first and third objections. As to the first the only evidence, as opposed to allegation,[3] indicates merely that the union representative, in explaining the union dues structure, stated that those few union members receiving high rates of pay, $12 to $17 per hour, did not have to pay the normal monthly dues of twice the hourly rate, but instead were charged a reduced amount. Moreover, the statement was made six days prior to the election, giving the Employer ample time to respond.[4]

The Board has held that an election will be set aside "only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply * * *." *Hollywood Ceramics Co.,* 140 N.L.R.B. 221, 224 (1962); *see also General Knit of California, Inc.,* 239 N.L.R.B. 619 (1978). Given the evidence proffered, we do not believe the Regional Director erred in concluding that as a matter of law there was no substantial departure from the truth at a time which prevented the Company from making an effective reply. Because this evidence could not satisfy the *Hollywood Ceramics* test, no ground was produced which would warrant setting aside the election on the first objection, and therefore no hearing was required on that objection. *Anchor Inns, Inc., v. NLRB,* 644 F.2d at 296.

The Company relies principally on *Michem, Inc.,* 170 N.L.R.B. 362 (1968), to support its third objecting alleging unlawful electioneering. In *Michem* the Board overturned an election in which a union officer stood beside the line of employees waiting to vote, engaging them in conversation. The Board established a rule against "prolonged conversation between the representatives of any party to the election and voters waiting to cast ballots," based on the premise that "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible." *Id.* The rule, however, has limitations. First it applies to "conversations between a party and voters *while the latter are in a polling area awaiting* [*sic*] *to vote.*" *Id.* at 363 (emphasis added). *Accord, Harold W. Moore,* 173 N.L.R.B. 1258 (1968) (rule applies only to conversations with voters "in the polling area or in line waiting to vote"). Second, the rule "does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that 'the law does not concern itself with trifles.'" 170 N.L.R.B. at 363.

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[3] The Company alleged that Baird stated that the Union had obtained hourly rates of pay of $12 to $17 for workers at two nearby distribution centers. Such a statement, if made, would be untrue, for workers at those centers make considerably less. None of the employees interviewed, however, including those proffered by the Company, remembered such an explicit statement by Baird. Rather, all the employees remembering the mention of wages at $12 to $17 hourly rates stated the figures came up only in discussion of unon dues computations. It is not contended that there are no union members making those amounts.

[4] The Employer asserts that it did not receive notice of the alleged wage misrepresentation until the morning of May 29. The election began at 3:30 p.m. on May 31. Thus, even though the Board would not allow the Employer to make election speeches on company time during the 24 hours before the election, *Peerless Plywood Co.,* 107 N.L.R.B. 427, 429 (1953), it had all of May 29 and much of May 30 to address employees at work to correct any misrepresentation. Further, although half the workforce was on layoff, the Company could reach those employees by telephone and in fact did talk to eight or nine by that method. Yet the Company never presented any clarification of the alleged wage error, either to the employees at work or to those reached while on layoff.

The incidents which the Employer alleges constituted unlawful electioneering do not fall within the *Michem* prohibition. The Company charges first that Baird and another union representative campaigned among employees waiting for the commencement of the election, but the alleged campaigning took placed in the warehouse cafeteria prior to the voting, not the recreation room where the polls were located. Because the campaigning was not directed to voters in the polling area, this alleged

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incident does not violate *Michem.* The second charge is that "a minute or two before the polls were to open, two union adherents burst into the polling place exclaiming 'we are going to be observers in the election, Mr. Baird, is that okay?'" This is precisely the "chance, isolated, innocuous comment" *Michem* excepts from its rule against conversations. There is no indication here of last minute campaigning. The third incident alleged by the Company is that a union adherent stood near the line of workers waiting to vote, "staring" at them and telling them when it was their turn to vote. The only evidence of conversation by this "starting" employee was the exchange of pleasantries. Although, as *Michem* counsels, parties to elections might be wise to refrain entirely from conversing with prosective voters, *Id.*, we conclude that this third incident also was a trifle not reached by the *Michem* rule.[5] In sum, we agree with the Regional Director that the evidence proffered in support of the third objection would not under *Michem* warrant setting aside the election, and so no hearing was required on this objection either. *Anchor Inns, Inc. v. NLRB,* 644 F.2d at 296.

III.

We cannot accept, however, the Regional Director's conclusion that no hearing is necessary on the second ojection. The Company alleged that at the May 25, 1979, meeting attended by approximately 20 employees Union Secretary-Treasury Robert Baird called Company Vice-President Mark Silverman a "stingy Jew." The Regional Director assumed the truth of this allegation, but concluded that "it does not afford a sufficient basis for setting aside an election." For that reason the Regional Director refused to hold a hearing on the objection. The refusal was improper.

In *Sewell Manufacturing Co.,* 138 N.L.R.B. 66 (1962), the Board set aside an election which the union had lost 985–331 because the employer appealed to anti-black racial prejudice in its campaign literature.[6] The employer had sent to employees a number of photographs and newspaper clippings purporting to demonstrate the friendliness of union leaders to blacks and the support the union had given to several civil rights groups. By such a linkage, the employer could exploit any anti-black animus and convert it to anti-union sentiment to defeat the organizational effort. The Board in *Sewell* took a position by which it clearly sought to prevent such tactics. "The Board does not intend to tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to influence the racial feelings of voters in the election." Id. at 71. This view is reflected in the test announced by the Board in *Sewell:*

> So long * * * as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party

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[5] The Company did not allege in the Board prodeeding that the employee was a union agent. In concluding that this incident could not as a matter of law violate *Michem,* we find it unnecessary, as the Board also did, to determine whether the adherent, as a member of the Union's inplant organizing committee, was a union agent. *See generally Season-All Indust., Inc. v. NLRB,* 654 F.2d 932 (3d Cir. 1981).

[6] A second election, which the union lost 931–345, was subsequently set aside because the employer continued the improper campaign tactics. *Sewell Mfg. Co.,* 140 N.L.R.B. 220 (1962).

> making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

Id. at 71–72 (emphasis in original) (footnote omitted). This rule was intended to be consistent with and in furtherance of the Board's function

> to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization
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> in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

Id. at 70

The Board contends that the evidence proffered here was insufficient under *Sewell* to warrent setting aside this election. We disagree. The general rule to be derived from *Sewell,* and the one that we apply, is that an effective appeal to racial or religious prejudice prima facie warrants setting aside an election. The facts of this case disclosed an utterance that falls well within the proscription of that general rule. In making a remark such as the one involved here, a party does not simply set forth another party's position on matters of racial interest. Indeed, the remark, rather than identifying any position of the Employer, can typically serve only to spotlight the minority religion of the Company' principal. Such a remark has no purpose except blatantly to exploit religious prejudices of the voters. It deliberately injects "an element which is destructive of the very purpose of an election." *Id.* at 71. There is no question of truth or falsity in a slur such as this. We can see no reason for the remark except to inflame and incite religious or racial tensions. Thus, the Company has alleged a remark that falls within the *Sewell* definition and, under the rule of that case, the burden of establishing the legitimacy of the remark shifted to the Union. Without a hearing, however, the Union was never required to meet that burden; furthermore, it was a burden that the Union clearly could not have met.[7]

On the other hand, it is not clear whether the Union could have met the separate burden of proving that Baird's remark, although nothing but a slur, was nevertheless harmless. However, in concluding that the objection was meritless prior to an evidentiary hearing, the Regional Director effectively deprived the Company of its right to a considered determination on that issue. *Cf. NLRB v. Staiman Brothers,* 466 F.2d 564, 567 (3d Cir. 1972). In his report certifying the election results, the Regional Director explained that Baird's remark was, in his view, "[a] single, casual reference to a party's religious or ethnic background in a campaign otherwise free of racial hostility." In the Regional Director's view, *Sewell,* as modified by *Paula Shoe Co.,* 121 N.L.R.B. 673 (1958), stands for the proposition that "*only* a deliberate and sustained appeal to racial prejudice which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory [*sic*] appeals affords a sufficient basis for setting aside a Board election." (Emphasis added.) The Board, pursuing this line of reasoning, argues that the incident was isolated, and therefore did not require a hearing. We cannot add our voice to this chorus. As a matter of *stare decisis,* it misstates *Sewell.* As a matter of policy, it is similarly flawed. The remark may not have been reported, but because of its sensitive nature we hold that the Regional Director could determine the extent of its probable impact on the election only after a hearing.[8]

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[7] In a post hoc effort to rationalize the Regional Director's report on a ground not mentioned in that report, the Board in its brief and at argument on this appeal contended that the slur was "marginally germane." Apparently the Board's counsel was attempting to justify Baird's remark for purposes of meeting the second part of the *Sewell* test. However, we can reject that effort on grounds, *inter alia,* of its own lack of merit. If the Union leader had desired to stress the executive's parsimony, he could have referred to "stingy Silverman" or the "stingy vice-president." Instead, he allegedly resorted to a disreputable stratagem of bigots. The man's religion was not germane to the proper purposes of this election effort.

[8] We need not now speculate whether there could ever be a blatant ethnic slur, having no other purpose or possible effect than to invoke irrelevant prejudices, that could properly be treated by the Board as if it had never occurred. For it may be possible that there could be a set of circumstances in which such a remark might be said, even absent an evidentiary hearing, to have had absolutely no effect on the outcome of the election. However, this was not a case in which the slur was so obviously devoid of impact as to be rejected out of hand.

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In *Paula Shoe Co.*, the Board, without a prior hearing, rejected an objection to an election based on the union's inclusion in a handbill of a slur similar in character to the one now before us. Frankly, we find such a conclusion, reached without benefit of a hearing to determine the circumstances and likely impact of such a statement, to be inconsistent with the Board's professed position that "it does not condone appeals to prejudice," 121 N.L.R.B. at 676, and we reject it as an anomaly.[9] We note further that *Paula Shoe*, the only case cited by the Board in which such a result was reached without benefit of a hearing, was decided before *Sewell*.

When it is recognized that *Sewell* stripped the earlier result in *Paula Shoe* of any possible rationale, it becomes clear that the existing cases do not insulate Baird's remarks, as a matter of law, from attack. To the contrary, they stated a standard for legitimacy that the Union is clearly unable to meet.[10] Moreover, the allegations in the Company's objection raised a prima facie case that Baird's religious slur did impermissibly infringe on the employees' freedom of choice. Twenty employees were present when the slur was allegedly made. If three were influenced in their votes by this improper remark, the outcome of the 29–23 election could have been altered. In addition, the Employer was powerless to answer a remark of this type in the way that it could have answered the alleged misrepresentation of wages. To respond to such a racial remark would only draw attention to it and perhaps fuel any bigotry inflamed by the Union leader's appeal. Because the Union resorted to religious prejudice in a manner that may have affected a significant number of employees and that precluded an effective response by the offended party, a new election may be required.[11]

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We conclude that under the law announced in *Sewell*, the Company's allegations, if true, would warrant a new election, assuming that the totality of circumstances surrounding Baird's remarks evinced an atmosphere in which those remarks may reasonably be expected to have had a significant impact on the employees' free exercise of choice. These factors should properly be explored at a hearing, because they constitute substantial and material factual issues necessarily arising out of the allegations made in the Company's objection. *See Anchor Inns, Inc. v. NLRB*, 644 F.2d at 296. Having received the Company's allegations, it was only through a hearing that the Regional Director could determine that such circumstances were *not* present, for only through a hearing could the union have borne its burden of proving that the utterance was harmless. Such a course—followed already by at least some Regional Directors—is necessary if elections are to be kept free, as they should be, from appeals to racial or religious prejudice.

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[9] Apparently, other Regional Directors no longer follow *Paula Shoe*. In two recent cases Regional Directors have scheduled hearings to review what seem to us incidents potentially less damaging to free choice than that alleged here. In *American Enka Co.*, 231 N.L.R.B. 1335, 1342 (1977), a hearing was held on an objection alleging three black union adherents had told another black worker at her home that she had been promoted so she would become a "white folks' nigger." In *Coca-Cola Bottling Co. Consol.*, 232 N.L.R.B. 717, 713–18 720 (1977), a hearing was held on the allegation that a supervisor told four black employees that the man who would be their shop steward if the union won did not like blacks. In the present case, on the other hand, the slur was allegedly stated in front of twenty employees and the election might have come out differently if only three votes were altered.

Although in neither *American Enka* nor *Coca-Cola* were the election results ultimately set aside on these grounds, the hearings served two important functions. First, they provided the essential facts on the alleged improper conduct and its impact. Second, they indicated clearly to parties to elections that the Board will back up with action, not just tongue clicking its position that it does not condone appeals to racial prejudice.

[10] *See* note 7 *supra*. In addition to *Paula Shoe*, the Board on this appeal cited several other cases purporting to support the proposition that this single remark was insufficient as a matter of law to warrant setting aside an election. Although those cases are undoubtedly viable in other factual contexts, they are inapposite here. For example, in *Peerless of America, inc. v. NLRB*, 576 F.2d 119, 125 (7th Cir. 1978), the union had charged the employer with past discrimination against workers on the basis of sex and nationality. Such a charge, concerning a legitimate and germane issue of importance to workers, is wholly different in character from the bald, bigoted slur alleged in this case. Similarly, in *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 440–44 (5th Cir. 1975), *cert. denied*, 424 U.S. 914 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976), the union appeals to black pride that were found not to violate either the *Sewell or Hollywood Ceramics* rules, were different in character than the directly abusive remark alleged here. Moreover, in *Bancroft* a hearing had been held to determine the specifics and impact of the allegedly offensive conduct.

[11] We note that due to the presence of these circumstances, the probable impact of Baird's remark may well have been sufficient to warrant setting aside the election under the standard announced in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), and subsequently revived and reinstated in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). That the objectionable conduct was a racial slur, not a misrepresentation, does not make the *Hollywood Ceramics* rule inapplicable. Both can deprive employees of the "full and complete freedom of choice in selecting a bargaining representative," *Hollywood Ceramics Co.*, 140 N.L.R.B. at 223, and can destroy the "laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The Board's General Counsel recognized the relevance of the rule by arguing in the Board's brief that remark did not meet the *Hollywood Ceramics* standard.

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On the alleged facts, we hold that a hearing was necessary to ascertain whether the remark alleged in the second objection was made, and, if made, the extent to which it infected the election. Accordingly, enforcement will be denied and the proceedings remanded to the Board for a hearing on this objection only.

NLRB v. Belcor, Inc. d/b/a San Jose Care & Guidance Center

652 F.2d 856 (9th Cir.), August 7, 1981—248 NLRB 1201

On petition to enforce Board Order

Before TRASK and BOOCHEVER, Circuit Judges, and CURTIS,* DISTRICT JUDGE

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BOOCHEVER, Circuit Judge: The National Labor Relations Board has petitioned for enforcement of its order that Belcor, Inc. bargain with Hospital and Institutional Workers Union, Local 250, the certified collective bargaining agent. The Board's decision and order is reported at 248 N.L.R.B. 153 (1980). The principal question concerns the property of the conduct of a union representation election. Belcor has also raised an issue regarding the Board's failure to require submission of the evidence relied upon by the regional director in rejecting objections to the conduct of the election. We find that, in the absence of submission of evidence by the regional director two issues require a hearing. Thus, the Board's petition for enforcement is denied and the case is remanded for further proceedings.

The employer, Belcor, Inc., operates a mental health care facility in San Jose, California. Local 250 represents hospital service workers. On May 30, 1979, the union and Belcor signed a stipulation for certification upon consent election.[1] The Board's regional representative conducted an election on July 6, 1979. Of 50 employees eligible to vote, 32 voted for the union, 7 against, 7 ballots were challenged and 4 employees did not vote. The challenged ballots were too small in number to affect the outcome of the election.

On July 13, 1979, Belcor filed a number of objections relating to the conduct of the election. To substantiate its claims, the company filed documentary evidence and seven affidavits.

On August 17, after an *ex parte* investigation, the regional director issued a report in which he recommended that the Board overrule the company's objections. As required by 29 C.F.R. § 102.69(c), the company then filed with the Board a brief and its exceptions to the regional director's report. On November 20, in an unreported decision, the Board denied the company's exceptions, adopted the regional director's report, and certified Local 250 as the employees' exclusive collective bargaining representative.

In order to obtain judicial review of the election certification, the company refused to bargain with the union. The regional director issued a complaint charging the company with an unfair labor practice under § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5). The company admitted its refusal to bargain and again raised its objections to the conduct of the election. The case was transferred to the Board, the Board issued a motion to show cause why the general counsel's motion for summary judgment should not be granted, and the company again raised its objections to the underlying election. In its decision and order of April 17, 1980, the Board refused to reconsider the issues raised in the representation proceeding and ordered the company to bargain with the union. The Board now seeks enforcement of that order.[2]

I. FAILURE OF THE REGIONAL DIRECTOR TO SUBMIT THE ENTIRE RECORD

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*The Honorable Jesse W. Curtis, Senior District Judge for the Central District of California, sitting by designation.

[1] 29 C.F.R. § 102.62(b) (1980).

[1] 29 C.F.R. § 102.62(b) (1980).

[2] Election certifications are not enforceable final orders, *A.F.L. v. N.L.R.B.*, 308 U.S. 401, 404–407 (1940), but an order to bargain following an unfair labor practice hearing is a final order. 29 U.S.C. § 160(e). In the Ninth Circuit an employer challenging election irregularties must present its objections both in the certification proceeding an the unfair labor practice proceeding to preserve the issue for appellate review. *N.L.R.B. v. Children's Baptist Home*, 576 F.2d 256, 261–262 (9th Cir. 1978).

In transmitting the election report to the Board, the regional director neither sent the underlying documentation gathered during the region's *ex parte* investigation, nor submitted any of Belcor's affidavits and other documentation. When the company filed its exceptions with the Board, however, it also filed all the documents that it had given the regional director. Therefore, when the Board issued its decision certifying the election, it had before it the regional director's report, the company's exceptions, and the evidence the company had gathered to rebut the regional director's report. This material is contained in the appellate record. Therefore, any error of the regional director in failing to transmit Belcor's evidence to the Board is harmless.

The company now argues, however, that without the evidence gathered to prepare the regional director's report, the Board was unable to ascertain whether the regional director's report was supportable, and therefore the Board could not overrule the company's exceptions. This argument missess the point.

If no objections are filed, the regional director will certify an election. 29 C.F.R. § 102.69(b). If a party does file objections, the regional director must determine whether the objections are serious enough to warrant setting the election aside. The determination may be made either on the basis of an administrative investigation, or if "substantial and material" factual disputes exist, on the basis of a hearing. 29 C.F.R. § 102.69(d). In a case where no hearing is conducted, the Board will review the regional director's report and the exceptions filed to it. If it apears that no substantial factual disputes exist, the Board will decide the legal issues presented. On the other hand, if the Board finds that there are factual disputes, the case will be remanded back to the region for a hearing. 29 C.F.R. § 102.69(f). A party contesting factual findings cannot simply state a disagreement with the regional director's report. Objections must be specific and they must be supported "by offers of proof in support of findings to the contrary." *N.L.R.B. v. Kenny,* 488 F.2d 774, 775 (9th Cir. 1974). Furthermore, "the Board is entitled to rely on the report of the Regional Director in the absense of specific assertions of error." *Id.* at 776 (quoting *N.L.R.B. v. Tennessee Packers, Inc.,* 379 F.2d 172, 178 (6th Cir.), *cert. denied,* 339 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967)).

If there is a dispute between the facts as presented in the regional director's report and the facts as presented in the exceptions, the dispute must be resolved through a hearing. Factual disputes cannot be resolved on the basis of the regional director's *ex parte* investigation. *N.L.R.B. v. Claxton Manufacturing Co.,* 613 F.2d 1364, 1366–67 (5th Cir.), *modified on other grounds,* 618 F.2d 396 (5th Cir. 1980).

In *N.L.R.B. v. North Electric Co., Plant No. 10,* 644 F.2d 580, 584 (6th Cir. 1981), the Sixth Circuit discussed the appropriate appellate procedures to follow where the Board adopts the director's recommendation without the benefit of the evidence before the director. In substance, we agree with these procedures to determine whether the Board abused its discretion in denying a hearing.

Where the Board certifies the union without the benefit of either a hearing or the full record, we will construe the "well pleaded factual assertions * * * most favorably to [the excepting party]." *Prestolite Wire Division v. N.L.R.B.,* 592 F.2d 302, 307 (6th Cir. 1979). *See also Reichart Furniture Co. v. N.L.R.B.,* 649 F.2d 397 (6th Cir. 1981). If these factual assertions create a material issue of fact, we will remand to the Board to order a hearing. If not, we will affirm the Board's decision. In this case the only question to be resolved is whether the factual issues raised by Belcor are so substantial and material that the Board should have ordered a hearing.[3]

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[3] Belcor also contends that the Board's regulations require forwarding the entire record. The contents of a "record" are discussed in 29 C.F.R. § 102.69(g).

> (g) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case. Materials other than those set out above shall not be a part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision.

The first sentence of Subsection (g) does not refer specifically to evidence the regional director might gather during an *ex parte* investigation. The entire first sentence might be construed as referring to the record developed during a hearing. The second sentence refers specifically to

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II. ELECTION IRREGULARITIES

Belcor's burden to set aside the election is a heavy one, *N.L.R.B. v. Sauk Valley Manufacturing Co., Inc.*, 486 F.2d 1127, 1130 (9th Cir. 1973), particularly where, as here, there has been such an overwhelming vote in favor of the union. *N.L.R.B. v. Claxton Manufacturing Co., Inc.*, 613 F.2d 1364, 1366 (5th Cir.), *modified on other grounds,* 618 F.2d 396 (5th Cir. 1980). Nevertheless, applying the principles we have set forth above, two issues require further evidentiary hearing.

A. The *Savair* Violation

In *N.L.R.B. v. Savair Manufacturing Co.*, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), the Court held that a union could not promise waivers of initiation fees for those who signed union recognition slips before an election. The Court concluded that allowing the union to buy endorsements "paints a false portrait of employees support during [its] election campaign." 414 U.S. at 277, 94 S.Ct. at 499.

The company has introduced employee affidavits which state that Rick McGiffen, an employee active in the drive to unionize the health care facility, promised the affiants fee waivers if they would sign recognition slips prior to the election. According to the evidence, eight employees may have signed recognition slips to avoid paying initiation fees.

The Board counters this evidence with two arguments. First it maintains that in a letter to hospital employees and at two pre-election meetings, the union clearly explained its policy of collecting fees. This policy did not include fee waivers of the type condemned by *Savair.* The director's report states that "there can be no basis for concluding that *any* employee was in doubt or misled as to the [union's actual policy]." (emphasis added). This contention is not supportable in view of the employee affidavits stating that they signed recognition slips to avoid paying fees.

Second, the Board maintains that McGiffen's illegal offers cannot be attributed to the union. Misconduct which is caused by union adherents rather than by the union itself must be more serious to justify setting a election aside. *N.L.R.B. v. Aaron Bros. Corp.*, 563 F.2d 409, 412 (9th Cir. 1977).

The undisputed evidence in this case is that McGiffen was active in the union campaign, served as an election observer, solicited union recognition slips, and distributed "local 250" writing tablets. Activities as union election observers or in campaign organization activities are ordinarily, by themselves, inadequate to prove agency status. *See N.L.R.B. v. Morgan Health Care Center, Inc.*, 618 F.2d 127, 129 (1st Cir. 1980); *Owens-Corning Fiberglass Corp.*, 179 N.L.R.B. 219, 223 (1969), *enf'd,* 435 F.2d 960 (4th Cir. 1970). Nevertheless, we conclude that the evidence might support a finding that the union either authorized or condoned McGiffen's conduct. *Id.; N.L.R.B. v. Golden Age Beverage Co.*, 415 F.2d 26, 32 n.5 (5th Cir. 1969). It was error for the Board to resolve this issue on the basis of the unsupported assertions contained in the regional director's report.

B. Violation of the 24 Hour Rule

In *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953), the Board announced a policy of not

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allowing mandatory meetings of employees for campaign speeches twenty-four hours before an election. In its ban on such activity, the Board specifically exempted voluntary meetings taking place off company premises in employees' free time. 107 N.L.R.B. at 430. In support of its contention that an illegal meeting took place, Belcor has proffered a five by seven index card which refers to a meeting that was to take place at someone's home. On it is written "Mandatory Attendance." The regional director's report indicates that employees treated the meeting as an informal non-mandatory get-together to discuss the union. This is possibly true, but we can not affirm on the basis of the present record which does not include supporting documentation for the director's conclusion. Resolution of this issue also requires a hearing.

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the record where there has not yet been a hearing. In that instance, by suggesting that a party challenging an election might furnish evidence to the Board when it is not included in the regional director's report, the second sentence seems to contemplate a situation where the regional director may furnish the Board with only a "report or decision." At best, the regulations are inconclusive. The Fifth Circuit has considered, without deciding, the appropriate interpretation of this regulation in *Birmingham Ornamental Iron Co. v. N.L.R.B.*, 615 F.2d 661, 665–67 (5th Cir. 1980).

C. Coercion, Sabotage and Electioneering

In the week prior to the election, a storage shed was burned down and an office was burglarized. Belcor points to these incidents to support its contention that there was at atmosphere of fear and intimidation that made it impossible to hold a fair election. The company has failed to proffer any evidence that would link the incidents to the union, or, for that matter, to show that the incidents were even related to the election. The vandalism might just as well have been caused by a mental patient or third parties. In the absence of a showing that any employee was actually coerced or intimidated by these acts, the company's claim does not raise a material issue of fact. *See N.L.R.B. v. Miramar of California, Inc.*, 601 F.2d 422, 424 (9th Cir. 1979) (union adherents brandishing knives did not intimidate or coerce any employee as to his vote); *N.L.R.B. v. Spring Road Corp.*, 577 F.2d 586, 588 (9th Cir. 1978) (Rock throwing, vandalism to cars and property where union was not involved was inadequate showing to require hearing). *Cf. N.L.R.B. v. Masonic Homes of California*, 624 F.2d 88 (9th Cir. 1980) (the *union* was alleged to have made harassing phone calls and one union adherent refused to allow a female employee to close the door of her home while soliciting her vote).

In addition, Belcor points to general disorder and raucousness that took place in an area immediately outside the polling area. Rick McGiffen, the union's election observer, called out to several employees to "[c]ome in and vote." One employee asked another employee how she had voted. Other employees said everyone was voting for the union. An employee stated that "[e]verybody stared at me as I entered the voting room. It made me feel uneasy." Another employee, who was wearing a pro-union button, walked in and out of an office that was in view of the polling area. Belcor makes no effort to attribute this conduct to the union. Furthermore, conversations between union representatives and employees do not constitute a violation where they are only innocuous neutral statements. *South Pacific Furniture, Inc. v. N.L.R.B.*, 627 F.2d 173, 175 (9th Cir. 1980) (statement by union observer to "come on in and vote" not electioneering). *See also N.L.R.B. v. Vista Hill Foundation*, 639 F.2d 479 (9th Cir. 1980) (court sustained an order where extensive conversations took place).

The employee conduct in the health care facility's lounge might be compared to that in *N.L.R.B. v. Aaron Brothers Corp.*, 563 F.2d 409, 412 (9th Cir. 1977), where in a room adjacent to the polling area there were "loud cat calls" and "cheering and shouting." Employees yelled "come on man, let's do it." The court rejected the company's contention that this conduct necessitated a hearing absent evidence that any employees were "intimidated or influenced" by the conduct. Belcor's showing that the conduct in the lounge made affiant Morales "uneasy" is inadequate to demonstrate that any employee was unable to exercise his or her free choice at the polls. *Spring City Knitting Co. v. N.L.R.B.*, 647 F.2d at 1019 (1981).

D. Voting Lists

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Affiant Sandoval stated that the "*observers* [emphasis added] had a list in front of them." Union and employer agents are not allowed to keep separate lists of voters in the presence of voters at the polls. This does not apply to election observers who need the official voting list to determine who is eligible to vote. *See Piggly-Wiggly* #011, 168 N.L.R.B. 792, 793 (1967) ("It [is] the policy of the Board to prohibit anyone from keeping any list of persons who have voted, aside from the official eligibility list used to check off the voters as they receive their ballots"). Not surprisingly, the observers in this case did have a list. There is no suggestion that anyone other than the election observers had access to a list. The evidence in this case does not warrant a hearing on the issue.

E. Failure to Provide Ballots in Spanish

The pre-election sample ballots and instructions were printed in English. The employer never suggested before the election that Spanish language ballots should have been supplied. *See N.L.R.B. v. Lowell Corrugated Container Corp.*, 431 F.2d 1196, 1197 (1st Cir. 1970) (employer's pre-election failure to suggest need for foreign language ballots is "compelling evidence that the proposed procedure was adequate"). *Fibre Leather Manufacturing Corp.*, 167 N.L.R.B. 393 (1967), cited by Belcor, where the Board refused to certify an election, is not on point. In that case the Board was made aware of a potential foreign language problem prior to the election. There is no evidence that any Spanish speaking employee was actually confused about the voting procedure. This contention should not be the subject of a hearing.

F. Union Logos

The company next complains that the customary small union "bug" or logo that appears on items manufactured by union labor was imprinted on identification badges worn by election observers. Belcor's statement that this "display of * * * union insignia by the Board makes it apparent that the election must be set aside," is frivolous.

G. Misrepresentations

The company's final contention is that the union substantially misrepresented facts about the employer that impaired the election. It objects to a letter mailed to employees sixteen days before the election. The letter blames the nursing home industry for preventing a bill from passing that allegedly would have allowed a wage increase for hospital employees. This claim must also be rejected. First, the company had ample time to respond. The election was held more than two weeks after the date of the letter. *See Spring Knitting Co. v. N.L.R.B.*, 64 F.2d at 1017 (9th Cir. 1981) (eight day interval adequate time to respond). Furthermore, the issue relates to general political issues and not specific statements of fact that might be given more credibility because of their source. *See Heavenly Valley Ski Area v. N.L.R.B.*, 552 F.2d 269, 272 (9th Cir. 1977). Belcor has not offered any evidence that the letter deceived the employees so as to affect the election process. *See El Monte Tool & Die Casting, Inc. v. N.L.R.B.*, 633 F.2d 160, 162–63 (9th Cir. 1980). Moreover, the letter does not even relate specifically to the election, but is addressed to all union members.

The case is remanded to the Board with instructions to hold an evidentiary hearing related to the alleged *Savair* and *Peerless Plywood* violations. The Board's petition to enforce its order is accordingly denied.

NLRB v. Lighthouse for the Blind of Houston

653 F.2d 206 (5th Cir.), August 21, 1981—248 NLRB 1366

On petition to enforce Board Order

Before BROWN and GARZA, Circuit Judges, and BEER*, District Judge

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BEER, District Judge: The National Labor Relations Board seeks to enforce its order of April 24, 1980, against the Lighthouse for the Blind of Houston ("Lighthouse," hereinafter). The Board's decision and order is reported at 248 NLRB 1366. Our jurisdiction arises by virtue of § 10(e) of the National Labor Relations Act (NLRA), 29 U.S.C. § 151, et seq.

The Board concluded that the Lighthouse violated § 8(a)(5) and (1) of the NLRA by refusing to bargain with the General Drivers, Warehousemen and Helpers Local Union 968 affiliated with the International Brotherhood of Teamesters, Chauffeurs, Warehousemen and Helpers of America ("Union," hereinafter), which had been certified as the exclusive bargaining representative of a production and maintenance unit of employees in the Lighthouse's Workshop A, and by refusing to furnish to the Union relevant wage and employment information concerning such employees. In so doing, the Board rejected the Lighthouse's contentions that the Board did not have statutory jurisdiction over it; that, even if the Board had statutory jurisdiction, it would not effectuate the purposes of the Act to assert jurisdiction over the Lighthouse; and that the blind employees in Workshop A were not "employees" within the meaning of the NLRA. We find that the Board's order is not supported by substantial evidence and that the Lighthouse has not unlawfully refused to bargain with the Union.

Lighthouse for the Blind of Houston is a nonprofit, charitable corporation with a principal office and place of business in Houston, Texas. A 35-member board of directors presides over and directs its operation. No member of the board of directors receives compensation for his services. The largest single group of board members are ladies who have served as volunteers at the Lighthouse in the past 20 years. The rest of the board members come from a cross section of the business and civic community of Houston. In providing social and technical services to blind people in the Houston area, the Lighthouse divides its operation into five departments: social services, volunteer services, library and special services, rehabilitation and industrial. The social services division provides social work and recreational services both at the facility and at the individual's residence to assist blind persons. The volunteer services division provides volunteers to support the various operations of the Lighthouse. The Lighthouse has a library and special services division, which makes braille, large print and talking books available for the unsighted community. The rehabilitation division offers vocational training which is geared toward helping visually impaired persons adapt to their surrounding environment. The fifth department, referred to by the parties as the Industrial Division, employs blind people to manufacture a product for sale, e. g. felt-tipped pens, mops, commercial scrub brushes, disinfectants and detergents. Pursuants to contracts with the U. S. General Services Administration (GSA), many of the felt-tipped pens, as well as the detergent and the disinfectant, are supplied to federal government agencies pursuant to the Wagner O'Day Act, 41 U.S.C. § 46, et seq. (1970).

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*District Judge of the Eastern District of Louisiana, sitting by designation.

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In 1977, the Industrial Division generated $4,620,000 in revenue from sales of the merchandise mentioned above. This resulted in a so-called profit of $237,000 which was then fed back into the Lighthouse's overall operation. Designation of this amount as "profit" depends, of course, on the bookkeeping methods applied. While there is serious doubt that an actual business-based "profit" was, in fact, earned, there is no doubt that the accounting methods here applied did, in fact, result in a profit figure.

The Industrial Division is divided into Workshop A and Workshop B. Workshop B employees are blind persons who, in many instances, have multiple handicaps and are, thus, unable to be fully productive. Some of these individuals have, after training and rehabilitation in Workshop B, "graduated" to Workshop A.

Workshop A employs approximately 70 individuals, 62 of whom are blind or have severe visual impairments. They perform a variety of packaging and assembling jobs; produce felt-tipped pens, mops and commercial scrub brushes; and bottle disinfectants and detergents. They also perform subcontracting work for various private companies, e. g. assembling fishing rod holders, doing grease check assembly jobs and filling notebook binders with inserts.

Workshop A employees are all paid at least the federal minimum wage for their work. At the time of the representative hearing below, wages in Workshop A ranged from $2.89 per hour to $3.25 or $3.40 per hour, the variations depending on differing levels of productivity. All the Workshop A employees are covered for workmen's compensation, unemployment insurance, hospitalization insurance, certain pension rights, and receive nine paid holidays per year. These workers also receive certain other benefits which vary according to their tenure, including vacation and sick leave.

Workshop A employees are eligible to receive merit raises based on productivity; however, merit raises are subject to recission if production subsequently drops. The progress of each of the workers in Workshop A is evaluated twice a year.

The supervisors in Workship A are, generally, former workers in Workshop A. Most of them are blind. They have limited authority to check time cards to make sure that all workers are present, dock workers who are late approve requests to leave work early or to not come in on a particular day. With regard to discipline, the Lighthouse attempts to resolve problems with its workers by counseling. If a problem can be corrected by counseling and discussion, it is. If a problem persists, it is usually referred to the general manager of the Lighthouse, who then attempts to personally resolve the problem. Failing this, the matter is referred to a workers' committee made up of workers in all departments who are elected each year by the workers themselves. This committee can make final decisions with respect to suspension or termination. In the last four years (prior to 1977), there have been three terminations authorized by this committee. This committee also meets to consider problems of the Lighthouse in general. They are kept informed as to what is projected for the future, the schedule for production, new items being worked on, the holiday situation, vacation schedules and general administration. The Lighthouse has no formal program for placement of blind workers but does attempt to place individuals in private industry on an ad hoc basis, particularly with certain employers. Over the years, there has been an average of four persons a year placed in private employment through Lighthouse-sponsored efforts. Unfortunately, experience indicates that the private sector is not very anxious to hire blind and multi-handicapped workers.

The issues presented here are whether the Board properly asserted jurisdiction over the Lighthouse and whether the Board properly determined that the blind and multi-handicapped workers in the Lighthouse's Workshop A facility are employees covered by the National Labor Relations Act.

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A review of the National Labor Relations Act of 1935, 29 U.S.C. § 151, et seq., and its legislative history leads to the conclusion that Congress did not intend or expect the exercise of jurisdiction by the Board over nonprofit institutions in general that do not affect commerce. *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979).

It is clear from the facts cited above that the individuals who comprise Workshop A and whom the Union now seeks to represent are employees in the generic sense of the word. Those individuals work for a set number of hours a day, perform functions which are or recognized economic value and are paid for the performance of those functions. However, the fundamental relation between these individuals and the Lighthouse is different in many significant aspects from a normal employment relationship.

The focus of the Lighthouse's employment concern is upon rehabilitating its clients and providing the maximum service possible to sheltered workshop clients. For example, regular employees in a typical industrial environment are hired because they have the skill and ability to perform the work involved. Workshop clients, on the other hand, are referred to the workshop by a counselor or social worker precisely because of their inability to preform work in the competitive job market.

The disciplinary structure is not handled in the same manner as in the private industry. When infractions occur, supervisory personnel sit down with the client, talk to him, and try to find out if there was a reason for his problem. If the client cannot be helped in the area where he is working, he is moved to another area. Only if the problem is critical and cannot be handled with counseling, are harsher measures used. Disciplinary discharges are extremely rare. Furthermore, wage payments based on productivity are completely consistent with the rehabilitative purposes of the sheltered workshop. 29 U.S.C. § 214(c) specifically authorizes sheltered workshops' payment to workers to be based upon severity of handicap and productivity. Such payments do not transform a sheltered workshop into an enterprise in which decisions are governed by economic considerations, rather payments relating to productivity are an integral part of the service provided by the workshop. They foster the goal of rehabilitation by providing an incentive to employees to learn the skills and, thus, become sufficiently acclimated to a work environment to move eventually from the sheltered workshop into the competitive job market.

It is certainly true that the Lighthouse's activities are governed, to some extent, by economic considerations. They must pay sufficient attention to economics to maintain a viable entity capable of rendering necessary rehabilitation services. However, the so-called $237,000 profit made by the Lighthouse in 1977 represents only a negligible impact on commerce, in light of all the circumstances here. If it were not for the moneys received from the federal government, as well as other charitable agencies, the Lighthouse would have lost money in fiscal 1977. Further, the vast majority of the products produced at the Lighthouse go to the General Services Administration of the United States government pursuant to the Wagner O'Day Act. Under this statute, the GSA must purchase the Lighthouse products at a price fixed by a presidential committee. 41 U.S.C. §§ 46–48.

Moreover, it is undisputed in the record that the main purpose of the Lighthouse is to provide a wide range of services to blind and disabled persons in order to enhance the quality of their lives including a serious effort to provide its clients with experience which may lead to employment in the competitive job market. When the Lighthouse receives word of a job that is available in private industry, Lighthouse staff personnel are sent to the job site to assist in fully developing that job for a blind worker. Though approximately 50% of those placed in outside private industry find it necessary to return to the Lighthouse, those who return are never refused.

This unusual "employer-client" relationship centers around a corcern for the welfare of the clients. To require collective bargaining in this context is to risk intrusion into the rehabilitative process by bargaining demands which could prejudice the Lighthouse's many faceted efforts at rehabilitation.

Although the Lighthouse clients who are employed in Workshop A are arguably employees within the meaning of the Act, it will not effectuate the purposes of the Act to assert jurisdiction over them. *Goodwill Industries of Southern California,* 231 NLRB 536 (1977).

The Board's contended differentiations between *Goodwill Industries,* supra, and the case at bar are not, in our view, significant. The Board contends that the Lighthouse workers are paid variable wages based upon performance and productivity, and are disciplined using "normal economic and business considerations." As previously noted, the variable wage policy is designed to foster rehabilitation, and discipline procudures certainly vary from those in effect in private industry. On the whole, clients are counseled rather than disciplined, and they are rarely, if ever, discharged. In fact, the record reflects that the Lighthouse's employment policies are commensurate with its rehabilitative objective. Thus, we conclude that the Board's order is not supported by substantial evidence; that the Lighthouse has not unlawfully refused to bargain with the Union.

The Board's application for enforcement of its order is denied.

ENFORCEMENT DENIED.

Southern Indiana Gas and Electric Co. v. NLRB

657 F.2d 878 (7th Cir.), August 10, 1981—249 NLRB 252

On petition to set aside Board Order

Before PELL and BAUER, Circuit Judges, and WILL, Senior District Judge*

PELL, Circuit Judge: Southern Indiana Gas and Electric Company (Company) has petitioned this court pursuant to 29 U.S.C. § 160(f) to set aside a final order [1] of the National Labor Relations Board (Board) which found that the Company violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 158(a)(1), (5).

The Company has recognized the International Brotherhood of Electrical Workers, Local Union 702, AFL–CIO, (Union) as the exclusive bargaining representative of its production and maintenance employees. The Union, seeking also to represent the Company's five Power Control Center's "System Supervisors" (system supervisors), petitioned the Board to direct an election among these employees. The Company opposed the election contending that these employees were (1) "supervisors" exempt from the Act's coverage under 29 U.S.C. § 152(11), and/or (2) managerial employees traditionally omitted from the Act's coverage by the Board, *see NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). A Regional Director of the Board held an evidentiary hearing, concluded that these employees were not supervisory or managerial personnel, and directed an election.[2] The union prevailed and was certified as the system supervisors' exclusive bargaining representative.

The Company refused to bargain with respect to these employees. The Union thereupon filed an unfair labor practice charge on October 29, 1979. The Board's Regional Director issued a complaint and the General Counsel moved for summary judgment which the Board granted. The Board found the Company in violation of Sections 8(a)(1) and (5) [3] of the NLRA and ordered it to bargain with the Union regarding the system supervisors.

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*Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

[1] The Board's Decision and Order, reported at 249 NLRB 252 (1980), is based upon findings made by the Regional Director in the underlying representation proceedings, Case No. 25-RC-7256.

[2] The Regional Director ordered the system supervisors to be placed within the existing production and maintenance bargaining unit should they vote in favor of Union representation.

[3] 29 U.S.C. § 158 provides, in part, that

Continued

The Company continued to refuse to bargain and filed this petition to review and set aside the Board's order. The Board has cross-applied for enforcement pursuant to 29 U.S.C. § 160(e).

The Company's Operations

The Company provides electrical utility service [4] to residential, industrial, and commercial customers over a 751-mile network of high voltage lines in an eight-county area around Vanderburgh County, Indiana. The Company operates a total of seventeen generating units eight of which are dual-fueled with oil and gas, eight are coal-fired, while the remaining unit operates on natural gas. Four of the generating units at the Warwick Generating Complex are jointly owned by the Company and the Aluminum Company of America Generating Company (Alcoa). The Company interconnects with six other utilities at seven interchange points which enables the Company to buy or sell power with these utilities.

The Power Control Center (Center), located apart from the Company's other facilities, monitors the generation and transmission of power for the entire system to ensure the supply of a safe and reliable energy source in the most economical manner. The Center, which operates 24 hours per day, seven days a week, is staffed by the Chief system supervisor, Claude Hunt, five system supervisors, and one clerk. Hunt works the daytime shift and is present during five of the twenty-one weekly shifts. At other times the system supervisors work alone although they generally can get in touch with Hunt, James Van Meter, the Director of Power Production and Procurement, or Norman Wagner, the Vice-President of Operations, if problems arise.

The Role of the System Supervisors

System Supervisors monitor the entire system through electronic measuring devices which enable them to supervise the production and transmission of power, the receipt of purchased power, and the distribution of sold power. They prepare load forecasts daily to predict the amount of power necessary to maintain the system. Factors such as temperature forecasts, customers' additional power requests, and the estimated capability of each generating unit are considered. Because these plans are only predictions, they are subject to frequent modification by system supervisors to adjust to actual capability and load requirements. Actual need may differ from projected need due to changes within the system such as the loss of equipment or interchanges, or due to unanticipated power demand.

If a power shortage develops, system supervisors can exercise a variety of options. They may direct control operators at any of the various generating plants to increase production, and can even start up the more expensive gas-operated turbine if necessary.[5] If no generation is available, the

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supervisors have authority to instruct Alcoa to curtail added power use from the jointly owned plant. These lines remain down until system supervisors authorize Alcoa to bring them back up. Finally, supervisors may decide to purchase power from other utilities. They can commit the Company financially on an instantaneous basis. When purchasing emergency power, system supervisors rarely have time to contact their superiors. Likewise, if the system's generation exceeds present demand for current, the supervisors must curtail generation or sell the excess power.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[4] Although the Company also produces and distributes gas, the parties have stipulated that only electrical operations are relevant here because the system supervisors have no connection with the gas operations.

[5] Because the cost of operating the gas turbine is higher, a decision to implement its use is considered a major decision. It is true, as the Board points out, that approval by or notification of Hunt or one of his superiors is generally desirable when a system supervisor makes this decision. The Board, however, would have us believe that the supervisors cannot implement such a decision under any circumstances without prior approval. The testimony of James Van Meter, the Director of Power Production and Procurement, belies that representation:

> Q: Now, with respect to putting on the gas turbine and taking it off, isn't it correct that *most of the time* the system supervisor must contact the chief, yourself, or Mr. Wagner in order to do that *except in an emergency*, to protect the system?
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> A: * * * [J]ust like any major decision that any of us make due to the cost of that, he reviews that with Mr. Hunt, who will inform me definitely about our need for this. But, that would be no different than me making the decision. I would certainly inform Mr. Wagner of that decision, too.

(Emphasis added.) As discussed hereinafter, the chain of command is always subject to subversion in the event of an emergency, particularly when superiors are not available.

Naturally, Hunt and his superiors have input into major decisions resulting from the modification of a load forecast when they are available. The system supervisors, however, frequently operate the Center alone. Time pressures can prohibit them from clearing their decisions with their superiors. James Van Meter testified at a Board hearing regarding the authority possessed by system supervisors:

> Q: * * * Do they [system supervisors] have the right to modify or alter that plan [load forecast] during the course of the day depending upon what the realities of the loads are?
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> A: I would venture to say that there are very few days that go by that the plan isn't altered, and that's true not only of the day shift, but also of the night shift where the supervisors are alone. There are some modifications that must be made to every plant [sic] due to unforeseen circumstances that come up as a result of generating or buying electricity.
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> Q: And that can occur at any time during any of the shifts?
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> A: That can occur at any time.
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> Q: Do they supervise that judgment independently of any orders?
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> A: They have the right and responsibility to exercise that independently of anything to protect our system.

Beyond power generation and procurement, the system supervisors are also responsible for power transmission. They regulate power flow throughout the system by remote control of transmission substations. System supervisors also oversee maintenance and repair work. They possess the sole authority to order a piece of equipment to be taken out of service or to prohibit its removal. Such a decision requires a detailed consideration of factors such as the overall condition of the system and the likelihood that any particular order may overload other lines. Repair work requires switching which is the diversion and rerouting of power to isolate the line or equipment requiring repair.

Ordinary switching necessitates the preparation of a switching schedule detailing instructions to be carried out by field personnel. These schedules are prepared by the Chief system supervisor or by system supervisors. In nonemergency situations, every schedule prepared by a system supervisor is checked by a second system supervisor or by the Chief supervisor, and by the field operations personnel who requested the repairs. Field supervisors dispatch crews to affected sites. When the crew is positioned in the field and ready to accept orders from the system supervisor at the Center, a field employee talks to a system supervisor by mobile radio. Field employees generally have copies of the switching schedules to assist them in following the system supervisor's radioed instructions.

System supervisors also prepare switching schedules in emergency situations which might occur due to a storm or accident. Unless the emergency occurs during the daytime shift, these schedules usually are not reviewed by anyone. In an emergency situation, the field personnel dispatched to the site have no copies of the switching schedule. The system supervisors are totally responsible to direct people in the field. They radio step-by-step instructions to the field employees, direct them to remain where they are, or instruct them to move to another location. Although system supervisors do not themselves reprimand field personnel, they do report misconduct.

Other duties of the system supervisors include recording data, preparing reports required by the Federal Power Commission and other agencies, and maintaining a written log of problems that arise.

At the hearing, one system supervisor denied ever being invited to management meetings.[6] Van Meter, however, testified that system supervisors are invited to some management meetings and training sessions. He stated that attendance is mandatory, but was unsure whether all of the supervisors actually did attend or whether any disciplinary action was taken against those who failed to attend.

Standard of Review

The Board is accorded substantial discretion when determining whether an employee is exempt from the Act due to managerial status, *see NLRB v. Yeshiva Univ.,* 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1908), or supervisory rank, *Ameri-*

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[6] This same supervisor admitted that he had made reservations to attend the last annual management dinner meeting (a "state of the company" address) but was unable to attend for personal reasons.

can Diversified Foods, Inc. v. NLRB, 640 F.2d 893, 894 (7th Cir. 1981). Consequently, Board findings will be upheld as long as they are supported by substantial evidence. *See, e. g., Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487–88 71 S.Ct. 456, 463–65, 95 L.Ed. 456 (1951); *American Diversified Foods, Inc., supra.* The substantial evidence standard requires this court to review the entire record, including that evidence which detracts from the Board's decision, even though evidence supporting the Board's conclusions, viewed by itself, might seem "substantial." If the record, considered in its entirety, "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence," the Board's decision must be set aside. *Universal Camera,* 340 U.S. at 490, 71 S.Ct. at 466, quoted in *NLRB v. Adam & Eve Cosmetics, Inc.,* 567 F.2d 723, 727 (7th Cir. 1977).

Supervisory Status

Supervisors are excluded from the Act's coverage by 29 U.S.C. § 152(3). Section 152(11) defines a supervisor as

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

We find the Board's conclusion that system supervisors are not supervisors within the meaning of the statute unsupported by substantial evidence.[7] Upon a review of the

entire record, we are convinced that these supervisors possess the authority responsibly to direct other employees. Because § 152(11) must be read in the disjunctive, supervisory status is proven if the evidence establishes the presence of any one of the criteria listed.[8] *See, e. g., American Diversified Foods, supra,* 640 F.2d at 896; *Adam & Eve Cosmetics, supra,* 567 F.2d at 727.

The Board concluded that system supervisors were not supervisors in the statutory sense for several reasons. It noted, for example, that the supervisors are located in facilities separate from, and function within a different employment hierarchy than, the generating station operators or the switching personnel whom they allegedly direct. It is true that the Power Control Center staff, generating station personnel, and repair crews do operate independently of one another to the extent that each is separately housed and each has its own immediate chain of command. It is also true, as the Board indicates, that system supervisors do not assign particular employees to perform switching operations. Rather, they contact a foreman in the field who assigns individuals to report to the locations specified by the system supervisors. The Board further emphasizes the fact that while supervisors can design switching schedules which require overtime, they cannot designate the particular employee who will perform the overtime work. In its brief on appeal, the Board characterizes contacts between system supervisors and other employees as mere cooperative endeavors in which system supervisors routinely impart technical expertise to other employees in the form of requests, not orders.

These factors alone, however, will not deprive the employees of supervisory status if the record as a whole indicates that they do responsibly direct other employees. Upon strikingly similar facts, the Ninth Circuit in *Arizona Public Service Co. v.*

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[7] The Company's alternate contention, that the managerial exemption from the Act applies in this case, rests largely on the system supervisors' ability to bind the Company financially without prior approval in emergencies. While the court in *Arizona Public Service Co. v. NLRB,* 453 F.2d 228, 233 n.10 (9th Cir. 1971), considered such power to be an indicator of *supervisory* status, the Board treated such authority as evidence of *managerial* status in *Central Maine Power Co.,* 151 NLRB 42, 44–46 (1965). Electrical utility employees whose purchases have been deemed "routine," however, have not been accorded managerial status. *Westinghouse Electric Corp. v. NLRB,* 424 F.2d 1151, 1158 (7th Cir.), *cert. denied,* 400 U.S. 831, 91 S.Ct. 63, 27 L.Ed.2d 62 (1970); *Connecticut Light and Power Co.,* 121 NLRB 768, 770 (1958). We recognize that system supervisors' authority independently to commit the Company's credit in this case quite possibly exceeds that previously considered "routine." We need not decide, however, whether this purchasing function would establish an independent basis for exemption from the Act as either a supervisory or managerial responsibility because we find system supervisors' directions to field employees sufficient to establish supervisory status.

[8] Although the Company does not allege that system supervisors discipline field employees, evidence established that they do report misconduct to field supervisors. However, we do not decide whether system supervisors thereby possessed the power "effectively to recommend" discipline.

NLRB, 453 F.2d 288 (9th Cir. 1971), ruled that an electrical utility's employees, whose duties and responsibilities were analogous to those of the system supervisors in the case at bar, were in fact statutory supervisors. That court rejected many of the arguments advanced here by reasoning that "[t]he effective exercise of authority is nonetheless supervisory though it is passed on through another supervisory employee. Nor is it less supervisory power because it is couched in non-demanding terms." *Id.* at 233 (citation and footnote omitted). *See Maine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347, 362 (1st Cir. 1980). System supervisors do direct other employees. Van Meter testified that they give instructions to generating operators to increase or decrease power. System supervisor Cook testified that he had the responsibility to direct individual switchmen in the field. The system supervisor's job description stipulates that they have "the authority to direct crews to assure safe and adequate power production." The fact that system supervisors do not exercise complete authority over these employees does not mean that they do not direct them. Nor does the cooperative spirit in which the work is performed deprive the supervisors of supervisory status.

The Board further contends that to the extent the system supervisors do direct other employees, their instructions are nonetheless routine and require little discretion or independent judgment. The Board

found, for example, that "with regard to the switching operation, * * * there's no showing that would support an inference that there is a large significant discretion available to the system supervisors in the manner in which they divert live current from areas to be worked on by production and maintenance employees." Section 152(11) does condition the supervisory exemption upon the exercise of one of the enumerated duties in a nonroutine manner and explicitly "requires the use of independent judgment." *See, e. g., Adam & Eve Cosmetics, supra,* 567 F.2d at 747; *Westinghouse Electric Corp. v. NLRB,* 424 F.2d 1151, 1156 (7th Cir. 1970). We find the Board's conclusion that this condition was not satisfied, however, to be unsupported by the record.

The Board virtually ignored the scope of the system supervisor's authority in emergency situations. If an emergency arises which requires switching during Hunt's absence, a system supervisor must design an emergency schedule and, as with routine switching, give field employees step-by-step instructions by radio. In emergencies, field employees do not possess a copy of the switching instructions and therefore are totally dependent upon the system supervisors to guide them safely through their work, and to release them when the task is completed. As James Gordon, Director of Electric Operations, testified:

> Under emergency switching procedures, the responsibility is up to the system supervisor to totally direct people in the field, to get equipment out of service. Under emergencies, a line fault, if that line has to be broken down and sectionalized, it's his responsibility to direct people to the location where the work needs to be done.
>
> He also quite often does call a district manager and ask him to assign so many people that can perform the switching under his direction.

While the Board emphasizes that switching schedules are usually double-checked, it disregards the fact that schedules generally are *not* checked by anyone in emergency situations unless the emergency occurs during the day shift when Hunt is present.

Although the record does reveal one occasion when Hunt reported in during an emergency when he was not on shift, this does not undermine the supervisor's authority to act wholly without guidance when a superior is not available. The Company's position description, for example, states that:

> The major challenge to this position is the ability to handle effectively necessary spontaneous action and decisions required in emergencies. The incumbent works within the framework of Company policies and practices. He must have approval for power transmitting but can take measures necessary to assure power supply and protect system in time of emergency or absence of Supervisor, Chief System.

Gordon testified that "[o]n an emergency basis, [the system supervisor] has to be knowledgeable enough to be able to sit down and make up a [switching] schedule on pretty short notice. He is there by himself, so he has to make those decisions." The system supervisors here are like those in *Arizona Public Service, supra,* 453 F.2d at 232, who were held to be "more than simple supervisors of machines. They effectively direct field operations during emergencies and after hours."

The Board minimizes the system supervisors' role in emergencies, presumably because emergencies are infrequent. Yet, it is well settled that it is the existence of supervisory authority, not the frequency of its use, which determines supervisory status under § 152(11). *American Diversified Foods, supra,* 640 F.2d at 896; *Arizona Public Service, supra,* 453 F.2d at 230; *Oil, Chemical and Atomic Workers Int'l Union v. NLRB,* 455 F.2d 237, 244 (D.C.Cir. 1971), *cert. denied,* 404 U.S. 1039, 92 S.Ct. 713, 30 L.Ed.2d 730 (1972); *Ohio Power Co. v. NLRB,* 176 F.2d 385, 388 (6th Cir.), *cert. denied,* 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553 (1949); *Graves Trucking, Inc.,* 246 N.L.R.B. No. 52 (1979).

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The Union, as intervenor-respondent, contends that system supervisors' discretion in switching operations is severely limited by the existence of switching guidelines. Gordon, however, testified that existing guidelines ensure "that the proper paperwork is done, the proper people are informed and that someone does not get out of line," but that "the actual step-by-step procedures are determined by the system supervisor based on his knowledge of the system. * * *" Although some routine switching schedules are additionally available, there was no evidence to indicate that they cover every potential contingency or that they are actually used by the supervisors. Each switching situation is unique and each switching schedule "will vary with whatever line section or piece of equipment that you want to get out of service," Gordon testified. In *NLRB v. Detroit Edison Co.,* 537 F.2d 239 (6th Cir. 1976), a factually similar case, the court rejected the argument advanced here. The court reasoned that while specific written instructions covered a number of situations confronted by the system supervisors in that case, there was no evidence to show either that those guidelines covered every possible situation which might arise, or that the employees could not depart from the instructions if they decided that another course of action was more advantageous. *See Maine Yankee, supra,* 624 F.2d at 362 ("[E]ven were we to assume that written guidelines could somewhere be found to cover virtually every eventuality, we do not think that this would demonstrate that independent judgment is not exercised."). We find the existence of written guidelines regarding switching operations insufficient to deprive the system supervisors of supervisory status.[9]

The employer buttresses its position by advancing the argument that unless the system supervisors are considered supervisors, the Company's electrical system is operated without any supervision during certain hours every day and in emergencies. The Board seeks to rebut this argument by pointing out that certain superiors generally are on-call, and that during one emergency Hunt returned to work. The Board ignores the fact that system supervisors are responsible for the complete operation of the Company's electrical system. The fact that they may consult with superiors in emergencies if time permits, or that they may advise superiors of actions taken, should not obscure the fact that they can do virtually anything necessary to protect the system. The record does not support the contention that system supervisors never take discretionary action without consulting superiors. Emergency switching schedules, for instance, are rarely reviewed by anyone unless the emergency occurs during the day shift. Purchases of emergency power can and do occur without prior approval.

The Company's expectation that supervisors will advise one of their superiors of decisions taken independently does not eliminate their authority to take independent action when necessary. As James Van Meter testified regarding the system supervisor's decision to start up the more expensive gas turbine:

> [J]ust like any major decision that any of us make due to the cost of that, he reviews that with Mr. Hunt, who will inform me definitely about our need for this. But, that would be no different than me making the decision. I would certainly inform Mr. Wagner [Vice-President of Operations] of that decision too.

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[9] As Company employees, the system supervisors are also necessarily circumscribed to some degree by the existence of general Company policy. The Company's job description for system supervisors, for example, states that these employees work within Company policies and practices, and that they should perform their duties with the goal of economy, efficiency, and safe power production. This very same document, however, authorizes the system supervisors to take whatever measures they deem necessary to assure power supply and to protect the system in emergencies. Moreover, it is axiomatic that all employees, including top management, work within the framework of Company policy and practices. All Company employees are, or should be, necessarily interested in producing power cheaply and safely.

* * * * *

> I want to say, that doesn't mean that [the system supervisor] doesn't make the deci-
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> sion, but it is passed on all the way through.

Neither the Company's expectation that system supervisors will inform a superior of actions taken in emergencies, nor the very infrequency of emergency situations, detracts from the supervisory status of these employees. *Maine Yankee, supra,* 624 F.2d at 364; *Detroit Edison, supra,* 537 F.2d at 244. Emergency decisions made by lower level supervisory personnel are eventually passed up through the management hierarchy in almost every business. *Detroit Edison, id.* There is no guarantee that a superior will be available for consultation after hours, or in every emergency, even assuming that time factors would permit such contact. Especially in light of this, if these employees are not supervisors, then the Company's entire electrical system operates without any supervision in the evenings, on weekends, and in emergencies. *Arizona Public Service, supra,* 453 F.2d at 231–32 n.7. *Cf. American Diversified Foods, supra,* 640 F.2d at 896 (fact that shift managers are generally highest ranking employees in store provided one indicator of supervisory status).

The Board's decision fails to mention the Company's own determination of the system supervisor's status. The Company has the right to define jobs within its own hierarchy and, therefore, to grant supervisory status to employees provided that the actual job duties reflect the designation.[10] The Company's designation of the position as supervisory, while not itself determinative, is certainly a significant factor in ascertaining employee status. *Maine Yankee,* 624 F.2d at 365; *Arizona Public Service,* 453 F.2d at 231. The job description in this case stipulates that system supervisors have authority to direct switching crews and to take unsupervised emergency measures when necessary. The description specifies that the "major challenge" of the job is "the ability to handle effectively necessary spontaneous actions and decisions required in emergencies." It also acknowledges that the employees' impact on purchasing and power control has an "unmeasurable" effect upon Company revenue and capital. The Board does not assert that the job description is a mere pretense by not fairly reflecting the actual duties of system supervisors. Thus, the Board should have accorded some weight to the job description. *Maine Yankee,* 624 F.2d at 364–65; *West Penn Power Co. v. NLRB,* 337, F.2d 993, 997–98 (3d Cir. 1964).

Finally, we acknowledge two minor factors which, aggregated with the evidence supporting supervisory status detailed above, buttress our determination that the Board's conclusion was not based upon substantial evidence. Initially, we note the contested state of the evidence regarding employee participation in management meetings. The Board found that system supervisors did not attend any management meetings. One witness, however, stated that system supervisors were in fact invited to some management meetings. The sole system supervisor who testified stated that he was never invited to management meetings. Yet he also testified, at another

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point, that he had in fact made a reservation for the annual management meeting dinner, but failed to attend for personal reasons. *See* note 6, *supra,* and accompanying text. While seizing upon the supervisor's denial that he never attended management meetings, the Board gave no weight to Company testimony that system supervisors were invited to meetings. In *Maine Yankee,* 624 F.2d at 365, however, the court cited the Company's *invitation* "to attend so-called management meetings" as one factor supporting supervisory status. The Board oversimplified the dispute in this case when it credited a portion of the contradictory testimony of the only system supervisor who testified[11] and disregarded the Company's testimony on the subject. Secondly, the Board failed to give any weight to the fact that system supervisors are salaried employees ineligible for overtime pay. Again, while this factor, standing alone, may not be overly significant, it does merit some weight when considered with the rest of the evidence supporting supervisory status. *Maine Yankee,* 624 F.2d at 365.

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[10] In *Maine Yankee, supra,* 624 F.2d at 349 n.4, the First Circuit reasoned that the employer's designation of the employees as supervisory was a reasonable effort to exclusively identify them with the interests of the employer. The company's interest in allying those employees exclusively with management was compelling because the employees bore substantial responsibility which, if not conscientiously carried out, could result in an accident exposing the company to significant liability.

In the present case, the electric utility employer's potential liability in the event of a malfunction is not comparable to that of the nuclear facility in *Maine Yankee.* Nonetheless, the principle is applicable. In each case, the employees possess the potential to assert a significant economic impact on the employer. A system supervisor's failure to make the most advantageous decision could, for example, result in a power blackout or in higher energy production costs due to the unnecessary use of an expensive source of power. System supervisors also possess the authority to commit the Company financially on an instantaneous basis when buying power from interconnected utilities. Given these potential economic impacts, it is not unreasonable for the Company to designate the system supervisor's position as supervisory since the Company certainly has an interest in ensuring that the system supervisors are exclusively identified with management.

We consider *Maine Yankee, Detroit Edison, and Arizona Public Service,* to be controlling cases on the issue of supervisory status as applied to these facts. As the Board points out, these cases are not wholly identical factually. Nonetheless, we find the Board's attempts to distinguish them unpersuasive.

The Board contends that the system supervisors in *Arizona Public Service* possessed a substantially greater degree of independent authority than the employees in this case. The Board highlights the Ninth Circuit's determinations that the employees in *Arizona Public Service* chose which linemen would work, when, and where and that the supervisors ignored the chain of command in an emergency. 453 F.2d at 232–33. By contrast, the Board argues, the employees in this case do not choose which individual will perform the work, they merely coordinate switching operations, and they allegedly follow the chain of command even in emergencies. A thorough comparison of the cases indicates that these asserted distinctions reflect only semantic differences.

While we cannot review the record upon which the Ninth Circuit based its decision, we have examined the Board's findings in that case. The Board's Decision and Direction of Election, 182 N.L.R.B. 505 (1970),[12] indicates that the supervisors there worked within an overall framework virtually identical to that in the instant case. In that case, the Board found that the system supervisors "[*n*]*ormally* * * * dispatch crews of servicemen to trouble spots by orders issued to station managers or foremen, although in remote areas or in emergency situations there may also be direct contact with crewmembers." *Id.* at 506 (emphasis added). Employees "may also direct generating plants to increase or decrease power generation.* * * This is ordinarily done by contacting station managers or foremen at such plants." *Id.* Furthermore, the Board in that case found that the system supervisors

> *normally* transmit their instructions to * * * [supervisors in the field], who in turn provide specific local supervision to field employees. * * * Direct contacts with field employees * * * appear to be limited and almost always by telephone, and even then often occur only after the field employees have been ordered by their immediate supervisors to communicate with the [system supervisors] in order to clarify general directions already received from them. Furthermore, orders give directly to field employees * * * are normally in the form of routine directives to perform certain known mechanical functions.

Id. (emphasis added).

The day-to-day operations in the case at bar are similar, and, if anything, reflect greater independence and direction since the system supervisors here maintain communications with and direct switching personnel in the field even in routine situations.

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Upon review, the Ninth Circuit in *Arizona Public Service* primarily focused upon the system supervisors' authority in emergency situations or after hours, a subject largely ignored by the Board. We find that the authority possessed by system supervisors in emergency situations in the instant case does not differ substantially from that exercised by the employees in *Arizona Public Service.* As detailed above, system supervisors can and do bypass the chain of command in emergencies when no prior is available for consultation, or when time simply does not permit the delay inherent in clearing an instantaneous decision with a superior. Similarly, in *Arizona Public Service,* the court noted that the employees discussed courses of action with their superiors when "there is no immediate threat to life or property and a superior is available. * * *" 453 F.2d at 232.

The Board advances a similar contention regarding the employees in *Detroit Edison.* In that case, the court found that the functions performed by the company's system supervisors were virtually identical to those performed by the system supervisors in *Arizona Public Service,* 537 F.2d at 242. The Board points out that in *Detroit Edison* the system supervisors issued "literally thousands of instructions to field personnel." *Id.* at 243. The Board, however, does not show that the situation in the instant case is any different. System supervisors here direct switching personnel in the field in every switching operation—routine and emergency. They also instruct generating operators to increase or decrease production. Although apparently no one has counted the precise number of such directives which have ever issued, the record implies that it is clearly a substantial number, surely approaching, and quite possibly surpassing, "literally thousands."

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[11] Of the five system supervisors who voted in the election, four favored Union representation.

[12] The Board's grant of summary judgment based upon these finding is reported at 188 N.L.R.B. 1 (1971).

Second, the Board contends that employee responsibilities in *Detroit Edison* differed from those at hand because evidence in that case showed that system supervisors "take over" any operator who ordinarily would be controlled by a local supervisor anytime the situation warrants. 537 F.2d at 243. In the case at bar, system supervisors similarly "take over" switchment in the field particularly in emergencies by guiding them through the switching operation, directing them to new locations when necessary, and releasing them when finished. That the system supervisors do not initially assign the particular individual who will perform the switching operation is immaterial. The supervisors nevertheless directly instruct the employee. Both routine and emergency switching schedules originate in the Power Control Center. Field supervisors dispatch the switchmen, but do not themselves formulate the switching procedure. Finally, contrary to the Board's assertion, higher officials do not always handle emergency situations. The record reflects only one instance in which the Chief system supervisor returned after hours during an emergency. The record also indicates that system supervisors possess authority to take independent actions when necessary to protect the system.

Finally, the Board distinguished *Maine Yankee* in oral argument by emphasizing that in that case the Shift Operating Supervisor (SOS) had authority to direct one other employee also stationed in the control room, and two others (by telephone) stationed elsewhere in the plant. The fact that the court found that the SOS directed both sets of employees indicates that presence of the employees subject to direction in the same immediate area as the supervisor is not required. The Board asserts that, in the case at bar, the employees do not report directly to the supervisors as was the case in *Maine Yankee.* Although the Board is correct, *Arizona Power* and *Detroit Edison* so illustrate that supervisors can responsibly direct other employees even when those employees routinely report to someone else.

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The Board prefers to analogize the SOS in *Maine Yankee* to the Chief system supervisor in this case. The comparison quickly disintegrates, however, because the Board concedes that a plant shift superintendent, the SOS's superior, was always present at the plant (though not always in the control room) on every shift, thus rendering the SOS the second ranking employee on every shift. 624 F.2d at 351, 352. Although at any moment, the plant superintendent might have been traveling between parts of the plant and therefore momentarily beyond contact, the fact remained that the superintendent was always on the premises. This contrasts starkly with the situation in the instant case where the system supervisors operate wholly on their own in evenings and on weekends. Although superiors may be accessible by telephone, their absence from the plant necessarily renders them somewhat less accessible than a superior stationed within the very same plant. Yet the court in *Maine Yankee* found significance in the possible momentary inaccessibility of the plant superintendent because the evidence "established that in the event of an emergency, the SOS's clear responsibility includes the taking, on his own initative, of the proper corrective measures where prior consultation with the plant shift superintendent is not possible." *Id.* at 363.

Cases cited by the Board in its brief on appeal which might arguably mandate a different result are inapposite. In *Exxon Pipeline Co. v. NLRB,* 596 F.2d 704, 706 (5th Cir. 1979), for example, employees monitoring oil flow in pipelines notified field personnel when problems arose but, unlike the present case, they had "no further authority or responsibility to direct the field personnel in the manner of performing their remedial duties." In *Oil, Chemical and Atomic Workers Int'l Union v. NLRB,* 445 F.2d 237, 242 (D.C. Cir. 1971), *Cert. denied,* 404 U.S. 1039, 92 S. Ct. 713, 30 L.Ed.2d 730 (1972), helium plant operators were specifically instructed to contact the plant manager in any emergency "rather than to exercise 'independent judgment.' " By contrast, system supervisors in the case at bar are explicitly admonished to take any necessary measures to protect the system in emergencies anytime supervisors are unavailable or time pressures forbid consultation.

In its decision the Board cites prior NLRB decisions[13] ruling that electrical utility dispatchers (which the Board finds, without discussion, to be "obviously analogous" to system supervisors) were neither supervisory nor managerial personnel. *Arizona Public Service Co.*, 182 N.L.R.B. 505 (1970), *enf. denied* 453 F.2d 228 (9th Cir. 1971), and *West Penn Power Co.*, 139 N.L.R.B. 810 (1962), *enf. denied* 337 F.2d 993 (3d Cir. 1964), however, undermine the Board's conclusion here since enforcement was ultimately denied in both cases. The system supervisors' responsibility actually to direct employees in the field is significantly broader than authority of the dispatchers in *Western Colorado Power Co.*, 190 N.L.R.B. 564, 566 (1971), who could "effect the assignment of other employees only remotely by calling for a line crew at an outlying station in emergency situations." Similarly, this case is unlike *Connecticut Light and Power Co.*, 121 N.L.R.B. 768 (1958), in which the Board denied both supervisory and managerial status to an electrical utility's load dispatchers. On the surface, the dispatchers' responsibilities seen somewhat analogous to many of the duties performed by system supervisors, but the opinion contains too little detail to ascertain the actual amount of authority possessed by the dispatchers. The Board accorded substantial significance to the existence of "detailed written rules" which, it found, abrogated the dispatchers' independence. *Id.* at 770. To the extent that these regulations were so detailed and binding as to prohibit any exercise of independent judgment, *Conneticut Light and Power* differs from the case at bar in a crucial respect. To the extent, however, that the Board may have mischaracterized rules which this and other circuits

consider mere written guidelines[14] allowing independent discretion, the Board's view clearly is contrary to the law as it exists today. For the same reason, this case is also unlike *Boston Gas. Co.*, 136 N.L.R.B. 219, 223 (1962), in which action taken by dispatchers in emergency situations required some inital discretion, but essentially "involve[d] certain predetermined procedures varying in each case only in a degree corresponding to the extent of the emergency." Finally, in *Baltimore Gas and Electric Co.*, 138 N.L.R.B. 270, 277 (1962), in which action taken by dispatchers in emergency situations required some inital discretion, but essentially "involve[d] certain predetermined procedures varying in each case only in a degree corresponding to the extent of the emergency." Finally, in *Baltimore Gas and Electric Co.*, 138 N.L.R.B. 270, 277 (1962), the Board granted supervisory status to chief and senior load dispatches, but denied that status to the remaining load dispatchers. Chief and senior dispatchers forecasted and scheduled electric loads as do the system supervisors in the case at bar. The Board shed no further light upon dispatchers' responsibilities except to note that the lower level dispatchers worked under the immediate supervision of, or performed their duties according to explict written directions left by, the senior dispatcher. 138 N.L.R.B. at 277. Consequently, we cannot conclude that the duties of lower level dispatchers and system supervisors are identical, or that the responsibilities of chief or senior dispatchers and system supervisors differ significantly.[15]

For the reasons stated herein, the Company's petition to set aside the Board's order is granted and the Board's cross-application for enforcement is denied.

Petition To Set Aside Granted; Enforcment Denied.

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[13] While Board decisions merit respectful consideration as authority, we do note that the orders cited by the Board involving electrical utility dispatchers which have been reviewed by the courts have been denied enforcement.

[14] The courts have rejected the argument that written guidelines preclude independent judgment where the evidence does not show (1) that they cover any situation which might arise, and (2) that employees cannot depart from the guidelines even when they conclude that another course of action would be more appropriate. *Maine Yankee*, 624 F.2d at 362; *Detroit Edison*, 537 F.2d at 243.

[15] We find it unnecessary to discuss *Idaho Power Co.*, 126 N.L.R.B. 547, 551–52 (1960), cited by the Board in the instant case, because *Idaho Power* discussed dispatchers only in relation to their alleged managerial status, an issue which we decline to resolve in the context of the present case.

NLRB v. Delchamps, Inc.

On petition to enforce Board Order

653 F.2d 225 (5th Cir.), August 14, 1981; rehearing and rehearing on banc denied October 7, 1981—244 NLRB 366

Before KRAVITCH and THOMAS A. CLARK Circuit Judges, and LYNNE,* District Judge

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LYNNE District Judge: Pursuant to the provisions of 29 U.S.C. § 160(e), the National Labor Relations Board (the Board) has petitioned this Court for enforcement of its order reported at 244 NLRB No. 51 (August 20, 1979), directed against respondent, Delchamps, Inc.

Vigorously resisting the enforcement of such order, respondent insists that the Board's findings of fact which undergird its legal conclusion that Delchamps violated 29 U.S.C. § 158(a)(1) are unsupported by substantial evidence in the record.

It bears repeating that our duty to canvass "the whole record" in assessing the substantiality of the evidence supporting the Board's order is demanding indeed. As explicated in *Universal Camera Corp. v. Labor Board,* 340 U.S. 474, 487–8, 71 S.Ct. 456, 463–4, 95 L.Ed. 456 (1951):

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
>
> To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably rquipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*

Agreeing with the findings and conclusions of the Administrative Law Judge (ALJ), the Board concluded that Delchamps violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) by engaging in the following subtle practices, *inter alia,* to discourage unionization of its work force:

(1) Delchamps threatened employees with loss of employment in the event of unionization, and threatened not to sign a contract if its employees joined the union;

(2) It coercively interrogated employees concerning union activities and sympathies, and restricted employee movement within its stores because of union activity, and

(3) It created among its employees the impression of surveillance of union activities.

Having canvassed the whole record, we find that there is substantial evidence, albeit forcefully contested, from which the Board could have found the foregoing violations.

Respondent contends that the finding of coercion was infected by error committed by the ALJ in excluding proffered evidence regarding the friendly relationship between its assistant manager, Rejczyk, and some of its employees. We disagree, The existence of friendship between a manager and an employee is only

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one factor to be considered in determining whether the manager's questions are coercive. Both Board and the Courts must weigh the totality of circumstances surrounding the interrogation. *Federal-Mogul v. NLRB,* 566 F.2d 1245, 1249 (5th Cir. 1978). Moreover, Ms. Rejczyk did not question employees in a friendly and informal manner. She sought out particular employees to question and recorded their responses in writing.

Additionally, respondent insists that the ALJ erred in excluding documents relating to the alleged unfair labor practices of the union. This contention is without merit. The document concerned involved unfair labor practice charges against the union which were dissmissed by the General Counsel. *Federal-Mogul, supra.*

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*District Judge of the Northern District of Alabama, sitting by designation.

More troublesome is the Board's conclusion, in rejecting the contrary determination of the ALJ, that the pre-election luncheon and dinner meetings conducted by respondent violated Section 8(a)(1). Substantial evidence in the record supports the Board's finding that, except for the June 15 meeting on the day preceding the election, respondent permitted employees of its several stores who were not on duty to clock in and receive pay for attendance upon these meetings at which free meals were served. While some union supporters attended these meetings, the more active and vocal of their number were excluded.

While an employer may exclude union supporters from meetings held during work hours at which it expresses its opposition to unionization, *Mueller Brass Co.*, 220 NLRB 1127 (1975), enforcement denied, 544 F.2d 815 (5th Cir.1977), and its conduct in providing free meals to employees during non-working hours at campaign meetings does not, *per se,* constitute interference with an election, *Northern States Beef, Inc.*, 226 NLRB 365 (1976), *Ohmite Manufacturing Company,* 111 NLRB 888 (1955), we are constrained to agree with the Board that the combination of these two tactics, to which is added the payment of wages to some, but not all, of its employees for attendance at meeting during their scheduled off-hours constitutes a violation of the Act.

Turning to the remedy proposed by the ALJ and adopted by the Board, we are reminded that the Board has broad discretion in fashioning appropriate remedial measures and its decision must be given "special respect", *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 609, 612 n.32, 89 S.Ct 1918, 1937, 1939, n.32, 23 L.Ed.2d 547 (1969), and "considerable weight", *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed 1568 (1943). Its order should not be altered by the court unless it is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.*

We readily agree that the cease and desist order was clearly appropriate, 29 U.S.C. § 160(c). The affirmative requirement that a "Notice of Employees" be posted at all seventeen of respondent's stores within the loosely described Mobile metropolitan area causes us some pause. Strenuously objecting to the wide-spread posting requirement, respondent insists that the record reveals that the unfair labor practice findings made by the Board implicated only the manager and assistant manager of its store in Fairhope, Alabama (No. 34), the assistant manager of Store No. 46 in Mobile, and one employee of Store No. 45 in Spanish Fort. Therefore, respondent submits that the requirement of posting at the remaining fourteen stores is an unduly excessive and harsh remedy.

The strong surface appeal of this argument is undercut by the findings of the ALJ that since the unfair labor practices affected more than one of respondent's stores in the seventeen store bargaining unit in Mobile and Baldwin Counties, and because of the "close association" between that group of stores, the ends of the Act would best be achieved by requiring it to post such notices at all seventeen stores. This finding is supported by substantial evidence, both direct and inferential, in the record. Indeed, the "close association"

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which precipitated this affirmative remedy is the logical result of the intermingling of the employees of most of respondent's stores at the luncheon and dinner meetings.

ENFORCED.

Alaska Statebank v. NLRB

653 F.2d 1285 (9th Cir.), August 17, 1981—250 NLRB 1384

On petition to review Board Order

Before WRIGHT and HUG, Circuit Judges, and EAST,* District Judge

1286

EAST, District Judge: Alaska Statebank (employer) petitions for review of an order of the National Labor Relations Board (Board) directing the employer to bargain with the union elected by the employees at the employer's Kenai branch bank. 250 NLRB No. 179. The employer challenges the finding of the Board that eligible employees at the Kenai branch alone constitute an appropriate bargaining unit, contending that the only appropriate unit is one composed of employees at all of its branches and head office. The Board cross-petitions for enforcement of its order.

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*Honorable William East, Senior United States District Judge for the District of Oregon, sitting by designation.

The employer bank has a head office in Anchorage and nine branch offices: four in Anchorage, three in Fairbanks, one in Unalaska (Dutch Harbor), and the one in Kenai involved here. Fifteen of the employer's approximately 168 employees work at the Kenai branch. The Kenai branch is 150 miles from Anchorage, 526 from Fairbanks and over 850 miles from Dutch Harbor. There is little employee interchange between the various branches. Although conditions of employment such as wages, hours, and benefits are uniform throughout the bank, each branch manager independently hires, fires, promotes and disciplines branch employees, albeit subject to head office subsequent oversight and general approval.

On October 15, 1979, the United Food & Commercial Workers Union Local 1496 filed a representation petition with the Board, seeking certification as the bargaining representative of the Kenai branch employees. On November 15, 1979, the Regional Director issued his decision that the employees at the branch bank constituted an appropriate bargaining unit under Section 9(a) of the National Labor Relations Act (Act), 29 U.S.C. § 159. An election was held; the employer refused to bargain with the elected union, and the Regional Director issued a complaint charging the employer with unfair labor practices in refusing to bargain. After the Board affirmed the findings and conclusions of the Regional Director, this appeal ensued.

The Act itself provides little guidance to the Board in determining what an appropriate bargaining unit shall be. When the Act does give instruction, it does so in relation to the rights of employees.[1] Assuring employees of the free exercise of their rights is the paramount criterion in determining what will be the bargaining unit.

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The Board's judgment as to what bargaining unit will serve this purpose will rarely be disturbed on appeal. The unit selected need only be an appropriate one; it need not be the only appropriate one or even the optimal unit. *Beck Corp. v. NLRB,* 590 F.2d 290 (9th Cir. 1978). "Because this is an area where special expertise is needed, the Board has exceptionally broad discretion in determining an appropriate unit * * * . Unless clear arbitrary or capricious, the board's legal conclusion—that the unit is appropriate or inappropriate—will be credited on appeal." *Pacific Southwest Airlines v. NLRB,* 587 F.2d 1032, 1037 (9th Cir. 1978).

Employers have generally fought a losing battle with the Board in arguing for employer-wide instead of single location bargaining units. Instead the Board has adopted, in the retail sales, industrial, insurance, and banking industries, a presumption that a single store, plant, office or branch is an appropriate unit. This presumption has generally received approval by the courts. *See, e.g., NLRB v. Lerner Stores Corp.,* 506 F.2d 706 (9th Cir. 1974) (retail stores); *Spring City Knitting Co. v. NLRB,* 647 F.2d 1011 (9th Cir. 1981) (industrial); *State Farm Mutual Automobile Insurance Co. v. NLRB,* 411 F.2d 356 (7th Cir.), *cert. denied,* 396 U.S. 832, 90 S.Ct. 87, 24 L.Ed.2d 83 (1969) (insurance); *Banco Credito y Ahorro Ponceno v. NLRB,* 390 F.2d 110 (1st Cir.), cert. denied, 393 U.S. 832, 89 S.Ct. 101,21 L.Ed.2d 102 (1968) (banking).

The Courts of Appeals for two Circuits have considered the multi- versus single-plant unit issue in bank cases. The First Circuit, in *Banco Credito,* enforced a designation of a single branch as an appropriate unit with facts similar to those in the present case. As here, there was considerable centralization of banking operations and a centralized determination of labor relations policy, with branch employees working under a bank-wide classification system with uniform salaries, hours, and fringe benefits. Services were also centrally administered, with central check clearing, etc. The court held that the factors of supervision by the branch managers over employees on a day-to-day basis, geographic dispersion (the branch office was 40 miles from the head office, and 16 miles from another branch), and the lack of employee interchange (of 206 transfers in the previous 2½ years, only two involved the branch), justified the Board's designation of a single branch unit.

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[1] Section 9(b), 29 U.S.C. § 159(b), provides:

> The Board shall decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act,* the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * * .

(Emphasis added.) These rights are given in Section 7, 29 U.S.C. § 157:

> Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *

The Sixth Circuit, on the other hand, has held that the Board abused its discretion in designating a single branch bank as a unit. *Wayne Oakland Bank v. NLRB*, 462 F.2d 666 (6th Cir. 1972). Instead of disagreeing with the rationale of *Banco Credito*, however, the court distinguished that case on two factors: geographic proximity (all branches in *Wayne Oakland* were within 25 miles of the main office) and substantial employee interchange, which the court felt would create friction and chaos in labor relations were one branch to unionize while others did not.

This court has already approved the single-location unit presumption in the retail

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sales field. In *NLRB v. Lerner Stores Corp.*, 506 F.2d 706, we enforced an order by the Board that designated a single store, out of 400 stores nationwide, as a bargaining unit. The employer argued that a unit composed of all seven San Francisco area stores was the only appropriate one. This court stated that one of the ways the single-store presumption can be overcome is by evidence that the single store "lacks 'meaningful identity as a self-contained economic unit.'" *Id.* at 708. In deciding that the single store was an identifiable economic unit, we focused on the amount of employee interchange between the Bay Area stores, concluding that a 10% exchange between stores over a five-year period was an insufficient amount to preclude a single-store unit. We further stated that centralized control over labor policies will not preclude a single-store bargaining unit. *Id.*

We find no reason why the banking industry should be excepted from the single-location unit presumption already adopted for the retail sales field. As the Board has stated, this would only "deny employees in the expected industry the same rights enjoyed by employees in other industries." *Wyandotte Savings Bank*, 245 NLRB No. 120 (1979).

Applying the factors used in *Lerner*, we cannot find that a bank-wide unit is the only appropriate one. The Kenai branch is geographically isolated, local managers retain control over day-to-day employee relations, and there is no significant amount of employee interchange between the branches. Distance between the branches frustrates effective union activities, since employees would be greatly inconvenienced if not prohibited in attending union meetings hundreds of miles away. Differences in cost of living at the different branch locations might also hinder collective bargaining.

Given these geographic conditions, the employer has not met its burden of showing that the designated unit is an inappropriate one for the purposes of collective bargaining. Employees at the Kenai branch comprise an indentifiable and autonomous unit, and the Board did not abuse its discretion in designating them as a bargaining unit. We, therefore, deny the employer's petition for review and grant enforcement of the Board's order.

ENFORCED.

The Berry School v. NLRB

653 F.2d 966 (5th Cir.), August 17, 1981—239 NLRB 1160

On petition to review Board Order

Before GEWIN,* RONEY and HATCHETT Circuit Judges

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RONEY, Circuit Judge: this case is before the Court on petition for review and cross-application for enforcement of an order of the National Labor Relations Board finding The Berry Schools committed an unfair labor practice by granting only a substandard salary increase to Dr. N. Gordon Carper for the 1977-78 Academic year. Because there is insufficient evidence in the record to support the Board's finding that the action was in retaliation for Carper's protected concerted activity, we set aside the Board's order and deny enforcement.

Briefly stated, the facts are these. Dr. Carper joined the faculty of Berry College in 1965 as Assistant Professor of History and Chairman of the Social Science Department. He was subsequently promoted to full professor, awarded tenure and named one of four Dana Professors, a distinguished chair. In March 1975 Carper attended an informal meeting of approximately forty faculty members to discuss salary increases. This group, termed the "Concerned Forty," appointed Carper chairman of an *ad hoc* committee to investigate the possible advantages of collective bargaining for the faculty. The committee met twice but never made a report. After being made aware of these activities, the President of Berry College, Dr. John R. Bertrand, gave a speech before the faculty and staff explaining why he believed collective bargaining was inappropriate at Berry. He referred in his speech to a "small power bloc" allegedly maneuvering to gain control over the faculty. Shortly thereafter Carper was replaced as chairman of the Social Science Department and the faculty member who has organized the Concerned Forty meeting, Dr. Joyce Jackson, was denied promotion to full professorship.

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*This case is being decided by a quorum due to the death of Judge Gewin on May 15, 1981. 28 U.S.C. § 46(d).

Initially, The Berry Schools was charged with violating section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C.A. § 158(a)(1), for demoting Carper and failing to promote Dr. Jackson. The Board ruled that Carper, as department chairman, was not protected by the Act because he exercised supervisory powers, but that failure to promote Jackson was in reprisal for her attempts to engage in protected activity. *The Berry Schools,* 234 N.L.R.B. No. 145. In *The Berry Schools v. NLRB,* 627 F.2d 692 (5th Cir. 1980) (*Brerry I*), this Court affirmed the Board's ruling as to Carper but reversed the finding of an unfair labor practice as to Jackson because there were legitimate reasons for not promoting her and President Bertrand had decided not to promote her several months before she engaged in protected activity.

After he was removed as department chairman, Carper continued to speak out regarding certain administration practices. In particular, during faculty meetings in January and February of 1977, he advocated a ten percent salary increase for all faculty and renewal of a sabbatical program. These suggestions were overwhelmingly endorsed by the faculty.

Friction developed between Carper and his replacement as department chairman, Dr. Robert Geisel. As part of the salary review process Geisel was required to evaluate each member of his department at the beginning of each year, based on his previous year's performance. In January 1977, Geisel rated Carper as "below average," the lowest possible ranking. The Associate Dean for Arts and Sciences, Dr. Barbara Abels, also was to make an independent evaluation of each professor in Geisel's department. She too rated Carper as below average. these evaluations were sent to the Vice President and Dean of Academic Affairs, Dr. Doyle Mathis. Although Mathis could add his own evaluation if he disagreed with the prior two, he did not make an independent evaluation of Carper. Mathis then met with two other administrators, the Director of Management and Planning and the Controller, to determine tentative salary increases for each faculty member. The tentative increases were submitted to President Bertrand, who approved a $700 increase for Carper without question. The $700 represented a 3.35 percent increase for Carper. The average percentage increase for all continuing faculty for 1977–78 was 6.21 percent.

While the decision of this Court in *Berry I* was pending, the instant action was initiated charging that Carper's failure to get a larger salary increase was motivated by unlawful animus. Although the Administration Law Judge (ALJ) concluded there was insufficient evidence in the record to show that Carper had been discriminated against because of his protected activity, the Board reversed.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of rights" protected by the Act. An employer's denial of part or all of an employee's salary increase for engaging in protected activity is a violation of section 8(a)(1). *See NLRB v. Dothan Eagle, Inc*, 434 F.2d 93, 97–99 (5th Cir 1970).

The Board's ruling that an unfair labor practice has been committed must be sustained by the Court if it is supported by substantial evidence in the record:

> If the Board's decision is based upon such relevant evidence as might be accepted as adequate by a reasonable person, we are not at liberty to deny enforcement merely because the evidence may also reasonably support other conclusions or because we might have reached a different conclusion had the matter come before this Court *de novo. NLRB v. United Insurance Co.,* 390 U.S.

> 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5th Cir. 1967); *NLRB v. Camco, Inc.*, 369 F.2d 125 (5th Cir. 1966). Although the scope of our review is thus limited, we may deny enforcement of an order of the Board if, after full review of the record, we are unable conscientiously to conclude that the evidence supporting the Board's decision is substantial. *Universal Camera Corp. v. NLRB*, 340 U.S. [474] at 488, 71 S.Ct. 456 [95 L.Ed. 456] [(1951)]; *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d at 200.

NLRB v. Mueller Brass Co., 509 F.2d 704, 706–07 (5th Cir. 1975). Moreover, where the Board has reversed a decision of the ALJ finding no unlawful behavior, the Court has an obligation to examine the evidence and findings of the Board more critically then if the two were in agreement. *NLRB v. Florida Medical Center, Inc.*, 576 F.2d 666, 674 (5th Cir. 1978).

Carper's substandard salary increase could properly result from his poor evaluation. The ALJ found, and the Board did not dispute, that Carper was not discriminated against in comparison with other professors who received a below average evaluation. Of the ten professors so rated, only

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one received a salary increase of more than $700 ($850 or 4.4 percent) and four received no raise at all (one contract was not renewed).

The Board, however, decided the poor evaluation was illegally motivated, a conclusion based on timing. Prior to 1976, Carper had consistently been rated as above average ("excellent" or "good to excellent" on the scale used in previous years). The Board found that Carper continued to perform as an outstanding professor during 1975 and 1976 and should have been rated as above average. In light of its finding that Carper was engaged in protected activity at the time and that Berry College had expressed animus toward such activity, the Board determined that a prima facie case of discrimination could be inferred. The Board discredited Berry College's stated reasons for rating Carper below average. It is this determination of the Board that is unsupported by the record. The General Counsel failed to show the stated reasons were pretextual and therefore failed to sustain its burden of proving by substantial evidence that the substandard salary increase was unlawfully motivated. *See Federal-Mogul Corp. v. NLRB*, 6 F.2d 1245, 1259 (5th Cir. 1978); *Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617 (5th Cir. 1961).

The department chairman, Dr. Geisel, testified he evaluated Carper as below average in 1977 because of what he perceived as Carper's hostile and uncooperative attitude toward him and within the department generally after his 1975 demotion. Geisel stated that in making evaluations he gave heavy weight to the teaching performance of the faculty member and that he considered "relations with the college, duties within a department, advising, and of course, class activities themselves" particularly important. Geisel cited numerous examples of Carper's alleged poor attitude after he was replaced as department chairman: refusing to give up the chairman's office; failing to return departmental forms on time; making derogatory statements about recently hired department members; submitting a grade for a student he was not assigned to supervise; not following department rules concerning the handling of student evaluation forms; not keeping scheduled office hours; complaining about teaching an 8:00 a. m. class; intimidating student advisees; using class time to criticize The Berry College administration; and changing class times without following the proper procedures. Geisel also testified he could not recall a single member of the department who had not complained to him about Carper's attitude. The magnitude of Geisel's dissatisfaction with Carper was evidenced by the fact he recommended that Carper not be continued in his position, although he noted that Carper held tenure.

Carper testified regarding many of these problems. The ALJ sided with Carper in most instances and concluded that Geisel had not acted objectively in evaluating Carper as below average. Nevertheless, the ALJ found that Geisel believed the problems to be real and that his evaluation was made in good faith based upon such belief and not upon Carper's protected activity. The Board deferred to this finding of the ALJ, which was amply supported by the record (regardless of who was right or wrong as between Geisel and Carper). It nonetheless found an unfair labor practice because each of the other administrators involved in the evaluation process accepted the subpar evaluation without question.

The ALJ drew no specific conclusions regarding Associate Dean Abels' evaluation of Carper. Abels testified that her 1977 evaluations were based on the ratings given by the department chairman, a disire to achieve uniformity between departments, and her own independent knowledge of the faculty member. Since she was new in her position, Abels said she gave rather heavy weight to the department chairman's evaluation, making a different evaluation only if she had reason to believe the chairman was wrong. Thus, she gave eight evaluations exactly the same as Dr. Geisel and gave only one professor a different (and higher) evaluation.

With regard to Dr. Carper, Abels mentioned four factors from her personal knowledge which led her to believe Geisel's below average evaluation was appropriate: (1) Carper's workload was among the lowest of the fulltime faculty in his department; (2) he changed the meeting time for some of his classes; (3) he complained bitterly about being required to teach an 8:00 a.m. class; and (4) from her exposure to informal student conversations, she felt student feeling toward Carper's teaching in 1976 was not particularly good.

The Board failed to consider this last stated reason and discounted the other three as not supported by the record. The Board found that Carper's workload was actually above average and that Geisel had approved the one documented class change. It further found Carper had reason to complain about teaching the 8:00 a.m. class and that the College had acted unreasonably in this regard.

It is unnecessary for the Court to scrutinize in detail the Board's findings as to what actually occurred. It is sufficient to say the testimony was conflicting with regard to Carper's workload and his request for time changes and the Board was entitled to draw the conclusions it did. Regardless of what was true in fact, however, the Board did not find, nor could it on the record, that Abels did not in good faith believe the stated reasons to be true. She testified the records showed that Carper taught the absolute minimum number of required hours in 1976. No documentary evidence was offered to dispute this testimony. Although Carper stated his workload in fact was rather heavy because of the number of upper level preparations, Abels was not questioned about this.

Whether or not Geisel eventually approved Carper's request for a class change, it is clear from the record that a confrontation had occurred and that Geisel believed Carper had acted improperly. Again, there is no record evidence from which the Board could conclude that Abels did not reasonably believe the incident occurred.

Finally, in rejecting Abels' testimony regarding the 8:00 a.m. class the Board stated, "[a]s to his 'complaining bitterly' about teaching an 8:00 a.m. class, the Administrative Law Judge found, and we agree, that Dr. Carper had reason to argue against the setting of that class for that time and that the administration should have understood his concerns." The Board's analysis completely misses the mark. Whether the school acted unreasonably or made a bad managerial decision in requiring Carper to teach the course at 8:00 a.m. is totally beside the point. The only relevant question is whether Abels in good faith based her evaluation on the belief that Carper's complaints were unfounded. As this Court has often stated,

> The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the [unfavorable action] is evaluated in terms of its reasonableness.* * * But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can [take unfavorable action] for good cause, or bad cause or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specified definite qualification: it may not [take unfavorable action] when the real motivating purpose is to do that which Section 8(a)[(1)] forbids.

Florida Steel Corp. v. NLRB, 587 F.2d 735, 745 (5th Cir. 1979), *(quoting NLRB v. McGahey,* 233 F.2d 406, 413 (5th Cir. 1956)).

After a thorough review of the record, we cannot find sufficient evidence to permit the Board to conclude that Abels' evaluation was illegally motivated. Although some of Abels' stated reasons may not have been true in fact, there is simply no evidence from which to infer that she did not believe them to be accurate. Abels herself did not express any animus toward the exercise of protected rights and it would be pure speculation to say her evaluation was based on Carper's protected activity. An unlawful purpose is not lightly to be inferred. "Mere suspicions of unlawful

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motivation are not sufficient to constitute substantial evidence." *Federal-Mogul Corp.*, 566 F.2d at 1259.

The Court is not unaware of the difficulty of proving pretext. In the context of this case, however, where it is clear that problems existed between Geisel and Carper, and where there is no other evidence showing the administrators did not or could not in good faith have believed the problems to be real, this showing alone is insufficient to rebut the College's explanation for the evaluation.

Although the Board discredited certain justifications offered by the other administrators for Carper's below average evaluation, these individuals were primarily involved in setting the actual salaries and not in determining or reviewing the evaluations received. Dean Mathis was the only administrator other than Abels and Geisel who could add his own evaluation. His testimony as to why he did not make an independent evaluation of Carper was credible and this failure alone is insufficient to support a finding of unlawful motivation.

Thus, the only support in the record for finding an unfair labor practice is the College's knowledge of Carper's protected activity and its biased attitude. General bias, however, without any specific evidence that Carper's substandard salary increase was unlawfully motivated, cannot support a finding of an unfair labor practice. "An unlawful motivation * * * cannot be based solely on the general bias or anti-union attitude of the employer, whether proved or conceded, but must be established by other facts in each individual case." *Florida Steel Corp.*, 587 F.2d at 744. *See NLRB v. Speed Queen*, 469 F.2d 189, 194 (8th Cir. 1972); *NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 384 (5th Cir. 1960). The decision of the department chairman and the associate dean to evaluate Carper as below average may not have been a good or reasonable one, but so long as it was not in retaliation for protected activity the Board had no jurisdiction to question it. As suggested in *Berry I*, the courts and the Board should be loathe to intrude into the internal affairs of a college or university, particularly in regard to its academic judgments, absent a clear showing that an unlawful practice has occurred. 627 F.2d at 706. Without substantial evidence in the record as a whole from which the Board could reasonably infer a causal connection between Berry College's anti-organizational attitude and Carper's substandard evaluation and salary increase, *see Mueller Brass Co.*, 509 F.2d at 711, we decline to enforce the Board's order.

ORDER SET ASIDE; ENFORCEMENT DENIED.

NLRB v. Blake Construction Co., Inc., and its alter ego, M & S Building Supplies, Inc.

663 F.2d 272 (D.C. Cir.) August 17, 1981—245 NLRB 630

On petition to enforce Board Order

Before MCGOWAN, WILKEY and WALD, Circuit Judges

Opinion for the Court filed by Circuit Judge WALD

WALD, Circuit Judge: The National Labor Relations Board (the Board) seeks enforcement of its Order[1] against Blake Construction Co., Inc., and M & S Building Supplies, Inc. (referred to individually as Blake and M & S, and collectively as the Company). We grant the application except for paragraphs 1(c), 2(b) and 2(d) of the order insofar as they are premised on the Company's violation of sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (the Act) through failure to extend to its non-union employees the benefits of an existing collective bargaining agreement and through refusal to deal with the Union as the representative of these non-union employees. As explained more fully below we decline to enforce these portions of the order because we find that these violations were neither alleged in the complaint issued by the Board General Counsel nor fully and fairly litigated in the ensuing proceedings.

I. BACKGROUND

The record depicts grave violations of the Act which, with the exception discussed below, the Company concedes on this appeal. The following facts are undisputed.

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[1] 245 NLRB No. 76 (Sept. 28, 1979), the Board's order also appears at J.A. 17-22 ("J.A.——" refers to pages in the Joint Appendix filed in conjunction with this appeal).

Blake, a District of Columbia corporation, is a general contractor engaged in the construction of buildings. Blake owned and operated a yard and warehouse located at 5700 Columbia Park Road, Landover, Maryland until February 1978.

M & S is also a District of Columbia corporation established in 1974 to purchase and resell construction materials, equipment and supplies. M & S and Blake have the same corporate headquarters at 1120 Connecticut Avenue, N.W., the same principal stockholders and the same corporate officers. Prior to February 1978 M & S sold building materials and provided a tire fill service at a warehouse located at 5710 Columbia Park Road, Landover, Maryland immediately adjacent to the Blake yard and warehouse described above.

Blake was a member of the Construction Contractor's Council, Inc. (3-C's), a multi-employer bargaining unit. As such Blake was subject to a collective bargaining agreement (the contract) entered into by the 3-C's and Local 639 of the International Brotherhood of Teamsters (the Union) which was in effect from August 1, 1975 to April 30, 1978.

In July 1977 a Blake employee called the Union and complained that although not a Union member, as an employee of Blake he should be covered by the contract and receive the prevailing wages provided therein.[2] At this time only seven out of a fluctuating work force of 40–70 Blake employees belonged to the Union.[3] In response to this call a Union representative[4] visited Blake's Columbia Park yard and warehouse. There he spoke to between eight and ten employees who were not members of the Union. Since these non-union employees performed work that fell within the job classifications covered by the contract, and in light of the fact that the contract contained a Union security clause,[5] the Union representative attempted unsuccessfully to ascertain from a supervisor at Blake why the Union security provision had not been enforced.[6]

On August 31, 1977 the Union official met again with the Blake supervisor at the Columbia Park site in the presence of two employees who had applied for Union membership and had paid the Union initiation fee. At this meeting the Union requested that the two employees be paid the wage specified in the contract. The Company refused but indicated it would be willing to negotiate a separate contract for these two men.

Subsequently the Union shop steward actively solicited for Union memberships among Blake employees and obtained approximately thirty-two signed Union authorization cards. The Union then sought to have the Company pay these recruits the prevailing contract rate. The Company refused.

On February 17, 1978, Blake and M & S entered into a contract providing that, as of February 18, 1978, M & S—which previously had only one part-time employee—would thereafter furnish all personnel for the operation of Blake's Columbia Park Road business and for the operation of all Blake

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[2] Article Sixteen of the contract provided specific wage rates for the following job classifications:

Boom Trucks
Small Dump Trucks
Water Sprinklers
Grease and Oil Trucks
Dump Trucks Over Eight Wheels
Flat Trucks
Trailers
Low Boys
Tractor Pulls
Warehousemen Job Site
Pickups Hauling Materials
Helpers
Carryalls
Large Euclids
Small Euclids
Euclid Water Sprinklers
Tunnel Work Underground
Mechanics
Mechanics Limited
Greasers
Tiremen
Stockroom Men
Runners
Pay Haulers

GCX 3, at 23-25. ("GCX ——" refers to the General Counsel's exhibits).

[3] Blake considered the contract binding only as to these seven employees and maintains that the Union shared Blake's interpretation of the contract. Given our resolution of this case it is unnecessary for us to determine either the accuracy of this assertion or its potential legal significance. However, by way of background it is noteworthy that the Union did not show an active interest in Blake's non-union employees until mid-1977 when a new slate of Union officers was elected. The Union contends, nevertheless, that the contract applied to all of the Blake's employees and that it did not waive its right to represent them.

[4] The newly elected vice-president and business agent of the Unon investigated the complaint.

[5] Article One of the contract stated that all employees covered by the contract were to become members of the Union within thirty-one days after their employment and were to retain their membership during the period of contract coverage. GCX-3 at 3–4. Article One also obligated the Company, upon written notice from the Union, to discharge any employee covered by the contract who failed to become a Union member. *Id.*

[6] At no time prior to mid-1977 did the Union enforce this Union security provision by demanding discharge of an employee for not joining the Union. Nor did the Union press any grievances on behalf of any non-union employee of Blake or request that Blake pay the contract wages to any employee who had not either joined the Union or signed a Union membership application.

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trucks transporting materials and supplies."[7] Pursuant to this contract Company representatives informed Blake's Columbia Park Road employees that Blake was no longer in the trucking and warehousing business, but that instead M & S would now engage in these activities. The employees were also informed that Blake was laying them off, but that M & S was simultaneously offering them jobs, beginning on February 20, 1978, the following Monday. Each Blake employee would be required to sign a new employment application and a new W-4 form.

At a meeting on February 17, 1980, work applications for M & S were distributed to and signed by Blake's non-union employees. At M & S these employees received the same rate of pay they had been paid by Blake.

At a separate meeting that day the six Union employees then working at Blake[8] were told that their wages at M & S would be lower than their current rate of pay under the contract. The shop steward promptly reported the layoff and new terms of employment offered by M & S to the Union. On the following work day, a Union representative visited Company representatives at the Columbia Park Road site. The Company confirmed at that time that it would no longer honor the contract. When the Union representative tried to learn the new rate of pay for Union employees he was told that it was none of his business and that the Company would henceforth be dealing with the Union employees on an individual basis.

A Company representative then met individually with the six Union employees and negotiated their rate of pay at M & S.[9] These rates varied with the individual but in all cases the wages were substantially less than those received at Blake under the contract.[10] One of the six employees, the Union shop steward, refused to work at a reduced rate of pay and left the Company.[11]

Following the transfer of Blake's operations to M & S, employees performed the same functions at the same work site as they always had. They punched the same time clock, worked the same hours, and received their work instructions from the same supervisory staff. For example, the

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former yard superintendent at Blake became the warehouse manager of M & S. He testified that in his new capacity he did essentially what he had always done, namely supervise "the organization of the warehouse, and the distribution of the material, equipment, and supplies kept at the Landover yard location." Tr. 78. The employees continued to drive trucks with "Blake" insignia on them to the same building sites. The telephone and mail service at M & S remained the same as at Blake. The operations of both M & S and Blake continued to be supervised from the joint headquarters of both companies at 1120 Connecticut Avenue. In sum, as the Company states,

> from the viewpoint of M & S's employees, the ownership, management, business purpose, operation, equipment, customers, and supervision of M & S after February 20, 1978 was substantially

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[7] GCX-9. The contract required Blake to reimburse M&S on a weekly basis for the costs of providing these services and to pay M&S a monthly fee of 10 percent of these expenditure. *Id.*

[8] At this time only six of Blake's employees, all truck drivers, were members of the Union and paid wages specified in the contract. A sev- enth Union member left Blake on January 12, 1978 and is not involved in this appeal.

[9] The tone of these "negotiations" is suggested by one employee's unrefuted account of his meeting with the Company representative, the details of which were corroborated by the Company representative Tr 112. ("Tr. —— refers to the transcript of the hearing held before the ALJ.) According to this employee, who was then making $8.50/hour, the Company representative said:

> I'm saying you till last. * * * I ain't going to mess around with you. I'm going to tell you what I got. * * * I got six dollars and a quarter with insurance and a week's vacation. I got six dollars and seventy-five cents with nothing.

Tr. 425. The employee replied "No, I can't go with that" and quit. *Id.*

[10] The first Union employee to meet with the Company representative had been a Blake employee since 1961. At Blake he earned $8.30/hour when he drove a stake bed truck and $8.50/hour when he drove a tractor-trailer. He initially refused an offer of $6.25/hour but accepted an offer of $7.00/hour. The second Union employee had been with Blake since 1962. Although he was earning $8.50/hour he was offered $7.00/ hour without benefits or $6.25/hour "with everything" which included benefits such as hospitalization, one day off and a week vacation pay. He accepted the $6.25/hour with benefits. The third Union employee had been with Blake since 1967. His wages varied between $8.30/hour and $8.50/hour. He was initially offered $6.50/hour which he refused. When offered $6.76/hour without benefits and $6.25/hour with benefits he ac- cepted the former. The fourth Union employee who had worked with Blade since 1970 earned $7.50/hour and was offered $6.50/hour with benefits and $6.75/hour without. He accepted the offer of $6.76/hour. The fifth and last Union employee to accept the lower wages accepted an offer of $5.00/hour with benefits. The record does not show his prior wage rate.

[11] See note 9 *supra.*

identical to Blake's prior to that date * * * except for the absence of [the] shop steward * * * and the lower wages of the other five union employees, there was little if any, change between the employment conditions existing prior to February 17 and those prevailing February 20 and thereafter.[12]

The Union filed charges against the Company[13] and the Board General Counsel issued a complaint.[14] The complaint alleged that the Company discriminated against seven named Union members and that the events of February 17 and 20, 1978 were in violation of sections 8(a) (1), (3), and (5) of the Act.[15] However, the parties agree that the complaint, unlike the Union's original charge, did not include a specific allegation that the Company violated sections 8(a)(1) and (5) of the Act by failing to apply its contract with the Union to employees in the contractual unit or by failing to recognize and bargain with the Union as the representative of *all* of the employees in the unit, other than the seven named Union employees.[16]

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Following a hearing, an Administrative Law Judge ("ALJ") ruled that Blake and M & S were *alter egos* and that both comprised a single employer.[17] The ALJ also determined that the Union "has been and is now the exclusive bargaining representative of all employees of Blake and/or M & S whose jobs are enumerated in the contract. * * *"[18] The ALJ concluded: that the Company violated section 8(a)(1) of the Act by imposing condition upon all employees, *i.e.*, a requirement to complete new employment applications, because of the Union's demand that Respondent honor the terms of the contract with respect to all employees;[19] that the Company violated sections 8(a)(3) and (1) of the Act by constructively discharging the Union shop steward and by laying off and rehiring at reduced pay the five other employees who were Union members; and that the Company violated section 8(a)(5) and (1) of the Act by failing and refusing to honor the terms of the contract, by transferring unit work from Blake to M & S, without consultation with the Union, by unilaterally negotiating with, and by reducing the wages of unit employees in violation of the contract, and by failing to give notice to and bargain with the Union about Blake's plan to go out of business and to lay off its employees.

The Board affirmed the ALJ's decision and issued his recommended order with one modification.[20] The Board's order required the Company to cease and desist from the unfair labor practices found by the ALJ, including as specified in paragraph 1(c) "[r]efusing to recognize and bargain with the Union as the exclusive representative of its employees in an appropriate unit consisting of [the job classifications enumerated in the Contract]."[21] Paragraph 1(e) further required the Company to cease and desist from "[*i*]*n any other manner*" interfering, restraining, or coercing its employees in the exercise of their rights under section 7 of the Act. (emphasis supplied).

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[12] Company's Brief at 8 *quoting in part* the Administrative Law Judge's Decision at 6, J.A. at 6 (June 8, 1979).

[13] The Union filed a charge against Blake on January 19, 1978, GCX-1-A, before the transfer of operations from Blake to M & S. This charge alleged that Blake had violated sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1) and (5) on or about August 1, 1977, and continuing since that date, by unilaterally changing the terms of the contract and refusing to pay the contract rate to its employees reprented by the Union and by refusing to bargain with the union about such matters.

After the transfer of operations the Union amended the charge on February 27, 1978. GCX-1-C. The amended charge reiterated the allegation of the original charge and added an allegation that on or about February 17, 1978 Blake had "terminated the employment of all of its employees because of their membership in and activities on behalf of the Union.

On March 14, 1978 the Union filed a second amended charge. GCX-1-E. This charge added M & S as a charged party but was otherwise identical to the first amended charge.

[14] GCX-1-G. The complaint issued on March 30, 1978.

[15] 29 U.S.C. §§ 158(a)(1), (3) and (5) which provide in pertinent part:

> § 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representative of his employees. * * *

Section 7 of the Act, to which section 8(a)(1) refers, provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *

29 U.S.C. § 157.

[16] Board's Reply Brief at 2: Company's Brief at 9-10, 14-19. The allegation of the Union's January 19, 1978 charge, *see* note 13 *supra*, did not become part of the complaint. The complaint does, however, allege that the Company violated sections 8(a)(1) and (5):

> Since on or about February 17, 1978 the Company has failed and refused and continues to fail and refuse to bargain in good faith with the Union and has instead engaged in a course of conduct designed to undermine the representative status of the Union by [certain specified acts].

GCX-1-G, at 4, paragraphs 10 & 11.

[17] ALJ's Decision at 9-10, J.A. at 9-10 (June 28, 1979).

[18] *Id.* at 10-11. J.A. at 10-11 *See* note 2 *supra*.

[19] The Complaint also alleged that certain conversations between Company supervisors and employees "in or about January 1978" [sic] violated section 8(a)(1). GCX-1G at 3, paragraph 7 (a) & (b). The ALJ dismissed these allegations for lack of evidence. J.A. at 10. At several points in the ALJ's decision and the Board's Order the language is ambiguous as to whether it refers only to the six union employees, only the non-union employees, or both the union and non-union employees. The present controversy concerns the application of the ALJ's findings and remedies to non-union employees.

The affirmative relief ordered by the Board required the Company to remedy the harms suffered by the six Union member employees. In addition, paragraph 2(b) required the Company to recognize and bargain with the Union as the exclusive representative of all the employees who are in the unit consisting of the job classifications specified in the contract. Paragraph 2(d) required the Company to apply the contract retroactively to the employees of Blake and M & S and make them whole for any losses suffered as a result of the failure to apply the contract to them.

The present application for enforcement of the Board's order followed.

II. ANALYSIS

The Company concedes that there is substantial evidence in the record to prove that M & S is an *alter ego* of Blake, and that the Company's actions of February 17 and 20,

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1978 constituted an unlawful unilateral change in the working conditions of the six Union member employees.[22] The Company opposes enforcement of paragraphs 1(c), 2(b) and 2(d) of the Board's order, described above, because it contends they are based on violations of the Act which were neither alleged in the General Counsel's complaint nor litigated before the ALJ. The Company also objects to the Board language of paragraph 1(e) which prohibits violations "in any other manner" as improperly subjecting it to contempt for *any* subsequent infringement of employees' rights under section 7 of the Act.

A. *Paragraph 1(c), 2(b) & 2(d) of the Board's Order*

1. *The Due Process Issue*

The Company contests the propriety of the finding that it violated sections 8(a)(1) and (5) of the Act by refusing to apply the terms of the contract to all of its employees in the unit or to recognize the Union as the representative of all of those employees. Its main assertion is that it was denied due process since such violations were neither alleged in the complaint nor litigated at the hearing. Since we agree with that contention, we do not reach the Company's alternative argument that the challenged findings are not supported by substantial evidence.

The applicable law is clearcut. Both the Administrative Procedure Act[23] and the Board's own rules[24] require that the complaint inform the Company of the violations asserted. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. *E.g. General Teamsters & Allied Workers Union No. 992 v. NLRB*, 427 F.2d 582, 588 (D.C.Cir.1970); *United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1134 n.12 (D.C.Cir.1969), cert. denied*, 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179.[25] Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself. *E.g. United Packinghouse, supra; Montgomery Ward & Co., supra.*

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[20] Note 1 *supra*. Because the ALJ failed to include a unit description in his recommended order, referring therein only to the "appropriate unit," the Board modified paragraphs 1(c) and 2(b) of the ALJ's recommended order to make it clear that those portions of the order applied to all employees working for the Company within the job classifications listed in the contract, *see* note *supra*. *Id.* at 3 n.4, J.A. at 19 n.4. In all other respects the Board affirmed the ALJ's decision.

[21] Note 2 *supra*.

[22] Company's Brief at 16; Stipulation entered October 20, 1980.

[23] 5 U.S.C. § 554(b)(3).

[24] 29 C.F.R. § 102.15.

[25] *See also NLRB v. Local Union 25, IBEW*, 586 F.2d 959, 961 (2d Cir. 1978); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1967); *NLRB v. Tamper, Inc.*, 522 F.2d 781, 787–89 (4th Cir. 1975); *Engineers & Fabricators, Inc. v. NLRB*, 376 F.2d 482, 485 (5th Cir. 1976); *Boyle's Famous Corned Beef Co. v. NLRB*, 400 F.2d 154, 162–64 (8th Cir. 1967); *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763–64 (8th Cir 1967) *J. C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967); *NLRB v. Johnson*, 332 F.2d 216 (6th Cir. 1963); *NLRB v. H. E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962).

Here we have a situation in which the Union filed charges with the Board containing allegations which, if proved, could lead to a finding that the Company violated sections 8(a)(1) and (5) by failing or refusing to apply the contract to its non-union employees and refusing to deal with the Union on behalf of the non-union employees. But these allegations were not carried over and specifically placed in the complaint subsequently issued by the Board's General Counsel. Nevertheless, the ALJ's decision and the Board's order were based in part on the 8(a)(1) and (5) violations not in the complaint.

The Board argues that the variation between the General Counsel's complaint and the eventual findings of unfair labor practices is permissible because the Company actually was aware that the 8(a)(1) and (5) violations were in issue in the hearing and had ample opportunity to present its defense. *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 349–51, 58 S.Ct. 904, 912–13, 82 L.Ed. 1381 (1938). The Board relies on the principle that "a material isue which has been fairly tried by the **280** parties may be decided by the Board regardless of whether it has been specifically pleaded." *NLRB v. Thompson Transport Co.,* 421 F.2d 154, 155 (10th Cir. 1970) (cases cited); *United Packinghouse, Food & Allied Workers Int'l Union, AFL–CIO v. NLRB,* 416 F.2d 1126, 1134 n.12 (D.C.Cir.1969), *cert. denied,* 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179; *Electri-Flex Co. v. NLRB,* 570 F.2d 1327, 1335 (7th Cir. 1978), *cert. denied,* 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 256; *accord General Teamsters & Allied Workers Union No. 992 v. NLRB,* 427 F.2d 582, 588 (D.C.Cir.1970). In support of its positon the Board notes that the General Counsel's complaint contained a definition of the bargaining unit encompassing all employees in the job classifications described in the contract; and it also included general allegations of section 8(a)(1) and (5) violations based on conduct which affected all of the Company's employees. From these inclusions, the Board seems to maintain that the complaint was sufficient to apprise the Company that the hearing and remedial order would not be limited to Company actions involving only the six Union employees. However, the heart of the Board's argument is that the hearing record itself demonstrates that the Company's attorney fully understood that the Company's responsibilities toward all employees with job descriptions within the unit were at issue and that he had an adequate opportunity to, and in fact, did, present the Company's defense to such charges.

However, after carefully reviewing the transcript of the several day hearing, we conclude that the record does not support the Board's position. At no point in the hearing do we find a clear statement from the counsel for the General Counsel (General Counsel) to the Company or the ALJ that the Company was on trial for its failure to apply the contract to non-union employees and to deal with the Union as their representative. On the contrary, we garner both from what the General Counsel did say on several occasions and from what, on other occasions, inexplicably, he did not say, that, notwithstanding any possible ambiguity in the complaint, he was not pursuing the 8(a)(1) and (5) violations now challenged by the Company.

The General Counsel never, so far as we can tell, indicated to the Company, much less affirmatively attempted to show, that the Company's actions toward its non-union employees comprised a central element of its case. The vast bulk of the testimony of Board witnesses went toward proof of the *alter ego* relationship between Blake and M & S. In that context, the limited evidence relating to the non-union employees was incidental to the main thrust of the Board's case that there was continuity of operations between Blake and M & S and that the changeover was merely a device to avoid meeting Union demands.[26] The Company

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[26] Only three of Blake's non-union employees testified briefly as to the continuity of their duties and pay before and after the Company changeover. This testimony clearly was part of the General Counsel's main *alter ego* case.

The only possible indication of another purpose for their testimony came during the direct examination of the first witness. The Company Counsel objected to the relevance of questioning the witness about a conversation with a Company supervisor that might show an 8(a)(1) violation not alleged in the complaint. Tr. 370, 372. The General Counsel represented that he was "not prepared to say it constituted an 8(a)(1) violation," but that the conversation was nevertheless relevant. He did not, however, state for what purpose the conversation was relevant but merely that he would establish relevance through later witnesses with testimony about "all of the employees who are not in the Union signing cards." Tr. 370–72. When pressed by Company Counsel he conceded. "I'll state right now that I'm not going to amend the complaint to include an 8(1). * * * I don't believe it's appropriate to be alleged as 8(1)." Tr. 372. And at another point in the hearing he represented that non-union employees were "not subject to this complaint as 8(3)'s" but only "subject to the complaint in terms of being hired by M & S Company. * * *" Tr. 105. Whatever they mean, these exchanges were altogether too ellip-

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counsel objected repeatedly that testimony about the pay rates and working conditions of non-union employees was irrelevant since the complaint only addressed the named Union employees and that the coverage of the contract, and the scope of the unit were not questions properly before the ALJ.[27] The General Counsel responded each time either that the objected to testimony about non-union employees was merely "background," or relevant to the "chain of events" in its *alter ego* case, or not offered for the truth of the matter asserted.[28] Invariably, the objection was overruled on the basis of such assertions and the testimony admitted for the limited purpose stated. At other times the General Counsel merely responded to the Company Counsel's objection with silence.[29] Not once, however, did the General Counsel forthrightly take issue with the Company Counsel's statement of the limited nature of the proceeding or explicitly state that he was in fact seeking a finding of the Company's liability for the 8(a)(1) and (5) violations challenged here.[30] We believe that affording such notice during the proceeding was a minimal obligation especially in light of the General Counsel's failure to specifically plead such violations in the complaint after the Union had included them in its original charges filed with the Board.

We can only speculate whether the confusing series of passes that counsel on both **282** sides made regarding non-union employees stemmed from a genuine failure to communicate their assumptions to one another, or from a misbegotten tactical strategy on the General Counsel's part to play a cat-and-mouse game. But on the existing record we cannot see how the Company could be held to have actual knowledge that it was being charged directly with failure to apply the contract to non-union employees or to deal with the Union as their representative. Hence it would not be fair now to order enforcement of an order based on such charges. *Cf. NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350, 58 S.Ct. 904, 912, 82 L.Ed. 1381 (1938) (due process claim rejected when "at no time during the hearings was

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tical to establish that the Company understood that the purpose of the three non-union witnesses was to prove the unlawfulness of the Company's actions toward its non-union employees.

The only other evidence in the record concerning non-union employees was expressly admitted only as "background" to show "a chain of events, that the Union was on notice as to a certain situation" and not for the "truth" of the Contract's application to specified employees. Tr. 330-32, 381-83. Indeed, the comparatively few and brief references to non-union employees in a 556 page transcript in itself tends to refute the notion that the subject of their rights under the Contract, an issue of greater potential economic consequence to the Company than the six Union members' treatment, was thoroughly litigated.

[27] For example, consider this exchange during the General Counsel's opening statement:

> General Counsel: * * * Some time in July of 1977, the business agent for the [Union] received a call from an employee working for Blake Construction, complaining, among other things, that he was not being paid union scale.
>
> Company Counsel: Your Honor, I am going to interrupt and object here. There is nothing in the Complaint concerning a failure to pay Union scale, and I don't think Counsel for the General Counsel has a right to prejudice the Court with remarks that aren't encompassed in any allegation of the Complaint.
>
> ALJ: Well * * * this is not a jury trial, so please let [General Counsel] make an opening statement uninterrupted, irrespective of whether or not it contains relevant or irrelevant information.

Tr. 23-24. Similar objections were raised throughout the hearing. For example,

> General Counsel: Did you speak to all the other employees on the 17th as well, other employees of Blake?
>
> Company Counsel: Objection; there are no other employees named in the Complaint.
>
> ALJ: Which employees are you referring to?
>
> General Counsel: Other employees who were not in the Union who were working for Blake.
>
> Company Counsel: They're not the subject of this Complaint, Your Honor. There are seven named people.
>
> General Counsel: They are not subject to this Complaint as 8(3)'s. They are subject to the Complaint in terms of being hired by M & S Company, from M & S to Blake.
>
> ALJ: All right, overruled.

Tr. 105. And for example,

> Company Counsel: Objection as to the statement "employees not in a Union." If we're interested in continuity of employment, then what employees did, and whether or not they were in union, is irrelevant.
>
> ALJ: Objection overruled.

Tr. 108. *See also* Tr. 106, 163-64, 330-332, 335-36, 379-82. The Company reiterated its position in its brief to the ALJ: "[The Union] treated its agreement with Blake as covering seven named employees and no others * * * General Counsel made no allegation that the terms of any contract were breached as to coverage for any but the named seven." Company's brief dated October 6, 1978 at 9-10, J.A. at 40-41.

[28] *E.g.* Tr. 105, 331, 332, 336, 379, 382.

[29] *E.g.* Tr. 23, 108, 158-59, 163-64.

[30] The General Counsel persistently failed to correct or clarify the Company Counsel's and the ALJ's understanding of the scope of the lawsuit. *See, e.g.*, colloquy at 158-59. *See also* Tr. 410-416 (General Counsel argued that grievance of non-union member for Union's failure to represent was irrelevant, Tr. 416) (General Counsel does not take issue with Company Counsel statement that "this Complaint doesn't go to any of the nonunion people," Tr. 412); *and see* General Counsel's Post-Hearing Brief filed October 6, 1978, at 13 J.A. at 58 ("the question of appropriate unit is relevant only to the extent that it established a predicate for Blake's subsequent unfair labor practices").

there any misunderstanding as to what was the basis of the Board's complaint").

Nor can we agree with the Board that the Company actually litigated its available defenses to the 8(a)(1) and (5) violations so as to justify enforcing the challenged portions of the order.[31] Indeed, when the Company Counsel sought to probe the Union's own behavior toward the non-union employees, he was cut off by the ALJ upon the General Counsel's objection that it was unnecessary to explore this subject.[32]

We surmise from the hearing transcript there was little doubt as to the nature of the underlying dispute. When the formerly moribund Union began to aggressively solicit new members and to seek to represent their interests with the Company, the Company sought to limit the application of the existing contract to existing Union members or to avoid it altogether by resort to a corporate shell game. Nevertheless, no matter how reprehensible the Company's conduct, it does not excuse the Board or its General Counsel from a duty to assure that a charged party is given adequate notice of all the alleged violations of the Act and that these violations are litigated before sanctions are imposed. Elemental procedural due process prevents this court from granting enforcement of remedies that go beyond the scope of the complaint and are directed toward violations of the Act not noticed or actually tried before the ALJ or the Board.

2. *The Waiver Issue*

The Board in its reply brief asserts a threshold argument that the Company is barred by section 10(e) of the Act from raising its due process claim on appeal because it failed to do so before the Board. Section 10(e) of the Act provides in pertinent part:

> No objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C § 160(e). In addition, the Board's rules provide that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived," 29 C.F.R. 102.46(b), and "[n]o matter not included

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[31] The Company represents that had it been squarely presented with 8(a)(1) and (5) charges it could have defended on a number of grounds including: (1) that the charge was untimely; (2) that a prior oral or written addendum to the contract altered the scope of the unit at Blake; (3) that the scope of the unit had been altered by actions of the parties from that specified in the contract; (4) that the Union had waived its right to enforce the contract or had acquiesced in some unit other than the one described in the contract. Company's Brief at 29. We, of course, do not pass on whether any of these defenses were available or whether the Company would have succeeded if they had been asserted. But we do note that although there is some evidence related to these defenses on the record it is apparent that they were not pursued with even a modicum of the vigor displayed on behalf of the Company in other less potentially vital areas. *See e. g.*, regarding the defense of waiver: (Tr. 373, 400–01, 427–29, the Union's failure to enforce the contract's Union security provision); (Tr. 373–74, 427, 430, the Union's failure to file any grievance on behalf of nonmembers, line of question opposed as irrelevant by General Counsel); (Tr. 407–12, 414, 417; Union's filing of grievance only on behalf of the Union member employees, line of questioning opposed as irrelevant by General Counsel and cut off by ALJ); regarding the defense of agreement or acquiescence to a new unit: (Tr. 433–36, RX3, prior refusal by Company to include non-union employees under the contract unchallenged by Union, line of question successfully opposed by General Counsel) ("RX—" refers to the Company's exhibits).

[32] General Counsel: Objection, Your Honor.

> I'm going to object to this line of questioning. *What transpired in '76 has nothing to do with the Complaint.* What a prior Union administration may have done with respect to Blake has nothing to do with the Complaint. It's all of course Pre 10(b) as well. *I don't think it has any bearing at all on the matters at issue.*
>
> ALJ: [D]o you want to reply to that?
>
> Company Counsel: Yes, I do, Your Honor. First, the contract which General Counsel offered into evidence predates the current administration. Secondly, General Counsel has stated, in arguing before you yesterday as to the relevancy of the '78 sign-up, that that somehow or other triggered the change from Blake to M&S. I want to show that the very same thing happened in '76, therefore people signing cards don't trigger subcontractors. And I want to show that the administrations, both administrations, both the current one and the old one, how they viewed the collective bargaining agreement, or what the collective bargaining agreement was.
>
> General Counsel: Well, as to [Company Counsel's] argument, first, it sounds as if he's trying to erect some kind of habit argument; the fact that Blake may have been a good guy in 1976, of course, cannot be shown with respect to whether they were a good guy in '78. As I say, *this has absolutely no bearing on what may or may not have happened in '76, to the Complaint at issue here, which is what took place on February 17th, and thereafter.*
>
> ALJ: All right, objection sustained.
>
> Company Counsel: Do I take it then that Your Honor is ruling that I cannot go into how the parties treated the collective bargaining agreement, or what they thought the collective bargaining agreement was, prior to July of 1977?
>
> ALJ: Right, I think your cross-examination goes beyond those areas covered by direct. Tr. 432–34. (Emphasis supplied.) Upon an appeal of this ruling, J.A. at 23, the Board directed the hearing to be reopened to "permit [the Company] to cross-examine the witness with respect to the administration of the Contract in 1976." Board Order dated August 1, 1978, J.A. at 27. At a hearing held pursuant to this order on September 7, 1978, Company Counsel elicited that the witness had spoken with counsel for the Union and elected not to question the witness further. Tr. 559–60.

in exceptions or cross-exceptions may thereafter be urged before the Board, or in further proceeding." 29 C.F.R. § 102.46(h). In short, the Board ironically says that even if if did not provide the Company with notice or an opportunity to litigate every violation found against the Company, the Board itself must have notice and an opportunity in the first instance to consider any resulting challenge to the fairness of its decision.[33]

In fact, the Company did take exception to the ALJ's finding that the Company violated sections 8(a)(1) and (5) of the Act and to the ALJ's related conclusions of law and remedial measures. However, the Company did not expressly assert due process objections to the way the hearing was conducted. For example, the Company characterized most of the ALJ's findings as "misstatements" and excepted to the ALJ's conclusions of law as "based on misstatements of facts, mistaken premises, suppositions, hearsay, and misapplication of law." Respondent's Exceptions, *supra,* 29–30. But in its brief in support of its exceptions, J.A. 74–87, the Company Counsel did argue, *inter alia,* that the 8(a)(1) and (5) violations were not supported by substantial evidence because there was no proof of a contract covering all employees, J.A. 74–75; and although it did not specifically raise the due process issue, it stated that the General Counsel had not included an allegation in the complaint "that the terms of any contract were breached as to coverage for any but the named seven [Union employees]." J.A. at 85. It also objected specifically to the ALJ's refusal to allow questioning as to "how the parties treated the contract." J.A. 77.

The Board argues that these objections are too vague to satisfy the requirements of section 10(e). *See Marshall Field & Company v. NLRB,* 318 U.S. 255, 63, S.Ct. 585, 586, 87 L.Ed. 744 (1943); *NLRB v. Seven-* **284** *Up Bottling Company,* 344 U.S. 344, 350, 73 S.Ct. 287, 290, 97 L.Ed. 377 (1953).

We disagree because we think the Company's brief accompanying its exceptions to the ALJ's decision, and in particular the above-quoted language about the scope of the complaint, the lack of proof as to what the contract provided as well as the ALJ's refusal to allow cross-examination on the subject were adequate to apprise the Board that the Company intended to press the question now presented and thus there was no waiver of the right to argue the due process issue before this court. *May Department Stores Co. v. NLRB,* 326 U.S. 376, 386–87 n.5, 66 S.Ct. 203, 209–10 n.5, 90 L.Ed. 145 (1945). While the Company's objections are no paragon of precision or detail, the specific exceptions to the 8(a)(1) and (5) findings and the argument that these findings were not supported by evidence and that no notice was given in the complaint as to such violations are considerably more focused and quite different from the general *pro forma* objections found to be impermissibly vague in other cases relied on by the Board. *See, e.g., Marshall Field, supra,* (only objection was examiner erred "in making each and every recommendation"); *Seven-Up, supra* (only objection was the remedy was "contrary to, and unsupported by the evidence and contrary to law").[34]

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[33] Of course we respect the policy underlying section 10(e) reflected in the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952); *NLRB v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 322, 82 S.Ct. 344, 347, 7 L.Ed.2d 312 (1961).

[34] *NLRB v. United Shoe Machinery Corp.,* 445 F.2d 633, 634 (1st Cir. 1971) (objection to Board decision in its entirety as "contrary to constitutional principles of due process" was "too broad to call attention to the narrow point raised * * * or to suggest that this was [the] point"); *see also Singer Co. v. NLRB,* 429 F.2d 172, 180–81 (8th Cir. 1970) (objection to "The Recommended Order in its entirety * * * as said recommended order is against the preponderance of the evidence and the law").

There are additional reasons for reaching the Company's substantial due process claim. Failure to object at the Board level does not invariably deprive a court of the ability to decide that the hearing was fundamentally flawed for lack of procedural fairness. *NLRB v. Local Union No. 25, IBEW,* 586 F.2d 959 (2d Cir. 1978) (party took exception below to a specific finding, but on different grounds than urged an appeal, and the Board is not prejudiced thereby); *accord ILGWU, AFL–CIO v. NLRB,* 339 F.2d 116 (2d Cir. 1964) (failure to object not deliberate and no prejudice to Board); *cf. Retired Persons Pharmacy v. NLRB,* 519 F.2d 486 (2d Cir. 1975) (due process claim is barred when there is no prior objection at all on substantive or procedural grounds and no extraordinary circumstances to warrant review); *NLRB v. Kobritz,* 192 F.2d 8 (1st Cir. 1951) (due process objection "obviously without merit" not raised with the Board is barred by section 10(e)).

Cf. authority for the proposition that review is not precluded in the absence of objection below when the Board has patently traveled outside the orbit of its authority. *NLRB v. Cheney California Lumber Co.,* 327 U.S. 385, 388, 66 S.Ct. 553, 554, 90 L.Ed. 739 (1946) (Board without jurisdiction); *NLRB v. Mark J. Gerry, Inc.,* 355 F.2d 727 (9th Cir. 1966), *cert. denied,* 385 U.S. 820, 87 S.Ct. 46, 17 L.Ed.2d 58 (Board without jurisdiction but also appeared that question might have been raised below); *see also NLRB v. Doug Neal Management Co.,* 620 F.2d 1133, 1139 (6th

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In sum, it goes against the grain to uphold a finding of a violation not charged in the complaint, never acknowledged in the hearing, and objected to in some detail before the Board simply because the magic phrase "due process" was not used in the objection. We do not think section 10(e) requires such a triumph of technical pleading over fundamental fairness.

B. *Paragraph 1(e) of the Board's Order*

Finally, paragraph 1(e) of the Board's order prohibits the Company from:

> *In any other manner* interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist [the Union], or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

J.A. at 13 (emphasis supplied). The Company contends that this portion of the order is too broad and that it impermissibly subjects the Company to contempt proceedings for any future violation of its employees' rights under the Act.

The Board has wide latitude to exercise its remedial powers under the Act. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 215–17, 85 S.Ct. 398, 405–06, 13 L.Ed.2d 233 (1964); *NLRB v. Seven-Up Bottling Co.,* 344 U.S. 344, 346–47, 73 S.Ct. 287, 288–89, 97 L.Ed. 377 (1953); *Phelps-Dodge Corp. v. NLRB,* 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1941); *Int'l Ass'n of Machinists v. NLRB,* 311 U.S. 72, 82, 61 S.Ct. 83, 89, 85 L.Ed. 50 (1940). However, there are limits to the remedies the Board may issue based on the nature and extent of the violations it finds:

> [T]he authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

NLRB v. Express Publishing Co., 312 U.S. 426, 433–34, 61 S.Ct. 693, 698, 85 L.Ed. 930 (1941). The Supreme Court has held that an isolated violation of the Act

> does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

Id. at 435–36, 61 S.Ct. at 699.[35] In contrast, substantial evidence of a "generalized scheme" to violate the Act will support such broad relief. *San Francisco Local Joint Executive Board of Culinary Workers v. NLRB,* 501 F.2d 794, 802 (D.C.Cir.1974).

Both the Company and the Board agree on the test to be applied in this case:

> [s]uch an order is warranted only when a respondent is shown to have a *proclivity* to violate the Act, or has engaged in such *egregious or widespread* misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

Hickmott Foods, Inc., 242 NLRB No. 177 (1979) (emphasis supplied); *Honsa Mold, Inc.,* 243 NLRB No. 146 (1979); *NLRB v. Union Nacional de Trabajadores,* 540 F.2d 1, 11 (1st Cir. 1976), *cert. denied,* 429 U.S. 1039, 97 S.Ct. 736, 50 L.Ed.2d 750 (1977); *NLRB v. Curtis Manufacturing Co.,* 421 F.2d 1335 (5th Cir. 1970). The Board adopted paragraph 1(e) because "the issuance of a broad order is warranted in this case as [the Company's] unlawful conduct was egregious and widespread and demonstrated a

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Cir. 1980) (court raised issue of indispensable party *sua sponte* notwithstanding section 10(e) in interests of equity).

While deference is certainly due the laudatory objective of section 10(e) to give the Board the first opportunity to resolve "on the merits" questions urged on review of its orders. *Marshall Field, supra,* 318 U.S. at 256, 63 S.Ct. at 586, courts are and should be reluctant to enforce orders that emanate from proceedings conducted contrary to the clear requirements of the Administrative Procedure Act and devoid of basic due process guarantees unless there has been a deliberate bypass of the Board's rules. Here the Company's exception to the sufficiency of the evidence underlying the ALJ's 8(a)(1) and (5) findings gave the Board a chance to reconsider the merits of the ALJ's decision. In doing so, the Board could not have examined, even cursorily, the ALJ's findings without discovering in the transcript the ongoing swords-crossing exercise between counsel as to the relevance of evidence about non-union employees. *See May Department Stores, supra.*

[35] *See also General Motors Co v. NLRB,* 512 F.2d 447, 448 (6th Cir. 1975); *NLRB v. Curtis Manufacturing Co.,* 421 F.2d 1335, 1337 (5th Cir. 1970); *NLRB v. Kingwood Mining Co.,* 404 F.2d 348 (4th Cir. 1968); *NLRB v. Scherer & Sons, Inc.,* 307 F.2d 12, 13 (5th Cir. 1967), *cert. denied,* 389 U.S. 836, 88 S.Ct. 46, 19 L.Ed.2d 97.

general disregard for the employees' fundamental statutory rights." J.A. at 19 n.3. We agree that the facts of this case are flagrant enough to support the Board's expansive remedial provision.

The Company's actions in refusing to talk to the Union about contract pay rates for its new members, culminating in a dramatic, albeit transparent, turnover of all company activities to an *alter ego*, solely to abrogate its obligations under the Act unquestionably rise to the level of "a general disregard for the employees' fundamental statutory rights." This maneuver was exacerbated by the deplorable techniques used in the individual bargaining with the Union employees to drastically lower their current rates of pay: confronting the employees

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with the Solomonic dilemma of choosing between lower take home pay or slightly higher take home pay which was still appreciably less than the employees' current rates of pay and did not include necessary benefits. The Company's conduct in this regard and the lengths to which it went to perpetuate that conduct are reminiscent more of the pre-National Labor Relations Act era of industrial warfare than of the later Twentieth Century. The mere fact that the Company has no prior record of NLRB violations does not, in itself, dissipate the egregiousness of the conduct involved in this proceeding. *Cf. NLBR v. Beth-Israel Hospital,* 554 F.2d 477 (1st Cir. 1977), *aff'd,* 437 U.S. 483, 98 S.Ct. 2463, 57 L.Ed.2d 370 (1978) (non-profit hospital's concern about deleterious effects on patients of organizational conduct was reasonable, and although hospital failed to justify its no solicitation, no distribution rule as it related to some parts of the hospital (cafeteria and coffee shops) it could not be reasonably inferred from a single violation *of this character* that the hospital had a proclivity knowingly to violate the Act, thus justifying a broad order).[36]

We find, therefore, that paragraph 1(e) is warranted and conclude that the Company's opposition to its enforcement is without merit.

Enforcement granted in part and denied in part and remanded.

Electric Machinery Company v. NLRB

653 F.2d 958 (5th Cir.), August 17, 1981—243 NLRB 239

On petition to review Board Order

Before Vance, Frank M. Johnson, Jr. and Thomas A. Clark, Circuit Judges

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Thomas A. Clark, Circuit Judge: Petitioner, Electric Machinery Company, seeks review of an order of the National Labor Relations Board in which the Board held that petitioner violated Section 8(a)(5) and, derivatively, Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1),[1] by unilaterally changing mandatory terms and conditions of employment and by bargaining directly with employees rather than bargaining with the union's elected representatives. The Board also found that petitioner violated Sections 8(a)(3) and (1) (29 U.S.C. §§ 158(a)(3) and (1)),[2] by constructively discharging eighteen employees. Respondent has filed a crosspetition for enforcement. We affirm the Board's determination that petitioner violated Section 8(a)(5), and we reverse the determination that petitioner violated Section 8(a)(3).

I. *The Facts.*

The facts are largely undisputed. The International Brotherhood of Electrical Workers, Local No. 915, AFL-CIO ("union") has represented

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[36] *Compare also* with the present case, *Blount Bros. Corp. v. NLRB,* 571 F.2d 4 (7th Cir. 1978) (incident involving one out of 1,000 employees at company with no prior history of unfair labor practices did not justify order prohibiting violating the Act "in any other manner"); *NLRB v. Curtis Manufacturing Co.,* 421 F.2d 1335, 1337 (5th Cir. 1970); *J. P. Stevens & Co. v. NLRB,* 417 F.2d 533, 539 n.11 (5th Cir. 1969) (if no showing of proclivity to violate the Act the scope of the orders must be limited); *Richfield Oil Corp. v. NLRB,* 143 F.2d 860 (1940) (violation was a mistake of law and no evidence of general attitude or conduct on employer's part to violate the Act).

[1] Sections 8(a)(1) and 8(a)(5) state in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, * * *.

[2] Sections 8(a)(3) state in relevant part:

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

Electric Machinery's (the "company") wiring electricians since 1954. During the past 12 years the company has been represented at bargaining sessions by the West Coast Chapter of the National Electrical Contractor's Association ("NECA") which represents electrical contractors who have authorized NECA to bargain on their behalf. At the time of the events which give rise to this suit, the union and the company were parties to a NECA-Union contract effective from December 1, 1976, to November 30, 1977. On June 30, 1977, Electric Machinery revoked NECA's authority to bargain on its behalf and on August 30, 1977, gave timely notice that it intended to terminate the contract on its scheduled expiration date.[3]

The union contended that both the NECA revocation and the notice to terminate were improper, basing their contention upon Article I, Section 2(c), of the collective bargaining agreement which provided that "[t]he existing provisions of the agreement shall remain in full force and effect until a conclusion is reached in the matter of proposed changes." Consequently, the union took no immediate action to commence collective bargaining despite a September 16, 1977, letter from the company which invited it to do so.

On November 17, 1977, Electric Machinery sent the union's business manager, Joseph Cain, a second letter in which the company put forth the specific proposals for terms and conditions of employment which **961** the company desired to initiate upon expiration of the NECA agreement. It was the company's contention that the high union wage scale, and the accompanying holiday, travel, vacation, and pension benefits, had placed the company in a position of competitive disadvantage and, consequently, that the company was finding it impossible to submit bids that were competitive with other electrical subcontractors. The November 17 letter concluded that "[i]n the event that we have not heard from you or in the event that your union does not make a meaningful offer on or before November 30, 1977, it is our intent to put these wages and working conditions into effect on December 1, 1977."

The union responded to the proposals by requesting a November 22, 1977, meeting. This meeting, which lasted approximately three hours, was the first bargaining session which occurred between the parties and was attended by Electric Machinery's president, Jaime Jurado, the local business manager, Cain, and a representative from the International, John Ericksen. Although the parties did not arrive at any specific agreement, Ericksen nevertheless accompanied Jurado back to the company's offices where the men discussed the competitive bidding problem in greater depth with Electric's estimator. At the conclusion of their discussion, and after preliminary examination of the company's financial records, Ericksen remarked to Jurado that he agreed that some changes in terms and conditions would be necessary in order for the company to become competitive with other area subcontractors.

After the November 22 meeting, Jurado directed counsel to prepare a "Memorandum of Agreement" in advance of the meeting scheduled for the next week, November 28. The agreement stated, among other things, that the parties would acknowledge that the NECA agreement would have no binding effect after November 30, 1977, but that "[t]he company, of its own volition * * * will continue to pay wages and provide terms and conditions of employment identical to those provided by the contract for a period of (30) days from November 30, 1977." The memorandum further stated that "the parties agree that such action does not constitute an extension of the expired agreement." The memorandum itself contained no specific contract proposals.

Sometime during the week between November 22 and November 28, counsel for the union met with Electric Machinery's employees and discussed the management's November 17 proposals for changed terms and conditions of employment. During this meeting, the union members were specifically directed to remain on the job while negotiations continued, and were assured that their union membership would not be penalized or disciplined by the union for continuing work, even if it meant working without a contract until an agreement could be reached.

On November 28, at the outset of the bargaining session, Jurado presented Cain with the prepared "Memorandum of Agreement" and asked him to sign. When Cain refused, Jurado became angry and threatened to walk out of the negotiations. The Administrative Law Judge found that Jurado attempted to induce Cain to sign the memorandum "by indicating he would be willing to agree for six months at thirty day intervals to abide by the terms of the expiring contract while negotiations continued." Cain, however, informed Jurado that he would not sign "because he felt respondent was contractually obligated to abide by the expiring contract while negotiations continued." The bargaining session broke up immediately thereafter, when Jurado stated that he would go directly to the employees and request that they accept the contract modifications which had been outlined in the November 17 letter to the union. On his way out, Ericksen requested that Jurado leave a copy of the memorandum so that the union could consider it further.

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[3] Article I, § 2(a) of the collective bargaining agreement provides: "Either party desiring to change or terminate this agreement must notify the other in writing at least 90 days prior to the anniversary date."

The following day, November 29, Jurado began visiting job sites to meet with employees. He handed out copies of the company's November 17 letter which contained

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the company's proposals for a new contract and, according to testimony, "practically begged" the employees to stay on with the company and work under the new conditions. Jurado further told the employees they should "contact their foremen if they were not going to stay with [the company]." (R. 32)

Victor Moore, a journeyman electrician, immediately informed Jurado that he could not accept the company's offer and "was going to quit." He, and another employee, Dennis Field, left at the end of the day On December 1, the company proceeded to implement all of the proposals set out in its November 17 letter to the union, and on December 5, sixteen more employees left their jobs.[4] On December 30 the company signed a new letter of assent designating NECA as its bargaining agent and automatically making it a party to the new NECA-union collective bargaining agreement. Immediately thereafter, a majority of the employees returned to work.

II. *Discussion.*

At the outset, we acknowledge that the court of appeals must affirm the National Labor Relations Board if there is "substantial evidence" to support the Board's conclusions. Nevertheless, "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951).

In the instant case, the Administrative Law Judge found that the company had violated Section 8(a)(5) and derivatively, Section 8(a)(1) by unilaterally changing mandatory terms and conditions of employment on December 1, 1977, before having bargained to impasse. Additionally, the ALJ found that, by personally urging its employees to work under the new conditions, the respondent engaged in direct bargaining with individual employees in violation of Sections 8(a)(5) and 8(a)(1). The Board affirmed with respect to both 8(a)(5) violations and we affirm.

It is well-settled that an employer has a duty to consult and negotiate with the union before changing terms and conditions of employment, and violates Section 8(a)(5) of the Act by instituting unilateral changes before negotiations have been given a fair chance to succeed. *NLRB v. Datz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). Here the company admits that it unilaterally changed wages and benefits on December 1, but defends its action on the grounds that negotiations with the union were at an impasse and, alternatively, that even if negotiations were not at an impasse, the company had a "reasonable belief" that an impasse had been reached, and therefore was justified in taking unilateral action.

We cannot agree that the company's contentions are supported by the law or the record. In *NLRB v. Katz* the Supreme Court stated:

> Clearly, the duty [to bargain] thus defined may be violated without a general failure of subjec-

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[4] Four of the employees who left work on December 5 testified before the NLRB. Whitely testified that he left because he "didn't feel [the situation] was right." (R. 97) Stallings testified that he left because "he wasn't receiving his full wages * * * [and] fringe benefits." (R. 106) Dempsey testified that he left because his wages, retirement, and health and welfare benefits were cut. (R. 126) Cannella testified that he left because there was "too much tension," and because he "didn't know what [his] pay was going to be, or what [working] conditions were going to be." (R.138)

> tive good faith; * * * refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union. * * * We hold that an employer's unilateral change in conditions is similarly a violation of § 8(a)(5) * * *.

369 U.S. at 373, 82 S.Ct. at 1111.

While the employer urges strenuously its defense of impasse, we do not consider **963** this to be an impasse case. In *NLRB v. Big Three Industries, Inc.*, 497 F.2d 43 (5th Cir. 1974), we stated:

> "Impasse" within the meaning of the federal labor laws presupposes a reasonable effort at good faith bargaining which, despite noble intentions, does not conclude in an agreement between the parties. *NLRB v. Palomar Corporation*, 5 Cir. 1972, 465 F.2d 731, 735. Here the company failed to fulfill this necessary precondition to impasse.

Id. at 48. Impasse is a deadlock in negotiations and presupposes negotiations. The employer in its brief cites a Board opinion in *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973), *enf, den. sub nom. NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974), which provides the following definition of impasse:

> A genuine impasse is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

206 NLRB at 23.

In the present case negotiations had barely begun, the first negotiating session being November 22, 1977. There was a second meeting on November 28 which did not result in any bargaining when the union refused to sign the "Memorandum of Agreement" proposed by the employer. The next day the employer, through its chief executive officer, visited the employees, delivering to them a copy of his November 17 letter to the union outlining proposed contract modifications, which included reductions in wages. As previously noted, the contract expired November 30. The employer points out that the union had been tardy in responding to the employer's notification that the contract would have to be modified so that the company could be more competitive. While the record does reflect this tardiness on the part of the union, it at no time refused to bargain nor did it waive its right to bargain. We note also that the union advised its members to continue working after the expiration of the contract on November 30 while the parties negotiated.

On the record before us there appears no reason which impelled the employer unilaterally to change the wage schedule, institute a company hospitalization plan rather than the union plan, and eliminate the pension plan and other fringe benefits, including vacation fund payments and travel time. The facts do not begin to support a defense of impasse because, as we have previously pointed out, bargaining had only just begun.[5] The fact that the union refus-

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[5] The Fifth Circuit has discussed the subject of impasse in many cases, and we will now make reference to some of them. These cases all differ on their facts. Most acknowledge that the subject of impasse is a difficult one and must take into consideration a myriad of circumstances, such as the background of the relationship between the parties, their willingness to negotiate, the number of bargaining sessions, the degree to which the parties are making legitimate efforts to move toward an agreement as contrasted to sham negotiations which merely consume time, whether the company produces financial information when requested by the union (if the employer is seeking to reduce wages and in some instances when an increase in wages is being negotiated), and the good or bad faith of the parties if such can be determined from the facts, which cannot always be done.

In *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960), our circuit held that "generally speaking, the freedom to grant a unilateral wage increase 'is limited to cases where there has been a bona fide but unsuccessful attempt to reach an agreement with the union, or where the union bears the guilt for having broken off relations.' *NLRB v. Andrew Jergens Co.*, 9 Cir., 1949, 175 F.2d 130, 136, *cert. denied*, 338 U.S. 827, 70 S.Ct. 76, 94 L.Ed. 503."

NLRB v. Tex-Tan, Inc., 318 F.2d 472 (5th Cir. 1963), involved a unilateral wage increase instead of reduction which was approved by this court. The unilateral wage changes were made in March-April, 1960. The opinion indicates that between April, 1959, and June 8, 1960, twenty-nine bargaining sessions were held, and the court notes further in its note 19 that the union early expressed the wish that the wage increases be instituted without awaiting final, total contract agreement.

NLRB v. Celotex Corp., 364 F.2d 552 (5th Cir. 1966), sustained a § 8(a)(5) violation in that an impasse did not exist. The company wanted certain contract revisions which would reduce compensation, making the claim that it wanted to remain competitive. At the same time the company refused to furnish financial information respecting its condition, and this court held that such refusal which led to an impasse did not constitute a valid impasse and thus sustained the Board's finding of a violation.

The case of *A. H. Belo Corp. v. NLRB*, 411 F.2d 959 (5th Cir. 1969), is sometimes cited as an impasse case. Under a rather complicated factual situation, our court sustained the Board's finding that a unilateral increase

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ed to sign the "Memorandum of Agreement" presented to it by the company on November 28 was no reason to make the change. All that agreement proposed to do was to continue the existing agreement for thirty days. The company could have continued to pay wages and benefits as it had been doing, and the workers could have continued in the employment without a contract. The only other imaginable reason would be that the contract terminated on November 30. We held in *NLRB* v. *SAC Construction Company, Inc.*, 603 f.2d 1155 (5th Cir. 1979), that:

> The duty to refrain from making unilateral changes in those employment conditions subject to mandatory bargaining after termination of an existing contract derived from the employer's statutory duty to bargain collectively, because such changes are tantamount to a refusal to negotiate. *Hinson v. NLRB*, 428 F.2d 133, 137 (8th Cir. 1970); see *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962).

Id. at 1156–57. Therefore, we concluded that the employer instituted unilateral changes which constituted a refusal to bargain collectively with the representatives of its employees in violation of 29 U.S.C. § 158(a)(5).

We next turn to the Board's finding that Jurado violated Section 8(a)(5) by bargaining directly with employees on November 29. The evidence is undisputed that Jurado personally met with employees and attempted to persuade them to accept the proposed contract terms, and appellant has not contended in its brief that this conduct was not violative of Section 8(a)(5). Therefore, we affirm.

The remaining violation which we must consider is whether the eighteen employees who left work between November 29 and December 5, 1977, were constructively discharged in violation of Section 8(a)(3) or whether, as appellant contends, the eighteen employees were either "voluntary quits" or "strikers." The Administrative Law Judge found that the company had not violated Section 8(a)(3) because the "General Counsel has failed to show that Respondent altered the wages * * * to encourage or discourage membership in any labor organization." The Board reversed the Administrative Law Judge based upon its reading of *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976). Having reviewed the record, and

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upon consideration of this court's recent decision, sitting *en banc*, in *NLRB v. Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981), we agree with the Administrative Law Judge, and we reverse the Board's finding that Electric Machinery constructively discharged eighteen employees.

Section 8(a)(3) states that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Consequently, as this court stated in *Haberman, supra*:

> There are two elements to a constructive discharge * * *. First, the employer's conduct must have created working conditions so intolerable that an employee is forced to resign. Second, the employer must have acted "to encourage or discourage membership in any labor organization" within the meaning of section 8(a)(3) of the Act.

NLRB v. Haberman, 641 F.2d at 358.

Appelle contends that this court should infer anti-union animus simply by virtue of the fact that the employer unilaterally changed mandatory terms and conditions of employment, thereby placing the

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in vacation benefits without notice to the union was a violation of the Act, but that a wage increase during negotiations to a certain group of employees was not unlawful where the company had given the union notice of the proposed change. In another part of the opinion our court sustained the Board's finding that the company had exhibited an attitude of bad faith and lack of sincere desire to reach an agreement, thus failing in its duty to bargain in good faith. The complexities of that case hardly qualify it as a typical impasse case.

NLRB v. Palomar Corp., 465 F.2d 731 (5th Cir. 1972), is a case extremely close on its facts to the present *Electric Machinery Company* case. The collective bargaining agreement expired September 30, 1970. There were three bargaining meetings on September 9, September 30, and October 11, 1970. The employer reduced the wage rates on October 1, 1970, and had given notice to the union that this would be done. Our court in that opinion held that there existed no legally cognizable impasse.

The case of *Winn-Dixie Stores, Inc. v. NLRB*, 567 F.2d 1343 (5th Cir. 1978), *modified on petition for rehearing*, 575 F.2d 1107, involved certain unilateral changes by the employer during contract negotiations, some of which our court found to constitute violations. The company did not defend a wage increase, which was given after notice to the union, on the ground of impasse, but defended on the ground that it notified the union that had an excessive turnover of employees and had to grant the wage increase to meet this problem. Our court approved the company reason for the wage increase.

This note is not intended to review exhaustively the cases in the circuit but is done for the purpose of pointing out some of the authorities and their divergent reasons for finding violations in some cases and not in others.

employees in a position where they were, in fact, forced to abandon rights guaranteed under the Act. The Board relies upon *Superior Sprinkler, supra*, for this contention, quoting that opinion:

> [The employer] unlawfully refused to bargain with the Union and thus * * * offered its employees the choice of accepting the employer's unlawful repudiation of its statutory bargaining obligations and working under unlawfully imposed conditions of employment or quitting their employment.

Superior Sprinkler, 227 NLRB at 210.

While we do consider the question of constructive discharge to be close, we do not consider *Superior Sprinkler* to be dispositive for two reasons. First, the facts in the instant case are distinguishable from the facts in *Superior*; second, to consider the present case as presenting a § 8(a)(3) violation, where the conduct was not inherently destructive of important employee rights, would approach eliminating the requirement of proving anti-union animus entirely.

We begin our analysis, as we did in *Haberman, supra*, with the Supreme Court decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967). In *Great Dane*, the court concluded that motivation to discourage union membership was indispensable to a Section 8(a)(3) violation unless the employer's conduct fell within the category of " 'inherently destructive' of important employee rights," in which case "no proof of an anti-union motivation" would be required. *Id.* at 1798. Based on *Great Dane*, therefore, the General Counsel has the burden of establishing either that Electric Machinery's conduct was so egregious as to be "inherently destructive of important employee rights." or that Electric Machinery acted with the intent to discourage union membership.

In *Superior Sprinklers*, 227 NLRB 207 (1976), the Board successfully brought the complained of activity within the inherently destructive category by demonstrating facts from which the Board could reasonably infer that the employer had refused to bargain with the intention to discourage union membership. Not only had the employer instituted unilateral changes in mandatory terms and conditions prior to impasse, but the employer had accompanied his actions with express declarations that he would no longer negotiate and that he intended to operate "open shop."

The facts in the instant case do not lead to the same inferences. At the time that Jurado committed the section 8(a)(5) violation, the Administrative Law Judge found that "Jurado was not threatening to immediately create a non-union company * * *." Furthermore, the record yields considerable testimony that the employees were informed by their own union officers to remain on the job even if the parties had not yet arrived at an agreement when the contract expired because the union and the company were still negotiating. Signifi-

cantly, these reassurances occurred even after the November 28 meeting where Jurado had left the bargaining session. Finally, Jurado himself testified that, while discussing the contract with individual employees, he urged them to stay on until the union and the company could arrive at some agreement. None of these facts supports an inference that the company acted with anti-union animus.

In discussing what types of conduct justify such an inference, this court in *Haberman* emphasized especially conduct that "directly and unambiguously penalizes or deters protected activity." *NLRB v. Haberman*, 611 F.2d at 359. The court referred to *Portland Willamette Co. v. NLRB*, 534 F.2d 1331 (9th Cir. 1976), as presenting such an instance of inherently destructive activity. There, the Ninth Circuit Court of Appeals concluded that inherently destructive activity was that which has "far reaching effects which would hinder future bargaining * * * [including] permanent discharge for participation in union activities, [and] granting of superseniority to strike breakers." *Id.* at 1334. None of these is present in the instant case, and we therefore cannot conclude that Electric Machinery's conduct was so egregious as to eliminate the General Counsel's burden of proving anti-union animus. Electric Machinery took no action which would permanently jeopardize future union status and, in fact, three weeks after committing the unfair labor practices discussed above, the company rejoined NECA.

In sharp contract to *Superior Sprinkler*, the "Memorandum of Agreement" which Jurado proposed evidenced a desire to bargain with the union in good faith. Although Electric Machinery was not contractually bound to follow the terms of the NECA agreement, having given the union timely notice of its intention to terminate in accordance with Article I, § 2(a), of the collective bargaining agreement, the company was nevertheless willing to abide by the contract for thirty-day intervals lasting up to six months, provided negotiations were proceeding in good faith.[6]

In light of this evidence of good faith, the court finds it impossible to infer anti-union animus. Where, as here, the refusal to bargain caused no permanent future impairment of union rights, the employer brought forward a convincing business justification for his actions, and the employees were encouraged to continue working until the union and the company reached agreement, we see no factual basis from which we can infer anti-union motive. Consequently, we conclude that the employees were not constructively discharged.

ENFORCEMENT AFFIRMED in part.

ENFORCEMENT DENIED in part.

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[6] We are not persuaded by the union's contention that, even after the contract termination date, the company was bound to abide by the contract, based upon the union's interpretation of Article I, § 2(c), because that provision refers solely to "changes" in the agreement and not "termination." Article I, § 2(c) provides:

> The existing provisions of the agreement shall remain in full force and effect until a conclusion is reached in the matter of proposed *changes* (emphasis added).

MGM Grand Hotel-Reno, Inc. v. NLRB

653 F.2d 1322 (9th Cir.), August 17, 1981—249 NLRB 961

On petition to review Board Order

Before MERRILL, ADAMS* AND SNEED, Circuit Judges

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ADAMS, Circuit Judge: This case is before the Court on the petition of the MGM Grand Hotel, Reno, Nevada, hereinafter the "Hotel," to review an order of the NLRB issued against it on May 30, 1980,[1] The Board has filed a cross-application for enforcement of its order.

a.

The Hotel is a Nevada corporation engaged in the operation of a hotel and casino in Reno. It commenced business operations on May 3, 1978. All individuals hired by the Hotel received a copy of the employee's "Handbook" as well as a separate document entitled "General Rules." The Hotel's "no solicitation policy," as outlined in the Handbook, stated as follows:

> Solicitation by anyone for funds, membership in organizations or clubs, or dis-
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> 1324
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> tribution of any literature for any purpose, is strictly forbidden on company property. The circulation of petitions of any kind is similarly forbidden. This includes employees and nonemployees.

The original "General Rules" also contained the following language: "Circulation of petitions of any kind for solicitation of employees for any purposes other than the United Way is not permitted." On May 6, the Hotel issued a revised set of General Rules to all current employees. These revised rules were distributed to employees hired thereafter. Although the employees' Handbook was revised after the Hotel opened, the original Handbook continued to be distributed to newly hired employees until the first part of August and the revised Handbook was not distributed until November.

On June 13, Andrew Csonka was hired by the Hotel's Maintenance Department as a "Welder-Engineer" at a rate of $52 for an eight-hour shift. Csonka's initial job was to examine new equipment and set up the welding shop. Thereafter, Csonka was the engineer primarily responsible for maintenance-type welding and fabrication, which occupied 90.95% of his working time.

In late June the Union began an organizing campaign among the Hotel's engineering employees. Csonka signed an authorization card and played an active role in assisting the Union, talking with several employees about unionization and distributing authorization cards. On August 18 the Union filed a petition with the NLRB seeking certification as an exclusive bargaining representative with the Hotel's Maintenance Department employees. During the period between the filing of this petition and the representative election, which was held on August 6, the Hotel conducted a number of meetings with Maintenance Department employees to discuss the upcoming election. Supervisors Williams and Kelly distributed anti-Union campaign literature and engaged in discussions with various Union members regarding the merits of the Union's cause. From that discussion Williams and Kelly evaluated each employee's probable adherence or lack thereof and reported the results to top-level management.

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*Honorable Arlin M. Adams, United States Court of Appeal for the Third Circuit, sitting by designation.

[1] Reported at 249 in NLRB 153.

In the latter part of August supervisor Williams approached James Corbett, a maintenance engineer, and asked him "what * * * (he thought) of the Union." When Corbett replied that he did not know and had not thought about it, Williams stated, "You know, if the Union comes in here, you guys are going to probably have to take an examination to check to see your qualifications and * * * that's going to bring down a lot of changes, and a lot of people are going to be going out the door." About a week later, Williams called Corbett aside from a group of employees and asked him whether Charlie Green or any other employee had "been talking to (him) about the Union." Williams further asked whether Corbett had "been down to any of the Union meetings." Finally, during approximately the same period, when Williams encountered Corbett and another engineer on their way to a job, Williams asked Corbett "what * * * (they were) doing together." Corbett replied that they were "going to a job." Whereupon Williams stated, "Well, I am giving you fair warning. You guys aren't supposed to be caught together. Two guys together, that's no good." When Corbett repeated that they were merely on their way to a job, Williams replied, "if Administrative Director of Engineering Helmut (Herbrechtsmeier) catches you, you're going to hear about it."

About a month before the election the Hotel conducted a meeting for all day shift personnel in the Maintenance Department. At this meeting Williams instructed employees that they were not to "talk to each other * * * in between jobs." Further, upon completion of their jobs, employees were to return to the Engineering Department for another work order and then to proceed alone to their next assignment.

On September 10, Csonka spoke with supervisor Williams about the Union. During the course of the conversation Csonka expressed an interest in going to school. Williams informed Csonka that the Hotel at times "catered to people who were going to school," but that "if the union came in" there would be no chance of that happening in the future. Around September 21, Williams mentioned to Csonka that he (Williams) had been "jumped on by Herbrechtsmeier for permitting Csonka and another employee to walk "through the halls together on the way to their job." Williams warned Csonka that maintenance engineers should avoid contact even while "going to or from a (two-man) job" or even "to or from lunch."

During he same time period, prior to the election, Williams engaged in additional conversations concerning the Union with unit employees Paul Magrini and Thomas Hansen. Williams invited Magrini into the back of a pickup truck for a private discussion, and then asked whether Magrini was planning to vote for the Union. When Magrini stated that he "hadn't made up his mind," Williams suggested that perhaps Magrini "could better negotiate for himself, rather than with a Union." Similarly, Williams asked Hansen "what (he) thought about the Union," and stated that the Union would take (Hansen's) money. Williams also told Hansen "not to walk with anybody or talk to anybody about the Union."

At an assembly of Maintenance Department employees on October 2—four days before the election—the Hotel announced a substantial wage increase for the maintenance engineers and other employees in the bargaining unit. Concurrent with the wage adjustment, the Hotel established a new classification system which designated each maintenance engineer as either in Group I or Group II. For employees in Group I the new rate of pay ranged from $64–$76 for an 8 hour shift; for Group II engineers the wages per shift ranged from $50–$64. Twenty-three of the maintenance engineers in the bargaining unit were classified as Group I and received wage increases in varying amounts.

A secret ballot election was held on October 7, 1978, and the Union was defeated. After the election, at a meeting with Williams, Herbrechtsmeier and Engineering Manager James Sauder, Csonka was advised of his classification as a Group II maintenance engineer and that he would not be receiving a wage increase. When Csonka expressed his disagreement with this action by the Hotel and asked Sauder for an explanation, Sauder stated that to be in Group I an employee "has to know all different aspects of the engineering field" and "has to be able to handle" whatever work is required. Thus, as Sauder explained to Csonka, Group I engineers must be able to perform carpentry, upholstery, and boiler room work and to know how to paint and how to be a plumber. Csonka replied that in that case no one working at the Hotel "was qualified to be a Group I engineer." Csonka was then told that he would be given the opportunity to "go on different jobs * * * throughout the hotel" to broaden his experience. Following this meeting, Csonka had a conversation regarding his classification with his immediate supervisor Ralph Kelly. Kelly agreed that Csonka's classification should have been Group I.

Several months later, in mid-April 1979, Supervisor Bill Ferris informed Csonka "that he was working on moving Csonka up to a Group I engineer but * * * was having some problems." Ferris mentioned that "there was spot open on the swing shift," and that if Csonka took it he would be able to learn "different aspects of the engineering field" and "move up rapidly." Csonka accepted the swing shift position. On June 13, 1979, Csonka received his yearly evaluation and was granted a wage increase from $58 to $64 per 8-hour shift. He has never been informed whether his raise carried with it an upgrade to the level of Group I engineer.

The Board found that the Hotel violated Section 8(a)(1) of the Act by (a) interrogating and threating employees, (b) by suggesting that employees could negotiate more favorably without the assistance of the Union, (c) by maintaining invalid rules prohibiting employee communication, and (d) by granting a wage increase so as to affect the election results. The Board also found that the Hotel violated Section 8(a)(3) and (1) of the Act by discriminating against Csonka because of his Union activities. The Board ordered the Hotel to cease and desist from unfair labor practices and from interfering in any other manner with the exercise of employees' rights under Section 7 of the Act. Affirmatively, the Board's order requires the Company to make Csonka whole for any loss of pay suffered as a result of any discrimination against him and to promote him retroactively with all attendant privileges and benefits, to the classification of Group I maintenance engineer. The Board's order also directs the Hotel to post appropriate notices.

b.

The standard to be applied when reviewing findings of the NLRB is whether there is substantial evidence in the record to support the findings. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, S.Ct. 456, 95 L.Ed. 456 (1951). On the basis of this standard, we conclude that there was sufficient evidence in the record to support the Board's findings in all respects except as to the wage increase. The decision to increase the wages was necessitated by economic factors, the most notable being the intense competition for qualified employees in the competitive Reno labor market. The Hotel's President, Barry Brunet, testified in detail concerning the need for the wage increase. As he explained, the Hotel's inauguration was followed by the opening of several other hotels and casinos in the area, causing a severe labor shortage. The labor market became "tighter" as the other hotels began operating and MGM had extreme competition for an effective labor force. In addition, the Hotel suffered heavy employee turnover.

Mr. Brunet's testimony was substantiated at all important points. Personnel Director Ostrovsky reconfirmed that the problem in recruiting and retaining qualified employees constituted a crisis situation in the months prior to the wage increase. On the basis of computer surveys and interviews with departing employees, Ostrovsky concluded that the Hotel's compensation system was unsatisfactory in two respects. First, the Hotel's merit system gave department managers great discretion in setting the wage rates of individual employees and resulted in substantial disparities between employees of different departments. Second, Ostrovsky concluded that the Hotel's wages were inadequate to attract and retain experienced and qualified employees. Although the hearing examiner believed that the Hotel had solved its problems with respect to attracting and retaining maintenance engineers and having a satisfactory and stable work crew at the time of the wage increase, the evidence was inconsistent with this conclusion. Herbrechtsmeier testified that in the months prior to the wage increase the Hotel had difficulty recruiting qualified mainte-

best copy available

nance personnel. The Hotel was the largest building in Reno and had the most sophisticated equipment. Consequently it required a large number of highly-skilled maintenance engineers. A sufficient number was unavailable locally and the high cost of housing deterred prospective employees from readily moving into the Reno area. Engineering Manager Sauder also corroborated Ostrovsky and Herbrechtsmeier on this point. He testified that the Hotel had a difficult time finding maintenance engineers who were experienced with respect to boilers, plant operation, commercial refrigeration and high voltage electricity.

The ALJ placed great emphasis on a campaign leaflet that had been distributed during the course of the election campaign. It showed wages and benefits at the MGM Hotel in comparison with four other Reno employers. But it in no way purported to be a comprehensive survey. It did not compare the Hotel's wages and benefits with

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similar employers whose maintenance employees may have been represented by other unions or by no union at all. Nor was there any indication in the record that the Hotel's wages were sufficiently high to attract qualified employees from the other establishments. The general rule is that where an increase in benefits results from a corporate-wide decision and is implemented corporate-wide in a normal business fashion, election results will not be set aside. *Northrop Telecomm, Inc.*, 233 NLRB 1104, 1105 (1977). Accord, *Delchamps. Inc. v. NLRB*, 588 F.2d 476 at 480–81 (5th Cir. 1979); *Louisburg Sportswear Co. v. NLRB*, 462 F.2d 380 at 384 (4th cir. 1972).

Pre-election increases in wages have been considered lawful where the change serves to establish or maintain parity with wages provided to employees in other facilities of the employer. *See, e.g., Schulte's IGA Foodliner*, 241 NLRB 1332 (1979). Such corporate-wide increases have been held to indicate that the employer's conduct was not calculated to influence the impending election. Here the wage increase affected 1200 employees, only 49 of whom were in the bargaining unit in question. The increase resulted from a corporate-wide decision which was implemented in a normal business fashion. In no way did the ALJ dispute the evidence to this effect. The increase was based on a comprehensive study of the Hotel's wage rates and compensation policies that were instituted many months before the election.

Aware that the wage adjustments had potential legal ramifications with reference to the pending election, President Brunet discussed the situation with legal counsel. Ultimately the Hotel determined to do what it would do in the absence of an election—and granted the wage increase effective at the beginning of the next pay period after the final decision to give the increase had been made.

In short, a fair review of the evidence establishes that the wage increase resulted from a corporate-wide decision that was implemented in a normal business fashion. The Board failed to consider the evidence on the subject in its entirety, and therefore erroneously concluded that the wage increase of the bargaining unit employees was improper.

C.

The petition for review by the MGM Grand Hotel-Reno is denied except for that portion dealing with the wage increase. A judgment will be entered enforcing the Board's order aside from that portion of the order dealing with the wage increase.

David D. Sutherland, d/b/a Maaco Auto Painting and Body Work v. NLRB

656 F.2d 359 (8th Cir.), August 17, 1981

On petition to adjudge in civil contempt

Before Heaney, Stephenson and McMillian, Circuit Judges

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Upon motion of the National Labor Relations Board, David D. Sutherland, d/b/a Maaco Auto Painting and Body Work, is found in civil contempt for having failed and refused to comply with the judgment of this Court entered on April 21, 1981, 646 F.2d 1273, in that he has failed to offer reinstatement to Donald Rubino, failed to post notices and failed to pay Court costs. There being no genuine issue as to any material fact, the National Labor Relations Board is entitled to a civil contempt adjudication as a matter of law.

It is, therefore, ordered that David D. Sutherland, his agents, successors and assigns, purge themselves of civil contempt by:

a. Conducting himself in all respects consistent with the April 21, 1981, judgment of this Court and the provisions of the Board's order thereby enforced.

b. Immediately offering Donald Rubino full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and making him whole for any losses suffered by reason of Sutherland's failure and refusal to reinstate him, said amount, unless agreed upon, to be computed by the Board in a supplemental proceeding, subject to review by this Court.

c. Preserving and, upon request, making available to the Board or its agents, for examination and copying, all books and records necessary to determine the amount of back pay due, and to monitor compliance.

d. Immediately posting the notice required to be posted by the Board's June 16, 1980, order as enforced by the Court in the manner set forth therein.

e. Immediately paying the Board Court costs in the amount of $75.78.

f. Immediately posting in conspicuous places, including all places where notices to employees customarily are posted, for a period of sixty (60) consecutive days, an appropriate notice, in the form prescribed by the Board, signed by Sutherland, which states that Sutherland has been adjudicated in civil contempt of Court for disobeying and failing and refusing to comply with the judgment of this Court and that he will take the action in purgation ordered by the Court, a copy of the purgation order being posted alongside, and by maintaining such notices and adjudication in clearly legible condition throughout such posting period, and assuring that they are not altered, defaced or covered by any other material.

g. Filing a sworn statement with the Clerk of this Court and mailing a copy thereof to the Director the Board's Eigh-

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teenth Region within ten (10) days after the entry of the order of adjudication, and again at the end of the posting period, showing what steps have been taken by Sutherland to comply with the Court's directives, and making such further reports as the Court may require.

h. Reimbursing the Board for all costs and expenditures, including reasonable counsel fees, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding.

The Board is directed to renew its motion to assess a fine against Sutherland if Sutherland fails to comply with this order within five (5) days of the date the order is served on him.

Central Freight Lines, Inc. v. NLRB

653 F.2d 1023 (5th Cir.), August 21, 1981—250 NLRB 435

On petition to review Board Order

Before MARKEY,* Chief Judge, and GEE and POLITZ, Circuit Judges

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MARKEY, Chief Judge: Central Freight Lines, Inc. (Company) peititions to review, and the National Labor Relations Board (board) cross-petitions to enforce, the board's order of July 7, 1980. The board found that Company engaged in a number of acts violating Section 8(a)(1) of

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the National Labor Relations Act (Act), and discharged Thomas Sessions for Union activities in violation of Section 8(a)(3) of the Act. We modify.

Introduction

Nine witnesses testified at a hearing before an administrative law judge (ALJ) on May 30 and 31, 1979. Sharp conflicts in testimony make crucial in this case the ALJ's evaluation of the demeanor and credibility of witnesses. The board, in a 2–1 decision, affirmed the ALJ's findings of violations of Section 8(a)(1) and reversed the ALJ's finding of no violation of Section 8(a)(3). Our review is limited to a determination of whether the findings of the board majority are supported by substantial evidence on the record as a whole. Section 10(e) of the Act. *N. L. R. B. v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978).

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*Of the U.S. Court of Customs and Patent Appeals, sitting by designation.

I.

Section 8(a)(1)

A. *Supervisory Status of Martin*

The finding that Martin was not a supervisor within the meaning of Section 2(11) of the Act is supported by substantial evidence. His duties were merely routine, requiring no independent judgment.

It is apparent from Martin's testimony that he had none of the powers listed in Section 2(11) as indicia of supervisory status, such as power to hire, fire, or discipline employees, powers exercised here by Maritn's superior, the dock foreman. Martin's duties consisted of: (1) determining the size and destination of outbound shipments; (2) determining the available space in trailers; and (3) loading the trailers himself or with help from other dockmen. His only exercise of judgment was in distributing dockmen among available trailers for loading. As the ALJ said: "If a trailer fills up, then another trailer is loaded".

Like other dock employees, Martin spent most of his time engaged in manual labor, and was paid only 5 cent per hour more than the others.

Contrary to Company's assertion, the board was not required to defer to conclusory testimony of others (Domino and Anderpont) that Martin's duties were identifical to those of supervisor Anderpoint. The board properly accepted the view of the ALJ, who observed the demeanor of the witnesses. As stated by the ALJ:

> I found Martin's description of the work which he had actually performed for the [Company], and Martin's description of his own duties and authority to be more reliable than the testimony offered by others.

B. *Due Process*

Company asked for dismissal of these proceedings, arguing that an investigatory interview of Martin denied at due process because examiner Brown took an affidavit from "supervisor" Martin, treating him as an employee, without contacting Company's attorney.

Because we uphold the finding that Martin was not a supervisor within the meaning of Section 2(11), it follows that there was no impropriety in the investigation, and the ex post facto administrative inquiry into the investigation occasioned by Company's motion to quash the complaints is irrelevant to the outcome of this litigation.

C. *Domino-Martin Conversation*

Substantial evidence supports the finding that Domino told Martin in October, 1978, to refrain from participating in Union activities and to "remain neutral". Martin having been an employee with a full Section 7 right to participate in Union activities, not a supervisor within the meaning of Section 2(11), we affirm the board's finding that Company is liable for an unfair labor practice under Section 8(a)(1) because of Domino's instruction to Martin.

D. *The Barthell Affidavit*

Over Company's objection, General Counsel introduced at trial the Barthell affidavit, concerning a conversation between Domino and Barthell in, August, 1978.

Barthell, a former Company employee, was deceased at the time of trial.

In admitting the affidavit, the ALJ relied on Fed.R.Evid. 804(b)(5), the residual exception to the hearsay rule. For that Rule to apply, however, an extra-judicial statement must have circumstantial guarantees of trustworthiness equivalent to those listed in the Rule at 804(b)(1)–(4): former testimony, belief of impending death, statement against interest, and personal or family history.

There is no evidence that Barthell had a belief in impending death. Nor is there evidence that the Barthell affidavit had any equivalent guaranty of trustworthiness of any kind. Indeed, it was written by examiner Brown and merely signed by Barthell. As stated in *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562, 565 (N.D.Ohio 1975): "The Court is well aware of the subtle shifts in meaning that can occur when one's statement is recorded by another."

Unless application of Rule 804(b)(5) be limited to circumstances evidencing a clear basis of trustworthiness, exceptions to the rule against hearsay could swallow the rule. Because there were no such circumstances here, the board erred as a matter of law in relying on the Barthell affidavit to support a finding that the Company violated Section 8(a)(1) because of a Domino-Barthell conversation. Paragraph 1(b) of the board's order depends entirely, and paragraph 1(c) thereof depends in part, on the Barthell affidavit. The former must therefore be deleted and the latter amended.

E. *Solicitation Policy*

Paragraph 7(g) of the complaint alleges that Domino "orally announced and enforced at [Company's] plant a no-solicitation rule which prohibited the employees from soliciting for the Union on the [Company's] premises at any time". However, the testimony of Sessions, witness for the General Counsel, does not support that allegation. According to Sessions, Domino held a meeting on the dock in mid-November, 1978, saying "I would prefer that [solicitation] be contained to your lunch breaks, your coffee breaks and before and after work. I don't want to see it any more on this dock during company work hours." Consistent with Sessions' testimony, Domino testified that the rule was not a blanket prohibition of solicitation for Union on Company premises.

Hence the board's position that the rule was too broad is unsupported in the record. Company's no-solicitation rule, being restricted to work areas and work time, was valid on its face. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 n. 10, 65 S.Ct. 982, 988 n. 10, 89 L.Ed. 1372 (1945); *Custom Recovery v. N.L.R.B.*, 597 F.2d 1041, 1044 (5th Cir. 1979).

The board says there were sports pools and a flower fund box, with no Company rule prohibiting them. It contrasts those activities with a rule forbidding union solicitation. There is, however, no evidence that the sports pool and flower fund activities had a potential for interference with work substantially equivalent to that of union solicitations. Moreover, the complaint charged the Company with promulgating an overboard rule prohibiting solicitation "at any time", not with failure to prohibit other activities. As indicated the record fails to support the charge in the complaint.

That the no-solicitation rule was announced coincidentally with a union organizational effort does not alone taint its adoption with a discriminatory purpose. If such rules are to be established, the time of an organizational effort is the logical time for their announcement. *TRW, Inc. v. N.L.R.B.*, 393 F.2d 771, 774 (6th Cir. 1968).

Because the solicitation rule did not constitute the violation charged, paragraphs 1(e) and 2(a) of the board's order must be deleted.

F. *Remaining Board Determinations Under Section 8(a)(1)*

Substantial evidence on the record as a whole supports the remaining Section 8(a)(1) violation determinations based on:

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(1) Domino's interrogation of Crumpler in Domino's office in August, 1978; (2) Domino's interrogation of Sessions in Domino's office in August and in November, 1978; and (3) Anderpont's interrogation of Saurage on the dock in August, 1978.

II.

Sessions' Discharge

Sessions, a truck driver and a leader in the union's organizational effort, incurred three chargeable traffic accidents in four months. Pursuant to its policy of discharging drivers after three chargeable accidents in 12 months, the Company discharged Sessions.

Notwithstanding Sessions' driving record, the board majority found that Company violated Section 8(a)(3) by discharging him because of union activities. We cannot agree.

We review the board's findings, but where its findings conflict with those of the ALJ, the record, including the ALJ's report, must be subjected to particular scrutiny. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496, 71 S.Ct. 456, 468, 95 L.Ed. 456 (1951). *N.L.R.B. v. Florida Medical Center, Inc.*, 576 F.2d 666, 674 (5th Cir. 1978).

The record supports the ALJ's findings that: (1) Company established a stricter enforcement policy toward accidents when Domino became terminal manager in February, 1977; and (2) Domino announced the new policy to employees at a meeting in January, 1978, months before Union appeared on the scene. Company drivers including Sessions, knew the policy. There is no evidence of disparate treatment, Sessions being the first and only driver to violate the three-accident rule after Domino announced the new policy. That others had not been discharged for accidents before Domino's announcement is of no moment. Similarly, that other drivers were not discharged, following the announcement, is of no moment when, as here, those drivers had incurred less than three accidents subsequent to the advent of the new policy.

In finding a violation, the board majority thus speculated that Company had a discretionary motive in discharging Sessions and usurped Company's prerogative to enforce strictly its accident policy. Hence paragraphs 1(f), 2(b), and 2(c) of the board's order must be deleted.

Conclusion

We modify the board's order,* deleting paragraphs 1(b), 1(e), 1(f), 2(a), 2(b), and 2(c), and amending paragraph 1(c) to read: "Creating the impression of surveillance of its employees' Union activities by telling an employee that his truck had been observed outside a Union meeting." We expect that the board will appropriately amend the "Notice to Employees" to be posted at Company's Beaumont plant.

MODIFIED, AND AS MODIFIED, ENFORCED.

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*The board added paragraphs 1(f), 2(b), and 2(c) to the ALJ's order. We have designated the resultant combination "the board's order".

Vicksburg Hospital, Inc. v. NLRB

653 F.2d 1070 (5th Cir.), August 21, 1981—251 NLRB 6

On petition to review Board Order

Before REAVLEY, RANDALL and SAM D. JOHNSON, Circuit Judge

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REAVLEY, Circuit Judge: Vicksburg Hospital, Inc. has petitioned this court for review of an order of the National Labor Relations Board finding it guilty of unfair labor practices in refusing to bargain with the union certified by the Board to represent its empoyees. The Board has cross applied for enforcement of its order. We grant the request for enforcement.

I. *The Background Facts*

Petitoner is a non-profit hospital engaged in the delivery of health care services in Vicksburg, Mississippi. On September 10, 1979, Local Union 1964 of the United States Brotherhood of Carpenters & Joiners of America, AFL–CIO petitioned the Board for certification as the exclusive barganing agent for a unit composed of Vicksburg Hospital's nonprofessional service, maintenance, and technical empolyees, excluding business office clerical employees, supervisors, and professional employees.[1] The hospital took the position that the proposed unit of all service, maintenance and technical employees was overbroad and urged that four separate units consisting of service and maintenance employees, technical employees, business office and clerical employees, and professional employees would be appropriate. After a hearing, the regional director issued a decision and direction of election, finding that the unit of service, maintenance and technical employees was appropriate for collective bargaining. The hospital filed a timely request for review of the regional director's decision, which was denied by the Board. An election was subsequently conducted among the employees in the unit. From the 230 employees who were eligible to vote, 148 votes were cast in favor of the union, and 66 votes were cast against it. Fifteen ballots were challenged, which was an insufficient number to affect the election.

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Vicksburg Hospital filed objections to the election, contending that the union offered economic inducements to employees who supported it by waiving initiation fees, that it misrepresented to employees various conditions of employment and their rights in the event of strikes, and that it misrepresented the Government's role in the election by leading employees to believe that the Board supported the union in the election. Thereafter, the regional director issued a supplemental decision and certification of representation in which he overruled the objections to the election, denied the hospital's request for an evidentiary hearing, and certified the union as the exclusive bargaining representative for the employees in the unit. The hospital applied to the Board for review of the regional director's supplemental decision and for reconsideration of the previous ruling on the appropriateness of the unit. The Board denied the application for review on April 2, 1980.

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[1] The parties stipulated that registered nurses would be considered professional employees and, thus, would not be included in either broad unit of service, maintenance and technical employees or a separate unit of technical employees.

The hospital refused to bargain with the union in order to challenge its certification as bargaining representative on the grounds that the bargaining unit of service, maintenance and technical employees was inappropriate and that conduct by the union had destroyed the "laboratory conditions" for a free election. A complaint was issued against the hospital, alleging a refusal to bargain in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). In answering the complaint, the hospital admitted the refusal to bargain, but denied it had committed an unfair labor practice, contending that the bargaining unit was inappropriate and that the union had engaged in impermissible conduct prior to the election. The general counsel filed a motion for summary judgment with the Board.

On August 11, 1980, the Board issued its decision and order granting summary judgment in favor of the general counsel and against Vicksburg Hospital.[2] The Board determined that the issues raised by the hospital had been previously decided and resolved against it in the underlying representation case and that the hospital had not presented any newly discovered evidence or made a showing of special circumstances requiring a reexamination of the Board's rulings in the representation case. The Board, therefore, determined that there were no material issues of fact to be litigated in the unfair labor practice proceeding and, accordingly, held that the hospital had violated §§ 8(a)(5) and (1) of the National Labor Relations Act by its refusal to bargain with the certified representative of the employees in the unit found appropriate. The Board's order requires the hospital to bargain with the union as the exclusive representative of all employees in the appropriate unit and to embody any understanding reached in a signed agreement.

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II. *Appropriateness of the Bargaining Unit*

Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b), directs the Board to "decide in each case * * *, in order to assure to employees the fullest freedom in exercising the right guaranteed by this Act, the unit appropriate for purposes of collective bargaining * * *." In making this determination, "[t]he Board is not by statute required to choose the *most* appropriate bargaining unit, only to select a unit appropriate under the circumstances." *NLRB v. Southern Metal Service, Inc.*, 606 F.2d 512, 514 (5th Cir. 1979) (emphasis in original). Moreover, "[t]o set aside a Board certified unit, the employer must establish that the designated unit is clearly not apropriate. A showing that some other unit would be appropriate is insufficient, for a choice among appropriate units is within the discretion of the Board." *NLRB v. J.C. Penney Co., Inc.*, 599 F.2d 373, 375 (5th Cir. 1977). As was stated in *NLRB v. Southern Metal Service,*

> "[t]his Court's standard of review is 'exceedingly narrow' in a challenge to the Board's determination of an appropriate bargaining unit. *NLRB v. Fidelity Maintenance & Construction Co.*, 424 F.2d 707, 709 (5th Cir. 1970). The Board's decision 'involves of necessity a large measure of informed discretion,' and 'is rarely to be disturbed.' *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491, 67 S.Ct. 789, 793, 91 L.Ed. 1040 (1947). The decision will not be set aside unless the Board's discretion has been exercised 'in an arbitrary or capricious manner.' *Spartans Industries, Inc. v. NLRB*, 406 F.2d 1002, 1005 (5th Cir. 1969); see *J.C. Penney*, 559 F.2d at 375."

606 F.2d at 514.

Despite the limited nature of judicial review available in such a case, Vicksburg Hospital argues that the Board's determination of an appropriate bargaining unit consisting of all service, maintenance and technical employees was arbitrary, capricious and an abuse of discretion because it was inconsistent with the Board's prior decisional rulings dealing with health care institutions. Specifically the hospital objects to the inclusion of technical employees (predominantly licensed practical nurses) in the same bargaining unit with service and maintenance employees. In support of its position the hospital cites Barnert Memorial Hospital Center, 217 NLRB 775, 89 LRRM 1083 (1975), in which the Board indicated that, in reference to heralth health care institutions, it would not normally compel the inclusion of technical employees in the same bargaining unit with service and maintenance employees.[3] *Accord,* Jewish Hospital of Cincinnati, 223 NLRB 614, 91 LRRM 1499 (1976).

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[2] The Board's decision is reported at 251 NLRB No. 3 (1980).

The hospital argues that the regional director, in his decision on an appropriate bargaining unit, relied solely on the traditional "community of interest" criteria, *see NLRB v. J.C. Penney Co.,* 559 F.2d at 375, and failed to articulate a satisfactory reason for deviating from the Board's established policy of "not normally compel[ling] in inclusion of technical employees in a unit composed of service and maintenance employees." *Jewish Hospital of Cincinnati,* 223 NLRB at ——, 91 LRRM at 1505. Although not citing *Barnert* or expressly stating why he was disregarding the Board's

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policy of not normally including technical employees in the same unit the service and maintenance employees, the regional director indicated that "[w]hen technical employees share a substantial community of interest with service and maintenance employees a combined service, maintenance and technical employees unit is an appropriate unit." In support of this conclusion, the regional director cited *Appalachian Regional Hospitals, Inc.,* 223 NLRB 542, 96 LRRM 1528 (1977); *National G. South, Inc., d/b/a Memorial Medical,* 230 NLRB 976, 95 LRRM 1478 (1977); and *Mount Airy Foundation d/b/a Mount Airy Psychiatric Center,* 217 NLRB 802, 89 LRRM 1067 (1975). In each of these cases, the Board found a combined unit of service, maintenance and technical employees to be appropriate. Moreover, the *Barnert* decision was cited and discussed in *Mount Airy,* 217 NLRB at —— n.2, 89 LRRM at 1068 n.2. We conclude, therefore, that the regional director was well aware of the Board's policy of not normally including technical employees in the same unit with service and maintenance employees, as was the Board when it denied the hospital's request for review of the regional director's decision, and that he, and the Board by denying the request for review, consciously determined that a combined unit of service, maintenance and technical employees would be appropriate under the circumstances of this case.

The hospital contended that technical employees should constitute a separate bargaining unit because their specialized skills, training, education and job requirements establish separate and distinct community of interests not shared by service and maintenance employees. The regional director found, however, that "many of the employees whom the Employer would place in a separate technical unit work in close association with and share common supervision with employees it would place in the service and maintenance unit." [4] He also found that the hospital's service and maintenance employees shared integrated job functions with, and have substantial and frequent contact with, those employees the hospital would place in a separate technical unit.[5] Given these findings,[6] we cannot say

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[3] In *Barnert,* the Board stated:

"In the health care field, as illustrated by those employees we find are technical employees below [*i. e.* licensed practical nurses, operating room technicians, X-ray technicians, EKG and EEG technicians, respiratory care technicians, orthopedic technicians, and the like], we find continuing reason to approve separate units of technical employees. Thus, the kinds of employees we would include in the technical unit are those whose specialized training, skills, education and job requirements establish a community of interest not shared by other service and maintenance employees. This separate community of interest is frequently evidenced by the fact that such employees are certified, registered, or licensed. However, we also find employees may not meet such standards without having been certified, registered, or licensed, and if they do, we shall include them in the technical unit."

217 NLRB at ——, 89 LRRM at 1086.

[4] For example, the regional director noted that "in the radiology department, the Employer would place the radiologic technologist and radiologic technicians in a technical unit but would place the radiology receptionist in the service and maintenance unit. The radiology receptionist works in the same area with, and has day-to-day contact with, other radiology department employees including the technologists and the radiologist. The receptionist is also under the immediate supervision of the chief technologist. Similarly, in the department of pathology laboratory, the Employer would include the histologic technician and lab technicians in a technical employee unit but would place the pathology secretary in a service and maintenance unit. The record reveals that the pathology secretary works in a day-to-day contact with the laboratory employees and is directly supervised by the pathologist. The record also establishes that relatively low-skill histologic technicians (no college or technical school education requirement, one year on the job training) work side-by-side with the more highly skilled medical lab technicians (who possess a minimum of 2 years training, an associate degree, and 6 months training in a supervised laboratory)."

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that the Board's decision on a combined service, maintenance and technical employees' unit as being appropriate was inconsistent with its prior decisional rulings in the health care field. *See Appalachian Regional Hospitals,* 233 NLRB at ——, 96 LRRM at 1529; *Memorial Medical,* 230 NLRB at ——, 95 LRRM at 1481. Instead, we conclude that the Board determined the "commonality of interest" between the hospital's technical employees and its service and maintenance employees was sufficiently so pervasive as to override the separate and distinct community of interest among technical employees flowing from their training, education, skills, and certification, registration or licensing. *See Barnert,* 217 NLRB at —— n.26, 89 LRRM at 1087 n.26.

Although the hospital has shown that a bargaining unit consisting of its technical employees would be appropriate, it has failed to establish that the combined unit of service, maintenance and technical employees is clearly *not* appropriate. Since we cannot conclude that the Board's decision, determining that the unit of service, maintenance and technical employees was appropriate, was made in an arbitrary or capricious manner, we must, therefore, defer to the Board's discretion.[7] Moreover, in finding that a single unit of service, maintenance and technical employees was appropriate, the regional director and the Board were mindful of the congressional mandate against undue proliferation of bargaining units in the health care industry. *See Allegheny General Hospital,* 239 NLRB ——, 100 LRRM 1030 (1978).

III. *The Objections to the Election*

The hospital raised three objections as a basis for invalidating the election in which the union won the right to represent its service, maintenance and technical employees: (1) that the union offered to waive initiation fees for employees who supported it: (2) that the union misrepresented to employees the nature of unfair labor practice strikes and their rights in the event of an economic strike; and (3) that the union led employees to believe that the Board supported it in the election. After reviewing the evidence submitted by the hospital in support of its contentions, the regional director, without conducting a hearing, issued a decision in which he determined that the objections were unfounded. The Board denied review of the regional director's decision.

"The Board has wide discretion in determining whether an election has been fairly conducted, and its decisions warrant special respect on review." *NLRB v. Claxton Manufacturing Co., Inc.,* 613 F.2d 1364, 1365 (5th Cir.), *modified,* 618 F.2d 396 (5th Cir. 1980). In order to gain the right to a new election, the hospital "has the entire burden of 1) offering 'specific evidence of specific events from or about specific people,' and 2) showing that these objectionable activities, 'when considered as a whole, either tended to or did influence the outcome of the election.'" *NLRB v. Klingler Electric Corp.,*

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[5] In his decision, the regional director stated: "The record shows that nurses aides and orderlies, as well as all nursing personnel, perform the Employer's simple housekeeping work such as changing of bed linens and assisting patients to their rooms. The record further reflects that the nursing personnel perform such work to the same extent as orderlies and aides. The record also establishes that nurses aides work along with and can, through on the job training, become surgical technicians. The record shows that the admissions clerk (who is assigned to an office job) is in day-to-day contact and works together with nurses in the patient care areas throughout the hospital. Similarly, the radiology receptionist has day-to-day contact with radiology technicians, patients, nurses aides, and LPNs. As an example of common supervision of a large number of technical and non-technical employees, the record reflects that both the 50 LPNs, whom the Employer contends are technical employees, and the 55 nurses aides, whom both parties agree are service and maintenance employees, are under the supervision of the Head Nurse. When asked at the hearing about the frequency of daily contact among its employees, the Employer's Executive Director and Hospital Administrator testified that 'We're a small institution and there's always contact between employees.' The record shows that every employee at the Employer's hospital shares the same employee benefit programs, the same eating and restroom facilities, and the same parking facilities (except for supervisors)."

[6] These findings are clearly supported by substantial evidence.

[7] The hospital also challenged the Board's determination of the bargaining unit because the regional director stated that the parties were in agreement that a number of specific job classifications should be included in any bargaining unit found appropriate, and that this statement was contrary to the evidence. The hospital's contention that the certification of the union is invalid because the regional director misstated the parties' positions is totally without merit. While the regional director erroneously stated at one place in his decision and direction of election that the employer and union agreed on the inclusion of relevant employee classifications "in any unit or units found appropriate," he did, in fact recognize that the parties only disagreed as to which of the employees are "properly includable in a service and maintenance unit, which are properly includable in a technical employee unit, or whether all belong in a broad service, maintenance, and the technical employees unit." Since the regional director's decision dealt specifically with whether there should be separate units or a combined unit, it is clear that his erroneous statement had no impact on the ultimate decision and is harmless error

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—— F.2d ——, —— (5th Cir. 1980) (citing *Claxton Manufacturing,* 613 F.2d at 1366). Establishing that the objectionable activities "either tended to or did influence the outcome of the election" is especially difficult where, as in the Vicksburg Hospital election, the union won by a wide margin.[8] *Klingler Electric,* —— F.2d at —— (citing *NLRB v. Sumter Plywood Corp.,* 535 F.2d 917, 924 (5th Cir. 1976), *cert. denied,* 429 U.S. 1092, 97 S.Ct. 1105, 51 L.Ed.2d 538 (1977)).

Although the Board has broad discretion in determining the fairness of employee elections, "this discretion is not unlimited. Due process requires the Board to grant 'a [post-election] hearing to a losing party who has supplied prima facie evidence raising substantial and material issues that would warrant setting the election aside.'" *Claxton Manufacturing,* 613 F.2d at 1365 (quoting *Gulf Coast Automotive Warehouse Co. v. NLRB,* 588 F.2d 1096, 1100 (5th Cir. 1979)) (brackets in original). Since we conclude that the evidence supplied by the hospital in support of its objections[9] was not sufficient, in and of itself, to warrant setting aside the election, the sole issue is whether the hospital presented prima facie evidence of election misconduct on the part of the union that would require the Board to grant the hospital a post-election hearing in which to prove its charges.

A. *Waiver of Initiation Fees*

A union's offer to waive its initiation fees for those employees who sign authorization cards before an election is a basis for setting aside the ensuing election. *NLRB v. Savair Manufacturing Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973). However, a union's offer to waive its initiation fees is permissible provided the waiver applies equally to all employees, whether they sign union membership cards before the election or afterwards. *NLRB v. Con-Pac, Inc.,* 509 F.2d 270, 272–73 (5th Cir. 1975).

In elaborating on the *Savair* doctrine, the Board has held that an ambiguous offer by the union to waive initiation fee, *i.e.* one which is "subject to a reasonable interpretation by the employees that they can avoid initiation fees by joining the Union prior to the election," *California State Automobile Association,* 314 NLRB 223, ——, 87 LRRM 1305, 1306 (1974), will constitute objectionable conduct warranting the setting aside of an ensuing election. *Id.; The Coleman Co., Inc.,* 212 NLRB 927, 87 LRRM 1004 (1974); *Inland Shoe Manufactuting Co.,* 11 NLRB 724, 86 LRRM 1498 (1974). The hospital argues that it presented evidence in support of its post-election objections showing that the union made an ambiguous offer to waive initiation fees so as to constitute an unlawful inducement under *Savair.* Among this evidence, the hospital produced affidavits of three employees and a pamphlet distributed by the union to the employees the day before the election.

The affidavit of employee "A" stated that he attended a meeting held by the union sometime in November of 1979 (the month preceding the electin) and "at this meeting Curtis [the union representative] told us that if the union won the election we would not have to pay an initiation fee. This is all he said about it and there weren't no more questions about that." The affidavit of employee "B" indicated that she had attended a meeting conducted by the union approximately one month before the election. This employee stated:

> "Curtis also told me that the hospital did not have a union and if I joined now you do not have to pay any initiation fee because we do not have a union to join right now and if we get in on the ground floor we don't pay any initiation fees. Once the union come in you would have to pay the initiation fee if you join. When he told me this Curtis was speaking loud enough so everyone at the meeting could hear him say it."

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The affidavit of employee "C," which was submitted by the hospital in support of its objections,[10] indicates that the employee had a conversation with the union representative about three weeks before the election. The affidavit states:

> "Curtis told me that one of the things that was being said was that we would have to pay an initiation fee and that was wrong because we

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[8] Out of 230 eligible voters, the union received 148 votes in its favor, and 66 votes were cast against it.

[9] *See* 29 C.F.R. § 102.69(a)

[10] This affidavit was not included in the record forwarded to this court. A portion of the affidavit was, however, quoted by the regional director in his supplemental decision, and the hospital has not challenged its accuracy before the Board or this court.

would not have to pay an initiation fee but that we would have ot pay dues. He said that we would not be required to pay an initiation fee because we don't make as much money as a carpenter."

The pamphlet received by the employees the day before the election states:

> "Subject to your majority vote and 'certification' issued by the N.L.R.B.—an agency of the federal government—WE GUARANTEE TO YOU:
> * * *
>
> 5. You will have opportunity to join UBC without payment of initiation fees!"

In his supplemental decision, the regional director fully addressed the hospital's contention that the statements by the union representative, as related by the three bargaining unit employees, and the "guarantee" contained in the pamphlet were ambiguous and could have created the notion in the employees' minds that they had to join the union before the election in order for the initiation fees to be waived. The regional director noted that both employees "A" and "C" stated that the union representative had told them they would not have to pay an initiation fee. No conditions were attached to the waiver of initiation fees in the union representative's statements to these employees. With respect to the "guarantee," the regional director noted that it was not limited to any select group of employees, *e.g.*, those who supported the union prior to the election, but was made in general to the entire unit of employees. He further noted that the pamphlet, in addition to the statement "you will have opportunity to join [the union] without payment of initiation fees," indicated that "membership will be on a voluntary basis [and that] [i]f you are not satisfied with the benefits and representation, you are not obligated to join the union." Therefore, we conclude, as did the regional director, that the only potentially ambiguous offer to waive initiation fees, presented by the hospital, was contained in the affidavit of employee "B".

Assuming that the statement offering to waive initiation fees for employees who "join right now" or "get in on the ground floor" was ambiguous and objectionable under *Savair,* the regional director concluded that the affidavits of employees "A" and "C" demonstrate that the scope of the union's waiver was sufficiently clarified to employees to render the colloquialisms "join right now" and "get in on the ground floor" unobjectionable. *See Evans Rotork, Inc.,* 242 NLRB No. 176, 101 LRRM 1333 (1979). The regional director also noted the contradictory nature of employee "B's" statement and concluded that it would be entirely unreasonable for an employee to have interpreted the phrases "join right now" and "get in on the ground floor" in a manner that would be objectionable under *Savair* because employee "B" stated that, in the same conversation, the union representative told her there was no union to join at the time. Because we find the regional director's decision to be "reasonable and based on substantial evidence in the record considered as a whole, our inquiry is at an end."[11] *Klingler Electric,* —— F.2d at ——. Moreover, we conclude that the hospital has completely failed in its burden to show that the offer to waive initiation fees, as recounted by employee "B", either had the tendency to or actually did influence the outcome of the election, which the union won by a wide margin.[12] *See Claxton Manufacturing,* 613 F.2d at 1366, 1370–71. We hold, therefore, that the hospital was not entitled to a post-election hearing on the waiver of initiation fees issue because it failed to present prima facie proof of facts sufficient to invalidate the election under *Savair.*

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[11] The hospital argues that in his decision, the regional director relied on statements from Curtis (the union's representative) that were obtained during the regional director's ex parte investigation. In support of its argument, the hospital notes that the regional director quotes extensively from Curtis' ex parte statement regarding the union's policy on waiver of initiation fees and that portions of Curtis' statement seemingly conflict with affidavits supplied by the hospital. Hence, the hospital contends that the regional director made credibility determinations between Curtis' statement and the affidavits supplied by it. While we agree that "[i]f there is any credibility issue on a point sufficient to invalidate the election, a hearing is required," *Klingler Electric,* —— F.2d at —— (citing *Claxton Manufacturing,* 613 F.2d at 1366–67), it is clear from the regional director's decision that he relied solely on the "guarantee" in the pamphlet, the affidavits of employees "A" and "C," and the internal inconsistency of employee "B's" affidavit.

[12] This conclusion is inescapable in view of the fact that the hospital had either adequately responded to, or perhaps precipitated, the waiver of initiation fees issue. In its campaign literature, distributed to the employees near the end of November 1979, the hospital noted that the union's bylaws required a $200 initiation fee. In addressing the employees in this literature, the hospital asserted that

> "[u]nion salesmen may try to tell you that you can get in 'free' if you join up right away. WATCH OUT FOR THIS BARGAIN! Once the union organizers get control over you, they can find lots of ways to make you *pay* and *pay* and *pay* whether you like it or not."

B. *The Asserted Misrepresentations*

An election will be set aside "only where there has been a misrepresentation which involves a substantial departure from the truth, *at a time which prevents the other party or parties from making an effective reply,* so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." *Hollywood Ceramics,* 140 NLRB 221, 224, 51 LRRM 1600, 1601 (1962), *Quoted in General Knit of California,* 239 NLRB 619, ——, 99 LRRM 1687, 1688 (1978) (emphasis added); *see also NLRB v. Bancroft Manufacturing Co.,* 516 F.2d 436, 443 (5th Cir. 1975), *cert. denied,* 424 U.S. 914, 96 St. Ct. 1112, 47 L.Ed.2d 318 (1976).

The hospital contends that the union made material misrepresentations regarding strikes. In support of its allegations, it presented employee affidavits which showed that the union's representative misrepresented the nature of unfair labor practice and economic strikes.[13] The regional director concluded, however, that these misrepresentations were sufficiently rebutted by the hospital through a speech made by its administrator and by a letter to the employees.[14] In his supplemental decision, the regional director wrote:

> "Accordingly, the undersigned finds that in the speech delivered December 3, 1979, the Employer dwelt at length with respect to pay and benefits during an economic strike. In its December 3, 1979 letter to its employees * * * the Employer emphasized in paragraph 4 that 'the people who were out because of these strikes drew no wages from their employer. They lost money every day the strike lasted.' "

Because the hospital had ample opportunity to, and did on several occasions, reply to the union's misrepresentations, the regional director concluded that the misrepresentations did not warrant setting aside the election. We agree.

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The hospital also contends that the union created the false impression that the Board supported it in the election. In support of this allegation, the hospital relies on a leaflet circulated by the union as well as a letter from and a statement by the union representative. The leaflet is headed by the caption: "STAND UP FOR YOUR RIGHTS. IT'S YOUR RIGHT TO HAVE A UNION." The leaflet then depicts a figure of Uncle Sam standing behind a man wearing a button bearing the word "Union," with a caption underneath reading, "REMEMBER UNCLE SAM STANDS BEHIND YOU." The leaflet also shows another figure of Uncle Sam pointing a finger, with the caption underneath reading, "Here's The Law," accompanied by an arrow directing the reader to the reverse side. The reverse side of the leaflet states in large, bold letters, "YOUR RIGHT TO JOIN THE UNION IS PROTECTED BY THE U.S. GOVERNMENT"; then portions of the National Labor Relations Act are set forth with explanations of what the Act's provisions mean.

Conduct by a union which creates the impression that the United States Government encourages employees to organize and join the union constitutes a sufficient basis to warrant setting aside an election. *See Tyler Pipe Industries, Inc.,* 447 F.2d 1136 (5th Cir. 1971) (where the election was set aside because the union distributed a handbill stating "* * * the United States Government STRONGLY URGES employees to organize * * *"). In this case, however, the role of the government was not misrepresented by the leaflet. As noted in the regional director's supplemental decision, the thrust of the leaflet is to explain the meaning of the employees' rights under §§ 7 and 8(a) of the National Labor Relations Act. We agree with the regional director's conclusion that the leaflet did not exceed the bounds of permissible campaign propaganda because it did not suggest that the government encourages employees to organize, nor did it suggest that the government endorses the union. Instead, the leaflet merely conveyed that the government protects the right to join a union.

The hospital also asserts that a verbal statement by the union representative created a false impression that the Board had endorsed the union in the election. This verbal statement was recounted in an employee's affidavit:

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[13] Curtis (the union representative) distorted the distinctions between unfair labor practice and economic strikes by asserting to employees assembled at a union meeting that, if employees went on strike to protest the hospital's failure to agree to what the employees considered reasonable terms the employees could go out on an unfair labor practice strike. The thrust of Curtis' remarks was that any time employees went on strike to force an employer to agree to economic demands, the strike would be an unfair labor practice strike and that, upon return from such a strike, the hospital would have to give employees back pay for the time they were off. This is not the law. *See, e.g., National Fresh Fruit & Vegetable Co. v. NLRB,* 565 F.2d 1331, 1337 (5th Cir. 1978).

[14] The administrator's affidavit and the letter were submitted by the hospital in support of its objections.

> "[The union representative] got into the meeting that [the hospital administrator] had for employees at the hospital where he stated that [the administrator] said if the union comes in the slate will be wiped clean and start afresh, this is a lie, he cannot take any benefits away from you employees. He said he is backed up by the National Labor Relations Board."

In his supplemental decision, the regional director stated:

> "The evidence disclose[d] that the Employer made employees aware that benefits can be bargained away during the course of collective bargaining while the [union] made them aware that the Employer cannot unilaterally take away benefits presently enjoyed by the employees. The undersigned therefore concludes and finds the statements made with respect to benefits amount to mere campaign puffery and do not exceed the bounds of permissible campaign propaganda."

We agree. We also conclude that the leaflet and the union representative's statements taken together do not create the impression of endorsement of the union by the Board.

The hospital also points to a letter sent by the union to the hospital administrator, complaining about an employee who made anti-union remarks in the emergency room. The letter complained about the hospital's failure to enforce a no-solicitation rule and asserted that "your refusal to treat all employees fairly and equally in the adminstration of hospital rules and policies has resulted in a violation of the National Labor Relations Act." A copy of the letter was mailed to the Board. Because the hospital neither alleged nor showed that the union made the employees aware of the letter, we are unable to find that the letter

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created any possible impression of Board sponsorship for the union.

We conclude that no post-election hearing was required for the alleged union misrepresentations because the regional director assumed the truth of the allegations raised by the hospital's evidence and found those facts insufficient to warrant setting aside the election. *See Klingler Electric,* —— F.2d at ——.

Vicksburg Hospital's petition for review is DENIED, and the request of the National Labor Relations Board for enforcement of its order is GRANTED.

C.H. Heist Corporation V. NLRB

657 F.2d 178 (7th Cir.), August 24, 1981; rehearing denied November 24, 1981–250 NLRB 1400

On petition for review and cross petition for enforcement of Board Order

Before SPRECHER and CUDAHY, Circuit Judge, and EAST,* District Judge

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EAST, District Judge. The Heist Corporation (Company) dismissed an employee, Michael Mitchell (Mitchell), who had been a union steward prior to and during a wildcat strike by certain employees of the Company. The Administrative Law Judge (ALJ), following a union charge of unfair labor practice against the Company, found that the Company's dismissal of Mitchell violated § 8(a)(3) and (1)[1] of the National Labor Relations Act, and ordered Mitchell's reinstatement with back pay. The Board, by a two-to-one majority, adopted without comment the findings and decision of the ALJ. 250 NLRB No. 185.

The Company seeks review of the Board's decision, and the Board cross-appeals for enforcement. We note jurisdiction under 29 U.S.C. § 160(f) and grant enforcement *FACTS:*

A rather extensive delineation of the pertinent facts is necessary in order to reach a proper disposition of the parties' contentions.

Mitchell went to work for the Company, which owns several plants, in 1976 and became a union steward in 1978. He filed numerous employee grievances during his tenure as a steward, but was no more active than previous stewards. Although Mitchell had locked horns with the Company's area representative, William Sheehan, on occasion, the ALJ found no lingering hostility from those incidents at the time of the strike.

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*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

[1] 29 U.S.C. § 158(a)(3) and (1).

In Febuaury of 1979, Sheehan posted on the bulletin board new seniority lists reclassifying and essentially demoting six plant employees in accordance with the Company's interpretation of the recently concluded collective bargaining agreement. Late that night an employee telephoned Mitchell at his home and informed him that several employees wanted to obtain from Mitchell a list of employee telephone numbers so that they could ascertain the feelings of the plant employees concerning the demotions. In response to a question, Mitchell indicated that he did not know the union's position on the matter because he had not yet conferred with the union's business agent, and urged the employees to do nothing until the union has been consulted. The employees insisted upon receiving the phone numbers, and Mitchell agreed to supply them. Shortly thereafter, the employees arrived at Mitchell's home and informed him they wanted to organize a "show of strength." Mitchell advised them, instead, to utilize the contractual grievance procedures. They persisted and Mitchell permitted them to phone the other plant employees from his home because, he told them, he "wanted to be in on it" and wanted "to know what was going on."

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The next morning some 20 employees gathered at the plant to confront Sheehan. Sheehan called Mitchell into his office and told him that he would not meet with the employees unless they designated their assemblage as a "union meeting." Mitchell delivered that message to the workers, who agreed to the condition. Sheehan then appeared and Mitchell and several other employees presented their grievance. Sheehan responded that the demotion decision had been made at a higher level in the Company, and that it could not be changed at the plant level.

The next day several employees organized a meeting of the Company's workers for the purpose of conducting a strike vote. Mitchell attended the meeting, and when he was asked to state his views on the strike vote, urged the employees not to strike but to instead allow the union to handle the matter through the contractual grievance procedure. He also said that, at the least, the employees should obtain legal counsel before taking action on their own.

The employees voted to strike and, unaccompanied by Mitchell, went to the plant and set up a picket line. Later that night Mitchell went to the plant upon the request of a striking employee who told him that several employees and the police were already there. At the plant, Mitchell explained to an inquiring Sheehan that the employees had voted to strike.

The police, after turning down a Company foreman's request that they arrest Mitchell requested Mitchell to move the employees off the Company property. Mitchell complied.

The workers picketed the plant for two and a half days until the Company obtained an injunction ordering them back to work. Mitchell was present on the picket line "on and off" for about eight hours a day. During the strike, the Company and the union both communicated with the picketers through Mitchell. Mitchell received three calls from the union during the strike, and delivered the union's messages that the strike was illegal, in violation of the contract, and not sanctioned by the union. Mitchell also told the strikers that the union wanted them to go back to work and that they should go back to work so that they would not discharged. They refused.

Mitchell and all of the picketers were requested individually by the Company to return to work, and they all refused. Mitchell delivered the same request to the picketers on behalf of the Company, and it was again refused.

At no time during the course of the strike did Mitchell urge the employees to remain on strike. Instead, he urged the employees to return to work or, at the least, seek legal counsel.

Immediately preceding and during the course of the strike, Mitchell was in telephone contact with union stewards in other company plants in which the same reclassification/demotion policy had been instituted. The stewards discussed the situations in their respective plants, but Mitchell at no time requested the stewards or the employees they represented to strike or othewise support the walkout at his plant.

On the last day of the strike, after being informed that the Company would seek an injunction, Mitchell and several employees visited an attorney. When the Company obtained the injunction late that day, an employee informed Sheehan that the employees, on the advice of counsel, were ready to return to work. The next day Mitchell informed Sheehan that he was

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ready to return. Thereafter, the Company informed the employees that it did not condone the strike and would conduct an investigation. Mitchell then resigned as union steward.

The Company interviewed only Mitchell about the strike and declined another employee's offer to answer questions. When Sheehan asked a plant supervisor if he thought Mitchell had led the walkout, the supervisor responded that he did not think so. Twelve days after the strike ended, Mitchell was discharged by Sheehan and vice-president Heist.

After the Mitchell discharge, Heist met with the unit employees and informed them, according to one of the employees, that "nobody else would be condemned for their actions during the strike but Mike Mitchell was fired because he was the man that held the position of union steward at that time, and he had to get rid of somebody, that Mike held the position." At that point, an employee stated that "it wasn't right" because Mitchell had not been the leade of the strike. Heist responded, stating that that made no difference because Mitchell held the "position" and, therefore, he was the one that had to be fired.

ISSUE ON REVIEW:

The sole issue presented by the parties on this appeal is:

> Whether the discharge of an employee who participated in an illegal work stoppage constitutes a violation of section 8(a) (3) and (1), where the discharge is based solely upon the fact that the employee was the union steward, and where the employee participated only reluctantly in the strike and attempted to dissuade the employees from striking.

We answer in the affirmative.

DISCUSSION:

At the time of the strike and Mitchell's discharge, the union and the Company were parties to an industry-wide collective bargaining agreement which contained, *inter alia*, the following provisions:

> Article VIII. Stewards
>
> Section 1. The Union shall have the right to appoint one chief shop steward * * * [who] shall be [an employee] covered by this Agreement * * *
>
> Section 2. The stewards duties shall consist of seeing that all terms and conditions of the Agreement are being complied with * * *
>
> * * * * *
>
> Article XXI Dispute/Grievance Procedure:
>
> Section 5. There shall be no strike or lockout, slowdown, interference, or work interruption on any job over any grievance of dispute while it is being processed through this grievance procedure, and until the said procedure has been exhausted. If any employees engage in any such activity, they may be disciplined by management without recourse *except to establish that they actually participated in or were a part of such activity* [emphasis supplied] * * *.

The Board, through the adoption of the ALJ's finding, concluded that by disciplining only Mitchell out of the 25 strikers, not because of his actions as an employee or his role in the strike, but solely because he was a union official, the Company violated sections 8(a)(3) and (1) of the Act.[2]

The Company contends nevertheless that it could lawfully discharge Mitchell even if he was only a mere participant in the strike. This argument principally relies upon two cases: *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979), and *Gould Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied, Moran v. Gould Corp.*, ––– U.S. –––, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980).

Indiana & Michigan Electric Co. involved a wildcat strike at a public utility in violation of a collective bargaining agreement provision that the employees would "not be called upon or permitted to cease or abstain

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from the continuous performance of the duties pertaining to the positions held by them * * *." 599 F.2d at 228. The employees went out on strike and were joined by five union officials who left work falsely claiming that they were ill. That afternoon three of the striking officials joined in an effort to end the strike. The next morning all the strikers returned to work.

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[2] Section 8(a)(3) prohibits employers from "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

The Electric Company, by suspending the union officials for from one to three days, disciplined them more harshly than the rank and file employees, who received only written warnings. This court, in denying enforcement of the Board's order, first noted that where the employer's discriminatory conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed to establish a § 8(a)(3) violation. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967). On the other hand, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," anti-union motivation must be proved. *Id.* at 34, 87 S.Ct. at 1797–98.

The *Indiana & Michigan Electric* Co. court found that there was no evidence of anti-union motivation, and thus the question was whether the suspensions were inherently destructive of important employee rights.[3] The court noted that "[t]he more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file," 599 F.2d at 230. The court found that, until recently, the Board had recognized that the higher responsibilities of union officials justify disciplining them more severely for particpation in unprotected activity, and that the Board had erred in rejecting that position in *Precision Casting Co.*, 233 NLRB No. 35 (1977) and *Gould Corp.*, 237 NLRB No. 125 (1978).

The Third Circuit followed suit in denying enforcement of the Board's order in *Gould Inc. v. NLRB*, 612 F.2d 728. That case involved a union steward who was singled out for disciplinary discharge out of fifty striking employees. The court found, however, that he was not fired solely because he was a steward, but because he "participated in an illegal strike and failed to perform his contractual obligation to take positive steps to halt that work stoppage." 612 F.2d at 733. The collective bargaining agreement there specifically required union officers to publicly disavow illegal work stoppages and to order the members to return to work.

In the instant case, there appears to be no finding that the discharge had anti-union motivation, and thus the issue is whether the discharge was "inherently destructive" of employee rights. If the discharge was "not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status," *Indiana & Michigan Electric Co.*, 599 F.2d at 230, then it is not inherently destructive of employee rights.

The *Indiana & Michigan Electric Co.* decision did not define exactly what that "higher responsibility" is or from whence it arises. The Board here contends that Mitchell met any higher responsibilities incident to his union office by attempting to dissuade the employees from striking both before and throughout the strike, and by his actions as mediator between the employees, the Company, and the union. The Board contends that the "higher responsibility" should not include an obligation to cross a picket line which is honored by the vast majority of the employees, because crossing the line would cause the steward to lose both credibility and the ability and opportunity to mediate a resolution of the strike. Conversely, the Company contends, rather unrealistically, that if the steward crossed the line, the strike might end.

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The collective bargaining provision in *Gould Inc.*, quoted above, were quite specific and would alone be sufficient to impose a higher responsibility upon the union officials to end the strike. In *Indiana & Michigan Electric Co.*, however, the contractual provisions were less specific, reciting only that the employees' services were essential to the operation of a public utility, and that the employees would not be "called upon or permitted" to strike.

The contractual basis for the union steward's "higher responsibility" in this case is even more tenuous than in *Indiana & Michigan Electric Co.* Here, besides the no strike clause, the contract contained only one other relevant provision which imposed upon the stewards the duty to "seeing that all terms and conditions of this Agreement are being complied with."

The Board contends that Mitchell met his obligations under this provision by attempting to dissuade the employees from striking, and that the provision did not impose upon him a "higher responsibility" to cross the picket line. By contrast, only three of the five union officials in *Indiana & Michigan Electric Co.* attempted to persuade the employees to stop the strike, and they did so only belatedly.

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[3] We emphasize the inherently less destructive *suspensions* in *Indiana & Michigan Electric Co.* from the *discharge* in the present case.

The Board's argument is persuasive. While *Indiana & Michigan Electric Co.* noted that a union steward's mere "presence" among illegal strikers may provide "active approval and encouragement," 599 F.2d at 231 n.9, no such conclusion can be drawn in this case as Steward Mitchell repeatedly attempted to dissuade the strikers, not belatedly, but throughout the strike. In the absence of a clear contractual provision requiring Mitchell to cross the picket line, his efforts were sufficient, if not the most effective possible, to satisfy his obligation to see that the no strike clause was complied with.

We will not construe *Indiana & Michigan Electric Co.* so broadly as to permit the Company's action here. Mitchell did just about everything possible to end a strike which he had tried to prevent, except to cross the picket line. To have taken that extra step would have been suicidal to his union stewardship and his capacity to enforce any provision of the bargaining contract.

The Company stated that Mitchell was fired not because he was thought to be a leader of the strike, but solely because he was the union steward. On the facts of this case, we find that the Company's action was "inherently destructive" of Mitchell's right to hold union office.

The evidentiary record clearly supports the findings of fact of the ALJ and the Board, and we approve the Board's conclusions of law.

The Company's petition for review is denied, and the Board's order is enforced.

ENFORCED.

Monongahela Power Company v. NLRB

657 F.2d 608 (4th Cir.), August 24, 1981—248 NLRB 69

On petition to review and cross petition for enforcement of Board Order

Before BUTZNER and HALL, Circuit Judges, and ERWIN,* District Judge

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ERWIN, District Judge: Monongahela Power Company (the Company) petitions this court to review an order of the National Labor Relations Board issued on September 30, 1980. The Board has filed a cross-application for enforcement of its order. The Company has refused to bargain with the International Brotherhood of Electrical Workers (the Union) on the grounds that (1) the bargaining unit certified by the Board is improper, because it includes control room foremen (CRF's) who are "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1976); and (2) the election was tainted by a number of misrepresentations and should therefore be set aside. We agree with the Company that CRF's are "supervisors" within the meaning of the Act and deny enforcement of the Board's order on that basis.

On May 21, 1979, the Union filed a petition with the Board seeking a certification election in a unit composed of virtually all of the Company's employees at its Fort Martin plant in Maidsville, West Virginia. The proposed unit included five individuals employed as CRF's. The Company opposed the inclusion of CRF's in the bargaining unit, and a representation hearing was held on June 15, 1979 to resolve the issue. On July 3, 1979, the Regional Director issued his decision finding that CRF's were employees and should be included in the bargaining unit and directing that an election be held. The Company filed for review of the Regional Director's decision on July 13, and the Board denied the request on July 25 on the basis that there were no substantial issues raised which warranted review.

An election was held at the Fort Martin Power Station on August 3, 1979 and was won by the Union by a vote of 58–56 with one challenged ballot. On August 10, 1979, the Company filed timely objections to the conduct of the election, alleging that the Union, through its officers, agents, and representatives, had made material misrepresentations regarding wages, benefits, and other conditions of employment at the Company.[1] The Re-

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*The Honorable Richard C. Erwin, United States District Judge for the Middle District of North Carolina, sitting by designation.

[1] The misrepresentations concerned: (1) overtime pay, shift differential, and paid meal allowance benefits of the Company's employees at facilities represented by the Union; (2) company benefits received by the Company's organized and unorganized employees over the last ten years; (3) the

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gional Director conducted an investigation and on November 20, 1979 issued a Supplemental Decision and Certification of Representative completely over-ruling the objections and certifying the Union as the exclusive bargaining representative. The Company's subsequent request for review was denied by the Board.

On April 24, 1980, the Union filed an unfair labor practice charge against the Company, based on its refusal to bargain. A Complaint and Notice of Hearing was filed by the Board on May 16, 1980. The Board subsequently moved for summary

judgment on the ground that the issues raised by the Company in its answer to the complaint had been previously decided in the representation proceeding. The motion was granted, the Board concluding that the Company had refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. The Board then issued the order which is before this court.

The facts on which the Regional Director based his decision concerning the CRF's were adduced at the representation hearing before Hearing Officer Thomas M. Stefanaco. The only witness at the hearing was Raymond S. Hackett, manager of the Fort Martin Power Station, who appeared on behalf of the Company. The following summary of facts is based on that testimony.

Monongahela Power Company is a wholly owned subsidiary of Allegheny Power Systems, Inc. and operates as a public utility engaged in the generation and transmission of electricity at various locations in West Virginia and Ohio. The Fort Martin Power Station produces electricity through the use of coal-fired boilers which run two steam driven generating units. These units generate approximately 1100 megawatts of electric power. The facility is composed of three departments, each of which is headed by a superintendent who reports directly to the plant manager. Approximately 138 people are employed at the plant.

The Operations Department bears the responsibility for actually running the generating units. The department personnel include the superintendent, four shift supervisors, five control room foremen, eight maintenance men, a station lubricator, and fifteen operators classified A, B, and C. Also included are a coal supervisor, a coal foreman, and twenty-one coal operators.

There are four main crews in the Operations Department, and each is scheduled to work an eight-hour shift, five days a week. In addition, there is a fifth crew—the relief crew—which covers one regular eight-hour shift per week and is available as relief for any of the other regular crews. The relief crew works an otherwise normal forty-hour week doing special assignments under the direction of a shift supervisor. The crews are assigned work shifts such that the plant operates twenty-four hours a day, seven days a week. Every ten days, each crew rotates to a different eight-hour shift—day, afternoon/evening, and night. The plant manager and the operations superintendent normally work the day shift, Monday through Friday, but both are available twenty-four hours a day in case of an emergency.

A typical operations crew consists of a shift supervisor, one CRF, two maintenance men, and three operators, A, B, and C. The CRF, operators, and maintenance men all report directly to the shift supervisor, who in turn reports to the operations superintendent. The CRF's work exclusively in the control room while the operators work on the plant floor, watching the equipment and communicating by telephone or over the public address system with the CRF.

The station is run from the control room which is located in the center of the plant close to the two generating units. The control room contains computer printout terminals, pressure and heat gauges, television monitors, and other information equipment which serve as indicators of the status of the plant's machinery. The CRF is in charge of the control room and is often the only employee there. From the control room, the CRF monitors the operation of the power generating units, the coal handling system, the plant's security system, and the startup and shutdown of machinery. He reports directly to the shift supervisor and does not generally leave the control room unless relieved by another employee.

The plant is almost completely automated, and its daily operation is governed to some extent by

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use to which the Union put its membership dues; (4) the rights of employees who choose not to join the Union; (5) the events surrounding the 1979 contract negotiations at one of the Company's organized facilities; (6) the employee relations of other employers; and (7) implications that the Company had engaged in unfair labor practices against Union supporters.

written procedures and guidelines. Its machinery can, however, be run manually. The CRF and the operators have access to manufacturers' guidelines for the operation of plant machinery and the Company's guidelines for handling the startup and shutdown procedures and emergency situations. There also exist estab-

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lished limitations for steam pressure, heat, and the like, of which the CRF is aware and which are monitored from the control room. The CRF generally follows established procedures whenever the equipment reaches or exceeds its prescribed limit. In situations where no predetermined procedure exists, the CRF uses his own judgment.[2]

During a startup procedure, the CRF coordinates the operators and maintenance men as they perform their tasks. The startup is a complex procedure, and therefore, the plant manager always tries to be in the control room to assist the CRF. The CRF is likewise responsible for coordination of the shutdown procedures.

The monitoring and handling of emergency situations is a crucial job responsibility for the CRF. When an alarm is heard from one of the monitors in the control room, the CRF is expected to react quickly, evaluate the problem, and determine the appropriate response, which is usually one of the established procedures. Sometimes the CRF can alleviate or resolve the problem by operating the affected machinery from the control room. Often he must call an operator who will deal with the problem from the plant floor. The CRF may instruct the operator in what procedure to follow; if he cannot determine the nature of the problem from the control room, the operator must analyze the problem himself and report back to him. An experienced operator may make the necessary corrections before reporting back to the CRF. The CRF and the operators remain in close communication by telephone as the CRF utilizes the control room monitors to ascertain whether a particular problem is being satisfactorily resolved.

Some emergencies require decisive action to avoid total shutdown. In those situations, the shift supervisor and plant manager report to the control room to assist the CRF. Often the emergency requires an instantaneous response, and the CRF must make a decision and take decisive action without waiting for the shift supervisor to arrive. On those occasions, the shift supervisor will then be advised of whatever action was taken by the CRF. CRF's spend twenty to twenty-five percent of their day responding to emergency problems.

All employees at the plant, including CRF's are salaried. CRF's earn between seven percent less than shift supervisors and fifteen to twenty percent more than the operators. All employees receive the same basic benefits, including vacation, hospitalization, group life, retirement, sick pay, and leave of absence. CRF's are exempt employees, however, as are other management personnel, and receive additional benefits such as travel insurance and jury pay above their normal salary. Because they are required to be in the control room at all times, CRF's are allowed to work on scheduled holidays and use that time to add on to their vacations, a flexibility which is not allowed nonexempt employees. CRF's do not attend the weekly supervisors' meetings; they do, however, attend the annual supervisors' dinner and have attended training conferences which were not open to other employees. CRF's have the authority to talk with employees about minor disciplinary problems. In addition to directing operations employees, CRF's train them as relief CRF's or as new employees. CRF's can have employees stay past their normal shift times.

Discussion

We are well aware of the demonstrated expertise of the Board in resolving questions of this nature, and that as a general rule, the Board's findings are to be accepted if they are supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed.2d 456 (1951). We are not barred, however, from setting aside a Board decision when we cannot "conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety

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furnishes, including the body of evidence opposed to the Board's view." 340 U.S. at 488, 71 S.Ct. at 464.

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[2] The CRF's were responsible for writing a checklist for shutdowns and startups of equipment.

The Regional Director found that CRF's are not supervisors within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1976). That section provides that:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that this section is to be read in the disjunctive, so that an individual possessing any of the above-enumerated powers is considered a "supervisor" for purposes of the Act. *NLRB v. Pilot Freight Carriers, Inc.*, 558 F.2d 205, 207 (4th Cir. 1976), *cert. denied*, 434 U.S. 1011, 98 S.Ct. 723, 54 L.Ed.2d 754 (1978); *NLRB v. Metropolitan Petroleum Co.*, 506 F.2d 616, 618 (1st Cir. 1974); *NLRB v. Brown Specialty Co.*, 436 F.2d 372, 375 (7th Cir. 1971).

In holding that CRF's are not supervisors, the Regional Director concluded that because the participation of the CRF's in decisions concerning hiring, evaluations, promotion, or discharge of employees was only occasional and usually involved the participation of the shift supervisor or station manager, those functions were insufficient to impart supervisory status. With respect to the responsibility of CRF's to give directions to operators or maintenance employees, the Regional Director concluded that these directions are "based upon their greater skills and experience, are dictated by written procedural and operating guidelines, and do not involve the exercise of independent judgment."[3]

We agree with the Board's conclusion that CRF's do not exercise the requisite authority with regard to hiring, discharge, transfer, promotion, recall, discipline, or adjustment of grievances of other employees and so are not supervisors within the meaning of the initial part of Section 2(11). CRF's are generally unaware of whose applications are on file. Neither do they significantly affect the transfer of employees. The normal procedure is for the plant manager to solicit opinions from *all* who know about an employee's work before reaching a decision as to transfer. CRF's do not figure prominently in the discharge of employees.

Routine personnel matters are handled by the shift supervisors. This includes the preparation of work assignment schedules, vacations, and timecards, resolving grievances, and preparing employee evaluations. The CRF is involved to a limited extent, generally handling those duties which have been delegated to him by the shift supervisor. Although this task appears in his job description, there is no evidence that the CRF's have resolved employee grievances. Their role in employee discipline also appears to be minor.

Mindful that the powers in Section 2(11) are to be read in the disjunctive, we are of the opinion that there exists sufficient evidence in the record to demonstrate that CRF's "responsibly direct" other employees and in doing so utilize the requisite "independent judgment."

That the CRF "directs" other employees is readily apparent from the record and further is exemplified by his job description, which provides generally that he "direct and participate in activities required to achieve safe, economical, and reliable operation of all electrical, mechanical, and steam generating power production equipment."[4]

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[3] Joint Appendix, p. 148

[4] Joint Appendix, p. 140. The other "typical duties" of a CRF include:

a. Direct and participate in the operation of power station boilers, turbines, generators, condensers, switchboards, substations, and related auxiliary equipment during an assigned shift.

b. Direct and participate in placing equipment in service, removing equipment from service, releasing equipment for maintenance, and switching any electrical equipment at the station.

c. Direct and participate in the testing of equipment.

d. Direct and participate in the preparation of records of all operations and changes to the equipment during the shift and prepare or check all station daily operating reports.

e. Contact power control centers regarding station capacity, system conditions, planned and forced outages, load changes, switching and voltage schedule unusual or emergency conditions, and other operating requirements and problems.

f. Keep informed of company labor policies and endeavor to settle minor complaints and misunderstandings.

g. Plan and schedule delegated phases of operating work at the station, and develop work schedules for the assignment of operators needed to man the equipment according to capacity requested by power control personnel and the cleaning, oiling, and inspecting of station equipment to conform with load conditions.

h. Report unusual or emergency operating conditions which affect plant capacity and reliability.

i. Perform special studies and investigations.

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The question is whether that direction is "responsible" within the meaning of Section 2(11).

"Responsibility" is defined as being "answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and is implied by power." *Ohio Power Company v. NLRB,* 176 F.2d 385, 387 (6th Cir. 1949), *cert. denied,* 338 U.S. 899, 70 S.Ct. 249, 94 L.Ed. 553 (1949). The CRF is in charge of the control room and therefore the entire operation of the plant. It is his expertise and judgment on which other employees, including his superiors, rely. This is illustrated by the evidence adduced at the representation hearing.

Plant Manager Hackett stated at the representation hearing that CRF's are considered by him to be supervisors, and they have been told that they are supervisors. They are considered to be the immediate supervisors of Operators A, B, and C on a particular shift. Mr. Hackett testified that the CRF's have "constant interaction" with these individuals.[5] CRF's do not normally direct the activities of the maintenance men but have the authority to put them to work when and where needed.[6]

There is no dispute that the CRF is responsible for coordinating the activities of the operators and maintenance men during startup and shutdown. In emergency situations, he is to analyze and resolve difficulties which arise from the operation of the machinery. After doing so, he often tells operators what procedures they should then follow in dealing with those difficulties. The CRF can determine whether a problem has been satisfactorily resolved by observing the monitors. Emergencies may arise which allow no time to wait until a shift superintendent arrives; the CRF moves first and advises his superiors later. We think this illustrates that the CRF "responsibly directs" other employees.

In arriving at this conclusion, we find a recent decision to be particularly persuasive. In *Marine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347 (1st Cir. 1980), the court analyzed the supervisory status of "shift operating supervisors" (SOS's), who were in charge of the control room of a nuclear power plant. The functions, duties, and responsibilities of the SOS in *Maine Yankee* are quite similar to those of the CRF in this case.

In holding that the SOS is not a supervisor within the meaning of Section 2(11), the Board in *Maine Yankee* discounted the significance of the SOS's authority to direct other shift employees in such the same way as the Regional Director in the instant case discounted the Fort Martin CRF's functions of directing plant operators in the startup and shutdown of equipment or in emergency situations. The Board ruled that the SOS did not possess supervisory authority, because the occasions on which directions were given to other employees were of a "'routine and repetitious nature,' involving little use of independent judgment," as evidenced by the existence of pre-established operating procedures which were followed on most occasions. 624 F.2d at 362.

The court rejected the Board's contention that the exercise of authority by the SOS was of a routine and repetitive nature. It found that an employee such as the SOS, who must coordinate the activities of several other employees to ensure the smooth operation of delicate machinery, necessarily exercises a significant degree of independent judgment. We find that reasoning applicable here. As the duties of the SOS and the CRF are so similar, we find the following language to be particularly persuasive:

> The SOS's duties include ensuring that numerous gauges are accurately monitored, responding efficiently and appropriately to the many warning signals and alarms should they become activated, and seeing that any one or more of the plant's some 60–70 systems are properly placed in and out of service on the many occasions when that is necessary. These tasks at times involve his coordinating the efforts of the three other operators and making decisions among them as to the correct action to take whenever there is any question. And, while the Maine Yankee facility is semi-automated and there are many safety backups, the possibility of operator error is not merely theoretical * * * such error could cause damage to the plant * * *. We are at a loss to

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j. Contact system power supply personnel to obtain and exchange information and to discuss and work out problems in regard to operating, engineering, safety, and related activities affecting equipment operation.

k. Assist shift supervisor in performance evaluation of operating personnel on an assigned shift.

[5] Joint Appendix, pp. 33–34.

[6] *Id.,* p. 30.

see how such grave responsibility can be swept aside as routine and clerical.

624 F.2d at 361.

In addition, the court in *Maine Yankee* found the role of the SOS during an emergency to be further evidence of his supervisory status. In emergencies, the SOS, like the CRF in this case, was responsible for taking the necessary action when consultation with his shift superintendent was impossible. That the SOS would be expected to inform his superior of an emergency would not strip him of his authority and duty to act. 624 F.2d at 364. The same is true of this case. The CFR can and often does act on his own authority if an emergency situation requires it.[7]

In analogizing the duties of the CRF to those of the SOS in *Maine Yankee*, we are well aware that the records in these two cases are not identical. The *Maine Yankee* record was developed from the testimony of several witnesses, some of whom worked in the disputed category. In addition, the job description for the SOS was much more explicit than the one we have here. Neither do we make any attempt to equate the seriousness of an error at Fort Martin Power Station with an error at a nuclear power plant. This does not, however, lessen the importance of the CRF at the Fort Martin plant. Given the responsibility placed on him, he must be a skilled employee. However, we do not find from the record before us that he is merely an automaton who does little than "supervise the use of sophisticated machines." *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 (9th Cir. 1971). He is a supervisor, with responsibility for himself and others, and was therefore improperly included in the bargaining unit as an employee.

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Our decision that CRF's are supervisors within the meaning of Section 2(11) means that the bargaining unit delineated by the Union was improper, and the election should be set aside. For that reason, we need not reach the Company's contentions regarding election misrepresentations. If required to consider the Company's arguments on the record before us, we would hold them to be without merit and affirm the Board.

Accordingly, the Company's petition for review is granted and the Board's application for enforcement of its order is denied.

TRW, Incorporated v. NLRB

654 F.2d 307 (5th Cir.), August 24, 1981; rehearing denied in part September 24, 1981—245 NLRB 1158

On petition to review Board Order

Before BROWN, GEWIN* and POLITZ, Circuit Judges

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POLITZ, Circuit Judge: The National Labor Relations Board found that TRW, Inc., violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3), during and immediately after a campaign to organize its Corpus Christi, Texas plant. We conclude that the Board's findings are not supported by substantial evidence on the record considered as a whole and, accordingly, deny enforcement of the Board's order.

TRW manufactures and distributes electronic equipment nationwide. The company employs approximately 200 persons at its resistor plant in Corpus Christi. In mid-March of 1978, the International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC (Union) began an organizing campaign, at the Corpus Christi plant. Meetings were held, union cards were signed and pro-union activities commenced. By the middle of

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[7] Plant Manager Hackett testified to the following:

Q. What kind of emergencies arise at the plant?

A. Well, we lose pieces of equipment.

Q. What do you mean, "lose"? They don't work?

A. That's right. We got the worst mills in the world, they're ball-type mills. You break a ball and the mill has to be taken out of service right now. It quits performing and if you are not able to deliver fuel to the boiler you have to get the load down, get that mill out of service. The controlling foreman has to do all this. There is no time to wait for someone to come help him. Usually he gets help after it's all over.

Q. If he doesn't do it, what happens?

A. Well, you could lose the whole unit. If you don't get the thing back to the level that you can handle it with the equipment still in service, then the whole works goes right down the tubes.

Q. So, circumstances dictate that he take decisive action or else the whole plant will not function at all?

A. He has to make a judgment, make it quick and do something. That's correct.

Joint Appendix, pp. 65–66.

*Due to his death on May 15, 1981, Judge Gewin did not participate in this decision; the case is being decided by a quorum, 28 U.S.C. § 46(d).

April TRW became aware of the campaign and communicated its opposition to the employees. On April 28, the Union successfully petitioned for an election. The election was held on July 19 and resulted in union certification on that date.

Subsequent to the election, the Union filed several unfair labor practice charges against TRW claiming violations of §§ 8(a)(1), (3), and (4) of the National Labor Relations Act. All violations were predicated on events involving two employees, Henry Miranda and Rosie Garza. The ALJ found that TRW had violated §§ 8(a)(1) and 8(a)(3) by disciplining Garza and Miranda (Miranda was suspended twice and Garza was discharged), and that TRW had violated § 8(a)(1) by interrogating, threatening, and coercing them. The Board basically adopted the ALJ's findings and conclusions, modifying the broad cease-and desist language in the recommended order and substituting a different notice.

The Board's determination will be sustained if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 71 S.Ct. 456, 95 L.Ed. 456 (1951); *Delco-Remy Div., General Motors Corp. v. N.L.R.B.*, 596 F.2d 1295 (5th Cir. 1979). Recognizing the Board's expertise in labor law, we will defer to plausible inferences it draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo. N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968); *Sturgis Newport Bus. Forms, Inc. v. N.L.R.B.*, 563 F.2d 1252 (5th Cir. 1977). In assessing the substantiality of the evidence, however, we must consider not only those facts that support the Board's decision, but also those facts and inferences that militate against it. *Universal Camera*, 340 U.S. 487–88, 71 S.Ct. 463–65.

Section 8(a)(3) Violations

The Board found that the reasons advanced by the company for the discharge of Garza—excessive absenteeism—and the suspensions of Miranda—poor work performance—were pretextual, concluding that the real motive for the company's actions was retaliation for their pro-union activities. We conclude that this finding is not supported by substantial evidence.

In a § 8(a)(3) discharge or suspension case, once the employer has articulated a legitimate business reason for his action the burden is upon the general counsel to present substantial evidence that anti-union animus was the "moving cause" of the disciplinary measures. *Federal-Mogul Corp. v. N.L.R.B.*, 566 F.2d 1245 (5th Cir. 1978); *Frosty Morn Meats, Inc. v. N.L.R.B.*, 296 F.2d 617 (5th Cir. 1961). In *Florida Steel Corp. v. N.L.R.B.*, 587 F.2d 735 (5th Cir. 1979), we further clarified the extent of the general counsel's responsibility as being not simply to present some evidence of improper motive, but to find an "affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one." *Id.* at 742 (*quoting* from *Clothing Workers, Midwest Regional Joint Board v. N.L.R.B.*, 564 F.2d 434, 440 (D.C. Cir. 1977)).

Miranda was employed as a resistor processor on January 25, 1978. From the outset his performance was less than exemplary. The ALJ found Miranda was "not a good employee," and characterized him as "a somewhat intractable and arrogant employee who could be and probably was given to intemperate outburst under criticism." The ALJ also found:

> the undisputed evidence shows that Miranda encountered difficulties with superiors over his work performance at least one month before his first brush with the Union. Supervisors Ponce and Casey Eidukonis both testified at some length about difficulties they had with Miranda in the first week of his employment, and the problems they encountered in placing him in a job which he could perform to their satisfaction.

Miranda received a written evaluation on February 25 that ranked him "marginal" in a number of categories, particularly in the area of "attitude." One supervisor noted that Miranda did not pay sufficient attention to the quality of his work, lacked a sense of urgency, and disliked criticism.

There was other evidence of Miranda's difficulty in achieving satisfactory job performance. Entries were made in his personnel file on March 20, April 5, and April 14, 1978, reflecting a continuation of negligent or careless working habits and noting that he spent too much time talking, thereby disrupting the work of others. On April

3, Miranda was counselled by one of his supervisors and warned that he would be discharged if he did not show improvement. Due to his unsatisfactory performance in the resistor division, he was transferred to the shipping department.

Miranda was suspended on two occasions. The first occurred on June 13 when he was ordered by his supervisor, Eidukonis, to return to his regular work station from an area where he had been temporarily located due to repairs. In returning, Miranda began to move a chair taken without permission from the supervisor's office and was ordered by his supervisor to stop. Miranda did not stop, and when accused of disobeying this order insisted that he had not heard the supervisor. The controversy was presented to John Allen, a higher level supervisor, who investigated this incident and suspended Miranda.[1]

Recognizing the dissatisfaction with Miranda's performance, but apparently believing that he could become a productive employee, Allen directed Miranda's immediate supervisors to prepare a specific work schedule, listing tasks to be accomplished and the time allowed for completion. Miranda was assigned the job of inventorying the finished reels in the shipping area. He failed to perform the outlined tasks and committed what the supervisor considered egregious errors in performing the inventory. On June 20, because of these failures, Miranda was suspended for three days.

Garza's employment problems arose out of her attendance record. She had previously been employed by TRW from February to November 1977, during which time she had attendance problems. She was rehired on March 9, 1978 and immediately resumed her lax attitude. In April she was absent four times, once in May, four times in June and five times in July. Garza was aware of the company attendance policy which considered excessive more than two absences in one month. The ALJ found that Garza was aware of this policy and that she had been cautioned orally and in writing, including warnings that if she persisted she would be terminated. On the morning of July 26, 1978, when she failed timely to report for the fifth time in July, she was informed by her supervisor that if she did not work that day "there was nothing they could do for her." She did not appear for work and was discharged. The ALJ found:

> The evidence shows that Garza had a poor employment record, that she had received a verbal and a written warning, and that in that month of July, she had already been absent a number of times, which was considered excessive by [TRW's] standards.

In the face of this evidence, the Board found that the reasons given by the company for Garza's discharge and Miranda's suspensions were pretextual[2] and that the real reason was anti-union animus. The record does not sustain these conclusions of the Board.

To sustain a finding that a discharge is pretextual, there must be no legitimate business reason advanced by the company. The very nature of a "pretext" is a false or sham reason. When the employer advances a legitimate reason for the discharge, and it is not shown that this reason is untrue, the case cannot be characterized as a pretext case but must be considered a "dual-motive" case.[3] To hold otherwise would permit avoidance of the application of the "moving-cause" analysis which we have consistently held to be the law. The mere characterization of an employer's action as pretextual does not satisfy the responsibility of fully weighing all reasonable bases for that action. Whether an action is truly pretextual is a finding of fact, but it is a finding of ultimate fact which is subject to our plenary review. *See Thompson v. Leland Police Dept.*, 633 F.2d 1111 (5th Cir. 1980).

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[1] The ALJ considered this a three day suspension. The record reflects a suspension for one full day and a portion of a second.

[2] The ALJ found Miranda's suspension to be pretextual but apparently found that Garza's discharge involved both proper and improper motives. The ALJ then proceeded to analyze the case as a dual-motivation case and found that there was an improper discharge. It is not clear from the record, however, what test the ALJ employed to arrive at the result. He uses language from the now discredited "in part" test, from the "but for" test and from the "motivating cause" test.

> So finding, I conclude, that but for the Kendrick incident, Garza would not have been discharged. The Respondent's dominant motivation thus, being, at least in part, unlawful, I find that Garza's discharge was a violation of Section 8(a)(3) of the Act.

The Board changed this finding of the ALJ concluding that Garza's discharge was "pretextual."

[3] This analysis has recently been adopted by the Board. *See Wright Line v. Lamoureaux*, 251 N.L.R.B. No. 150, 105 LLRM 1169 (Aug. 27, 1980).

Were we to assume arguendo that the Board could properly engage in the analysis of the evidence as it did, the conclusions reached are not supported by substantial evidence. The employer assigned valid reasons for the suspensions and discharge. These reasons were not shown to be untrue.

If by pretextual the Board meant that the reasons were legitimate but the moving cause was anti-union animus, such a finding would also lack the support of substantial evidence. There are no facts establishing that the motivating cause for Miranda's suspensions and Garza's discharge was anti-union prejudice. Such facts could only be inferred. But as we have observed, an unlawful purpose is not to be lightly inferred. *N.L.R.B. v. Federal Pacific Electric Co.*, 441 F.2d 765 (5th Cir. 1971); *Federal Mogul Corp. v. N.L.R.B.*, 566 F.2d 1245 (5th Cir. 1978). Suspicion, conjecture and theoretical speculation register no weight on the substantial evidence scale. *Florida Steel Corp. v. N.L.R.B.*, 587 F.2d 735, 742 (5th Cir. 1979); *N.L.R.B. v. O.A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5th Cir. 1967).

To allow the Board to draw such inferences would place on the employer the burden to disprove the existence of an unlawful motivation, a burden that the employer is not required to bear.

> The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, * * * legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption * * *. In the choice between lawful and unlawful motives, the record taken as a whole must present *a substantial basis of believable evidence pointing toward the unlawful one.*

N.L.R.B. v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) (citations omitted) (emphasis added). *See also N.L.R.B. v. Varo, Inc.*, 425 F.2d 293, 301 (5th Cir. 1970).

We are not persuaded that either Garza's discharge or Miranda's suspensions were in retaliation for, or part of an effort to inhibit, their union activities. The overwhelming weight of evidence supports the opposite conclusion: that the moving cause for the suspension of Miranda was his poor attitude and work performance and that Garza was discharged for her poor attendance record. As we stated in *N.L.R.B. v. Mueller Brass Co.*, 509 F.2d 704, 711 (5th Cir. 1975):

> If the specific employee happens not only to break a Company regulation but also to evince a pro-Union sentiment, that coincidence alone is not sufficient to destroy the just cause for his discharge or suspension.

We decline to allow an employee, whose work or attitude is unacceptable, to draw a protective mantle around himself by espousing the union cause; Congress did not intend §§ 8(a)(1) and 8(a)(3) to provide a shield for the incompetent or job security for the unworthy. This is especially true in cases such as that of Miranda and Garza where the failings which led to the disciplinary actions surfaced before the company became aware of union activities. The Board's findings that TRW violated § 8(a)(3) in suspending Miranda and terminating Garza cannot be sustained.

Section 8(a)(1) Violations

Section 8(a)(1) of the National Labor Relations Act makes it unlawful for an employer to "interfere with, restrain, or coerce" employees in the exercise of their

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rights guaranteed under § 7 of the Act. The Board found several § 8(a)(1) violations in the present case, all of which can be grouped into two categories—threats and coercive interrogations. As with the § 8(a)(3) charges, we find that the Board's determinations are not supported by substantial evidence.

A. *Threats*

It is well settled that a threat of reprisal for union activity is a violation of the Act. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). On the other hand, so long as an employer does not threaten an employee with reprial for union activity the employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union. *Id.* at 618, 89 S.Ct. at 1942. Further, in determining whether a statement is an impermissible threat we recognize that language used by the parties involved in a union representation compaign must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken. *N.L.R.B. v. Big Three Industrial Gas & Equipment Co.,* 441 F.2d 774, 777 (5th Cir. 1971).

The Board found that certain statements made by supervisor Eidukonis to Miranda were impermissible threats. The first occurred on July 19, the date of the union election, when Eidukonis told Miranda, "All along I've told you that there's no money here and that we ain't going to negotiate with the IUE or any other union." Miranda replied that the day was not over, and that Eidukonis' comment would not keep them from trying. A few days after the election, Eidukonis informed Miranda that he, Eidukonis, was a better union buster than La Mountain.[4] The third incident occurred when Eidukonis approached Miranda at his work station and told him that they should get out the picket signs; they were going to have a strike.

While these comments may be abrasive and hostile, they do not rise to the level of a threat when viewed in the context of the totality of the surrounding circumstances. Furthermore, there is no evidence indicating that any of the stantements contained a threat of reprisal against Miranda *for engaging in protected activity.* The statements were merely open-ended predictions, "puffing," boasts, and expressions of opinion.

The Board also concluded that supervisor Ponce's statement to Miranda that he "needed to get some union hospitalization insurance" because he "was going to lose an arm or a leg," was also an impermissible threat. This statement, in isolation or in another context, could be an 8(a)(1) violation. But in the context presented here, we find no 8(a)(1) violation. Ponce and Miranda shared a reciprocal animosity; they regularly exchanged insults and threats of bodily harm.[5] This ill-will was noted by the ALJ.[6] On the basis of these facts we cannot sustain the Board's findings that Ponce's statement was a threat of reprisal for engaging in union activity. Instead, it was merely one statement in a chain reflecting the continuing hostility between the two men.

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B. *The Interrogations*

Interviews or interrogations of employees are not illegal *per se. N.L.R.B. v. J. Weingarten, Inc.,* 339 F.2d 498 (5th Cir. 1964). an employer with a legitimate cause to inquire may interrogate employees on matters which relate to their § 7 rights without incurring § 8(a)(1) liability. *N.L.R.B. v. Ambox, Inc.,* 357 F.2d 138 (5th Cir. 1966). An interrogation becomes illegal when the "works themselves or the context in which they are used * * * suggest an element of coercion or interference." *Id. Delco-Remy Div., General Motors Corp. v. N.L.R.B.,* 596 F.2d 1295, 1309 (5th Cir. 1979). To determine whether an interrogation tends to be coercive, we examine: (1) the history of the employer's attitude toward its employees; (2) the type of information sought or related; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether this purpose was communicated to the employee; and (8) whether the employer assures employees that no reprisals will be taken if they support the union.[7] These factors, however, are not exhaustive and the result of their application is not always conclusive; they are simply reliable guidelines. As we noted in *Sturgis Newport Bus. Forms, Inc. v. N.L.R.B.,* 563 F.2d 1252, 1256 (5th Cir. 1977):

> proper evaluation of the evidence goes beyond examining a list of factors and then comparing the number that favor the employer to the number that favor the union.

Thus, while these criteria must be applied in each case, a determination of whether the interrogation tends to be coercive rests on a consideration of the eight factors in light of the total circumstances of the case. *See N.L.R.B. v. Kaiser Agricultural Chemicals*, 473 F.2d 374 (5th Cir. 1973).

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[4] Fran La Mountain was a staff employee of TRW from California, who was brought into the Corpus Christi plant during the union campaign. He gave several talks to employees and helped to organize the company's election efforts.

[5] For example, on one occasion, Miranda told Ponce that the Union was going to "get" Ponce. On another occasion, Miranda threatened Ponce by stating that he [Miranda] "has a baseball bat for guys like him [Ponce]." Likewise, Ponce would make statements such as the one now under consideration and insult Miranda by calling him a "union worm" and a "pain in the ass."

[6] In commenting on the evidence, the ALJ stated:

> There was additional, conflicting testimony about threats to take out a "peace bond" between Ponce and Miranda; talk about a near miss with an automobile in the Company parking lot; and allegations concerning Miranda's cursing and impudence toward Ponce.

[7] These criteria were originally enumerated by the Second Circuit in *Bourne v. N.L.R.B.,* 332 F.2d 47 (2d Cir. 1964). They were adopted and augmented by us in *N.L.R.B. V. Camco, Inc.,* 340 F.2d 803 (5th Cir.) *cert. denied,* 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1965), and have been consistently employed since that time. *See, e.g., Delco-Remy Div., General Motors Corp. v. N.L.R.B.,* 596 F.2d 1295 (1979); *N.L.R.B. v. Aero Corp.* 581 F.2d 511 (5th Cir. 1978).

In the present case, the Board determined that supervisor Eidukonis engaged in an unlawful coercive interrogation on two occasions. The first occurred after Miranda began wearing a union button identifying him as a member of the in-plant committee. Eidukonis asked him what the button was and Miranda told him. Two days later, Eidukonis approached Miranda at his work station and asked Miranda if he knew anything about the union. Miranda replied that he couldn't talk about the union on company time, but Eidukonis said, "Come on, you can talk to me." Miranda again declined to talk and Eidukonis asked Miranda if he was a paid union plant.

The Board also concluded that an interview between Garza and the attorney for TRW was a coercive interrogation. On July 21, the attorney was at the plant gathering evidence for employer objections to the NLRB election. Garza, like several other employees, was asked to report to a company conference room to meet with the attorney to discuss alleged imporper union monetary reimbursement to employees, in the form of refunds for union T-shirts. Initially, Garza cooperated and discussed an incident relevant to the T-shirt question. The attorney then drafted a statement and asked Garza to sign it. She refused. The attorney prepared a second and a third statement. Garza refused to sign the second and when presented with the third Garza said she was embarrassed about being called out of her department and was concerned about how her participation might look to her fellow employees. The attorney purportedly said: "Embarrassing is when I'm going to subpoena you—I'm going to go and pull you out of [the] carbon department and take you to court, and then you'll have to testify, then that's embarrassment." At that point the attorney told

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Garza to leave and that he did not like union people.[8]

We initially note that nowhere in the Board's opinion, or in the ALJ's Findings and Conclusions, is there any indication that the *Bourne* criteria were applied. We again state, the *Bourne* test is the proper analysis to be applied in these instances.

With regard to the Miranda conversations, there is little doubt that these discussions were not coercive.[9] We also find that the interview of Garza was not coercive, although we are of the opinion that such an interview borders on being unethical conduct on the part of the attorney. Nonetheless, when the *Bourne* criteria are applied, and the interview is considered in light of all the surrounding circumstances, we do not find it to be a violation of § 8(a)(1).

The employer had a legitimate reason to interview Garza. Additionally, the attorney was not a member of TRW's management. Coupled with the fact that the interview took place in a conference room with another employee present, these circumstances tend to negate a finding of coercion since they mitigate the element of fear that attaches to an interview by a high-level company official in a formal office setting. Moreover, Garza's responses were truthful, and her lack of fear of any reprisal by the company was manifested in her refusal to sign the three statements proffered to her. Further, Garza was not singled out; the record establishes that other employees were interviewed as well. Although the interview did approach the level of impermissible coercion when the attorney stated that he would subpoena Garza if she did not cooperate,[10] we find that the interview, although perilously close, did not reach the level of an unlawful interrogation.

We conclude that the Board's findings that TRW violated §§ 8(a)(3) and 8(a)(1) of the Act are not supported by substantial evidence. Enforcement of the Board's order is DENIED.

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[8] There is conflicting testimony in the record concerning how the attorney worded this statement. The ALJ found that the attorney said "get the hell out of here." Although Garza first testified to this, on cross-examination she admitted that no profanity was used.

[9] Application to the *Bourne* criteria yields the following results: (1) The record is silent as to the history of TRW's attitude toward its employees; (2) The information sought was very general such as "do you know anything about the union"; (3) Eidukonis is a low level supervisor; (4) The conversations were held at Miranda's work area; (5) Miranda gave truthful responses; (6) The employer had a valid purpose in obtaining information about the activities of unions in the plant; (7) That purpose is self-evident; (8) There were no assurances against reprisal, but none were necessary given the informal manner of the interrogation and the general nature of the questions.

[10] Our conclusion is bolstered by the fact that the attorney was not making an inaccurate statement. The company would have the lawful right to subpoena Garza as a witness if it were to formally challenge the election results.

Hammermill Paper Company v. NLRB

658 F.2d 155 (3d Cir.), August 26, 1981; rehearing denied November 2, 1981; certiorari denied April 18, 1983—252 NLRB 1236

On petition to review Board Order

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ROSENN, Circuit Judge: This case presents the question whether the National Labor Relations Board should have deferred to, or concurred in, an arbitrator's decision permitting the disciplinary suspension of Thomas Stritzinger, a union steward. Hammermill Paper Company (Hammermill) admittedly enhanced Stritzinger's punishment for his failure, as a union steward, to take affirmative steps to defuse an illegal work stoppage. Although upholding, in part, the enhancement of his punishment, the arbitrator found that Stritzinger had no contractual duty under the circumstances to take such affirmative steps. On September 30, 1980, the Board ordered Hammermill to make Stritzinger whole for the loss of pay he suffered by reason of discrimination in violation in section 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (3) (1976). 252 N.L.R.B. No. 172, 105 L.R.R.M. 1409. Hammermill petitioned this court for review, and the Board cross-applied for enforcement under 29 U.S.C. § 160(e) & (f). We enforce the order of the Board and deny the petition for review.

I.

On the bitterly cold night of February 18, 1979, near Erie, Pennsylvania, nine employees of Hammermill, including Stritzinger, were called upon by their supervisors to build and tend a fire under a frozen "jackladder." They refused. Two of the nine, John Hughes and Paul Gallagher, having no record of prior disciplinary problems at the company, were suspended for two weeks without pay. Six of the nine, each having once previously been reprimanded for an unrelated, unexplained absence from work, were discharged. The ninth man, Stritzinger, despite a "clean" personnel record, was discharged on the ground that he had failed "to take affirmative action as a Union Representative in the face of a concerted action" in violation of the collective bargaining agreement.[1]

The nine employees, believing their refusal to build or tend the fire was justified on grounds of either safety or job jurisdiction, and also believing that Hammermill had improperly enhanced the punishments of the seven fired employees, grieved the discipline to arbitration.

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The arbitrator held that the employees had acted improperly in refusing to build and maintain the fire. The arbitrator believed "that the evidence justifies the finding that the men acted in an egregiously improper manner" and that they deserved disciplinary action but not discharge. Although he concluded that the seven dischargees should be returned to work, he also held that they did not deserve any backpay.

> In this case, I feel that to award backpay to these employees would be interpreted as a reward for their activity on the night in question. It was not conduct which ought to be rewarded. It was conduct that ought to be condemned in the most stringent of terms. Their return to work is based, in part, on the procedural defects in the method used to discharge them, and in part on the fact that the disparity meted out to the employees involved is just too great and not justified by their prior records. Accordingly, in light of all the testimony and evidence, the conclusion will be that the seven employees should be returned to work without backpay. The arbitrator will not disturb the two weeks suspension given to the two employees.

The effect of this award was to reduce the penalties of the seven fired employees to a suspension of approximately five months.

Although it might have been argued that Hammermill's impulse to enhance the punishment of the "recidivists" was, to some degree, justifiable,[2] the

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[1] By letter Hammermill notified Stritzinger that:

> As a result of your refusal to perform the work assignment given to you by your Foreman and the General Foreman on February 18, 1979, specifically, to prepare materials for a fire at the Woodroom Jackladder, and, additionally, your failure to take affirmative action as a Union Representative in the face of a concerted action in the violation of Article IV, para. (a), your employment with Hammermill Paper Company is terminated.

[2] The arbitrator did not find the prior reprimands an insufficient ground for enhancing the punishment by adding an extra 4½ months of

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arbitrator's award revealed that there was no such justification in Stritzinger's case, outside of a belief that the two-week suspension was an overly lenient punishment for *any* of the men. The arbitrator found that "[t]here was no reason to single Stritzinger out for differential disciplinary action on the grounds of his stewardship." This finding followed from the arbitrator's interpretation of the labor contract. Under it, he found that although Stritzinger was among those employed on the night of the incident, "[a] steward's jurisdiction is confined to a particular shift, seniority, group, and department. [But o]n the evening in question, Stritzinger was not the steward. He was not so regarded."

Thus, the arbitrator apparently concluded that while the employer had no case for treating Stritzinger more harshly than the other eight men, he believed that a 5-month suspension without backpay was not an inappropriate penalty for any of the men. For this reason, the arbitrator held that the employer did not have just cause to fire Stritzinger and he directed reinstatement, but *without* backpay. The NLRB's General Counsel apparently disagreed with the denial of backpay and subsequently issued a complaint charging that Stritzinger's discipline had constituted a violation of § 8(a)(3), and requesting the Board to order backpay.

Before the Board, Hammermill attempted to prove that Stritzinger's punishment was justified not on the grounds originally asserted by Hammermill (*viz.*, Stritzinger's failure as steward to affirmatively halt the unauthorized refusal), but on the alternate ground that Stritzinger had instigated or led the refusal.[3] However, the ALJ, like

the arbitrator, rejected Hammermill's evidence.[4] The AJL declined to defer to the arbitral award itself, however. He held that because the disparity between the sanctions imposed on Stritzinger and the two other men with "clean" records stemmed from Stritzinger's stewardship, Stritzinger's discharge violated § 8(a)(3). Thus, he found that the arbitrator's failure to award Stritzinger back pay was contrary to Board policy.

A panel of the Board, by a 2–1 vote, adopted the ALJ's rulings, findings and conclusions. According to the Board, the arbitrator had "disregarded" the evidence and the Act and had "found that [Hammermill's] treatment of Stritzinger was *unrelated* to his union affilitation * * *." (Emphasis added.) Therefore the Board found that the arbitrator had "rejected * * * material evidence which was admitted, unchallenged, and formed a primary basis for Stritzinger's discharge and the unfair labor practices alleged." Moreover, even assuming that the arbirator's reinstatement of Stritzinger did represent an accommodation of NLRA policies, the Board held that by not ordering backpay, the arbitrator had rendered an award incompatible with the Board's established policy of restoring the *status quo ante* wherever possible.

II.

The statutory issue before the Board in this case was not whether Hammermill had just cause to suspend Stritzinger for five months without pay. Rather, the unfair labor practice issue went to the legality, under the National Labor Relation Act (NLRA), of Hammermill's admitted *motive* (and clearly the "but for" cause)[5] for enhancing Strit-

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suspension. Thus, the arbitrator's award might arguably have been read as finding that the added suspension period was justified by the prior reprimands.

[3] Even under the Board's view of § 8(a)(3), and clearly under the Third Circuit's view, such instigation would have been grounds for differential punishment of a union steward. *E.g., Midwest Precision Castings Co.*, 244 N.L.R.B. No. 63, 102 L.R.R.M. 1074 (Aug. 24, 1979). However, Board precedents indicated that absent instigation by Stritzinger, Hammermill's stated reason for discharge would not have passed muster under § 8(a)(3). *E.g., Precision Castings Co.*, 223 N.L.R.B. 183 (1977). *See also Westinghouse Elec. Corp.*, 243 N.L.R.B. 306, 312 n.32 (1979), *enforced mem, sub nom. International Union of Elec., Radio & Mach. Workers v. NLRB*, No. 79–1707 (D.C. Cir. Dec. 5, 1980), *cert. denied*, —U.S.—, 101 S.Ct. 3122, 69 L.Ed.2d 980 (1981). Courts of appeals, on the other hand, have taken a view more favorable to employers. As of the date the Board's order was entered, the rule of *Precision Castings* has been rejected by the Third and Seventh Circuits. *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied*, —U.S.—, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980); *Indiana & Mich. Elec. Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979). Since that time, the Eighth Circuit seems to have followed the Third and Seventh. *See NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 55 (8th Cir. 1981). *See* Part III *infra*.

[4] Said the ALJ: "I credit the three employee witnesses, of course, and I find Stritzinger did not provoke, or in any way cause or encourage the other eight men to strike."

Said the arbitrator: "[T]here is no evidence before me to indicate that Stritzinger was the ring leader on the evening in question. In that sense, the company's basis of differentiation fails."

Finally, at oral argument before this court, Hammermill's counsel all but conceded the issue: "I think that the so-called leadership issue is really a red herring and I will concede it may be one that we fished for a bit."

[5] There is ample evidence to support the finding that Hammermill's post hoc assertion as to its reason for dismissing Stritzinger—that he allegedly instigated the illegal action—was, at best, unfounded. *See* note 4 *supra*. Consequently, we see no basis for rejecting that finding, which

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zinger's punishment beyond the two week suspension meted out to the others who, like Stritzinger, had no prior record of disciplinary problems.[6] That motive was found by the arbitrator to have no logical or contractual basis. If, as stated by the Board, that motive together with its practical effect, violated section 8(a)(3), then it follows that the objective existence of just cause for Stritzinger's punishment failed to negate the illegality of Hammermill's enhancement of the admittedly lenient punishment. "Despite the concurrent existence of a justifiable cause for discharge, the employer violates the act if anti-union animus was the 'real motive.' " *Edgewood Nursing Center, Inc., v. NLRB,* 581 F.2d 363, 368 (3d Cir. 1978).[7]

In *NLRB v. General Warehouse Corp.,* 643 F.2d 965 (3d Cir. 1981), we held that it was no abuse of discretion for the Board to reverse the outcome of an arbitral decision that upheld, as a *contractual* matter, the discharge of an employee, absent "some evidence that the *statutory* issue has actually been decided." *Id.* at 969 (emphasis added); *see also id.* at 975 n.6 (Aldisert, J., dissenting). In that case an employee, Coon, was allegedly discharged for excessive absenteeism, but suspected that the real reason for his discharge was his vehement opposition to the employer on various collective bargaining issues. Coon grieved his discharge to arbitration, raising the issue whether the discharge was actually in retaliation for his concerted union activities. 643 F.2d at 974 n.3 (Aldisert, J., dissenting). However, the arbitrator made no findings on the employer's motive for discharge. Instead, the arbitrator held simply that, in an objective sense, there had been ample just cause for the termination.

Coon then raised the issue of discrimination under § 8(a)(3) before the Board. The Board refused to defer to the arbitrator's award and found that the discharge was discriminatory under § 8(a)(3). This court enforced the Board's order. In doing so, we declined to hold (as the Board had held) that the arbitrator's award had been "clearly repugnant" to the purposes and policies of the NLRA, thus avoiding the question whether the Board was required to defer under *NLRB v. Pincus Brothers, Inc.,-Maxwell,* 620 F.2d 367 (3d Cir. 1980). Instead, we chose to adopt the rule, developed in a line of cases beginning with *Monsanto Chemical Co.,* 130 N.L.R.B. 1097 (1961), that had expanded upon the three criteria for arbitral deferral originally adopted by the Board in *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955), and embellished in *International Harvester Co.,* 138 N.L.R.B. 923 (1962), *enforced sub nom. Ramsey v. NLRB,* 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed.2d 1052 (1964).[8]

Monsanto Chemical and its progeny [9] have devised various formulae to refine the

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was reached by both the ALJ and the arbiartor. We proceed, then, on the assumption that Hammermill fired Stritzinger for the reasons stated in its letter of discharge. *See* note 1 *supra.*

[6] Because reinstatement without backpay failed to eliminate the disparity between Hammermill's treatment of Stritzinger, on the one hand, and Hughes and Galliagher, on the other, the unfair labor practice issue plainly survived the arbitral award of reinstatement. The issue to which we refer is, of course, not whether the arbitrator's decision to reinstate Stritzinger without backpay was itself an unfair labor practice, but rather whether Stritzinger's 4½-month layoff without pay was the enduring consequence of the initial illegal discharge. Thus we cannot agree with the dissent when it suggests that, given the reduction of the discharge sanction to a 5-month suspension prior to any proceedings before the Board, compliance with the reinstatement award necessarily insulated Hammermill's conduct from further scrutiny under the NLRA.

[7] *See, e. g., NLRB v. Garry Mfg. Co.,* 630 F.2d 934, 945 (3d Cir. 1980); *L'Eggs Prods., Inc. v. NLRB,* 619 F.2d 1337, 1341 (9th Cir. 1980); *NLRB v. Wilson Motor Freight Co.,* 604 F.2d 712, 722 (1st Cir. 1979), *cert. denied,* 445 U.S. 962, 100 S.Ct. 1650, 64 L.Ed.2d 238 (1980); *John Klann Moving & Trucking Co. v. NLRB,* 411 F.2d 261, 263 (6th Cir.), *cert. denied,* 396 U.S. 833, 90 S.Ct. 88, 24 L.Ed.2d 84 (1969); *Ilinois Ruan Transp. Corp. v. NLRB,* 404 F.2d 274, 278 (8th Cir. 1968).

[8] In *Spielberg* the Board held that

> the proceedings appear to have fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award.

112 N.L.R.B. at 1082. In *International Harvester,* the Board declined to address basic contract and statutory questions pertinent to the case before it "since it plainly appears to us that the award is not *palpably wrong.*" 138 N.L.R.B. at 929 (emphasis added). The Board restated its *Spielberg* rule as follows:

> If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the puposes and policies of the Act.

Id. at 927 (footnote omitted).

[9] *See, e. g., St. Lukes Memorial Hosp., Inc. v. NLRB,* 623 F.2d 1173, 1178–79 (7th Cir. 1980); *NLRB v. Davol, Inc.,* 597 F.2d 782, 786 (1st Cir.

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landmark *Spielberg* test.[10] However, central to them all is a notion that where the propriety of employee discipline is upheld under the terms of a collective bargaining agreement, the Board need not reject a complaint under § 8(a)(3), based on the same discipline, unless there is some indication that in deciding the contract issue, the arbitrator had also decided the questions necessary to the resolution of the statutory inquiry.

Pincus Brothers provides an example of a case in which such an indication was present. There, we dealt with a dismissal precipitated by an employee's distribution of a leaflet. Both the arbitrator and Board treated the dismissal on this ground. The only question was whether dismissal for distribution that particular leaflet was permissible under the law of the shop and the NLRA. By finding that the leafletting was justifiable grounds for dismissal, the arbitrator at least arguably concluded that the leafletting was unprotected both by the NLRA and the "law of the shop." For this reason the Board did not, and could not have, upset the arbitral decision simply by applying the rule grounded in *Monsanto.*

As *Pincus* illustrates, the employer's motives for disciplinary action will themselves often be ambiguous. At arbitration the employer and the employee will each attempt to convince the arbitrator that the "real" reasons for discipline were, or were not, justified under the "law of the shop," which may, as in *Pincus,* encompass congruent statutory and contractual issues. Thus, when the arbitrator finds that the employer had "just cause" to discipline the employee, his award is typically at least "susceptible" to the interpretation that "there is no causal connection of any anti-union bias and the loss of the job." *Edgewood Nursing Center, Inc. v. NLRB,* 581 F.2d at 368. Because the absence of such a causal connection would remove the 8(a)(3) taint from the employer's acts, the Board may then be obliged to defer to the award under the standard of *Douglas Aircraft Co. v. NLRB,* 609 F.2d 352 (9th Cir. 1979), specifically approved by this court in Pincus: "If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." 609 F.2d at 354.

An arbitrator's award may also evince resolution of unfair labor practice issues when the collective bargaining agreement, whose terms it is the arbitrator's duty to construe, expressly prohibits discriminatory discharges based on union activity. *See, e.g., Gulf States Asphalt Co.,* 200 N.L.R.B. 938, 939 n.11, 940 n.12 (1972); *Airco Industrial Gases—Pacific,* 195 N.L.R.B. 676, 677 (Member Kennedy, dissenting).

On the other hand, the Board has determined that where a disciplined employee fails even to *raise* the unfair labor practice issue in the arbitral proceeding, subsequent Board inquiry into that issue will not be limited by an arbitral award favorable to the employer. *Suburban Motor Freight, Inc.,* 247 N.L.R.B. No. 2, 103 L.R.R.M 1113 (Jan. 8, 1980). But failure to raise the statutory issue before the arbitrator is not a sine qua non for refusal to defer even assuming compliance with the three *Speilberg* criteria. Though the discharged employee may vigorously argue the issue of anti-union discrimination to the arbitrator, it is not unheard-of for an arbitrator to specifically disclaim any intent to decide the issue of discriminatory motive, and base an award solely on the existence of objective grounds for discipline. *Monsanto Chemical* was such a case. There, having heard evidence and arguments on the unfair labor practice issues, the arbitrator stated:

> "I have given a good deal of thought to the dilemma which arises out of the dual jurisdiction over the essence of the unfair labor practice charges. Because the NLRB has exclusive jurisdiction in the event of a conflict, and because I believe the case can be decided on other grounds, I have chosen to ignore for purposes of decision the allegations herein contained that Till's Union activities played a part in his discharge."

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130 N.L.R.B. at 1099. A similar approach was evidenced by the arbitrator's award in *Kalamazoo Typographical Union Local 122,* 193 N.L.R.B. 1065,

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1979); *Stephenson v. NLRB,* 550 F.2d 535 (9th Cir. 1977); *Banyard v. NLRB,* 505 F.2d 342 (D.C.Cir.1974); *John Klann Moving & Trucking Co. v. NLRB,* 411 F.2d 261, 263 (6th Cir.), *cert. denied,* 396 U.S. 833, 90 S.Ct. 88, 24 L.Ed.2d 84 (1969); *Illinois Ruan Transp. Corp. v. NLRB,* 404 F.2d 274, 280 (8th Cir. 1968); *Hawkins v. NLRB,* 358 F.2d 281, 284 (7th Cir. 1966); *Raytheon Co.,* 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds,* 326 F.2d 471 (1st Cir. 1964); *Suburan Motor Freight, Inc.,* 247 N.L.R.B. No. 2, 103 L.R.R.M. 1113 (Jan. 8, 1980).

[10] Some of these formulae are collected in *General Warehouse,* 643 F.2d at 969 & nn. 16 & 17.

1074 (1971). *See also* Note, *The NLRB and Deference to Arbitration,* 77 Yale L.J. 1191, 1204–05 (1968).

It is thus inevitable that the ground upon which the arbitrator acts be subjected to some scrutiny before the Board or a court can conclude that the award disposes of the statutory issue raised before the Board. After all, the Board defers not because the arbitrator could have reached and decided unfair labor practice issues in a grievance arbitration, but because in the very process of deciding the contractual issue, the arbitrator may necessarily dispose of the question whether the employee's legitimate rights under § 7 of the NLRA were interfered with impermissibly, within the meaning of § 8(a).[11] Thus in a case where the statutory issue—*viz.,* the identity of the "but for" cause for discipline—and the contractual issue—*viz.,* the existence or nonexistence of an objective justification for discipline—are evidently separate and distinct, and it clearly appears that only the latter has been treated by the arbitrator, the rationale for deferral necessarily evaporates. In *General Warehouse,* for instance, there was a dispute over the impetus for Coon's dismissal, but the arbitrator's finding of "objective" just cause seemed to indicate to us that the statutory issue of motive had been completely pretermitted by the arbitrator. Today, we hold that because the arbitrator definitely declined to decide the statutory issue lurking in Stritzinger's grievance, the Board committed no abuse of discretion in undertaking a de novo review of that issue.

Because it is clear that many of the factual and contractual issues bearing on the unfair labor practice issue were, in this case, presented to the arbitrator, and because he wrote an opinion acknowledging his complete familiarity with the relevant evidence, it is especially important here that we hew faithfully to the rule set forth in *General Warehouse, viz,* that the Board defer to the arbitral decision given "some evidence that the statutory issue has been decided."[12] We believe that this case, however, calls for a Board decision on the merits because here, even more than in *General Warehouse,* we are abundantly assured that the arbitrator, although presented with evidence of the motive for discipline, specifically and clearly declined to reach the question whether that motive was statutorily proscribed.

As a preliminary matter, we note that the collective bargaining agreement

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governing the arbitrator's award apparently contained no anti-discrimination clause, thus raising some question whether the arbitrator was even authorized to set aside discipline for which objective "just cause" existed.[13]

Secondly, it is undisputed that the arbitration case was litigated not as a case involving anti-union discrimination under § 8(a)(3), but solely as a just cause matter. The legal standard embodied in § 8(a)(3) was neither discussed nor even raised by the parties to that proceeding.

Finally, and most importantly, in the present case there is only one explanation for the *enhancement* of Stritzinger's punishment—his status as a union official. The arbitrator specifically found that Hammermill's motive for enhancing Stritzinger's punishment was the motive explained in Hammermill's letter. And the arbitrator also specifically found that the explanation for the discipline had no contractual basis. Thus his award could not have been construed as a finding that the collective bargaining agreement had heightened Stritzinger's responsibilities as union steward, so as to affect the balance of policies embodied in § 7 of the NLRA, and thereby the determination of discrimination under § 8(a)(3). Rather, the arbitrator refused to order backpay on the ground that Stritzinger's misconduct warranted, in an objective sense, five months of suspension, far more than he would have suffered had he not been a union steward. Although the first of these alternate holdings would have spoken to an unfair labor practice issue, the latter would not.

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[11] It is for this reason that the Board overruled its much-criticized decision in *Electronic Reprod. Serv. Corp.,* 213 N.L.R.B. 758 (1974), which had held that whether or not statutory issues had been raised, the Board would defer to arbitral awards absent "unusual circumstances * * * which caused the failure to introduce * * * evidence [of statutorily proscribed discrimination] at the arbitration proceeding." *Id.* at 762 (footnote omitted).

In the view of one commentator, and subsequently a majority of the Board,

> [t]he inference to be drawn from [*Electronic Reproduction*] is that *although the contract and statutory issues are different,* the union's interests may not coincide with the individuals', *and the statutory issue was in no way litigated or determined,* the Board will deprive these individual employees of their statutory rights under the guise of deferring to and encouraging arbitration. One's mind would need to be very fertile, indeed, to conjure up a more shocking sacrifice of individual rights on the altar of institutionalism. Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?* 123 U.Pa.L. Rev. 897, 909 n.32 (1975), *quoted in Suburban Motor Freight, Inc.,* 247 N.L.R.B. No. 2, 103 L.R.R.M. at 114 (emphasis added).

[12] *Cf. Bloom v. NLRB,* 603 F.2d 1015, 1020 (D.C.Cir. 1979) ("The key * * * is the evidence presented to the arbitration panel.").

> [T]he directive of the Court of Appeals for the District of Columbia [in *Banyard v. NLRB,* 505 F.2d 342 (1974),] that deference is an abuse of discretion unless the arbitrator's decision is congruent to the Board's, both as to issues and disposition, will effectively destroy the use of arbitral resources to resolve overlapping questions of contractual and statutory breach; the temptation will be very great indeed for the party losing before the arbitrator to try the case again before the Board.

R. Gorman, Basic Text on Labor Law 742 (1976).

[13] Of course, the rationale for deferral is undercut if he was not so authorized, since the arbitrator "has no general authority to invoke public laws that *conflict* with the bargain between the parties." *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 4347, 4351, — U.S. —, —, 101 S.Ct. 1437, 1446, 67 L.Ed.2d 641 (1981) (quoting *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 53, 94 S.Ct. 1011, 1022, 39 L.Ed.2d 147 (1974)) (emphasis added).

In our view, the arbitrator's decision came close to stating the sort of "handsoff" approach to the statutory issue that was displayed by the arbitrators in *Monsanto Chemical* and *Kalamazoo Typographical Union.* There was no question, even in the arbitrator's mind, as to what motive prompted Hammermill to discipline Stritzinger more severely than Hughes or Gallagher. Nor was there any question that the actual motive was not valid under the collective bargaining agreement. Thus it cannot plausibly be argued that the arbitrator was concerned about Hammermill's motive, or that his decision to uphold Stritzinger's enhanced level of punishment somehow constituted a finding that Hammermill's motive was legitimate. As Hammermill's counsel before the arbitrator explained to this court at oral argument, the arbitration case "was dealt with solely as a just cause matter." We conclude, therefore, that the Board acted correctly in undertaking a de novo review of the statutory issues raised in the complaint issued on behalf of Stritzinger.

III.

We now turn to the question whether the Board erred in concluding that the disparity of treatment between Stritzinger, on the one hand, and Hughes and Gallagher, on the other, constituted discrimination prohibited by § 8(a)(1) & (3).[14]

> [O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

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NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967) (emphasis in original); *accord, e.g., United Dairy Farmers Cooperative Association v. NLRB,* 633 F.2d 1054, 1061 (3d Cir. 1980). We believe that Hammermill's discrimination against Stritzinger could readily have had an adverse affect on employee rights. The mere office thus became a burden, unilaterally imposed by the employer, even under circumstances where the office carried no extra burden under the terms of the contract. The holding of union office, after all, is the essence of protected union activities;[15] union status may not, without more, be treated by employe.rs as an open invitation for sanctions. All other things being equal, the marginal effect of this burden would be to "discourage members from holding union office" and thus "no doubt have an inherently adverse effect on employee rights." *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227, 230 (7th Cir. 1979).

Secondly, we hold that where an employer offers a contractually unsupportable explanation for imposing more severe sanctions on a union offical than it imposes upon an ordinary member for similar misconduct, it has failed to establish, as required by *Great Dane,* that it was motivated by a legitimate objective. In this case, the employer initially assigned only one reason for its disparate treatment of Stritzinger, a justification found by the arbitrator to be unacceptable under the collective bargaining agreement and in the general factual context of this case. We see no reason for reviewing that finding at this stage. Reconsideration of the contract issue seems particularly inappropriate here, because of all the forums in which this case has been heard, including this court, the arbitration proceeding was the one most suitable—and the one bargained for—to determine the meaning of the collective bargaining agreement in this respect. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424 (1960). *See generally Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969).

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[14] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the NLRA];

* * * * *

(3) by discrimination in regard to hire or tenure of employement or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

29 U.S.C. § 158(a) (1976).

[15] *General Motors Corp.,* 218 N.L.R.B. 472, 477 (1975), *enforced mem.,* 535 F.2d 1246 (3d Cir. 1976); *accord, Indiana & Mich. Elec. Co. v. NLRB,* 599 F.2d 227, 230 (7th Cir. 1979).

Thus we have not the slightest doubt that the employer's decision to enhance Stritzinger's punishment, without a legitimate business reason, and based solely on his union office, constituted a violation of § 8(a)(3). Ironically, however, we reach a result consistent with the majority of the Board panel, even though the panel relied on precedent overruled by this court's decision in *Gould, Inc. v. NLRB*, 612 F.2d 728 (3rd Cir. 1979), *cert, denied*, —— U.S. ——, 101 S. Ct. 247, 66 L.Ed.2d 115 (1980). We do not, however, mean to express any lack of support for our decision in *Gould* and its underlying reliance on the reasoning of *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979).

Gould established that where a collective bargaining agreement explicitly requires union officers and representatives to use every reasonable effort to terminate an unauthorized "work stoppage," an employer may single out for disciplinary discharge a union steward who fails to take affirmative steps to terminate that work stoppage. *Gould, Inc. v. NLRB*, 612 F.2d at 730 & n.3. *Gould* is not, of course, directly applicable here because Stritzinger had no such contractual duty, and the arbitrator so found. Somewhat closer to this case, but still tangential, is *Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979), the decision from which *Gould* adopted its reasoning. *Indiana* also permitted an employer to discipline union stewards more severely than rank-and-file members for participating in unauthorized refusals to work, because participation in the unlawful strike by the stewards constituted not only a violation of their duties as employees, but a repudiation of their responsibilities as union officials. 599 F.2d at 230. However, the contract in *Indiana* was somewhat less emphatic, and less specific, in spelling out the duties of union officers than was the contract in *Gould*. In *Gould*, the contract required that

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> [i]n the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:
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> Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.
>
> The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

612 F.2d at 730 n.3. In *Indiana*, on the other hand, the contract, in general language, merely stated.

> that the employees covered by this Agreement * * * will not be called upon or permitted to cease or abstain from the continuous performance of the duties pertaining to the positions held by them * * *.

599 F.2d at 228. In a case where no anti-union motive is shown, held Judge Tone, disparate punishment of union officials covered by such an agreement could not be considered "inherently destructive" of important employee rights. *Id.* at 232.

Indiana thus suggests a short step beyond *Gould*. It allows a court to find that an employee's status as a union official carriers responsibilities to take affirmative steps to prevent unlawful work stoppages, even absent the emphatic and unmistakably clear language of individual duty in *Gould*. Both parties now before us seemed to urge at oral argument that we take this progression to its limit; they urge us to read in *Indiana* a rule allowing employers to single out for harsher punishment union officials who merely participate in illegal strikes *regardless* of the language in their collective bargaining agreement.[16] Of course, such an extension would foster the unacceptable result that employers and unions could no longer agree upon the responsibilities under the contract of union officials. Instead, an inflexible approach would be compelled in every case, regardless of the particular circumstances. Not only do we reject that approach as unsound, but we also note that the factual context in which *Indiana* arose would forbid us from reading it as anything more than a determination that, within the context of the labor agreement there at issue, the actions of the union stewards violated duties with which the rank-and-file were not burdened.

Given that the "status" of union stewardship, without more, is not a criterion upon which discipline is warranted, 599 F.2d at 230, then whether responsibility does, or does not, accompany the status of union stewardship is a conclusion that must be reached by construing the contract, rather than a condition dictated purely by operation of law. The decision in *Indiana* was tied to contract language that imposed a higher duty on union stewards than the duty imposed on Stritzinger by the labor contract in this case. Here, the contract stated only that "[t]he Union agrees that there will be no strikes, slowdowns, or work stoppages." In *Indiana*, on the other hand, the agreement specifically noted that the services to be provided were essential to the operation of a public utility, "and to the welfare of a public dependent thereon." Thus the contract, "in consideration" of this strong public interest, provided that employees "will not be called upon *or permitted to* cease or abstain from the continuous performance of their jobs." 599 F.2d at 228 (emphasis supplied). By use of this language, the contract implicitly differentiated between two tiers of union membership—those who could engage in strike activity, and those who could wield the additional power to promote or deter strike activity by others—and imposed higher duties on members of the latter tier. Even arguing strictly from the face of the contract in this case, it would thus be technically consistent to conclude that Stritzinger's punishment here penalized the exercise of a protected right, while the differential punishments in *Indiana* did not. But we have more to go on, here, than the mere face of the contract. In this case the arbitrator made specific findings that *negated* the inference that any "higher responsibilities" accompanied Stritzinger's status as a union steward.[17]

Thus, the result we reach is not at all inconsistent with *Gould* and *Indiana*. Nor do we see any need to reconsider our decision in *Gould*. The Board argues vigorously on this appeal that it is improper to allow an employer to enforce the special antistrike obligations of union officials through the sanction of discharge. It argues that the breach of such an obligation is an internal union matter and that "a major policy of the Act is to 'insulate employees' jobs from their organizational rights' and to permit them to be 'good, bad or indifferent members * * * without imperiling their livelihood.'" Brief for the NLRB 17 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40, 74 S.Ct. 323, 335, 98 L.Ed. 455 (1954)). Because we have already determined that Stritzinger violated no special anti-strike obligation as union official, it is unnecessary, in the strict sense, for us to reiterate here our view of how an employer may enforce that obligation. However, we caution the Board that insofar as *Gould* holds that an employer may use discipline as a means of enforcing the individual duties of union officials, we continue to adhere to that precedent.[18]

IV.

Having concluded that the arbitrator clearly failed to decide the statutory issue in this case, and that therefore the Board did not abuse its discretion in failing to defer, we express no opinion whether the arbitrator's award was or was not, in any sense, "clearly repugnant to the purposes and policies of the Act."[19] The Board's order will be enforced insofar as it requires the employer to treat Stritzinger, Hughes, and Gallagher on an equal basis. The petition for review will be denied.

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[16] For instance, the Board's counsel asserted that were this court to follow the rationale of *Indiana*, we could not enforce the order under review.

[17] For this reason, we express no view as to how we would have interpreted Stritzinger's contractual duty had we been asked to interpret the bare words of the contract, lacking the arbitral interpretation bargained for by the parties to the agreement.

[18] The Board would also have this court overrule *Gould* on the ground that *Complete Auto Transit, Inc. v. Reis*,—U.S.—, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981) expresses a determination by the Supreme Court that Congress did not intend to allow employers to obtain money damages against individual employees who violate their collective bargaining agreements.

This argument is meritless. In *Complete Auto*, the Court acknowledged that Congress approved of disciplinary discharges of employees who violated collective bargaining agreements. *Id.*—U.S. at— & n.16, 101 S.Ct. at 1844 & n.16. A fortiori, an employer's disciplinary suspension of a contract violator is protected under the NLRA. Therefore *Gould*, a case in which an employee was fired for violating his individual duties under the contract, is perfectly consistent with *Complete Auto*.

A. LEON HIGGINBOTHAM, JR., Circuit Judge, concurring: I agree fully with the majority's conclusion that the Board's application for enforcement should be granted and the Hammermill Paper Company's petition for review denied. I also concur with the majority's reasoning on the appropriateness of the Board's refusal to defer to an arbitration award where the arbitrator did not decide the unfair labor practice issue. I write separately only to express my views on the issue of whether an employer commits an unfair labor practice when it disciplines a union officer more severely than rank-and-file workers similarly situated.

I.

The Hammermill Paper Company employs four "tour crews" of maintenance mechanics at its Erie, Pennsylvania mill. Thomas Stritzinger was a ten-year employee at the mill and the union steward for Tour Crew D. On the night in question, Stritzinger had agreed to work to work the Tour Crew A shift as a substitute for a fellow employee. He was not serving as a steward when the work stoppage occurred. All of the negotiations over whether Tour Crew A would build the fire transpired between the mill foreman and the union steward for Tour Crew A. Yet, when the company sent out its disciplinary notices, Stritzinger was informed that he been fired. Of the remaining members of Tour Crew A, six who had participated in an earlier work stoppage were also fired and two who had clean records were suspended for two weeks. Stritzinger had a clean record prior to the work stoppage at issue but was fired all the same because he was a union steward at the mill. The contract between the company and the union contained a no-strike clause but did not impose an explicit duty on union officers and stewards to end any illegal work stoppages.

A. *The Third Circuit's Decision in Gould, Inc. v. NLRB*

In *Gould, Inc. v. NLRB*, 612 F.2d 728, 730 (3d Cir. 1979), we considered "whether it was an unfair labor practice for the employer to single out for disciplinary charge a union steward who participated with a number of rank-and-file union members in an illegal work stoppage where the steward failed to discharge his contractual obligation to take steps to terminate that work stoppage." There the collective bargaining agreement contained a no-strike clause as well as a company authorization to discipline or discharge employees who participated in illegal work stoppages. The contract further provided that:

> In the event of an illegal unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:
>
> > Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence

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[19] We have not been presented with any evidence that, after reinstating Stritzinger, the arbitrator went on to decide the surviving statutory question arising out of the remaining disparity between the treatment of Stritzinger, on the one hand, and Huges and Gallagher, on the other. *See* Part II *supra.* Had we been presented with such evidence, it is perhaps arguable that, as the dissent suggests, we could have gone on to find that the arbitrator's failure to award backpay would not have been "clearly repugnant to the purposes and policies" of the Act's remedial provision which directs the Board to order such affirmative action "as will effectuate the policies of" the NLRA. 29 U.S.C. § 160(c) (1976). *Cf. Ohio Ferro-Alloys Corp.*, 209 N.L.R.B. 577 n.2, 583 (1974) (discharged employee properly reinstated without backpay, but the Board declines to decide whether the "but for" cause of discharge was lawful or unlawful). *But see Cessna Aircraft Co.*, 220 N.L.R.B. 873, 875 (1975) (arbitrator's award of reinstatement without backpay "is repugnant to the purposes and policies of the Act"). *See generally Sea-Land Serv., Inc.*, 240 N.L.R.B. 1146, 1147 n.4 (1979). However, the rule in *General Warehouse* obviates the need for an inquiry into this last question (apparently a novel one in this circuit) for, as we have found, it is quite plain that the arbitrator did not even address, much less decide, the question whether the disparity between Stritzinger's and Hughes's and Gallagher's treatment constituted a violation of § 8(a)(3) of the Act.

> of any wild-cat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.
>
> The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

Id. at 730-31. The court concluded that, since the contract gave the employer the power to fire illegal strikers and imposed an affirmative duty on union officers to attempt, in good faith, to end the strike, the employer did not commit an unfair labor practice by discharging a union steward who breached his contractual duties. *Id.* at 733.

I believe that this court's opinion in *Gould* was far too expansive and ladened with dicta which stated precepts far beyond the unique facts of that case, but *Gould* is the rule of our circuit unless and until it is changed by the full court sitting *en banc.* I question the *Gould* court's reliance on the Seventh Circuit's decision in *Indiana & Michigan Electric Co. v. NLRB,* 599 F.2d 227 (7th Cir. 1979).

In *Indiana & Michigan Electric,* a union steward was discharged under a collective bargaining agreement much less specific than *Gould* in the duty it imposed upon union officials. The court found no unfair labor practice because:

> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights.

Id. at 232 (footnote omitted). Insofar as the Seventh Circuit based its conclusion on the theory that a union steward's status conveyed rights and responsibilities, not specifically enumerated in the contract, which justfied more severe discipline, I would reject its decision completely. The Board in its brief in the present case argues convincingly that:

> Shop stewards may receive certain special treatment to accommodate their role in processing grievances. Thus, contracts frequently provide that stewards get time off with pay for grievance handling (as in the contract in this case, A. 202a) or extra protection against layoffs ("super-seniority"). See Bureau of National Affairs, *Basic Patterns in Union Contracts,* at 36–37 (8th ed. 1975). However, such special treatment is statutorily permitted only to the extent that it reflects the union's "legitimate and substantial" need for having the grievance-handling function performed in the plant, and is incorporated in the parties' agreement. See *NLRB v. Milk Drivers & Dairy Employees, Local 338,* 531 F.2d 1162, 1165–1167 (2d Cir. 1976); *Teamsters Local 20 v. NLRB,* 610 F.2d 991, 994–995 (D.C.Cir. 1979); *Paintsmiths, Inc. v. NLRB,* 620 F.2d 1326, 1330–1331 (8th Cir. 1980). *The special benefits are thus confined to a legitimate and agreed-upon need; they clearly do not justify exposing the stewards to a countervailing set of obligations unilaterally devised and enforced by the employer.* But see, *Indiana & Michigan Electric Co. v. NLRB,* 599 F.2d 227, 231, n.10 (7th Cir. 1979), and Co. Br. p. 25.

Brief for the NLRB at 10 n.5 (emphasis added).

Therefore, I would limit the rule in *Gould* to cases where the collective bargaining agreement is as precise in its obligations as it was in *Gould* and the employee in question is serving in an official capacity at the time of the incident. Stritzinger's discharge constitutes an unfair labor practice in my view under both circumstances. The collective bargaining agreement imposed no affirmative duty on a union steward and Stritzinger was not functioning as a steward for Tour Crew A.

ADAMS, Circuit Judge, dissenting: I respectfully dissent.

It is conceded that on the night of February 18, 1979, nine employees of the Hammermill Paper Company improperly refused to proceed with an operation that would have permitted the production at the plant to go forward. There is no doubt, either, that there was no real safety concern motivating the actions of the employees. As a result of the costly and unjustified interruption in production, Hammermill imposed discipline on the employees: It discharged six of the employees who had received a previous warning, and suspended for two

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weeks the employees who had a "clean" record. As for Thomas Stritzinger, who was a union steward in the plant, but not on the operation in question, it imposed a discharge penalty. Stritzinger also had a "clean" record.

All the employees who were discharged, including Stritzinger, filed a grievance, and the matter was assigned to an arbitrator. After hearing the witnesses and carefully reviewing the record, the arbitrator stated:

> We are left then with the matter of the appropriate penalties. I believe that the evidence justifies the finding that the men acted in an egregiously improper manner, that they refused to perform work tasks assigned to them, that whatever their concern for safety, it was at best premature, that they should have proceeded to do the tasks assigned to them. The simple reasons for their compliance rests on the needs for industrial production upon which their well-being and continued livelihood depends. The needs of ordinary production requires that supervision must be given the authority to make assignments. If there had come a time when safety hazards were involved, there would have been ample time for them to make their stand and to refuse to do the work assigned to them on the grounds of safety. Their failure to perform work was the type of conduct that deserves disciplinary action but in light of the total situation it does not deserve discharge.
>
> * * * In this case, I feel that to award backpay to these employees would be interpreted as a reward for their activity on the night in question. It was not conduct which ought to be rewarded. It was conduct that ought to be condemned in the most stringent of terms. Their return to work is based, in part, on the procedural defects in the method used to discharge them, and in part on the fact that the disparity meted out to the employees involved is just too great and not justified by their prior records. Accordingly, in light of all the testimony and evidence, the conclusion will be that the seven employees should be returned to work without backpay. * * *

Despite these determinations by the arbitrator, an expert in dealing with employer-employee matters, the NLRB filed an unfair labor charge against Hammermill, on the ground that not to give Stritzinger five months backpay would constitute a violation of 8(a)(3).

Although Stritzinger had already been reinstated as an employee of Hammermill in accordance with the arbitrator's award, the ALJ declared that the "case should not be dismissed in deference to the Arbitrator's decision, because the failure to compensate Stritzinger is contrary to Board law." The ALJ ordered that Hammermill pay five months backpay to Stritzinger. The National Labor Relations Board affirmed the ALJ, and filed a petition seeking enforcement of the backpay order.

In *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), the Board set forth its standards for deferring to arbitrators' awards. It stated that it would defer to an arbitrator's award if: (1) the proceedings have been fair and regular; (2) the parties agreed to be bound; and (3) the decision was not "clearly repugnant" to the purposes and policies of the Act. *Spielberg*, 112 N.L.R.B. at 1082.

There is no question that the proceedings before the arbitrator here were "fair and regular" and that the parties to the arbitration "agreed to the bound." The principle question is whether the decision of the arbitrator in delclining to awarding backpay to Stritzinger was "clearly repugnant" to the purposes and policies of the Act. Since there is a clear finding that Stritzinger acted "in an egregiously improper manner" in refusing to perform work tasks assigned to him, I believe that the decision of the arbitrator in declining to pay Stritzinger five months wages for the time he was not working is not "clearly repugnant" to the Act. The Act itself does not require any backpay. Section 10(e). And certainly a decision not to pay backpay to one who has been laid-off after participating in a blatant interruption with production is not inconsistent with the purposes and policies of the Act.

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As explained in *International Harvester Co.*, 138 N.L.R.B. 923 (1962), the source of the Board's deferral policy is rooted in both congressional and Supreme Court pronouncements:

> If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the

> arbitral process as "part and parcel of the collective bargaining process itself," and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly apears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.

Id. at 926-27 (footnote omitted).

As this Court declared in *N.L.R.B. v. Pincus Bros., Inc.-Maxwell,* 620 F.2d 367 (3rd Cir. 1980):

> Based on the Board's *Spielberg* doctrine, congressional action, and judicial decisions of the Supreme Court as well as this circuit, we conclude that it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy. In other words, "[i]f the reasoning behind an award is susceptible to two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugant' to the Act." *Douglas Aircraft Co. v. NLRB,* 609 F.2d 352, 354 (9th Cir. 1979).

620 F.2d at 374.

Since it is clear to me that the reasoning behind the arbitrator's award is susceptible to the interpretation that his decision not to grant backpay was a judgment by him that it would not be salutary to reward monetarily an employee who had "egregiously" interfered with production, I believe the Board should have deferred to that decision.[1]

Accordingly, I would not enforce the Board's order in this respect.

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[1] The only decision by the employer that was the subject of the proceeding before the NLRB was the discharge of Stritzinger when other emloyees with "clean" records were merely suspended. The employer did not order a discrete penalty of no backpay for Stritzinger, it simply discharged him. Since Stritzinger was reinstated before the NLRB proceeding, it is clear that it is the arbitrator's decision that Stritzinger not receive backpay that is the target of the Board's order. Since the atrbitrator's decision is not, itself, an unfair labor practice, this would be an additional reason why the Board should have deferred to it.

Industrial Personnel Corp. v. NLRB

The B.F. Goodrich Company v. NLRB

657 F.2d 226 (8th Cir.), August 26, 1981; rehearing and rehearing en banc denied October 5, 1981; certiorari denied January 11, 1982—250 NLRB 1139

Before LAY, Chief Judge, MCMILLIAN, Circuit Judge, and LARSON,* Senior District Judge

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LARSON, Senior District Judge. Petitioners Industrial Personnel Corp. (IPC) and the B.F. Goodrich Company (Goodrich) ask this Court to review and set aside a decision and order of the National Labor Relations Board (Board) entered July 28, 1980, holding that IPC and Goodrich are joint employers and that, as a result, IPC and Goodrich's refusal to bargain with the General Drivers and Helpers Local Union 823 (Union) on a joint-employer basis constituted a violation of section 8(a)(1) and section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5).[1] The Board has cross-applied for enforcement of its order. We deny the petition to set aside the Order and grant its enforcement.

IPC supplies various transportation services for companies throughout the country. Goodrich primarily manufacturers tires, chemicals, and engineered products. To facilitate delivery of its products in the area of Tulsa, Oklahoma, Goodrich contracted with IPC to provide it with drivers for its trucking operation. In a nutshell, the agreement provides that IPC will hire drivers and handle most labor relations, while Goodrich will oversee the day-to-day operations of informing the drivers of their destinations and routes. Goodrich leases the trucks. Through its involvement, Goodrich complies with the Interstate Commerce Commission regulations that allow it to be classified as a "private carrier." Goodrich reimburses IPC for all of its expenses plus its service charges.

When the arrangement began in 1978, there was an existing contract between the Union and IPC.

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*Earl R. Larson, United States District Judge, District of Minnesota, sitting by designation.

[1] Section 8(a) provides in pertinent part:

> It shall be unfair labor practice for an employer—
>
> (1) to interfere with, restrain or coerce employers in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, grants employees the right to bargain collectively through representatives of their own choosing.

In August of 1979 the Union filed a representation petition seeking certification as the collective bargaining representative of drivers employed by both companies as joint employers. The companies opposed the petition on the basis of the existing contract and the fact that IPC was the sole employer. In October of 1979 the Board's Acting Regional Director found that IPC and Goodrich were joint employers. In December, after an election, the Union was certified as the bargaining representative for drivers employed by the joint employers.

Subsequently the companies refused to bargain and the Union filed an unfair labor practice charge in February of 1980. The Board's General Counsel issued a complaint in March; the answer alleged that the companies were not joint employers. The Board granted its General Counsel's motion for summary judgment in July of 1980. A cease and desist order was issued at the same time. The companies appealed to this Court.

The jurisdiction of this Court is invoked pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f).[2] Although the alleged unfair labor practice occurred in Tulsa, Oklahoma within the jurisdiction of the Court of Appeals for the Tenth Circuit, IPC and Goodrich have obviously chosen this circuit in order to rely on the decision in *Pulitzer Publishing Co. v. NLRB,* 618 F.2d 1275 (8th Cir. 1980).

The Eighth Circuit recently reiterated its test to determine whether a union's joint

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employer claim is valid. The test applied was

> whether the total relationship of two nominally separate businesses reveals: "(1) some functional interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. While none of these factors, separately viewed, have been held controlling, stress has normally been laid upon the first three factors which reveal functional integration with particular reference to whether there is centralized control of labor relations."

Miscellaneous Drivers Local 610 v. NLRB, 624 F.2d 831, 833 (8th Cir. 1980) (per curiam) quoting *Pulitzer Publishing Co. v. NLRB,* 618 F.2d 1275, 1279 (8th Cir. 1980).

Pulitzer involved a reversal of a Board finding that a publisher and delivery company were joint employers. The facts are quite similar to the present case. There was a contractual relationship resulting in some functional interrelation of operations. The publisher determined where deliveries were made, the trucks bore the publisher's logo, and the contract was a cost-plus one. On the other hand, the deliverer hired and managed the employees, exercised day-to-day control, paid for insurance and owned the trucks.

Local 610 involved the affirmance of a Board finding that a funeral home and a service which provided drivers and vehicles to the home and to others were not joint employers. The home obtained services by calling the driver service. The driver service then dispatched the driver and vehicle to the location specified by the home. The service hired employees, paid them, and billed the home a flat amount for driver and vehicle.

A third recent Eighth Circuit case, *Russom v. Sears, Roebuck & Co.,* 558 F.2d 439 (8th Cir. 1977), is also factually similar to the present case. There this Court affirmed a district court finding that Sears and an appliance repair service company were not joint employers. All of the service company's business was with Sears, Sears did the training, the employees wore Sears uniforms and received employee discounts at Sears. The contract was cost-plus. The companies, however, were not interlocking; the service company was in total control of wages and working conditions, hired and fired employees, paid for insurance and owned and operated its own trucks and equipment. Although Sears may have made some suggestions concerning operations, the service company made its own decisions. It should also be pointed out that although the Court determined whether the two companies were co-employers, the issue being determined was whether Sears was bound under the contract signed between the service company and the union. The service company had gone out of business and its employees were absorbed by Sears—without their negotiated pension rights. So this was not a decision in the same posture as the present case and *Pulitzer.*

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[2] IPC and Goodrich have taken advantage of the following provision in § 10(f).

> Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business.

At oral argument this Court was made aware of the Ninth Circuit's recent decision in *Kaylor v. Crown Zellerbach, Inc.,* 643 F.2d 1362 (9th Cir. 1981). There the Ninth Circuit affirmed a district court finding on summary judgment that appellants had shown insufficient facts to hold Crown liable under a joint employer theory. Crown ran an in-house trucking operation to ship its goods around San Francisco Bay area and contracted with various companies to supply it with drivers for its trucking operation. Crown had full control over the dispatch, routing, and use of its trucks and the hours of service of the drivers. Nevertheless, we agree with the Board that, due to the circumstance that the joint employer question in *Kaylor* was disposed of by summary judgment, the full factual basis for the Ninth Circuit's decision cannot be ascertained. Therefore, comparisons with the present case are questionable. Even if the facts were identical, this Court is not bound by the Ninth Circuit's decision. *Kaylor,* like *Russom,* was in a slightly different posture than the present case and *Pulitzer.* At issue in *Kaylor* was whether Crown had breached a contractual duty to employ the

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drivers of the various driver supply companies that had previously contracted with Crown. In the present case and in *Pulitzer,* the issue was whether Goodrich and Pulitzer were required to bargain with their drivers' unions.

In at least one previous case, *Ace-Alkire Freight Lines v. NLRB,* 431 F.2d 280 (8th Cir. 1970), this Court has affirmed the Board's finding that two companies engaged in the trucking business were joint employers. One company was a common carrier and the other leased trucks to the carrier. The lessor interviewed prospective employees, sent possibilities on to the carrier, and paid the wages. The carrier set age and experience requirements, reserved the right to reject drivers, dispatched drivers, and monitored their logs.

The standard to be applied in this appeal of a finding of fact by an administrative agency is whether the Board's finding that the companies are joint employers is supported by substantial evidence in the record as a whole. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487–88, 71 S.Ct. 456, 463–64, 95 L.Ed. 456 (1951). With this standard in mind, and the test adopted by this Circuit to determine whether a joint employer relationship exists, we reach the following conclusions. To a significant degree, there is functional interrelation of operations between the two companies; IPC hires the drivers and Goodrich determines the conditions of employment. While IPC interviews, hires, disciplines, pays, and discharges employees, Goodrich controls the day-to-day operations of the trucking group. Goodrich determines the destination of the drivers and what routes they take. Drivers are required to call their location in to Goodrich each day, and their logs are sent to Goodrich.

Although there seems to be little centralized control of labor relations—IPC does most of it—Goodrich may on occasion get into this area due to its control over day-to-day operations. The Board found that since Goodrich has such control over day-to-day operations, it will inevitably handle labor problems. Extensive work rules are set out in an operating manual issued to drivers by Goodrich. Goodrich reserved a right to reject employees that do not comport with Department of Transportation (DOT) regulations and DOT requires Goodrich to annually review each driver's record to determine whether that driver meets minimum requirements for safe driving. While IPC sets the drivers' wages, Goodrich reimburses IPC and presumably has some control over those wages since it can rescind the IPC-Goodrich contract on thirty days' notice. Finally, although the control of labor relations is one factor to be considered, it is not controlling in and of itself.

Reviewing the factors as a whole, it is our feeling that there is significant functional interrelation of operations between the two companies. This is the factor largely relied upon by the Board. While IPC controls the direct labor relations, Goodrich's control of working conditions will inevitably involve it in labor relations. As a result, we think that the two companies should be compelled to bargain as joint employers.[3]

Pulitzer can be distinguished from the present case on several different grounds. First, in *Pulitzer* the delivery service exerted much more daily control over the employees than IPC did in this case. The delivery service in *Pulitzer* maintained its own facility where its drivers punched in and picked up their trucks. Assistant managers employed by the delivery service directed the drivers' routes and procedures according to a "run sheet" received from the Pulitzer dispatcher. In *Pulitzer*, if the drivers encountered any difficulty during the course of delivery, they were to report to the delivery service's assistant managers. In the present case, drivers are supposed to call Goodrich. Another distinguishing factor between the two cases involves the ownership of trucks. The fact that the delivery service in *Pulitzer* owned its own trucks and paid its own liability and property damage insurance supported its contention that it

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[3] We agree with the Board's finding that there is no common management, ownership or financial control but we find these facts are not crucial to our determination.

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should be treated as a separate rather than a joint employer. In our case, Goodrich leases trucks from Ryder Rental and insures them itself; IPC merely provides drivers.

Accordingly, Goodrich's and IPC's petition for review and for the setting aside of the Board's decision are denied and the Board's order is enforced.

NLRB v. The American Can Company; United Steelworkers of America, and Local 5490 of the United Steelworkers of America

658 F.2d 746 (10th Cir.), August 31, 1981—244 NLRB 736

On petition to enforce Board Order

Before DOYLE, MCKAY and SEYMOUR, Circuit Judges

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WILLIAM E. DOYLE, Circuit Judge. The National Labor Relations Board has petitioned this court pursuant to § 10(e), 29 U.S.C. § 160(e), of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* The Board seeks enforcement of an order entered against the respondents, American Can Company, United Steel Workers of America (hereinafter called the "the International Union") and Local 5490 on August 30, 1979.

The order finds that application of a superseniority clause to certain Union officers was unlawful. It directed the respondents to take remedial action. The employer, American Can Company, the International Union and the Local object to this order and take the position in this appeal that it should be denied enforcement.

The Company, a national operation, had one of its plants in Denver, Colorado until December 5, 1979. Aluminum cans were manufactured and sold there.

Beginning in 1966, the employees at the Denver plant were covered by a collective bargaining agreement between the Company and the International Union. The particular agreement in this case covered a term from February 15, 1974 to February 28, 1977. Local 5490 represented the production and maintenance employees at the Denver plant; the membership averaged about 40 persons.

The agreement contained a general rule that layoffs and recalls from layoffs would be in accordance with employee seniority.

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Thus, those with the longest continuous service were the last to be laid off and the first to be recalled. However, another clause in the agreement contained the provision that is particularly applicable here, that of superseniority. It reads as follows:

> Super-Seniority
>
> 11.12 At each location covered by this agreement, super-seniority shall apply to a total of not more than ten local union officers and grievance committeemen who, notwithstanding their positions on the seniority roster, shall have preferential seniority in case of layoff or recall, provided there is work available which they can perform. The employees to whom super-seniority will apply will be designated to the company in writing. [R. 204]

In September of 1975, in accordance with the above provision, the Local Union submitted a list of ten union officials for whom it claimed superseniority. In October, 1975, the Company informed the Union that it would cease production at the Denver plant in early December. As is usual in this kind of situation, the International Union removed all of the officers of the Local, and appointed a staff representative, Wayne Anzick, as administrator of Local 5490. On December 1, 1975, again in conformity with normal procedure, Anzick reappointed all of the officers of Local 5490. Soon thereafter, on December 5, 1975, the Company laid off all but eleven employees who were retained to assist in closing down the plant. Two of these, C. E. Bugh and D. R. Howard, were retained on the basis of superseniority. On January 5, 1976, two employees, W. S. Miller and S. Schneider, were recalled on the basis of superseniority. Following general layoffs in February, the only employee on the job was C. A. Burton. On March 3, 1976, the Company confirmed with Anzick that superseniority was still claimed for Union officers. On May 20, 1976, Local 5490 was dissolved. Anzick notified the Company of this fact and indicated that superseniority was no longer claimed for union officers on May 26, 1976. On May 25, 1976 [1] Howard was recalled on the basis of superseniority, and worked until laid off on September 2, 1976.

The recalls and retentions which are at issue here are those having to do with Schneider and Howard. The exercise of superseniority as to Bugh and Miller is unchallenged. This is apparently because both men were grievance committeemen and also served as stewards. Retention of a third employee, C. Thompson, was originally challenged, but the parties now apparently agree that Thompson was retained on the basis of specific job qualifications. All other employees recalled or retained had sufficient seniority so that they would have been recalled or retained without regard to superseniority. The parties all agree that but for the application of superseniority to Howard and Schneider, other employees with longer service would have been retained or recalled.

Howard was a trustee of Local 5490, while Schneider served as a guard. The Union constitution describes their respective duties as follows:

> Duties of Guards. It shall be the duty of the Guards to take charge of the door and see that no one enters who is not entitled to do so.
>
> Duties of Trustees. It shall be the duty of the Trustees to have charge of the hall and all property of the Local Union, subject to the direction of the Local Union, and perform such other duties as the Local Union may require. [R.542]

At the hearing before the Administrative Law Judge no evidence was presented regarding the duties that were actually performed by Schneider. There was testimony by Charles Burton, former President of Local 5490, that Howard served as Chairman of the Health and Safety Committee, in addition to his duties as Trustee. Burton testified that Howard continued to raise

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safety problems with the Company up until his final termination in September of 1976.

The Administrative Law Judge and at least one member of the Board found this testimony irrelevant on the grounds that superseniority was available only to grievance committeemen and union officers. It is not disputed that Howard was accorded superseniority on the basis of his position as trustee, and not as a result of his activity on the Health and Safety Committee.

History and Background

Charges were filed against all the respondents by two former employees, S.H. Egan and D.R. Egan, who were members of Local 5490 before its demise. On the basis of these charges, the NLRB issued complaints against all of the respondents charging that the Union had violated § 8(b)(1)(A) and (2) of the National Labor Relations Act [2] and that the Company had violated the § 8(a)(1) and (3) of the Act.[3] Following a hearing held in May of 1977, the Administrative Law Judge recommended, on November 4, 1977, that the Board should order remedial action.

The Board issued two opinions. The first of these was issued April 5, 1978, 235 NLRB 704. This was a two to one decision. Chairman Fanning and Member Truesdale found that respondents had not violated the NLRA, and dismissed the complaint. The majority held superseniority accorded union officers to be presumptively lawful, and found that the General Counsel had not produced sufficient evidence to overcome that presumption. Member Penello dissented, indicating that in his view superseniority is presumptively unlawful when extended to union officers, and had been invalidly applied in this case.

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[1] The Administrative Law Judge found that Howard was recalled on April 25, 1976. [R. 641]. No explanation appears in the record for the Board's use of the May, 1976 date. It should also be noted that some of the facts set forth above are not included in the Board's opinions, but were extracted from the Administrative Law Judge's opinion. R. 636, *et seq.*

[2] 29 U.S.C. §§ 158(b)(1)(A) and (2).

[3] 29 U.S.C. §§ 158(a)(1) and (3).

On May 2, 1978, the Egans petitioned this court for a review of the Board's decision. Thereafter, the Board moved for permission to withdraw the record in order to reconsider its decision. This motion was granted October 23, 1978. On August 30, 1979, the Board issued a Supplemental Decision and Order, 244 NLRB No. 78. There three Board members found that the respondents had violated the NLRA and ordered remedial action; two members dissented. The Board then petitioned this court for enforcement of its order. We conclude that the action of the Board should be affirmed and that the order should be enforced.

Statement of the Problem

The question presented in this review is whether the grant of superseniority to Howard and Schneider impermissibly interfered with the rights of other American Can Company employees to refrain from union activities or by discrimination in a term of employment impermissibly encouraged participation in union activities.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, requires that the employee shall have the right to refrain from any or all union activities. Section 8 of the NLRA prohibits certain types of employer conduct. It reads, in part:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 157 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization * * * 29 U.S.C. § 158(a)(1), (3).

Section 8(a)(3) goes on to make an exception allowing a union and an employer, in a collective bargaining agreement, to require employees to maintain union membership as a condition of employment. This statute states that only payment of dues and initiation fees may be required as a condition of membership in a union. Section 8(b) prohibits restraints or coercion of employees by unions in the exercise of the rights guaranteed in Section 157 of the general title. Subsection (2) provides that it is an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). 29 U.S.C. §158(b)(1)(A) and (2).

The encouragement or discouragement prohibited by Section 8 is not limited to incentives or disincentives to union membership. Rather, it includes encouragement or discouragement of participation in union activities. *Radio Officers, Union v. N.L.R.B.*, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed.2d 455 (1954). Thus the question boils down to whether the grant of superseniority to Howard and Schneider interfered with the rights of American Can Company employees to refrain from union activities, or by discrimination impermissibly encouraged participation in union activities.

Is the Board's Order Enforceable?

The American Can Company's argument is that the court should deny enforcement of the Board's order on the ground that the order is based on conflicting rationales. The order itself recognizes that "the Board members have widely divergent views on [these issues]." It characterizes the decision and order as being based upon "aggregate majority." It cannot be denied that there is a remarkable division in viewpoints on the Board with respect to the issue before us.

Chairman Fanning and Member Truesdale, in the original (three member) decision, expressed their view that superseniority clauses are presumptively lawful when applied to union officers regarding layoff and recall. Their suggestion is that the General Counsel may be able to overcome this presumption of validity if it can be shown that the union officers involved contribute nothing to the ability of the union to represent unit members effectively and efficiently. Their rationale is that the descriptions of the duties of guards and trustees in the Union constitution were insufficient evidence to overcome the presumption.

In the second opinion, Chairman Fanning and Member Truesdale clarified their position. 244 NLRB No. 78. They do not believe that the hope of attaining a position in the Union which carries with it the "remote and contingent" benefits of superseniority would encourage employees to be active or good union members. Superseniority benefits, they say, only encourage employees to agree to serve as officers or stewards; such encouragement they regard as lawful because all employees benefit from services rendered by officers and stewards. *See also,* Chairman Fanning's dissent in a similar *Dairylea Cooperative, Inc.,* 219 NLRB 656 (1976), *enforced sub non. N.L.R.B. v. Milk Drivers & Dairy Employees Local 338,* 531 F.2d 1162 (2d Cir. 1976).

Members Jenkins and Penello filed a separate concurrence in support of the Board's second order. In their view, any provision of superseniority to union officers is presumptively invalid. They argue that superseniority is to be accorded to union officials whose activities facilitate employee rights and whose presence on the job is required for proper performance of those functions. Thus, superseniority is justifiable only to ensure continued presence of stewards on the job, because they handle grievances as they arise and generally administer collective bargaining agreements. In the view of Jenkins and Penello, union officers can generally perform their functions relating to administration and representation of employee interests without being present on the job. Thus, they would allow superseniority for union officers only if the union can show that their presence is necessary in the grievance settlement process. They do not consider their presence to be ordinarily necessary.

Member Murphy cast the third vote in support of the Board's final order in the case. In her view, superseniority may be lawfully extended to union officers whose functions relate in general to furthering the bargaining relationship. Her argument is that such clauses are presumptively lawful, and that, therefore, the General Counsel bears the initial burden of demonstrating that a superseniority clause is invalid as applied to particular union officials. Member Murphy has also concurred in *Union Carbide Corp., Chemical and Plastics Operations Division,* 228 NLRB 1152 (1977), *United Electrical Radio & Machine Workers of America, Local 623 (Limpco Manufacturing, Inc.)* 230 NLRB 406, 408 fn. 12 (1977), *aff'd sub nom. D'Amico v. N.L.R.B.,* 582 F.2d 820 (3d Cir. 1978). In this particular case, Member Murphy found that the descriptions of the duties of the trustees and guards in the Union constitution indicated that those officers have no duties which relate to furtherance of the bargaining relationship. Consequently, the burden shifted to the Union to demonstrate that such officers do, in fact, perform functions sufficient to justify superseniority privileges. In the absence of any such evidence in the case before her, she concluded that the respondents had violated the Act.

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It is true that there are a variety of views held by the members of the Board. The present case is not the first in which the Board's order has been based on an "aggregate majority" of views. *See e.g., Limpco Manufacturing, Inc., supra; Otis Elevator Co.,* 231 NLRB 1128 (1977). The Company here argues that this conflict among the Board members renders the order in this case unenforceable. The General Counsel has suggested the contrary view that the Board members really differ only as to burdens of proof, and that the ultimate issue in each case is whether superseniority is justified.

We are unable to agree with the General Counsel's characterization of the Board's views. Rather, it appears that two Board members would approve virtually all superseniority clauses based on their view that this type of encouragement of union service is desirable and permitted by the NLRA. Two of the Board members would allow the practice only for persons who perform steward-like functions, their view being that superseniority is discriminatory and violates the Act unless justified by clear business purposes. One other Board member would allow superseniority for those whose functions "in general" further the bargaining relationship. This is based on her view that the union needs to maintain an effective presence on the job justifies superseniority for such persons. These views represent a conflict on more than proper allocation of the burden of proof. At issue is the scope that can and should be allowed to superseniority provisions under the Act. We do not, however, accept the Company's argument that this conflict in views renders the Board's order in this case unenforceable.

Sections 10(e) and (f) of the NLRA grant the courts of appeals of the United States jurisdiction to review orders of the NLRB. The Courts are empowered to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the Board. However, in reviewing Board orders, "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The Supreme Court in *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 500–501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978), had occasion to expound general standards applicable to review of Board orders. The Supreme Court pointed out that it is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. It is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in light of the infinite combinations of events which might be charged as violative of its terms." The Court further said that if the Board is to accomplish the task which Congress set for it, it necessarily has to have the authority to formulate rules to fill the interstices of the broad statutory provisions. Ultimately, the problem is to balance the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often difficult and delicate, but it is the responsibility which Congress gave to the Board, subject to limited judicial review. *N.L.R.B. v. Truck Drivers*, 353 U.S. 87, 96, 77 S.Ct. 643, 647, 1 L.Ed.2d 676 (1957). The role of the judiciary is narrow; a Board order is reviewed for consistency with the Act and for rationality, but if it satisfies these crite-

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ria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, is to be enforced. *See also N.L.R.B. v. Iron Workers*, 434 U.S. 335, 350, 98 S.Ct. 651, 660. 54 L.Ed.2d 586 (1978); *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267, 95 S.Ct. 959, 968, 43 L.Ed.2d 171 (1975); *N.L.R.B. v. Okla-Inn*, 488 F.2d 498 (10th Cir. 1973); *U.S. Soil Conditioning v. N.L.R.B.*, 606 F.2d 940 (10th Cir. 1979).

In the case at bar, there is no lack of clarity in the Board's opinion. Indeed, the Board members have made their views plain in three separate opinions. The members' reasoning and the resulting "aggregate majority" are clear. It would do no good to remand for clarification. It would only further delay the resolution of this case.

To our knowledge there is no decision which holds that the lack of a majority rationale renders the Board's orders unenforceable. To rule that an order is for this reason unenforceable would be contrary not only to sound jurisprudence, but common sense as well. Resolving disputes is one of the most important functions of a legal system, and to hold that all agency decisions must be based on a majority agreement and may not rest on alternative rationales for a result agreed to by a majority, would seriously hamper the decision-making process. Hopefully, a court would never permit enforceability of its orders to depend upon all of the judges of a multijudge court giving opinions which jibe one with the other. Similarly, such a rule would not be justified as to NLRB orders.

It would be nice, of course, if the Board members' views provided us with a majority rationale in this case. Within limits which we believe to be established by the NLRA, the treatment of superseniority clauses is an appropriate area for the operation of the Board's special expertise in balancing conflicting interests, so as to effectuate national labor policy. Thus, had a majority of the Board members agreed upon a "defensible construction" of the Act, we would defer to that judgment. *N.L.R.B. v. Iron Workers, supra*, at 350, 98 S.Ct. at 660. There nevertheless remains a responsibility on this court to follow the statute and the Supreme Court decisions, and in so doing to enforce, modify or deny enforcement of the Board's judgment or decree. Although the court's function is limited, there is a role for it to play in defining the legal standards established by the NLRA. *N.L.R.B. v. Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965); *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed 2d. 341 (1971). In light of the conflict of views on the Board, we are not required to adopt one particular viewpoint, and although we hesitate to add still another viewpoint to those that have already been expressed, we will proceed to expound a decision in accordance with the governing act of Congress.

Analysis of the Problem in Consideration of the Decisions

The Supreme Court has had occasion to explain the Act's prohibition of encouragement or discouragement of union membership, and in that regard has made the following statement:

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow em-

ployees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts, * * * Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. * * * No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned. *Radio Officers' Union v. N.L.R.B., supra,* 347 U.S. at 40-42, 74 S.Ct. at 335-336.

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The Supreme Court has held also that "union membership" for the purposes of § 8(a)(3) includes "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership. Similar principles govern the interpretation of union membership where encouragement is alleged." *Radio Officers' Union v. N.L.R.B., supra,* at 40, 74 S.Ct. at 335.

In one of the three cases dealt with in the *Radio Officers' Union* opinion, the Supreme Court found that a loss of seniority requested by a union and enforced by an employer as punishment for failure to pay union dues on time constituted discrimination to encourage union membership. The Court held that at least in the absence of a valid union security clause in a collective bargaining agreement, such discrimination violated the employee's right "to join in or abstain from union activities, without thereby affecting his job." 347 U.S. at 42, 74 S.Ct at 336.

Not every action which encourages or discourages union membership is illegal. A possibility exists that such actions can be shown to be justified. *Radio Officers' Union, supra,* at 44, 74 S.Ct. at 337; *American Shipbuilding Co. v. N.L.R.B.,* 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965); *N.L.R.B. v. Brown, supra.* There need not be proof of specific intent to discriminate; proof of presumed intent is enough. *Radio Officers', supra,* 347 U.S. at 45-49, 74 S.Ct. at 338-340. There need not be proof of an actual encouraging or discouraging effect on the employee. *Id.* 48-52, 74 S.Ct. 339-342. The decision in *N.L.R.B. v. Erie Resistor Corp.,* 373 U.S. 221, 227-228, 83 S.Ct. 1139, 1144-1145, 10 L.Ed.2d 308 (1963), recognized that proof of a discriminatory intent can be sufficient proof of invalidity of an otherwise ambiguous act.

In sum, the Supreme Court has set forth the following principles, in the case of *N.L.R.B. v. Great Dane Trailers, Inc.,* 338 U.S. 26, 34, 87 S.Ct. 1792, 1797-98, 18 L.Ed.2d 1027 (1967);

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight", an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. (Emphasis in original.)

The above principles are said to be of controlling importance. In determining whether a particular discriminatory practice can be justified by legitimate objectives, or whether such practice should be regarded as illegal in spite of such justification, the competing interests represented by business objectives and employee rights have to be weighed. *N.L.R.B. v. Erie Resistor Corp., supra,* U.S. at 229, 87 S.Ct. at 1145.

The Supreme Court has not decided a case similar to the present one. However, seniority rights have been recognized as an important part of employment. *See Radio Officers' Union v. N.L.R.B., supra,* and *N.L.R.B. v. Erie Resistor Corp., supra.* In the latter case, the Board's determination that a grant of superseniority to strike replacements and strikers who returned to work was inherently discriminatory and in violation of the Act was upheld by the Court. Also, in *Patterson v. Tulsa Local No. 513,* 446 F.2d 205 (10th cir. 1971), *cert denied* 405 U.S. 976, 92 S.Ct. 1202, 31 L.Ed.2d 251 (1972), we held that a seniority clause allowing motion picture machine operators to "bump" less senior operators from their jobs violated §§ 8(b)(1)(A) and (b)(2).

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The Supreme Court in *Aeronautical Industrial District Lodge 727 v. Campbell,* 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513 (1949), consider a clause granting superseniority to union chairmen. Under 50 U.S.C. § 308, World War II veterans returning to work following the war were entitled to return to prior jobs with seniority rights unaffected by their absence due to service in the armed forces. Three veterans challenged the application of a superseniority clause to union chairmen during a layoff. They asserted that the superseniority clause violated their rights under 50 U.S.C. § 308 by causing the retention of union chairmen with less service seniority than the veterans. The Court said:

> One of the safeguards insisted upon by the union for the effective functioning of collective bargaining is continuity in office for its shop stewards or union chairmen. To that end provision is made, as it was here, against laying them off merely on the basis of temporal seniority. Because they are union chairmen they are not regarded as merely individual members of the union; they are in a special position in relation to collective bargaining for the benefit of the whole union. To retain them as such is not an encroachment on the seniority system but a due regard of union interests which embrace the system of seniority rights. 337 U.S. at 527, 69 S.Ct. at 1290.

The Court also stated: "Because a labor agreement assumes the proper adjustment of grievances at their source, the union chairman play a very important role in the whole process of collective bargaining. Therefore it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office." 337 U.S. at 528, 69 S.Ct. at 1290–91. The holding was that veterans, like other employees, were subject to superseniority clauses. The Court did not consider the issue of the validity of superseniority clauses under the NLRA.

The NLRA has considered the validity of superseniority clauses several times recently. The first of these cases was *Dairylea Cooperative, Inc., supra.* In that case the then Chairman Murphy and Members Jenkins, Penello and Kennedy found a clause giving stewards top seniority for all purposes to be presumptively unlawful. The Board stated that the Act prohibits linkage of union activities to job benefits; generally, a union must maintain its own organization without subsidy from employees. The Board recognized superseniority clauses limited to layoff and recall of stewards as "well-established" and proper, because effective administration of bargaining agreements is facilitated by the continued presence of stewards on the job. Member Fanning dissented, stating that in his view stewards may lawfully be granted broad superseniority under the Act.

The Second Circuit affirmed the *Dairylea* decision and recognized the general policy in the Act of insulating employees' jobs from union activities. The court held that it is reasonable to infer that superseniority benefits encourage union activity. A union can prevail in such a case if a legitimate and substantial business justification is demonstrated, but the desire to encourage employees to serve as stewards is not a sufficient justification. *N.L.R.B. v. Milk Drivers & Dairy Employees Local 338, supra. See also N.L.R.B. v. Local 443, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 600 F.2d 411 (2d Cir. 1979). *N.L.R.B. v. Auto Warehousers, Inc.,* 571 F.2d 860 (5th Cir. 1978) suggests a contrary view.

The Board in subsequent decisions has reiterated the view that superseniority clauses which go beyond layoff and recall for stewards must be justified by the Union. *Union Carbide Corp., Chemical & Plastics Operations Div., supra; Chauffeurs, Teamsters and Helpers Local Union No. 633,* 230 NLRB 81 (1977), *enforced without opinion* 578 F.2d 441 (D.C.Cir.1978); *Connecticut Limousine Service,* 235 NLRB 1350 (1978), *aff'd. in part sub nom. Teamsters Local 20 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. N.L.R.B.,* 610 F.2d 991 (D.C.Cir.1979).

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The Board has addressed the validity of superseniority for union officers, also. In Limpco Manufacturing, Inc., *supra,* the Board upheld the validity of a superseniority clause as applied to a union recording secretary. In that case it was said:

> [W]e do not consider that administration of the collective-bargaining agreement is limited solely

> to grievance processing or other "steward-like" duties performed at the workplace. What is at stake is the effective and efficient representation of employees by their collective-bargaining representatives. Certainly, the representational activities carried out by union officials involved in the administration of the collective-bargaining agreement on behalf of employees extend beyond the narrow confines of grievance processing. These encompass at the very least a functioning local to assert the presence of the union on the job. * * * [O]nce it has been initially established that the official responsibilities of the union officer in question bear a direct relationship to the effective and efficient representation of unit employees, then this officer is entitled to the benefit of the same presumption afforded to union stewards. 230 NLRB at 407, 408.

The language in *Limpco* is not unclear, but notwithstanding that, the decision rests on a conflict of views. Member Murphy concurred in the opinion, but made clear that she would find job retention clauses for union officers presumptively lawful. 230 NLRB at 408, fn. 12. Member Murphy, therefore, would not place an initial burden on the union to demonstrate a relationship between an officer's duties and unit representation. Chairman Fanning indicates continuing adherence to the view that superseniority clauses should be allowed broad applicability. 230 NLRB at 407, fn. 5. Members Jenkins and Penello dissented, again expressing the view that superseniority should be permitted only for those officials whose persence on the job is necessary for grievance settlement.

The *Limpco* decision was affirmed *sub nom., D'Amico v. N.L.R.B.,* 582 F.2d 820 (3d Cir. 1978). The view of the Third Circuit was that the neutrality required by §8 of the NLRA is not absolute, but has to be read in light of the § 7 right to bargain collectively. The court found that the burden ought to be on the union to show substantial justification for the application of superseniority to an officer whose official duties as described in the Union constitution do not involve the collective bargaining process. The court accepted justification based on a showing of "official responsibilities"—"officially assigned responsibilities which helped to implement the collective bargaining agreement in a meaningful way." "Any less rigid interpretation * * * would leave substantial room to dilute the statutory neutrality principle without the requisite collective bargaining notification." 582 F.2d at 825. *Cf., Otis Elevator Co., supra.*

We are mindful that superseniority clauses discriminate with regard to tenure or term of employment. Employees who receive superseniority obtain a benefit in the nature of patronage which is not afforded to others. Where superseniority is provided to persons holding a union office, such clauses encourage participation in union activities. At the very least, these clauses encourage service in union offices by rewarding such service with privileges. Perhaps such clauses encourage employees to be active in the union. We do not agree with Member Fanning's view that superseniority clauses only become important to an employee after he has been asked to serve in a union office, but have no impact on the employee's decision to participate in union activities.

The conflict here is not so inherently destructive of important employee rights that it should be held to be unlawful in spite of legitimate justification. But where the conduct is such that an employee's rights could have been adversely affected, the burden is on the responsible party to come forward with proof of justification for the conduct. *N.L.R.B. v. Great Dane Trailers, Inc., supra,* 388 U.S. at 34, 87 S.Ct. at 1797–98. The Board seems to regard these clauses as presumptively valid when limited to layoff and recall of stewards. We need not pass on the propriety of that approach or viewpoint. *See Aeronautical Industrial District Lodge 727 v. Campbell, supra.* As to union officers, we read the Board's opinions as holding that the union bears an initial burden of demonstrating that officers awarded superseniority have duties which relate directly to the effective and efficient functioning of the bargaining unit.

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We are satisfied that superseniority clauses are discriminatory and do "adversely affect employees' rights to some extent." *N.L.R.B. v. Great Dane Trailers, Inc., supra,* at 34, 87 S.Ct. at 1798. In the light of the Act's clear prohibition of discrimination and the Supreme Court's cases, it is our conclusion that those who are responsible for invoking or applying a superseniority clause to union officers must initially prove a legitimate and substantial purpose. The exact proof which will be sufficient has to depend on the surrounding circumstances of each case. The responsibility for development of such rules as may be appropriate in this area ought be left to the Board. We do say that in *D'Amico v. N.L.R.B., supra,* it is the Third Circuit's opinion that as a minimum the Act requires that the official duties and responsibilities of an officer who receives superseniority must help to implement the collective bargaining agreement in a meaninful way. We agree that a less demanding standard certainly would not satisfy the requirement that discrimination must be justified by legitimate and substantial business purposes.

In the light of the standards mentioned, there is no problem in concluding that the application of superseniority to Howard and Schneider was unlawful. The duties of guards and trustees at set forth in the Union constitution do not contribute in any meaningful way to the implementation of a bargaining agreement. Howard's responsibilities on the Health and Safety Committee were separate and independent of his status as a union officer; these duties were not officially assigned to him as a union officer. The justification for his receiving superseniority benefits stands or falls on the basis on which it was given, his role as a union trustee. We conclude that as to both Howard and Schneider no substantial justification for the application of superseniority has been established, and therefore, the Board's conclusion that the respondents here violated the Act should be, and is affirmed.

Analysis of the Remedy

We finally consider the contention of the Company and the Unions as to the validity of the Board's order. The order directs that the Union and the Company cease and desist from invoking and permitting the invocation of superseniority "for other than a reasonable number of local union officers whose duties involve the administration of the agreement or the processing of grievances * * *."

The Company and the Unions are further ordered to make whole any wage losses suffered by employees who would have been recalled or retained but for the exercise of superseniority by Howard and Schneider.

The Company and the Unions are also required to post notices for 60 days in all plants and meeting halls frequented by employees covered by the collective bargaining agreement. The notices to be posted in substance advise that henceforth superseniority will be invoked only for proper union officers. It is this last aspect of the Board's order which the respondents find objectionable and contend should be altered.

The respondents urge that the Board's order in this case is a retroactive change in previously established rules, and ought not to be enforced against them. In the alternative, they contend that the remedy is overbroad and not justified by the violations.

As to the retroactivity contention: We disagree that this is an abrupt change in a previously announced rule. *Cf., Retail, Wholesale and Department Store Union v. N.L.R.B.,* 466 F.2d 380 (D.C. Cir. 1972). In *Dairylea,* the Board did not, as respondents suggest, adopt a rule that all superseniority clauses are lawful if limited to layoff and recall. *Dairylea,* dealth with superseniority for stewards; superseniority limited to layoff and recall was recognized as lawful "on the ground that if furthers the effective administration of bargaining agreements on the plant level by encouraging the continued presence *of the steward* on the job." 219 NLRB at 658 (emphasis added).

We must reject the respondents' contention that the *Dairylea,* opinion can be read to establish the lawfulness of superseniority clauses for all union officers if limited to layoff and recall. Indeed, *Dairylea,* indicates the Board's view that superseniority clauses have "an inherent tendency * * * to discriminate against employees for union-related reasons," and the corresponding likelihood that the party asserting the legality of a superseniority clause might be called upon to justify the clause.

It does not appear that there are any Board opinions regarding superseniority clauses for union officials prior to Dairylea, *supra*. The fact that unions and employers may have been negotiating and enforcing such clauses for some time does not preclude the Board from finding such clauses improper when presented with the issue. An administrative agency can rule on a question of first impression in an adjudicative context. See *S.E.C. v. Chenery Corp.,* 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed.

1985 (1947), *reh. denied* 332 U.S. 783, 68 S.Ct. 26, 92 L.Ed. 367 (1947), and *N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), where the court stated: "The Board is not precluded from announcing new principles in an adjudicative proceeding and the choice between rule-making and adjudication lies in the first instance within the Board's discretion." 416 U.S. 294, 94 S.Ct. 1771.

In case at bar, adjudication can be viewed as particularly appropriate. There are a wide variety of circumstances in which superseniority might be asserted for union officers. "The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner, with attention to the specific circumstances presented. The Board's judgment that adjudication best serves this purpose is entitled to great weight." 416 U.. at 294, 94 S.Ct. at 1772. We, therefore, reject the respondent's contention that the Board's order is not to be enforce because of its retroactive impact.

We also disagree with the arguments of the respondents that the order is overboard. The superseniority clause here is contained in a collective bargaining agreement between the International Union and the Company affecting employees at plants, throughout the United States. Thus, the Unions reliance on Reads, Inc., 228 NLRB 1402 (1977) is not correct. That case involved interrogation of a single employee by a store manager.

It is for the Board, not the courts, to determine how the effect of unfair labor practices are to be expunged. *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584, 600, 61 S.Ct. 358, 366, 85 L.Ed. 368 (1941).

> Section 10 (c) * * * charges the Board with the task of devising remedies to effectuate the policies of the Act. The Board's power is a broad discretionary one, subject to limited judicial review. The relation of remedy to policy is peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightment gained from experience. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216, 85 S.Ct 398, 405—406, 13 L.Ed.2d 233 (1965) (citations omitted).

See also N.L.R.B. v. Tonkawa Refining Co., 452 F.2d 900, 903 (10th Cir. 1971); *Dayton Tire & Rubber Co. v. N.L.R.B.*, 591 F.2d 566–570 (10th Cir. 1979).

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We agree with the Board's aggregate majority conclusion that a violation of the Act occurred in this case. The order seeks to correct that violation and to prevent future violations based on the same contract clause. Our view is that the Board's order is valid. It does not seek to achieve ends which are out of harmony with the policies of the Act.

Accordingly, we decline to modify or set aside that order.

* * * *

The Company finally contends that it cannot be held responsible for application of the superseniority to Howard and Schneider; it contends that the Union bears sole responsibility for any violation of the Act in this case. The argument of the Company is based upon the fact that the Union names those to whom superseniority will apply. However, although the Company cannot conduct a full scale investigation as to the applicable facts, it certainly has access to some information without applying to union officers for information.

In *Union Carbide Corp., Chemical & Plastics Operations Div., supra,* it was found that an employer had violated § 8(a) and (1) of the Act by refusing to apply super-seniority rights to stewards regarding shift transfers. The emmployer in that case had relied on *Dairylea* for the view that superseniority for stewards must be limited to layoff and recall. The Board found that superseniority regarding shift retention was justified, because it served to protect the steward's continued presence in their respective departments. Thus, an employer may be found to be in violation of the Act for improperly allowing or improperly disallowing use of superseniority. In the case of union officers, the lawfulness of superseniority turns on the nature and extent of their collective bargaining duties. A company may thus have to determine the nature of a union officer's duties, an effort which may prove awkward.

The task of balancing such problems as are set forth above as against the need to enforce the provisions of the NLRA is the responsibility of the Board. The Supreme Court has expressed the proposition that both unions and employers are liable for violations of the Act which constitute discrimination in respect to encouragement of union membership. *Radio Officers' Union v. N.L.R.B., supra.* The Act itself contemplates such liability in the paralled provisions of § 8(a)(1) and (3), and § 8(b)1) and (2). It cannot be denied that the Company here acceded to the Union's request and in doing so made the unlawful discrimination possible and effective. Therefore, we must refuse the request to overrule the Board's judgment that American Can Company is to be held responsible along with the Unions for the violations shown in this case.

Based upon the reasons set forth above, the Board's petition for enforcement should be and the same is hereby granted.

NLRB v. Robin American Corporation

654 F.2d 1023 (5th Cir.), August 31, 1981—245 NLRB 822

On petition to enforce Board Order

Before GODBOLD, Chief Judge, MORGAN and HENDERSON, Circuit Judges

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GODBOLD, Chief Judge: The Board sues to enforce its order.[1] The major issues concern threats and interrogation, lay-offs and discharges, failure to reinstate unfair labor practice strikers, and validity of a *Gissel* [2] bargaining order.

Principals of a company not involved in this case purchased the zipper manufacturing department of the company in March 1977 and under the name Robin American ("RA") began producing zipper chain and the parts for the sliders that open and close zippers.[3] Of the three principals Robinson became president of the company, Benbasat vice president for manufacturing, and Samberg vice president for engineering. RA had several departments: coiling department, finishing department, sewing department, weaving department, slider department, shipping and receiving department.

Between November 5 and 10, 1977, 59 of approximately 86 to 88 non-clerical workers at RA's plant at Hialeah, Florida, signed union authorization cards.[4] The union demanded recognition, the request was refused, and in mid-November the union petitioned for a representation election.

I. Interrogation and threats

The Board found that between November and mid-January managerial and supervisory employees engaged in a number of interrogations and threats to persons who had signed union cards. RA does not deny that these events occurred but merely argues that they were not coercive. The question is not even close. The evidence amply supports the tendency of the interrogations and threats to coerce.

II. Closing of the slider department and discharge of employees

All five employees in the slider department signed union cards. Three

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were subjected to interrogation or threats by management or supervisory employees. On December 9 without prior warning Samberg told these five employees that the department was being closed and all of them terminated. All except one had been working in the department since 1972 or 1973. RA had been manufacturing some of its slider requirements and purchasing others from suppliers. On closing the department it began purchasing all of its needs from suppliers.

As is true of several issues in this case, the question is sufficiency of the evidence. There was evidence both ways. The Board considered testimony that the slider department was—and was not—successful, that the costs of operating it were excessive, and that the sliders produced were—and were not—of acceptable quality. Portions of the evidence tending to show that the slider department was successful came from company witnesses, including vice president for engineering Samberg. The evidence that the department was closed and the employees discharged for anti-union motives was adequate to make out a prima facie case to support the inferences that protected conduct was a motivating factor in RA's decision. The burden shifted to the employer to demonstrate that the same action would have been taken in the absence of protected conduct. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB No. 150, 105 LRRM 1169 (1980). RA did not discharge this burden.

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[1] The decision and order appear at 245 NLRB No. 108 (1979).

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

[3] Zipper chain consists of two continuous woven tapes, each with "teeth" on one side. A slider is a mechanism applied to the tapes to engage or digengage the teeth, thus opening and closing the zipper.

[4] The union is the International Ladies Garment Workers Union, AFL-CIO.

III. Other lay-offs

(a) Oses and Ruiz

These two employees worked in the sewing department. Both had signed cards. In early January superintendent Quiros, who was in charge of the sewing department, told Oses not to think that the union was going to protect her from lay-off. On January 20, a Friday, Oses was told by Quiros that she was laid off. Union spokesman Luna intervened with Quiros, who said he had been ordered to lay off Oses. Luna accused Quiros of laying Oses off because she was a member of the union. Quiros replied with an "affirmative gesture" and reiterated that he was following orders. Luna made the same accusation to Benbasat, who told him to "tell the union to stay in Coral Gables."[5] Oses had more seniority than sewing machine operators not laid off.

The next day, Saturday, Ruiz was laid off. On the Monday following, Luna asked Quiros about both of the lay-offs. Quiros responded that "the Company don't want the Union inside" and "if any people put the Union inside, I think he's not working in this Company."

RA contends that Oses and Ruiz were laid off because of a decline in sales and excessive inventory. According to Benbasat it was evident as early as September that RA was overproducing. But the lay-offs did not occur until four months later and two months after the union had come in and demanded recognition and approximately two weeks before the date of a scheduled election. Benbasat attempted to explain this discrepancy, but the Board was not required to accept his explanation.

The evidence adequately supports that Oses and Ruiz were laid off because of their union membership and not for economic reasons.

(b) Izquierdo

This employee, a sister-in-law of Octavio Rodriguez, the prime union supporter, worked in the finishing department. She had signed a union card and solicited three others. On January 20 she was told she was being laid off. This was done in the presence of her brother-in-law, Rodriguez. Rodriguez protested the discharge but without success. The company explains that it laid off Izquierdo because arrangements it had made with an outside firm to perform some manufacturing functions eliminated the need for her job. But immediately after Izquierdo was laid off the company replaced her with a worker from another department, who, however, had more seniority. Soon after the lay-off Arroyo, a junior employee in the finishing department, quit.

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Although Arroyo's job was difficult and Izquierdo had previously performed it, Izquierdo was not recalled to fill the vacancy

We agree with the company that there is not substantial evidence that it had knowledge of Izquierdo's union activity. Izquierdo's situation is different from that of Oses and Ruiz. No statements were made at the time of her lay-off that tended to show company knowledge of her union activities or anti-union bias. When Rodriguez accused Ballarino of laying off Izquierdo because she was his sister-in-law and was a union member Ballarino merely responded that he was carrying out orders. Rodriguez repeated his accusation to Benbasat, who only said "this is my decision." Izquierdo was not one of the persons found by the Board to be leaders of the organizational campaign. The Board made general findings that since the plant was small and relationships were informal and friendly it was likely that everybody knew what was going on. To infer knowledge the Board also relies upon the evidence that Ballarino and Benbasat did not deny they laid off Izquierdo for union activities when accused of having done so. These failures to deny their motives, the locale of a small and informal plant, plus the in-law relationship with Rodriguez, are not substantial evidence on which to base an inference that the company knew Izquierdo was a union supporter.

IV. The strike

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[5] Some of RA's operations were in Coral Gables. The sewing department was at Hialeah.

The strike began January 24. The preceding day 40 to 50 employees met at the union hall. The Board found that the employees were upset by the recent discharges and lay-offs,[6] they were concerned that there would be more lay-offs, and they feared that the union would lose its support before the election. The union attempted to dissuade the employees from striking before the election, but some of them went out on strike the next day. On January 25 another meeting was held at which union officers told the employees that if they really believed that the company would "throw everybody out" the union would support the strike. The employees then voted unanimously to strike.

The foregoing findings, plus the recent lay-offs and discharges, the closing of a department, and the threats and interrogations adequately support the finding of the Board that the strike was an unfair labor practice strike and not a demand for recognition. Therefore, RA's refusal to grant reinstatements was a violation of the Act.

On January 27 Vice President Benbasat personally delivered pay checks to employees including strikers. Of the 40 employees on strike he asked 20 selected strikers, by a question to each employee, whether he wished to return to work. Eight accepted the invitation soon thereafter. The Board found that this solicitation to abandon the strike and return to work violated § 8(a)(1) because it was an attempt to deal with the individual employees in disregard of the right of the employees to bargain through a chosen collective bargaining agent. There was no evidence of threats or promises of benefits made in connection with the solicitation, but this is not necessary since the rationale of this particular unfair practice is interference with the collective bargaining process. *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 681–82 (9th Cir. 1943); *NLRB v. Wooster Division of Borg-Warner Corp.,* 236 F.2d 898, 905 (6th Cir. 1956), *rev's on other grounds,* 356 U.S. 342 78 S.Ct. 718, 2 L.Ed.2d 823 (1958), *General Electric Co. v. NLRB,* 400 F.2d 713, 720 (5th Cir. 1968), cert denied, 394 U.S. 904, 89 S.Ct. 1012, 22 L.Ed.2d 216 (1969), is relied upon by the company as authority that soliciting employees not to strike is lawful. In that case, however, we explicitly recognized that solicitation of striking employees to return to work may be unlawful but distinguished the facts before us because there the employer was not guilty of over-all illegal opposition to the union, there was no unfair labor practice strike, and the employer recognized and bargained with the union.

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The election was set for March 3. On February 15 the union notified RA that the 32 employees still on strike wanted to return. The company did not respond to the request for reinstatement until after the election. In the election there were 40 votes against the union 14 in favor, and 30 challenged ballots. Of the 30 challenged, 27 were cast by strikers or alleged discriminatees. Three days after the election the company offered reinstatement to two employees, stating that 13 had been permanently replaced, three were ineligible, and the rest were not needed and had no expectation of early recall.

Unfair labor practice strikers are entitled to reinstatement on request even if they have been replaced. *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 76 S.Ct. 349, 355 100 L.Ed. 309 (1956). The company refused to reinstate Octavio Rodriguez and Martin Santiago on the ground they were supervisors and therefore not protected by the Act and subject to discharge for striking. In part V, below, we reject the argument that they were supervisors. They were, therefore, entitled to reinstatement.

The company argues that it was not required to reinstate strikers when they offered to return to work because no jobs were then available. It was not until March 6, three days after the election and 21 days after the offer to return, that the company responded to the strikers' offer. The company hired 10 to 12 replacements for strikers, and it did not begin to lay them off until early March. It is therefore, clear that the company committed an unfair labor practice by refusing reinstatement for three weeks and until after the election.[7]

V. The *Gissel* bargaining order

The Board issued a bargaining order based on both prongs of *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). It found "outrageous" and "pervasive" unfair labor practices had been committed and a bargaining order was the only available and effective remedy (Type I *Gissel* order). Also it found that the union had enjoyed a majority status, that the company had committed serious unfair labor practice that had undermined the union, and it was highly improbable that in the near future the employees could freely excercise their preference in an election (Type II *Gissel* order).

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[6] Oses and Ruiz and Izquierdo had been discharged/laid off only two or three days earlier.

[7] Also, when the company did respond it refused to reinstate two employees on the ground they were guilty of strike misconduct. No evidence was offered at the hearing to support this claim.

RA contends the card count was tainted because a substantial number of cards were solicited by Martin Santiago and Octavio Rodriguez who, it contends, were supervisors. Before the change in ownership there were three supervisors in the plant: plant superintendent Ballarino and salaried supervisors Rodriguez and Santiago. After the change in ownership Benbasat called Rodriguez in and told him that there would be no more supervisors, that the only supervisor recognized would be [plant superintendent] Ballarino. Rodriguez was switched from salary to hourly wages and began to punch in on the time clock. He lost several benefits but was promised overtime work so his pay would equal his previous salary. Rodriguez was a leader in the organization campaign and solicited 18 cards. He was interrogated about the union. The Board recognized that Rodriguez was the most senior and most qualified employee in his department. His hourly wage was, however, not the highest in the department. On adequate evidence the Board found that Rodriguez did not make hiring and firing decisions but merely made casual suggestions, in the same way other employees did, of persons available for hire, and these suggestions were often not accepted by Benbasat, who made the actual hiring decision; that Rodriguez did not effectively recommend promotions or wage increases; that he did not supervise overtime work, though he initialed time cards of employees who did work overtime (several other non-supervisory employees could initial time cards). In the absence of the department head Rodri-

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guez was notified by employees leaving early, but he had no authority to, nor did he, approve employees leaving early. Rodriguez performed a number of manual routine tasks, such as cleaning ovens, unloading boxes, moving material by hand trucks, and operating a fork lift.

Santiago's situation was generally parallel to that of Rodriguez. He had been supervisor of the weaving department. When RA took over, Banbasat told Santiago that Ballarino would be the only supervisor, that Santiago was to be transferred to a mechanic, and that under the law a supervisor could not repair a machine. He was changed from salary to hourly wage. Thereafter Santiago spent 90 percent of his time repairing machines. He had no substantial connection with hiring.

Several months after the change in ownership Quiros was hired to supervise the coiling and sewing departments, and Ballarino retained supervision of other departments.

The Board correctly found that Rodriguez and Santiago were not supervisors. *See NLRB v. Security Guard Service, Inc.,* 384 F.2d 143 (5th Cir. 1967). The card count was, therefore, not tainted.

The unlawful threats and interrogations, the discharges/lay-offs, the abolition of the slider department, the selective requests to employees to return to work, the offer of reinstatement to only two of the 32 strikers remaining out after eight of those solicited to return did return, all of which we have found supported by sufficient evidence, occurring within a short span of time and in a small shop where relationships were close, meet the requirements for a Type I order.

The company questions whether the Board has made the four findings required for Type II *Gissel* orders by *NLRB v. American Cable System, Inc.,* 414 F.2d 661, 668–69 (5th Cir. 1969), cert. denied, 400 U.S. 957, 91 S.Ct. 356, 27 L.Ed.2d 266 (1970), *discussed in Bandag, Inc. v. NLRB,* 583 F.2d 765, 770–73 (5th Cir. 1978). These criteria do not apply to a Type I *Gissel* order, which may be entered when the employer has committed outrageous and pervasive unfair labor practices and a bargaining order is the only available effective remedy. The first of these two prerequisites is clearly met. And the Board was entitled to conclude that the second was met because of the nature and severity of the unfair labor practices committed over a brief period of time in a small plant where relationships were close. Moreover, a Type I *Gissel* order may issue though no card majority has been demonstrated. Here the union had a card majority before the company's unfair labor practice began. The rationale of *Gissel* seeks to protect the "values of free choice," *NLRB v. WKRG-TV, Inc.* 470 F.2d 1302, 1320 (5th Cir. 1973). Here free choice was made and recorded before the company began its pattern of illegal conduct. When free choice is followed at once by pervasive and outrageous unfair practices "the card majority should not be subordinated to a potentially tainted election." *WKRG-TV, supra,* at 1320.

The Board order is ENFORCED except with respect to the discharge of Izquierdo.

Herman Brothers, Inc. v. NLRB

658 F.2d 201 (3d Cir.), September 3, 1981—252 NLRB 848

On petition to review Board Order

Before SEITZ, Chief Judge, and VAN DUSEN and HIGGINBOTHAM, Circuit Judges

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VAN DUSEN, Senior Circuit Judge: Herman Brothers, Inc. (the "Company") petitions this court to review and set aside an order issued by the National Labor Relations Board ("Board"). The Board seeks enforcement of its order. The Company contends that (1) the Board erred in refusing to defer to the arbitration procedure established in the collective bargaining

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agreement, and (2) the Company did not violate § 8(a)(1) and (3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(a)(1) and (3). After careful consideration, we have decided to deny the Company's petition and grant the Board's application for enforcement.

FACTS [1]

The Company engages in the interstate transportation of freight and other commodities. It employs truck drivers represented by the General Drivers, Warehousemen, and Helpers Local Union No. 21, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union"). Stief, the complainant in this case, works for the Company as a truck driver and is a Union member.

At the time this dispute arose, the Union and the Company were operating under an extension of their expired collective bargaining agreement. A new collective bargaining agreement had been negotiated but not yet ratified. The Union submitted this proposed contract to its membership for approval. Mail ballots were distributed and due to be counted in Hannibal, Mo., on October 5, 1979.

A dissident faction within the Union, including Stief, opposed ratification. This faction's opposition focused on the so-called mileage payment provision. This provision altered the manner of computing the drivers' wages: instead of using an hourly rate, the proposed agreement required using a mileage rate.

On September 26, 1979,[2] Stief wrote and distributed a letter to his fellow drivers in which he criticized the mileage payment provision. The Company acknowledges that its management learned Stief had written the letter and was irritated by it.

On October 3, Stief asked Dispatch Supervisor Hansen if he could take October 5 off to attend to personal business in Bowling Green, Mo. Hansen granted his permission

Normally, Stief received his job assignments from Dispatch Supervisor Hansen. Hansen would call Stief either the evening before, or the morning of, the day the job had to be done. Jobs were assigned according to seniority. Following this standard dispatch procedure, Hansen called Stief early on October 4 to give him his day's work assignment. Stief's wife told Hansen that Stief was ill and could not work.

Hansen called again that evening to given Stief his job assignment for October 5. Mrs. Stief answered the call and reminded Hansen that he had given Stief October 5 off. Because Hansen had heard that, instead of attending to personal business, Stief was going to watch the ballots being counted, he told Mrs. Stief that if Stief went to watch the ballot count, the Company would issue a warning letter for excessive absenteeism. Hansen repeated this statement to Stief and, in a later telephone conversation, told Stief he would be in a lot of trouble if he went to the union hall in Hannibal.

Stief did not watch the ballot count on October 5. He did attend to his personal business and also went to St. Louis where he discussed several problems with a Union busines representative.

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[1] These facts reflect the findings of the ALJ (A. 401–411) and are not contested here by the Company.

[2] Unless otherwise noted, all dates refer to 1979.

Because October 5 was a Friday, the next work day was October 8. Stief did not receive a call to work on October 8 or on any day thereafter. He did receive, however, a call from Union Steward Hubbard. The Company had asked Hubbard to call Stief and tell him that, due to his October 4 and 5 absences, he was obliged to call in his availability to work. Hubbard called Stief and relayed this message on October 6 and again on October 8.[3] Both calls were made at the Company's request. Stief refused to call in his availability because "the Company was obliged to call him" (A. 406).

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In a letter dated October 11, the Company notified Stief of his discharge. According to the letter, Stief had voluntarily quit pursuant to Work Rule 6(a). Work Rule 6(a) provides: "Absent for 3 consecutive working days without notification. Voluntary Quit."

PROCEDURAL HISTORY

The procedural history of this case is complicated by the presence of two arbitration proceedings, both of which concern Stief's discharge. The chronology of events is particularly noteworthy.

Stief filed a grievance on October 11, 1979. On October 25, 1979, the arbitration committee,[4] consisting of three union and three management representatives, considered Stief's grievance and held he had been discharged for cause. All now agree that certain remarks made by the Company representative rendered this first arbitration proceeding unfair.

In early November, Stief filed unfair labor practice charges against both the Union and the Company. He charged the Union with unfairly representing him at the arbitration proceeding and charged the Company with violating § 8(a)(1) and (3). The charges against the Company are the subject matter of this petition.

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A hearing before an administrative law judge ("ALJ") on all charges was scheduled for January 15, 1980. Immediately prior to the start of the hearing, the Union and Stief settled their differences. Pursuant to their settlement agreement, the Union promised to seek a second arbitration concerning

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[3] The findings of the ALJ include this wording (A. 406–07):

"The Respondent took the position that Stief did not have permission to be away from work on Friday, October 5, and that under all the circumstances, including his unavailability due to illness on October 4, was obliged to call in his availability for work before being dispatched. Consequently, on October 6, when Werbach and Hansen made up and issued the dispatches for Monday, October 8, Stief was bypassed. In addition, Werbach, who customarily contacted Union Steward Kenneth Hubbard when a potential employee problem arose, asked Hubbard to call Stief and make sure he understood the company policy about making himself available for work. Hubbard agreed. However, before Hubbard reached Stief, Stief called Hubbard around 1 p.m. that day and complained about not having been dispatched. Maureen Stief testified that she secretly listened to the conversation on another phone. Hubbard advised Stief to call the respondent and make known his availability for work, but Stief insisted he had been bypassed and that the Company was obliged to call him. Stief accused Hubbard of failing to properly represent the Union's members, favoring the Company, engaging in improper conduct by hitting a union member in the mouth, and demanded Hubbard's resignation. Hubbard hung up the phone.[7] A few minutes later Hubbard called Stief in an effort to placate him. Hubbard explained that he did not want to see Stief create a situation which might result in his supension, discharge, or a voluntary quit. According to Hubbard, Stief responded that he didn't mean what he'd said about Hubbard resigning, and that Hubbard had done a good job and Stief hoped he would stay on. In his testimony, Stief agreed that Hubbard apologized, but insisted that the apology was for threatening Stief. Stief also claimed Hubbard stated that the pressures of being a shop steward were too much for him, and that he would resign in January. Hubbard's telephone bill shows that he made a call to Stief's telephone number at 2:44 p.m. on October 6, and talked for 41 minutes. I find the timing and the length of the call more consistent with the conciliatory tone of Hubbard's version, which is credited.

"[7] Fred and Maureen Stief also testified that Hubbard ended the conversation with the remark that the Union and the Company were tired of Steif's s——, and were going to get rid of him. Stief also insisted that Hubbard made no mention of the contention that Stief was obliged to report himself available for work on October 5 in order to be eligible for dispatch. Hubbard denied making the threat, and insisted that he relayed the Respondent's position with respect to Stief's availability. I credit Hubbard over Stief in this respect. In all other respects the above version of this telephone conversation is an amalgam of their credited testimonies. In any event the alleged remark is hearsay with respect to the Respondent's intentions, as is the subsequent alleged threat by Hubbard, concerning Stief, to driver-steward Frank Warren.

"On Monday, October 8, Stief remained at home. * * * At 4:09 p.m. that afternoon, in response to a second request from Werbach, Hubbard again telephoned Stief and talked with him for 8 minutes about contacting the Company with respect to making known his availability for work. Stief adhered to his original position that he had been wrongfully bypassed by the Company, that the Respondent was obliged to call him for dispatch, and that if he lost his job he would file a grievance and, if necessary, take the matter up with the Labor Board.[8]

"[8] As indicated by Hubbard's telephone bill, Fred and Maureen Stief's testimony that they received no phone call from Hubbard on October 8 is clearly in error. Hubbard is credited with respect to this conversation."

[4] In the record, this is called a grievance committee.

Stief's discharge. The Company was told of this arrangement and indicated it would not object to a second proceeding. The ALJ then received testimony on Stief's charges against the Company.

On February 1, 1980, Stief's grievance was resubmitted to a different arbitration committee. This committee, like that of October 25, consisted of three union and three management representatives. The committee held:

> "Based on the facts presented, the grievant [Stief] was justly discharged for bein [sic] unavailable for work for more than three days without notice and without making himself available for work. Although the grievant engaged in activity in opposition to the mileage contract, this activity played no part in the decision to discharge."

On February 21, 1980, the Company submitted its brief regarding Stief's unfair labor practice charge to the ALJ. Although the record had closed, the Company also submitted, attached to its brief, a copy of the second, February 1, 1980, arbitration award and requested that the ALJ defer to this second award.

The ALJ rendered his decision in July 1980. He determined that: (1) the Company violated § 8(a)(1) when its Dispatch Supervisor Hansen threatened Stief with disciplinary action if Stief went to watch the ballot count; and (2) the Company violated § 8(a)(1) and (3) when it discharged Stief in retaliation for his protected union activities.[5] The ALJ never mentioned or considered deferring to the second arbitration award issued on February 1, 1980.

The Company moved to reopen the record to admit the second arbitration decision. The Board denied the motion and refused to even consider whether or not to defer to the second award. The Board affirmed the conclusions of the ALJ.

The Company seeks review of: (1) the Board's decision not to even consider deferring to the second arbitration proceeding (deferral issue), and (2) the Board's conclusion that the Company violated § 8(a)(1) and (3) when it discharged Stief. The Company does not dispute that Hansen's threat to discipline Stief if he went to watch the ballot count constitutes a violation of § 8(a)(1).[6]

THE DEFERRAL ISSUE

The Company argues that the Board should have refused to assert its jurisdiction and, instead, deferred to the second arbitration award. The Board, in addressing the Company's deferral request, reached alternative holdings.[7] The Board first held that it did not have to even consider deferring to the second arbitration award because the award was not issued or brought to the ALJ's attention until after the hearing when the record was closed. Alternatively, the Board held that, under the facts of this case, it would refuse to defer. The Company challenges both holdings.

We first address the Board's determination that it need not even consider deferring to an arbitration award issued after the record is closed. Pursuant to a long-standing, discretionary policy, the Board has chosen, in certain situations, to reliquish its jurisdiction and defer to the arbitral procedure established in the parties' collective bargaining agreement. *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955); *Collyer Insulated Wire,* 192 N.L.R.B. 837 (1971). This discretionary deferral policy has been noted with approval by the Supreme Court. *Carey v. Westinghouse Corp.,* 375 U.S. 261, 270–71, 84 S.Ct. 401, 408–409, 11 L.Ed.2d 320 (1964).

The Board will consider deferring to arbitration only if the party seeking deferral raises it before the ALJ and states the factors that make deferral appropriate in that particular case. *MacDonald Engineering Co.,* 202 N.L.R.B. 748 (1973), cited with approval in *Wheeling-Pittsburgh Steel v. N.L.R.B.,* 618 F.2d 1009, 1015 (3d Cir. 1980), *cert. denied,* —— U.S. ——, 101 S.Ct. 859, 66 L.Ed.2d 801 (1981). The issue presented here is whether the Company's request for deferral, made after the hearing and the closing of the record, but before the ALJ issued his decision, satisfies the notice requirement set out in *MacDonald Engineering Co.* and approved in *Wheeling-Pittsburgh Steel.*

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[5] The ALJ also refused to defer to the first arbitration award rendered on October 25, 1979. The Company does not contest this determination.

[6] Although the Company seeks review of the Board's decision generally, *see* "Petition for Review" at A. 433, it did not discuss in its brief or at oral argument the Board's conclusion that Hansen's threat to discipline Stief constitutes a violation of § 8(a)(1). Therefore, we do not address this conclusion.

[7] The Board also denied the Company's motion to reopen the record. In light of our approval of the Board's refusal to defer, this denial was appropriate.

Normally, the party seeking deferral must make its request at the first opportunity. As the Board points out, the Company did not notify the ALJ that it sought deferral at the hearing of January 15–16, 1980. Rather, the Company waited until February 21, 1980, at which time the record had closed and the Company knew of the arbitration committee's favorable decision. The Company's failure to request deferral at the hearing or before the record closed, however, is understandable. Generally, a dispute only goes through arbitration once. Although the Company knew the Union had agreed to seek a second arbitration, it did not know when, if ever, such arbitration would occur.[8] Furthermore, had the Company requested the ALJ to defer to the second, pending arbitration proceeding, its request would have been denied. The Board has not in the past deferred to pending arbitration where § 8(a) (1) and (3) has allegedly been violated. *General American Transportation Corp.*, 228 N.L.R.B. 808 (1977). Because the Company was charged with violating § 8(a) (1) and (3), any request for deferral at the time of the hearing would have been futile. Under these circumstances, the Company logically waited until the arbitration occurred and an award issued before it asked the ALJ to defer.

The Company did notify the ALJ of the second arbitration award at the first reasonable opportunity. The Company attached a copy of the second arbitration award to its brief which it submitted to the ALJ on February 21, 1980, just 20 days after the arbitration award was rendered. There was no reason to notify the ALJ any earlier as the ALJ could not be expected to take any action in the case until the briefs were filed.

Because the Company requested deferral before the ALJ issued his decision, the ALJ was given the time and opportunity to consider deferral. Consideration of the deferral issue, in many cases including this one, will not delay resolution of the dispute because the issue can be resolved without reopening the record. If the party seeking deferral (here the Company) fails to present factors supporting deferral, the ALJ, like the Board, may properly refuse to defer.[9] *Wheeling-Pittsburgh Steel, supra* at 1015. Requiring the ALJ and Board to at least consider the deferral request also promotes the Board's deferral policy, a policy the Board voluntarily adopted. Once the policy is adopted, it should be consistently applied. *Memorial Hospital of Roxborough v. N.L.R.B.*, 545 F.2d 351 (3d Cir. 1976); *N.L.R.B. v. Silver Bay L.U. No. 962, Int. Bro. of P., S. & P.M.W.*, 498 F.2d 26 (9th Cir. 1974).

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We hold that, under the particular circumstances in this case, the Company's request for deferral, made before the ALJ rendered his decision, satisfies the notice requirement established in *MacDonald Engineering Co., supra,* and approved in *Wheeling-Pittsburgh Steel, supra.* Therefore, the ALJ and the Board should have considered whether or not to defer to the second arbitration award.

Because we hold that the Board should have considered whether or not to defer, we must review the Board's alternative determination that, if it had to consider deferring, it would refuse to defer. In *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955), the Board determined it would defer to an arbitrator's decision if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [National Labor Relations] Act." After applying *Spielberg* to the facts of this case, Members Jenkins and Penello both concluded, although for different reasons, not to defer because the second arbitration proceeding did not appear to be fair.

The Board's decision that the arbitration proceeding appeared to be unfair can be reversed only if the Board abused its discretion. *Hammermill Paper Company v. N.L.R.B.*, 658 F.2d 155 (3d Cir. No. 80-2499, Aug. 26, 1981). We hold the Board did not abuse its discretion and agree with the rationale presented by Member Penello as to why the second proceeding appears to have been unfair.[10] The arbitration panel consisted only of union and management representatives, both of whose interests appeared to be aligned against Stief. Normally, the Union representatives would adequately represent Stief's interest. Here, however, Stief actively opposed adoption of the proposed collective bargaining agreement which was supported by the Union as well as the Company. Stief had had several disagreements with the Union leadership[11] which further aggravated the relationship between Stief and the Union. Given these facts, the Board did not abuse its discretion in determining that the arbitration proceedings did not appear to have been fair and regular as far as Stief was concerned. Therefore, we affirm the Board's decision not to defer to the second arbitration award.

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[8] Even though the ALJ may have known of the likelihood of a second arbitration proceeding since it was included in the settlement agreement submitted to the Board, the Company did not present to the ALJ factors justifying deferral as contemplated by *Wheeling-Pittsburgh Steel v. N.L.R.B., supra* at 1015.

[9] In other cases where the request to defer appears meritorious, the Board may have to reopen the record and permit the opposing party to submit evidence against deferral. This may delay resolution of the dispute.

THE § 8(a) (1) and (3) VIOLATIONS

The Board found that the Company violated § 8(a) (1) and (3) of the Act when it discharged Stief in retaliation for his protected, concerted activities. The Company admits knowing of Stief's efforts to defeat approval of the proposed collective bargaining agreement. These activities are concerted activities carried out on behalf of the Union and its members and so are protected under § 8(a) (1) and (3) of the Act. The Company, however, claims it discharged

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Stief for good cause pursuant to Work Rule 6(a). Thus we are presented with yet another case in which the parties disagree as to why the employer discharged an employee.[12] *See N.L.R.B. v. General Warehouse Corp.,* 643 F.2d 965 (3d Cir. 1981); *Gould, Inc. v. N.L.R.B.,* 612 F.2d 728 (3d Cir. 1979), *cert. denied,*—— U.S.——, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980); *Edgewood Nursing Center, Inc. v. N.L.R.B.,* 581 F.2d 363 (3d Cir. 1978). As in all such cases "[o]our goal is to find the 'real motive,' *NLRB v. Brown,* 380 U.S. [278] at 287, 85 S.Ct. [980] at 985 [13 L.Ed.2d 839]; *NLRB v. Gentithes,* 463 F.2d 557, 560 (3d Cir. 1972) or 'real cause,' *NLRB v. Rubber Rolls, Inc.,* 338 F.2d 71, 74 (3d Cir. 1967)" behind the discharge. *N.L.R.B. v. General Warehouse Corp., supra* at 972. Both the Board and the courts have struggled to construct a legal framework to aid in the difficult, yet crucial, determination of the employer's actual motivation.

The Company first argues that the Board applied incorrect law. The ALJ applied the so-called "in-part" test under which the employer violates § 8(a)(1) and (3) if only part of the employer's reason for discharge is unlawful.[13] The Board specifically disavowed the ALJ's use of the "in-part" test and applied instead the more stringent test announced in *Wright Line, A Division of Wright Line, Inc.,* 251 N.L.R.B. 150 (1980).[14] *Wright Line* defines and allocates the burden of proof for mixed motive cases. To establish a *prima facie* case, the General Counsel must initially demonstrate that the employee's protected conduct was a "motivating factor" in the employer's decision to discharge. To rebut this, the employer then must prove it would have discharged the employee, even had the employee not engaged in protected activity.

Wright Line, the Company argues, is inconsistent with law of the Third Circuit Court of Appeals as expressed in *Edgewood Nursing Center, Inc. v. N.L.R.B., supra,* and *Gould, Inc. v. N.L.R.B., supra.* The language used in these cases could possibly be interpreted as differing somewhat from the Board's shifting burdens approach stated in *Wright Line.* In *Edgewood Nursing Center, Inc.* this court explained:

> "[I]f the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory. In that circum-

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[10] See *Herman Brothers, Inc., et al.,* Case No. 14-CA-13123, 252 N.L.R.B. No. 121, at note 3, appendix at 428–29, where this wording is used:

> "Member Penello would not defer to the grievance-arbitration proceedings herein because the interests of both the employer and union members of the joint committee, which has no neutral member, appear to be aligned against the interests of the grievant on the crucial issue of whether the contract should have been ratified. Because of this appearance of bias by the committee, which controlled, presented, argued, and decided the grievance, the grievance proceedings herein do not 'appear to have been fair and regular' as required by *Spielberg.*"

We appreciate the concerns expressed in the last two paragraphs of the concurring opinion, but note that *Roadway Express, Inc.,* 145 N.L.R.B. 513 (1963), was not cited in petitioner's briefs and it appears unnecessary to discuss it.

[11] Stief opposed the Union leadership's decision to have the Union membership ratify the contract by mail ballot (A. 403). "Stief accused [Union Steward] Hubbard of failing to properly represent the Union's members, favoring the Company, engaging in improper conduct by hitting a union member in the mouth, and demanded Hubbard's resignation" (A.406). See note 3 above.

[12] The cases have been referred to as pretextual, mixed, or dual motive cases.

[13] See ALJ's decision at A. 410.

[14] The Board's decision and order is reprinted at A. 427–30.

stance there is no causal connection of any anti-union bias and the loss of the job. * * *

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"Once a legitimate reason for discharge is indicated, we must determine whether there is substantial evidence to support the Board's conclusion that the reason was merely a pretext for the discharge."

581 F.2d at 368. Similarly in *Gould,* this court stated:

> "[W]here an employee's discharge is prompted by concurrent reasons, some permissible and some not, * * * the Board must find that the permissible reason proffered by the employer is merely a pretext and that in fact the employee was disciplined because of anti-union sentiment."

612 F.2d at 734.

The Company here appears to argue that once it establishes a legitimate reason for the discharge, the burden shifts back to the General Counsel to prove that this reason is pretextual. The Company claims its reason for discharge was not pretextual and that the Board did not require the General Counsel to demonstrate that it was.

We need not decide here whether *Wright Line* and Third Circuit law differ. Under either test, assuming the General Counsel has proved an unlawful motive, the employer clearly has the burden of proving it had a legitimate reason for the discharge. The Company does not challenge the adequacy of the General Counsel's *prima facie* case. Rather, the Company argues it met its burden of proof (petitioner's brief at

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12-13). The Board, however, reached the contrary conclusion and held the Company had failed to carry its burden of proof, *i.e.,* that the Company's proffered excuse was legitimate.[15]

The question thus presented is whether substantial evidence supports the Board's conclusion that the Company "has not presented persuasive evidence that it would have discharged Stief for reasons other than his [Stief's] protected activities." *Universal Camera Corp. v. Labor Bd.,* 340 U.S. 474, 438, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). The court's review of the Board's finding in mixed motivation cases is limited; the court will accept all reasonable inferences drawn by the Board even though this court, if it considered the case de novo, might interpret the facts differently. *Labor Board v. Walton Mfg. Co.,* 369 U.S. 404, 405, 82 S.Ct. 853, 854, 7 L.Ed.2d 829 (1962); *National Labor Rel. Bd. v. Lewisburg Chairs & Furn. Co.,* 230 F.2d 155, 157 (3d Cir. 1956).

After reviewing the record presented on appeal, we hold the inferences drawn by the Board were reasonable, and that substantial evidence supports the Board's conclusion that the Company did not fire Stief for violating Work Rule 6(a). We observe at the outset that the issue of why the Company fired Stief is a close one. Were we to consider the case *de novo,* we might mark a different decision. *See N.L.R.B. v. General Warehouse Corp., supra* at 972.

The Company contends it discharged Stief in accordance with Work Rule 6(a). To determine whether the proffered reason for discharge is true, it is necessary to understand both Work Rule 6(a) and the Company's dispatch policy. Work Rule 6(a) provides that an employee who is absent for three consecutive days without notification is deemed to have voluntarily quit. The Company's dispatch policy purportedly requires an employee who has been absent ("booked himself off" or "reported off sick")[16] to call in his availability to work. According to the Company, if the employee fails to call in his availability for three days after an absence, he is deemed to have voluntarily quit under Work Rule 6(a).

The Company argues that because Stief failed to call in his availability for the three days after his October 5 absence, he was properly discharged pursuant to Work Rule 6(a). The Company emphasizes that Work Rule 6(a) is well established and that it had discharged 10 other employees for Work Rule 6(a) violations within the past three years. Because the Company was simply enforcing a well-established Work Rule, it argues it proved it had a legitimate reason for the discharge. *United*

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[15] "As * * * Respondent has not presented persuasive evidence that it would have discharged Stief for reasons other than his protected activities, we find in agreement with the Administrative Law Judge that Stief was discriminatorily discharged." (A. 429–30).

[16] The Company in its appellate brief represents that an employee who "is sick or has booked himself off" must call in his availability. Petitioner's brief at 5. "Dispatch Supervisor Hansen testified that drivers who report off sick are required to call in and report their availability" (A. 406).

Parcel Service, Inc., 252 N.L.R.B. No. 145, 105 L.R.R.M. 1484 (Sept. 30, 1980).

The Company's argument misses the point: it is not the applicability of Work Rule 6(a) but rather the applicability of the call-in requirement under the Company's dispatch procedure that is in dispute here. Unless Stief was obligated to call in his availability after his October 5 absence, he could not have been considered "unavailable" and therefore could not have been discharged pursuant to Work Rule 6(a).

The testimony on the call-in procedures under the Company's dispatch policy is conflicting. Stief testified that he understood the Company did not want drivers to call in under any circumstance. Dispatcher Hansen testified that drivers had to call in their availability after reporting off sick. Hansen admitted he was not aware that the drivers had ever been given copies of the Company's call-in procedures. Hansen also admitted that there were departures from the call-in rules from time to time. Indeed, in this case, there appears to be evidence of such a departure. Stief was absent due to illness on October 4. Nonetheless, Hansen called Stief that evening to give him an assignment for the next day, October 5. Thus the record itself demonstrates that the call-in procedure was not applied consistently, at least as to Stief. Yet after Shief's October 5 absence, the Company suddenly insisted that Stief call in his availability. This inconsistency in application justifies the Board's inference that the Company's proffered excuse was not legitimate. We conclude that substantial evidence supports the Board's determination that the Company's excuse for discharging Stief was not legitimate.

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We recognize that the Company went out of its way to ensure Stief knew he was to call in his availability. Twice the Company had the union steward call Stief and tell him he was expected to call in. Stief stubbornly refused to do so. Were we empowered to consider the case *de novo,* this fact might persuade us to conclude the Company had a legitimate reason to discharge Stief. Stief's stubborn refusal to call in his availability works against the peaceful resolution of labor disputes and thus against the primary goal of the Act. *Cf. Fibreboard Corp. v. Labor Board,* 379 U.S. 203, 211, 85 S.Ct. 398, 403, 13 L.Ed.2d 233 (1964). Such conduct should not be condoned or encouraged. Given this court's limited role of review, however, Stief's dubious conduct is not enough to offset the Board's conclusion, based on other evidence, that the employer did not discharge Stief pursuant to Work Rule 6(a).

Substantial evidence justifies the Board's conclusion that the Company violated § 8(a)(1) and (3). The Company admits it knew of Stief's efforts to have the union membership reject the proposed contract. The Company insisted that Stief call in his availability after his October 5 absence pursuant to a call-in procedure that was not known to Stief and had not been consistently followed by the Company in the past. Dispatcher Hansen threatened to discipline Stief if he attended the counting of the ballots on October 5. This threat constitutes an uncontested, independent violation of § 8(a)(1), thus conveying the "unmistakable overtone of a purpose to discriminate and retaliate because of union membership [or the protected activity]." *National Labor Relations Board v. Ferguson,* 257 F.2d 88, 89 (5th Cir. 1958). Stief was discharged shortly after the Company learned that Stief had written the anti-contract letter and within three days of the defeat of the proposed contract. The timing of the discharge immediately after Stief engaged in protected activity supports an inference of unlawful motive. *N.L.R.B. v. General Warehouse Corp., supra* at 971.

The Company's petition for review will be denied and the Board's cross-application for enforcement will be granted.

SEITZ, Chief Judge, concurring: I agree that the Board did not abuse its discretion in refusing to defer to the second arbitration proceeding and that substantial evidence supports the Board's conclusion that the employer violated section 8(a)(1) and (3). Because two members of the Board apparently would not have deferred to the second arbitration proceeding even if they had reopened the record to consider it, I rely on their rationale for not deferring in this case and do not think that it is necessary that I decide whether the Board abused its discretion by not reopening the record. I write separately because I believe the Board's policy of not deferring to an arbitration proceeding in a case such as the present one may be unfair to the employer.

In *Roadway Express, Inc.*, 145 N.L.R.B. 513 (1963), the Board held that it would not defer where, in addition to the absence of an impartial member, it appears from the evidence that the arbitration committee was constituted with members whose interests appeared to be aligned against the grievant. If the grievant had won at arbitration in this case, he would, of course, have been reinstated. When the employer won at arbitration, however, the Board refused to defer. The arbitration proceeding was thus a frustrating, costly hurdle for the

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employer, and the employer was compelled to participate in a proceeding in which it could not really win.

It is difficult to make principled judgments as to when the interests of the grievant and the union so diverge as to justify not deferring to an arbitration award, but in a day when employees are often hostile to their union and its leadership, the Board's policy of refusing to defer when there is the "appearance" of bias on an arbitration committee may threaten the validity of the decision of many committees that lack a neutral member. The Board may not have fully considered all of the possible ramifications of the *Roadway Express* doctrine as applied to a case such as the present one. Perhaps the Board will want to reconsider its doctrine, which is designed to promote fairness, to assure that it does not operate in a way that would be unfair to one party.

NLRB v. Slagle Manufacturing Company

658 F.2d 785 (10th Cir.), September 9, 1981—246 NLRB 449

On petition to enforce Board Order

Before DOYLE, MCKAY and SEYMOUR, Circuit Judges

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MCKAY, Circuit Judge: After an administrative investigation and a hearing, the National Labor Relations Board overruled a company's procedural objections to an election of the bargaining representative for the company's production and maintenance employees, and certified the elected union. To test the validity of the Board's rulings, the company refused to bargain with the certified union. The Board here is seeking enforcement of its order finding the company in violation of §§ 8(a)(5), 8(a)(1) of the Labor Management Relations Act (29 U.S.C. §§ 158(a)(5), 158(a)(1)).

All the proceedings below as well as in this court center on the status and activities during the election of an employee named Gann who had been discharged during the course of the union's organizing activities on company premises. Gann's discharge was the subject of an unfair labor practice charge which was pending at the time the election was held. Gann was present at the election to cast his vote. The company argues that the election must be set aside because the company met its burden to show either that Gann, as a union agent or representative, unlawfully engaged in prolonged conversations with employees during the election, or that his activities were so disruptive or coercive that the free expression of the will of voting employees was severely impaired.

The company's first theory on the basis of which it attacks the validity of the election is based on *Milchem, Inc.*, 170 NLRB 362 (1968), in which the Board ruled that any "prolonged" conversations between representatives of any party to an election and voters waiting to cast ballots will invalidate the election without inquiry into the substance of the conversations. The Board reasoned that such conversations carry with them so great a potential for last-minute engineering of unfair advantage that this prophylactic rule is warranted. This strict rule, however, applies only to conversations between parties to the election—union or employer representatives—and employees, not to conversations between employees. The Board apparently "credits employees with the ability to give true weight to the possibly impulsive allegations of fellow employees induced by the heat of the campaign." *NLRB v. Sauk Valley Manufacturing Co.*, 486 F.2d 1127, 1131 n.5 (9th Cir. 1973).

The company's second theory is that an employee's conduct, though not attributable to a party to the election, may become coercive, disruptive, or so aggravated "that a free expression of choice of representation [by voting employees] is impossible" *Bush Hog, Inc., v. NLRB*, 420 F.2d 1266, 1269 (5th Cir. 1969). The election may be set aside irrespective of party conduct "if the acts [of non-party persons] disrupted the voting procedure or destroyed the atmosphere necessary to the exercise of a free choice in the representation election." *NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111, 113 (5th Cir. 1981); *NLRB v. Claxton Manufacturing Co.*, 613 F.2d 1364, 1371 (5th Cir. 1980).

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In reviewing the Board's resolution of the factual dispute under each of these theories, we must uphold the Board's findings if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e), (f). The company's primary factual contentions are (1) that on election day the union arranged for Gann to attend the pre-election conference; (2) that Gann assisted the union's election observer in checking the polling place; and (3) that Gann engaged in conversation with some of the voters. The Board concluded, however, that Gann had not become an agent or representative of the union and therefore that his conversations were not governed by the strict rule of *Milchem*. The Board's finding in this regard is amply supported by the record. Neither the union's arranging for an employee to attend the pre-election conference nor the employee's inspection of the polling area conclusively converted that employee into an agent or representative of the union, and substantial evidence on the record suggests that he remained merely a disaffected employee.

The Board further concluded that Gann's conduct was not so clearly disruptive of the atmosphere of free choice during the vote that the election must be set aside. The presence of an election of any employee recently discharged for reasons that could be construed as an unfair labor practice always carries with it the potential for affecting voting choice. Nevertheless, where an employee's discharge is the subject of an alleged unfair labor practice at the time of an election, the employee has the right to be present at and to vote in that election. See *NLRB v. Hunter Engineering Co.*, 215 F.2d 916, 921 (8th Cir. 1954). The point at which this legitimate presence slides over into a clearly disruptive and thus an illegitimate presence which must be held to void the election is essentially a matter of reasonable judgement. Although the outer reaches of a legitimate presence may have been approached in this case, we hold that the record in this case viewed collectively in its component parts contains substantial evidence to support the Board's conclusion that the company did not show those limits to have been exceeded here.

ENFORCEMENT GRANTED.

Northwest Publications, Inc. v. NLRB

656 F.2d 461 (9th Cir.), September 14, 1981—250 NLRB 838

On petition to review Board Order

Before MARKEY,* Chief Judge, United States Court of Customs and Patent Appeals, WALLACE and SCHROEDER, Circuit Judges

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MARKEY, Chief Judge: Northwest Publications, Inc. (Northwest) petitions for review of an order of the National Labor Relations Board (NLRB). We *vacate* the order and *remand* to the NLRB.

Background

Northwest publishes two daily newspapers, *The San Jose Mercury* and *The San Jose News*. Robert O'Donnell, foreman of the newsprint warehouse since February 1978, is a member of Teamsters Local 296, Sales Delivery Drivers, Warehousemen and Helpers Union (Union). O'Donnell receives a ten percent pay premium for his duties as foreman. In addition to regular work duties, O'Donnell's position as supervisor requires him to hire employees, set work schedules, determine if part-time help is needed, and assign overtime. O'Donnell also has responsibility for inventory, paper work associated with the newsprint warehouse, and determining work priorities in the warehouse.

Beginning in February 1978, O'Donnell normally arrived at the warehouse thirty to forty-five minutes before the shift officially began. He unlocked the warehouse doors, walked through the warehouse and performed certain preliminary "prestart activities" so that work could begin smoothly when the shift started at 7 a.m. Those activities included one or all of the following: (1) starting a forklift to warm it up prior to the start of work, (2) if there was a truck at the loading dock, he would remove the first two rolls of newsprint and lower a dock plate into the truck, forming a bridge between the truck and the warehouse, (3) turning on the warehouse conveyor to move any newsprint rolls on it to the end of the warehouse. After performing those tasks, O'Donnell would punch in on the time clock. It is undisputed that Northwest did not pay O'Donnell "overtime" for his prestart activities.

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*The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

O'Donnell received a letter from Union dated April 12, 1979, stating that he had been observed working "off the clock", before starting time, on a number of occasions. Union, asserting that O'Donnell's actions constituted a violation of Union rules and sections 15 and 16 of the collective bargaining agreement between Union and Northwest, notified him to appear for a hearing.

On April 18, 1979, Northwest's Vice President for Employee Relations sent a letter to Union, pointing out that O'Donnell is a foreman, that the off clock work he does is necessary to assure efficient operation of the warehouse, and thus that that work is part of O'Donnell's duties as supervisor.

Acting on the advice of Northwest, O'Donnell did not appear at the hearing. He received a letter telling him he had been fined $250 for his actions, and that $150 of the fine had been suspended, leaving a fine owing of $100. The letter further stated that if he continued to work off the clock the suspended $150 fine would be reinstated. O'Donnell paid the $100 fine under protest.

On May 4, 1979, Northwest filed an unfair labor practice charge against Union, alleging violations of sections 8(b)(1)(B) of the National Labor Relations Act (Act). 29 U.S.C. § 158(b)(1)(B).

The NLRB administrative law judge concluded that Union fined O'Donnell solely for performing bargaining unit work off the clock and that there was no evidence that the discipline of O'Donnell involved a dispute between Northwest and Union over the meaning of a contractual provision.

A three-member panel of the NLRB affirmed by vote of 2-1. Northwest petitioned this court for review.

ISSUE

The issue presented is whether the NLRB correctly found proper the fining of O'Donnell.

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OPINION

Section 8(b)(1)(B) of the Act makes it an unlawful labor practice for a labor organization or its agents "to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B).[1] The circumstance in the industry here involved, in which supervisors are also union members, creates a special problem in relation to union discipline.

In *Florida Power and Light Company v. International Brotherhood of Electrical Workers, AFL-CIO, et al.,* 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974) (hereinafter *Florida Power),* the Supreme Court set forth the standard for determining when union discipline violates the statute. Enroute to its holding that the union did not violate Section § 8(b)(1)(B) of the Act by disciplining a supervisor for performing bargaining unit work during a strike, the Court stated:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only where that discipline may adversely affect the supervisor's conduct in performing the duties of and acting in his capacity as grievance adjustor or collective bargainer on behalf of the employer.

Id. at 805, 94 S.Ct. at 2745. As the Court noted in *Florida Power* the interpretation of activity that would adversely affect the supervisor's conduct as a grievance adjustor or collective bargainer has significantly expanded since the enactment of the Act in 1947.

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[1] It is undisputed that O'Donnell is a supervisor. Neither the administrative law judge nor the Board reached the question of whether O'Donnell was a "representative" within the purview of § 8(b)(1)(B), though the former indicated that he would not so hold if the question were reached. The Board's brief candidly refers to the administrative law judge's express recognition that Board guidance was lacking, citing conflicting authorities. Northwest's brief cites authorities, including *Wisconsin River, infra,* note 7, indicating that a supervisor having O'Donnell's duties is within § 8(b)(1)(B). Whether a supervisor is currently a representative may not be material if a union's disciplinary action be such as to chill a supervisor's willingness to undertake representative responsibilities, and thus restrain an employer in selecting his representatives. Because § 8(b)(1)(B) would not be implicated at all if O'Donnell were neither a representative nor one against whom disciplinary action would restrain Northwest's selection of representatives, it must be presumed that the Board assumed one or the other fact as true. Like the Board, however, we refrain from deciding the question, taking the case as it is presented and without prejudice to the Board's consideration of the question should it so elect on remand.

For more than 20 years the Board applied Section 8(b)(1)(B) only to cases squarely within the metes and bounds of the statutory language.[2] In 1968, however, the Board extended the reach of that section with its decision in *San Francisco-Oakland Mailers Union No. 18 (Northwest Publications, Inc.)*, 172 N.L.R.B. 2173 (hereinafter *Oakland Mailers*). In that case, involving the same employer as here, three foremen-members were expelled from the union for allegedly assigning bargaining unit work in violation of the collective-bargaining agreement. Despite the absence of union pressure or coercion aimed at securing the replacement of the formen, the Board held that the union had violated section 8(b)(1)(B) by seeking to influence the manner in which the foreman interpreted the contract.

In "assum[ing] without deciding that the Board's *Oakland Mailers* decision fell within the outer limits of [the] test"[3] being set forth in *Florida Power,* the Supreme Court observed:

> In *Oakland Mailers* the union had disciplined its supervisor members for an alleged misinterpretation or misapplication of the collective-bargaining agreement,

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> and the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union.

Florida Power, 417 U.S. at 801, 94 S.Ct. at 2743.

In *American Broadcasting Companies v. Writers Guild, supra,* note 3, the court again recognized that union discipline may have a "carryover" effect which would adversely affect the supervisor's conduct, depriving the employer of the full services of his representative and thereby restraining and coercing the employer in his selection of representatives. *Id.* at 429, 98 S.Ct. at 2434.

The inquiry into whether union conduct would or might adversely affect the duties of an employer's representative is "necessarily a matter of probabilities, and its resolution depends much on what experience would suggest are the justifiable inferences from the known facts. This seems . . . to be peculiarly the kind of determination that Congress has assigned to the Board. . . ." *Id.* at 432, 98 S.Ct. at 2435.

An order of the Board will be enforced by this court if there is substantial evidence in the record supporting it. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951); *N.L.R.B. v. Best Products Co., Inc.,* 618 F.2d 70 (9th Cir. 1980). Fear of an accusation that it is substituting its judgment for that of the Board should not, however, so enervate a court as to substitute judicial abdication for judicial review. *N.L.R.B. v. Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union, Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 630 F.2d 505, 507 (7th Cir. 1980).

There is no factual dispute between the parties concerning O'Donnell's specific prestart activities. The question before this court is therefore whether the Board applied the correct legal analysis to the facts of record.

In its decisions subsequent to *Florida Power* the Board has clarified the circumstances under which union discipline has a carry-over effect that impairs the supervisor's 8(b)(1)(B) functions. In *Teamsters Local No. 524, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Yakima County Beverage Company)*, 212 N.L.R.B. 908 (1974) (hereinafter *Yakima*), the union filed charges against three supervisors for performing bargaining unit work off the clock at the request of a customer. The union charged that the supervisor-members violated the union's bylaws and constitution by breaching a provision of the applicable collective-bargaining agreement because they performed work after regular working hours without prior union consent. The union therein acknowledged that its discipline of the supervisors was directed at the employer's interpretation of the contract, not primarily at the three men as union members. The union fines therefore served to impose upon the company the union's interpretation of the collective-bargaining agreement without initiating a grievance procedure. The Board has similarly found violations of Section 8(b)(1)(B) in numerous other cases where the union fine was in fact founded upon a disputed contract provision.[4]

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[2] *See, e. g., International Typographical Union and Baltimore Typographical Union No. 12 (Graphic Arts League),* 87 N.L.R.B. 1215 (1949; *Los Angeles Cloak Joint Board ILGWU (Helen Rose Co.),* 127 N.L.R.B. 1543 (1960).

[3] *Florida Power,* 417 U.S. at 805, 94 S.Ct. at 2745; *see also, American Broadcasting Companies v. Writers Guild,* 437 U.S. 411, 436, 98 S.Ct. 2423, 2437, 57 L.Ed.2d 313 (1978).

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In an attempt to distinguish *Yakima* and its progeny, the Board first says Union's fining of O'Donnell did not involve the interpretation or application of the collective-bargaining agreement. That assertion falls victim to the undisputed record.

In Union's initial letter to O'Donnell, citing him to appear before its executive Board, O'Donnell was charged with, "violation of Sections 15 and 16 of the contract and the working rules of this Local Union."[5] Sections 15 and 16 of the collective-bargaining agreement relate to the hours of work and wage rates therefor. More specifically, section 15 states that overtime shall be paid for all time worked in excess of 8 hours per day and 40 hours per week. Union's post-hoc efforts to portray the charge as solely a union matter, not involving the employer or the agreement in any way, cannot replace Union's own assertion to the contrary.

Similarly, it will not do to rest decision on the view that there was no employer-union dispute extant when Union's disciplinary action was taken. A major purpose of the National Labor Relations Act, and of the practices evolved under it, is to provide for an organized, and to the maximum fesible extent peaceful, mechanism for resolving such disputes. For a union to by-pass that mechanism, raising no contract interpretation dispute with the employer but proceeding directly to disciplinary action, would defeat that purpose of the Act. Hence, the question is not whether there was an employer-union dispute but whether there should have been. The focus is not on the existence of a dispute but on whether the subject matter involved in the disciplinary action is such as to require its submission to the agreed dispute-resolving mechanism.

Northwest posits that all of O'Donnell's prestart activities are supervisory duties customarily undertaken by his predecessors, "off the clock", without protest by the Union. It is undisputed that O'Donnell's activities are intended to facilitate the actual start of work at the scheduled hour. That action is asserted to be consistent with O'Donnell's supervisory responsibility for the effecient scheduling of work in the warehouse.

The Board says O'Donnell's prestart activities do not constitute a supervisory function, a view inconsistent with *Yakima*, in which the Board found that the supervisors conduct was "arguably for exercising supervisory or management functions"[6] when they performed bargaining unit work after hours. Thus the Board there recognized that proper classification of the work should be based upon an *overall* analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed.

Likewise, in other post-*Florida Power* decisions the Board found a violation of section 8(b)(1)(B) where the work performed was at least in part bargaining unit work.[7]

Of O'Donnell's numerous prestart activities, Union complains only of his removal of print rolls from the truck, for which O'Donnell should have been paid overtime under section 15 of the collective bargaining agreement. In selecting for disciplinary action a portion of O'Donnell's activity, Union reserved for itself the right to unilaterally decide what acts are covered under the collective-bargaining agreement and what acts are supervisory. Such a decision

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[4] *See*, for example, *Construction, Production and Maintenance Laborers' Union, Local No. 383, AFL–CIO (Chanen Construction Co.)*, 221 N.L.R.B. 1283, 1288 (1975) (the supervisor "was deciding the work jurisdiction issues relating to the size and composition of work crews in furtherance of his employer's interests, and consistent with his interpretation of the jurisdictional requirements of the collective-bargaining agreement"); *Local 423, Laborers' Int. Union of North America, AFL–CIO (Mansfield Flooring)*, 195 N.L.R.B. 241, at 241 (1972), *enf'd*, 82 LRRM 2478 (D.C. Cir. 1973) (per curiam) (dispute between the parties over whether a foreman can perform manual work on the jobsite); *Freight, Construction, General Drivers, Warehousemen and Helpers Union, Local 287, IBT (Grinnell Co.)*, 183 N.L.R.B. 398, 402 (1970) (dispute between the parties over the type of work to be performed by an employee working within a certain job description); *Sheet Metal Workers' Unt. Assn. Local Union 49*, 178 N.L.R.B. 139, 141 (1969), *enf'd*, 430 F.2d 1348 (10th Cir. 1970) (dispute between the parties over whether certain work should be assigned to sheet metal workers instead of to carpenters and laborers).

[5] The original Union charge form asserted only the violation of Sections 15 and 16 of the contract.

[6] *Yakima*, 212 N.L.R.B. at 910, n. 6.

[7] *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 N.L.R.B. 903 (1975), *enf'd*, 539 F.2d 242 (D.C. Cir. 1976); *Bakery, Cracker, Pie, Yeast Drivers and Miscellaneous Workers Union, Local 734, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (ITT Continental, River Grove)*, 238 N.L.R.B. 189 (1978); *see also*, *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO v. N.L.R.B.*, 532 F.2d 47 (7th Cir. 1976).

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avoids established grievance procedures and could affect the manner in which O'Donnell might fulfill a grievance adjustor or collective bargainer function. *American Broadcasting Companies, Inc. v. Writers Guild of America, supra,* note 3.

CONCLUSION

The Board's failure to follow its own precedents requires that its order dismissing the complaint be vacated. *See, Midwest Stock Exchange v. N.L.R.B.,* 620 F.2d 629 (7th Cir. 1980), *cert. denied,* ——— U.S.———, 101 S.Ct. 214, 66 L.Ed.2d 94 (1980).[8] The case is accordingly remanded to the Board for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Wells Fargo Guard Services, a Division of Baker Protective Services, Inc. v. NLRB

659 F.2d 363 (3d Cir.), September 15, 1981—252 NLRB 55

On petition to review Board Order

Before ADAMS, HUNTER and SLOVITER, Circuit Judges

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JAMES HUNTER, III, Circuit Judge: This case is before the Court on a petition filed pursuant to sections 10(e) and (f) of the National Labor Relations Act (29 U.S.C. §§ 160(e) and (f)) by Wells Fargo Guard Services, Inc. ("Wells Fargo") to review, and a cross-application of the National Labor Relations Board ("NLRB", "Board") to enforce, an order issued by the NLRB against Wells Fargo. The order directs Wells Fargo to bargain collectively with the United Security Guard Guild ("Guild"), and is based upon the Board's

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decision that Wells Fargo had refused to bargain with the Guild in violation of sections 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(1) and (5)).

Whether Wells Fargo committed an unfair labor practice by refusing to bargain with the Guild depends upon whether the Board's certification of the Guild as the exclusive bargaining agent of the Wells Fargo employees was correct. Wells Fargo contends that the Guild should not have been certified by the NLRB because the Guild engaged in improper conduct in the course of the campaign prior to the election won by the Guild. The NLRB rejected Wells Fargo's contentions during the certification proceedings without holding an evidentiary hearing and refused to reconsider them during the unfair labor practice hearing. We conclude that the NLRB's certification decision should not have been reached without holding an evidentiary hearing on one of the alleged pre-election improprieties. Since the Guild was not properly certified as the bargaining representative, Wells Fargo committed no unfair labor practice when it refused to bargain. Wells Fargo will be granted a hearing as set forth below, the Board's petition for enforcement will be denied, and the case will be remanded to the NLRB.

FACTS

On December 28, 1978, the United Security Guard Guild ("Guild") filed a petition with the National Labor Relations Board requesting that the Guild be certified as the exclusive bargaining agent for the security guards employed at the Lawrenceville branch of Wells Fargo Guard Services ("Wells Fargo"). In a letter sent by the Guild to the security guards in or around November 1978, Harry J. Martin, the president of the Guild, had introduced himself and the Guild to the guards. That letter contains the following paragraph: "Incidently [*sic*], I have heard rumors to the effect that my character is questionable and some go as far as to say that I am wanted by the Federal Bureau of Investigation. Well, they have my address and phone number if they want me." Appendix at 165. In a letter dated November 28, 1978 from Wells Fargo to its employees, Wells Fargo included the following as the opening paragraph:

> As some of you may know, Harry Martin, an individual who worked for Wells Fargo as a Field Inspector in 1976, is attempting to form a union and to organize our Trenton Office employees. He is calling his union the "UNITED

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[8] The parties here have not asked this Court to consider the correctness of the Board's reasoning or conclusion in *Yakima* in light of 29 U.S.C. § 158(b)(1)(B) and the Supreme Court's decision in *Florida Light and Power.* We express no view, therefore, on that question.

> SECURITY GUARD GUILD". He has drawn up a constitution and bylaws under which he had had himself named President and his wife Secretary Treasurer. Martin's union does not now and never has represented any employees of any company. He has never previously organized a union and has never negotiated a union contract. To our knowledge he has no experience whatever in organizing or running a union. By his own admission, Wells Fargo is his first target.

Appendix at 167.

On January 12, 1979, a hearing was held before Louis Verrone, Esq., a Hearing Officer of the NLRB, on the question of whether the Guild was in violation of section 9(b)(3) of the National Labor Relations Act, (29 U.S.C. § 159(b)(3)) which forbids affiliations between unions which have guards as members and unions which do not.[1] At the hearing, Harry J. Martin, president of the Guild, testified that he founded the Guild in May 1978 and registered it with the Department of Labor in November 1978. Appendix at 16. At the time of the hearing, the Guild had no members, no funds, and no paid employees. Appendix at 23, 34–39.

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Mr. Martin further testified that "I consider that I am the United Security Guard Guild." Appendix at 41.[2]

On January 22, 1979, the hearing officer issued a decision in which he found that the Guild was not in violation of section 9(b)(3) of the National Labor Relations Act and directed that an election be held. Wells Fargo did not appeal from that decision.

The campaign recommended, and the Guild and Wells Fargo each stated its case in numerous pieces of campaign literature. On or about February 9, 1979, Wells Fargo wrote a letter to its employees on the character and police record of Mr. Martin. Appendix at 178–79. On or about February 12, 1979, Mr. Martin wrote the following in a letter to the guards, defending himself and his character:

> My sincere thanks to the many of you who called me on Saturday to inform me of TITKO'S [the Wells Fargo Branch Manager] latest SMEAR CAMPAIGN * * *.
>
> First of all, let me set the record straight. I've never RAPED, ROBBED A BANK, STUCK ANYONE UP, MOLESTED, PUSHED DRUGS, KILLED ANYONE OR ROBBED OLD LADIES * * *.
>
> I am not going to try to defend my mistakes of 20 YEARS AGO, but I will say this, I was not born with a silver spoon in my mouth * * *. I found out [one] thing during this [campaign] BATTLE; I am up against the best PROPAGANDISTS in the business, but the more THEY try to KNOCK ME DOWN, the more DETERMINED I AM TO FIGHT ON. They know that I can never be BOUGHT OFF, so they STOOP LOW to pick the bones of a roguish kid of 20 YEARS AGO.

Appendix at 236.

On or about February 14, 1979, Wells Fargo distributed materials to its employees which included the information that Mr. Martin, under the alias of Harry Meehan, had pled guilty to and been sentenced to jail for felonious assault and robbery at age 18, had been sentenced to jail for auto larceny at age 20, and in 1962 at age 30 had pled guilty to charges of unlawful possession of a gun and assault and battery and been required to pay restitution to the victim. Appendix at 184–89.

A mailed-ballot election was held between February 16 and February 28, 1979. One of the pieces of campaign literature distributed by Wells Fargo at the beginning of that period was a two-page letter accompanied by a one-page sample ballot. Appendix at 104–06. The first page of the letter and the sample ballot were duplicated onto Wells Fargo letterhead, which is printed in blue and red ink. In the letter, George Titko, the branch manager, explained NLRB voting procedures and encouraged employees to vote against the Guild. The sample ballot consisted of a page of Wells Fargo letterhead in blue and red, with the sample ballot duplicated beneath the letterhead. The ballot was marked "sample" across its face, and was designated a sample ballot in printing beneath the ballot itself. Beneath the second sample ballot designation was printed the following:

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[1] Section 9(b)(3) provides in part as follows: [N]o labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Wells Fargo sought to demonstrate at the hearing that the Guild was in violation of section 9(b)(3), and that certain connections between 9(b)(3), and that certain connections between the Retail Clerks International Union (of which Harry J. Martin, a supermarket employee and president of the Guild, was a member) and the Guild constituted a forbidden affiliation.

[2] The other two officers of the Guild, a friend of Mr. Martin's named Pat McCullaugh and Mr. Martin's wife, had been appointed by Mr. Martin as officers so that the Guild could qualify as a bargaining agent. Letter of Mr. Martin to the security guards; appendix at 230–231.

> THANKS FOR YOUR SUPPORT—MARK YOUR BALLOT "*NO*"!

Beneath that sentence was printed "George M. Titko, Branch Manager." The "no" box on the ballot was filled by an X which, though duplicated like the rest of the sample ballot in black ink, was irregular in shape.

The Guild lost the February 1979 election by eight votes (62 to 54, with approximately 172 eligible to vote and 120 ballots cast). On March 6, 1979, the Guild filed objections to the election, but pursued only one objection: that Wells Fargo had impermissibly distributed a facsimile ballot before the election in violation of the rule of *Allied Electric Products Inc.*, 109 NLRB 1270 (1954).

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On March 23, 1979, Arthur Eisenberg, Regional Director of the National Labor Relations Board, issued a Supplemental Decision, Order and Direction of Second Election after conducting an investigation and allowing the parties to submit evidence. In his decision, the Regional Director ruled that the distribution of the facsimile ballot rendered the election invalid under *Allied Electric*. He concluded that the distribution of the facsimile ballot had interfered with the election, particularly in light of the facts that an X had been placed in the "no" box, that the facsimiles had been mailed out on the same day as the real ballots, and that the NLRB has a history of "strict and continuing adherence" to the *Allied Electric* doctrine. The Regional Director also decided that the presence of the letterhead, the "sample" designations and the partisan message were insufficient to "neutralize" the impact of the facsimile. Appendix at 110–11. He ordered that a second election be held. The NLRB denied Wells Fargo's request for review, and the second campaign began shortly thereafter.

In early April, 1979, Mr. Martin/Meehan wrote a letter to the security guards in which he spoke as follows:

> This will be my last letter to you with deep regret.
>
> When I began this fight for higher wages, benefits and standards for you, I was under the impression that I had paid a debt to society for being an irresponsible and roguish young man. I can see now that I was under a grave misconception * * *.
>
> I have tendered my resignation in the interest of all of you, because in order to achieve the high standards I feel you all deserve I will not remain in office to taint what I have fought so hard these many months to achieve for you.
>
> There is something that does make me happy to tell you, and that is the news of some of the states finest and influencial people who have offered their services in your behalf. They will be made known to you in the very near future. They will act as a board of trustees on a gratis basis, and I am certain that with their aid you will have a real chance for a successful future. You will also have a board comprised of fellow guards who will be acting in your interest.
>
> * * * * *
>
> Through the publicity gained in the news media during this campaign I was fortunate to have been offered some extremely well paying positions, one of which I will eventually accept. I only regret that I should be the one to benefit from something I started in your behalf * * *

Appendix at 195.

After Mr. Martin's resignation letter (which was signed with his own name) had been distributed, the Guild circulated a letter signed solely by the United Security Guard Guild. That letter read, in part, as follows:

> We are proud and happy to announce a newer and stronger Guild since the resignation of Harry Martin, a man we will all remember and respect for his courage and sacrifice to create a more secure and prosperous future for those of you in the security field.
>
> The board and members of the committee have allied themselves to carry on the fight for your future benefits. . . .
>
> The National Labor Relations Board has approved a petition for a new election, based on evidence of foul play on the part of Wells Fargo. It is unfortunate that companies should resort to such tactics, but thanks to agencies such as the N.L.R.B., the rights of the little person are still protected from such unfair practices.
>
> In the past month, many of you have confided that your failure to cast a vote was due to confu-

> sion of many issues that were distorted or clouded by a cleverly devised smear campaign leveled at Martin. Wells Fargo succeeded in their quest to confuse you, thereby escaping unionization by a narrow margin. We intend to present a more candid picture of your future and benefits. Wells Fargo officials have boasted flagrantly to all of you
>
> **368**
>
> that they have always defeated unionization. We are going to prove to you that they have misled you and have distorted many issues of vital importance.

Appendix at 127.[3]

Shortly after this letter was sent to the guards, and, according to the letter itself, within a week of the mailing out of official ballots, the Guild, over the signature of Harry Rouse, Secretary-Treasurer of the Guild, sent out the promised letter concerning prior unionization of Wells Fargo. The letter was accompanied by excerpts from a contract represented as being between Wells Fargo and the American Federation of Guards. Appendix at 129–131. In it, the Guild spoke as follows:

> Wells Fargo has been constantly telling you that they have always defeated unionization. We are happy to say that it is not so. The enclosed excerpts of an existing contract between Wells Fargo and the American Federation of Guards will attest to their misrepresentation. The entire contents of the current contract, which has been in effect for quite some time, is to [*sic*] lengthy to include in this letter, but we are certain that it will express the validity of such unionization, and prove to you that fellow officers from other branches of Wells Fargo are currently enjoying better wages and benefits * * *.
>
> * * * * *
>
> Those of you who attended the meeting on Feb. 13th were given copies of the bylaws of the Guild, and the majority have agreed that the laws were written to the common benefit of the security officer. They were outlined by a former officer who had great love and respect for his fellow workers * * *.

In a letter dated April 17, 1979, Wells Fargo set forth its version of the contract discussed by the Guild. Appendix at 133–35. Wells Fargo argued that the contract was one between Desert Patrol, Inc. and the American Federation of Guards, and that Desert Patrol was a "small separate corporation" which had already been unionized at the time of its purchase by Wells Fargo.[4] Wells Fargo also stated that the higher wage rates applied only to employees assigned to the Occidental Center, and that they had been negotiated by Wells Fargo and not by the union. The Wells Fargo letter also stated that several other benefits listed in the Guild materials as received by Desert Patrol employees were in fact not as good as the benefits received by Wells Fargo employees.

The second mailed-ballot election took place between April 17 and April 30, 1979. The Guild won the election by a vote of 67 to 59, with 165 eligible to vote and 130 votes cast—in other words, by an eight vote margin, the same margin by which it had lost the first election.

On May 2, 1979, an article appeared in the *Trentonian* in which Mr. Martin was quoted. He was the only person quoted for the Guild. The article characterized Mr. Martin as a "consultant" to the Guild. Appendix at 197.

Wells Fargo filed three objections to the election: that the Guild had misrepresented Wells Fargo as having engaged in foul play and unfair practices in the first election and had thereby implied that the NLRB supported the Guild (Objection 3), that the Guild had misrepresented the facts about the relationship between Wells Fargo and the American Federation of Guards and the nature of the contract achieved by the Federal (Objection 1), and that Mr. Martin had misrepresented the nature and extent of his relationship with the Guild subsequent to this purported resignation (Objection 2). Wells Fargo also argued that the misrepresentations were material.

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The Regional Director conducted an investigation and afforded all parties the opportunity to submit evidence. Despite a request from Wells

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[3] In a letter dated April 10, 1979, Wells Fargo had sent to the employees its own version of the events which had led to the ruling that a second election must be held. Appendix at 199–200.

[4] In its brief, Wells Fargo argues that Desert Patrol was purchased by Baker Industries, Wells Fargo's parent, and not by Wells Fargo. However, in its letter dated April 17, Wells Fargo implied that Wells Fargo had purchased the company of which Desert Patrol was a part.

Fargo that he do so, he did not conduct an evidentiary hearing. *See* appendix at 442. On July 20, 1979, the Regional Director handed down his decision overruling all of Wells Fargo's objections and certifying the Guild. Appendix at 247–58.

On the question of whether the Guild had misrepresented the facts about the American Federation of Guards and Wells Fargo in California (Objection 1), the Regional Director noted that Wells Fargo had itself stated to the employees that Wells Fargo had purchased Desert Patrol's parent, that the Guild's statements about the California contract were either quotations or "adequate paraphases," that the information about wage rates at the Occidental Center was in the form of a photocopy of the actual contract provision and indicated on its face that it only applied to employees stationed at the Center, and that "the information set forth in this material is easily subject to evaluation by the employees themselves." Appendix at 252–53. The Regional Director concluded "that there were no material misrepresentations contained in these documents which warrant setting aside the election." Appendix at 252. In the course of his discussion of the materials in question, the Regional Director referrred to testimony of Henry Rouse and Harry Martin the "former president," proffered by the Guild, concerning the date and content of the letter dealing with the California contract. If they had been called, Messrs. Martin and Rouse would have testified that the letter had been mailed to the guards on or before April 10 or 12, 1979. Appendix at 250.

On the issue of whether the Guild had tainted the second election by accusing Wells Fargo of committing unfair practices in sending out a facsimile ballot prior to the first election (Objection 3), the Regional Director ruled that the Guild's

> characterization of the results of that [first] investigation and Decision, while strong in tone, does reflect the Board's earlier determination that the Employer's conduct was improper. Consequently, the characterization of "foul play" in these circumstances, does not warrant setting the election aside, particularly where the Employer had given its own account of the Board's action.

Appendix at 256; footnote omitted.

With regard to Wells Fargo's contention that Mr. Martin had misrepresented his role in the Guild after his purported resignation (Objection 2), the Regional Director took note of Wells Fargo's contention that "the character and personal background of Harry J. Martin was [*sic*] in issue during the first campaign." Appendix at 254. The Regional Director wrote as follows:

> Rouse and Martin, stated that Martin resigned effective March 1, 1979, and that the letter in question was sent to all bargaining unit employees on March 31, 1979. The Petitioner also asserts that by the date of that letter, it had contacted several individuals to serve on the Board of Trustees * * *.
>
> It is conceded that the Petitioner did not advise the unit employees, prior to the date of election, who would be serving on the Board of Trustees, "Contrary to the assertion of the Employer that "new management of the Union was never made known to the employees" the Petitioner distributed a letter dated April 17, 1979, listing Patrick C. McCullagh [*sic*], Joseph Coculo, and Henry Rouse, as president, vice president, and secretary-treasurer, respectively.
>
> The Board has never, with respect to representation matters, adopted an affirmative requirement for a union to disclose the type of internal information that the Employer asserts should have been distributed to unit employees during the instant election campaign. Based on the above, I am unable to conclude that the statements contained in the Petitioner's letter were likely to confuse or mislead the voters as to the identity of the bargaining agent involved. I find that the fact that Petitioner did not inform the bargaining unit employees of the names of the new trustees, contrary to its statement that it would do so, constitutes the type of practice which is subject to employee evaluation during the election campaign. Noting that what the Petitioner said about the resignation of Harry J. Martin and the establishment of the Board of Trustees was true, and the Petitioner did not have any affirmative requirement to disclose the type of information involved herein prior to the election, I find that his objection does not warrant setting aside the results of the election.

Appendix at 254–55; footnotes omitted.

Wells Fargo filed a request for review of the July 20 decision and certification which was denied by the NLRB. While the petition for review was pending, Mr. Martin, as "advisor" to the Guild, sent Wells Fargo a mailgram dated September 10, 1979 demanding that Wells Fargo send the Guild a list of guards. Appendix at 430. Wells Fargo sent copies of that mailgram to the NLRB; however, they arrived at the Board after the Board had denied Wells Fargo's petition for review and were not considered. Appendix at 432.

Wells Fargo refused to bargain with the Guild in order to obtain judicial review of the certification. On October 23, 1979, the Regional Director issued an Order Consolidating Cases, First Amended Complaint and Notice of Hearing[5] based on the refusal to bargain. Appendix at 293–298. Wells Fargo answered the complaint, raising as defenses the contentions that Harry Martin had remained in control of the Guild throughout, that he had obtained the certification of the Guild by means of representing to the contrary, and that the Guild was in violation of section 9(b)(3) of the National Labor Relations Act. Appendix at 301–03.

A hearing was held before Edwin H. Bennett, Administrative Law Judge, on November 25, 1979. Wells Fargo sought to introduce evidence going to its affirmative defenses, including a letter dated October 22, 1979, from Robert F. O'Brien, counsel for the Guild, to Mr. Volger of the NLRB which, on its bottom, contains "cc: Harry J. Martin, President." Appendix at 434; exhibit 4 to the November 26, 1980 hearing.[6] The ALJ refused to hear Wells Fargo's evidence and quashed the subpoenas issued by Wells Fargo, on the ground that the issues which Wells Fargo was seeking to litigate had already been or could have been litigated in the context of the prior representation proceedings. The ALJ reaffirmed his decision not to hear Wells Fargo's evidence in his opinion, which he issued on May 9, 1980. Appendix at 439–449. The ALJ ordered Wells Fargo to bargain with the Guild and to post a notice.

Wells Fargo filed exceptions to the decision of the ALJ and petitioned for review of his decision by the NLRB. On September 9, 1980, the Board issued an order affirming the decision of the ALJ except in one minor respect related to the notice. Wells Fargo appealed from that affirmance, and the Board cross-petitioned for enforcement.

DISCUSSION

Because the Board's decision that Wells Fargo was guilty of an unfair labor practice in refusing to bargain with the Guild is premised upon its certification of the second election, we must consider the validity of that certification. *Anchor Inns, Inc. v. NLRB,* 644 F.2d 292, 293 (3d Cir. 1981). The Board has "'wide discretion'" in conducting representation elections. *Monmouth Medical Center v. NLRB,* 604 F.2d 820, 823 (3d Cir. 1979), *quoting NLRB v. A. J. Tower Co.,* 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946). However, where, as here, an election is close, "closer scrutiny

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of objections may be required of the Board." *Id.* at 823 n.4.

The Board overruled Wells Fargo's objections to the second election without holding an evidentiary hearing. A party objecting to an election is entitled to an evidentiary hearing if its objections have raised "substantial and material issues of fact." *Anchor Inns,* 644 F.2d at 296. If assuming all the allegations by the objecting party to be true would lead to the conclusion that the election should be set aside, then an evidentiary hearing to determine the truth of those allegations is required. *Id.* Based on this standard, we believe that Wells Fargo's contention that an evidentiary hearing should have been granted with regard to the role of Harry Martin is correct, and remand so that a hearing may be held on that subject.

A. *The Role of Harry J. Martin a/k/a Meehan (Objection 2)*

The Regional Director, affirmed by the Board, overruled Wells Fargo's objections concerning the alleged continuing role of Mr. Martin in guiding the Guild. He based his ruling on the absence of an affirmative obligation that a union "disclose the type of internal information [about who controls the union] that the Employer asserts should have been distributed to unit employees during the instant election campaign." Appendix at 255; footnote omitted. In addition, after stating the Guild's assertion that the Guild had "contacted several individuals to serve on the Board of Trustees," appendix at 254, the Regional Director stated that "what the Petitioner said about the resignation of Harry J. Martin and the establishment of the Board of Trustees was true." Appendix at 255.

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[5] The case with which the refusal to bargain was consolidated was settled and is not at issue in this appeal.

[6] This letter and several other documents were received into evidence by the ALJ "only for my personal convenience in writing the decision so that I have before me, in a single, contained file, the necessary proceedings for reference sake." Appendix at 347.

The Regional Director reached his decision without holding an evidentiary hearing, even though the factual question of whether or not Mr. Martin remained in control of the Guild was disputed. In his analysis of Wells Fargo's contentions, "the Regional Director substituted 'facts' gleaned from his *ex parte* investigation * * *." *Seasonal-All Industries, Inc. v. NLRB,* 654 F.2d 932 at 939, 940 (3d Cir. 1981), *quoting Anchor Inns,* 644 F.2d at 297. He should not have done so: material concerning disputed facts gleaned from an ex parte administrative investigation cannot take the place of an analysis of whether, if true, the allegations of an objecting party would warrant setting an election aside. *See Season-All Industries, supra* at 14–15; *Anchor Inns,* 644 F.2d at 297. Here, the question of whether Harry Martin remained in control of the Guild was a "substantial and material" issue of fact. Although it may be true that a union has no general duty to disclose information about who is running it, that does not answer Wells Fargo's objection here. Wells Fargo contends that Mr. Martin was himself a campaign issue in the first election, and that his representations about his departure from the Guild were, if false, material misrepresentations which would warrant setting aside the second election. We agree.

1. Materiality

The conclusion that Mr. Martin was himself a material campaign issue in the first campaign follows from a review of the campaign literature distributed by the Guild during the second campaign. The Guild with Harry Martin at its helm lost the first election by eight votes. Shortly after the Regional Director ordered that a second election be held, Harry Martin, in the opening salvo of the second campaign, sent his letter of resignation—his "last letter"—to the guards. His letter clearly implies that he resigned because he did not wish his past record to stand in the way of the Guild. In his letter he also implied that he was on the point of accepting a "well-paying" job elsewhere.

In an unsigned letter to the guards, the Guild, after Mr. Martin's ostensible severance of his ties with the Guild, announced that it was the stronger for Mr. Martin's resignation and that Mr. Martin would be remembered for his "courage and sacrifice." The Guild also stated that "many" of the Wells Fargo employees in the bargaining unit had failed to vote in the election be-

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cause of the "cleverly devised smear campaign leveled at Martin," and that Wells Fargo had escaped being unionized because its smear campaign had succeeded. Given the Guild's assertions that the "smear campaign" led to a failure to vote on the part of many of the guards and to the Guild's losing the election, the Guild cannot be heard to argue now that Mr. Martin's presence in the Guild was not a material issue in the first campaign.[7]

Mr. Martin sought to remove himself as a campaign issue by ostensibly resigning from the Guild. If, as Wells Fargo asserts, he removed himself in form but not in substance, then he remained as a campaign issue—only none of the voters knew it. At least some of those guards who failed to vote or voted against the Guild in the first election because Mr. Martin was in control of the Guild may have voted for the Guild in the second election under the erroneous assumption that Mr. Martin had severed his ties with the Guild. Mr. Martin's title was irrelevant; his role was not.

Not only did Mr. Martin seek to remove his character from the campaign, but he also sought to remove his inexperience. In the letter in which he announced his departure from the Guild, Mr. Martin also announced that a group of influential citizens had offered their services to the Guild, and that the Guild would be governed by a board of influential people and a board of guards. In a subsequent letter to the guards, the Guild stated that the "board and members of the committee have allied themselves to carry on the fight for your future benefits." The inference follows that the board of influential citizens was in place and looking after the interests of the Guild.

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[7] The Guild's assertion that the smear campaign succeeded in deterring some voters receives *prima facie* support from the fact that 120 guards voted in the first election (Harry Martin present) and 130 in the second (Harry Martin ostensibly absent).

The Board asserts in its brief that "the Union had never represented that Martin had severed all connection with the Union," and that "there was no evidence that the employees themselves were concerned about Martin's presence in the Union; rather, it is clear that it was the Company that made an issue out of who was running the Union during the second election." NLRB brief at 23. Neither assertion is correct.

2. Falsity

Wells Fargo contends that Mr. Martin in fact remained in control of the Guild, even after his purported resignation. In support of its contentions, Wells Fargo points to the following: that immediately after the second election, which the Guild won by eight votes, Harry Martin resurfaced as speaking for the Guild to the media; that it is difficulty to determine who was running the Guild if Mr. Martin was not; and that it was Harry Martin who demanded a list of guards from the Wells Fargo on September 10, 1979.[8] Wells Fargo also cites the October 22, 1979 letter written by Robert O'Brien, Counsel for the Guild, to the NLRB after the Guild had been certified by the Board. Copies of that letter were sent to John F. Cannon, counsel for Wells Fargo, and to Harry J. Martin, "President."

An additional item in support of Wells Fargo's contention that Harry Martin maintained his role in the Guild after his purported resignation emerges from the opinion of the Regional Director. In his opinion, the Regional Director referred to a proffer of testimony which Harry Martin would give to the effect that the letter written by the Guild about the relationship between the California union and Wells Fargo was mailed on or about April 10 or 12, 1979, considerably after the date Mr. Martin claimed to have resigned.

The Regional Director found that "what the Petitioner said about the resignation of Harry J. Martin and the establishment of the Board of Trustees was true." The only bases for these conclusions set forth in the opinion are the Regional Director's findings that Harry Martin had in fact resigned the presidency of the Guild and that the Guild

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had "contacted" influential citizens. Those findings, however, are not determinative of the objections raised by Wells Fargo. Wells Fargo contends that Harry Martin remained in control. That he did not retain the title of president does not mean that he did not remain in control. An evidentiary hearing is required to ascertain whethe. he in fact remained in control. In addition, the finding that the Guild had "contacted" influential citizens. Those findings, however, are not determinative of the objections raised by Wells Fargo. Wells Fargo contends that Harry Martin remained in control. That he did not retain the title of president does not mean that he did not remain in control. An evidentiary hearing is required to ascertain whether he in fact remained in control. In addition, the finding that the Guild had "contacted" influential citizens does not answer Wells Fargo's contention that the Guild had falsely asserted that influential citizens had offered themselves to the Guild and that the board of influential citizens was in place.

The Regional Director's failure to conduct an evidentiary hearing on the issue of whether Mr. Martin maintained his ties with the Guild was erroneous. In *General Knit of California, Inc.*, 239 NLRB 619 (1978), the Board readopted the rule of *Hollywood Ceramics Co., Inc.*, 140 NLRB 221 (1962), pursuant to which an

> election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on election.

General Knit, 239 NLRB at 620, *quoting Hollywood Ceramics*, 140 NLRB at 224; footnote omitted. Under that rule, if Mr. Martin in fact remained in control of the Guild after his purported departure, the second election should be set aside. According to the Guild's own campaign literature, Mr. Martin's presence as a guiding force in the Guild was a campaign issue in the first campaign: Mr. Martin/Meehan severed his ties with the Guild in order to leave those who had been affected by the "smear campaign" free to vote for the Guild. If Mr. Martin in fact continued to guide the Guild, his purported resignation was a misrepresentation, a substantial departure from the truth, and might well have had a significant impact on the election, which was close. Wells Fargo, of course, had no opportunity prior to the election to respond to the misrepresentation effective, since Mr. Martin did not resurface until after the election and only the Guild knew the truth.

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[8] Because Mr. Martin did not send the mailgram until after the Guild had been certified, the Regional Director did not have the mailgram before him in deciding whether to hold an evidentiary hearing.

Objections 1 and 3 of the Second Election

Wells Fargo also raised objections to the Guild characterization of the events which led to the setting aside of the first election as "foul play" and "unfair practices" on the part of Wells Fargo. However, it is undisputed that Wells Fargo had an opportunity to place its side of the story before the guards; indeed, Wells Fargo apparently explained the need for a second election to the guards before the Guild distributed the materials containing the characterizations to which Wells Fargo objects. In any event, as the Regional Director pointed out in his opinion certifying the Guild, Wells Fargo was in fact found guilty of conduct which required the setting aside of the first election.

Wells Fargo also objected to information disseminated by the Guild concerning the alleged relationship between Wells Fargo and the American Federation of Guards in California. For the reasons given by the Regional Director and set forth *supra,* this Court affirms the Board in overruling the objections of Wells Fargo to the Guild's analysis of the relationship between Wells Fargo and Desert Patrol.

The First Election

The Regional Director set aside the first election on the ground that Wells Fargo had distributed an altered facsimile ballot. In *Allied Electric Products, Inc.*, 109 NLRB 1270 (1954), the seminal NLRB opinion on facsimile ballots, the Board set an election aside where the union had distributed a sample Board ballot with the word "yes" printed to one side of the "yes" box, an "X" printed in the "yes" box, and an exhortation to place an X in the yes box printed on the bottom of the sample. In the course of its opinion, the Board wrote as follows:

> We find that the reproduction in this case by the Petitioner of altered copies of the Board's official ballot tended to interfere with a free choice in the election, and was improper. We shall therefore set the election aside and order a new election. Upon consideration, the Board has decided that in the future it will not permit the reproduction of any document purporting to be a copy of the Board's official ballot, other than one completely unaltered in form and content and clearly marked sample on its face, and upon objection validly filed, will set aside the results of any election in which the successful party has violated this rule.

Id. at 1272; footnotes omitted.

This Court recently discussed the *Allied Electric* rule in *Monmouth Medical Center,* 604 F.2d at 825-27 & n.12, and noted that the rule against distribution of an altered sample ballot has been strictly applied by both the Board and the courts, on the ground that such distribution has a strong tendency to mislead. Thus, this Court will affirm the action of the Regional Director in setting aside the first election. This Court notes in passing, however, that the possibility that the facsimile ballot in this particular case *actually* misled anyone is small. Among other factors, the ballot was clearly marked as a sample and was reproduced on the distinctive blue and red Wells Fargo letterhead. Thus, in setting aside the first election the Board applied the *Allied Electric* rule at its most strict, an application warranted in part by the closeness of the election. *See Monmouth Medical Center,* 604 F.2d at 823 n.4.

The first election, however, was no closer than the second. In ruling that the first election must be set aside, the Board stretched the *Allied Electric* doctrine to its outer limits. In certifying the results of the second election, the Board adopted a flexible approach in its analysis of objections to the materials distributed by the Guild and possible misrepresentations therein. The strictness of the Board's action in setting aside the first election, when contrasted with its flexibility in certifying the Guild after the second election, supplies a reason in addition to the ones discussed above for a remand of the case to the Board: the Board should have been as strict in examining possible Guild misrepresentations as it had been examining Wells Fargo's alleged misconduct, particularly given that the margins of victory in the two elections were equally narrow.

In sum, this Court affirms the Board's decision to set aside the first election and the Board's overruling of Wells Fargo's first and third objections to the second election (concerning the California union and Guild allegations of "foul play"). This Court remands this case to the Board for an evidentiary hearing on Wells Fargo's second objection (the role of Harry J. Martin/Meehan).[9] The NLRB's cross-petition for enforcement of its order is denied.

NLRB v. Digital Prging System of Toledo, Inc.

659 F.2d 725 (6th Cir.), September 17, 1981—244 NLRB 127

On petition to enforce Board Order

Before KEITH and MARTIN, Circuit Judges, and PECK, Senior Circuit Judge

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The National Labor Relations Board is applying to the Court under § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), to enforce its order against the Digital Paging Systems of Toledo, Inc., issued on April 29, 1980, to cease and desist from unfair labor practices, to reinstate an employee and to bargain with the Union. The Company filed an answer to the application. The application has been referred to a panel of this Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

In August, 1978, the Company demoted Carol Van Tuinen from the position of manager to salesperson in the Toledo office. She and the only two other employees in the bargaining unit became concerned over the security of their jobs and contacted a union agent. The three signed union authorization cards. The union agent met with the new manager to demand recognition. The manager began to interrogate Ms. Van Tuinen and the others about their knowledge of the union. On September 19, 1978, Company officials learned of the demand and two days later Ms. Van Tuinen was discharged. The Company thereafter refused to bargain with the Union, which then filed unfair labor charges against the Company.

As a result of the charges, the National Labor Relations Board held a hearing before an Administrative Law Judge. He found that the Company had unlawfully interrogated employees about union activi-

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ty, improperly discharged Ms. Van Tuinen and refused to bargain with the Union in violation of § 8(a)(5) and (1). The ALJ recommended, *inter alia,* an order be issued requiring the Company to bargain with the Union.

The Company filed exceptions to the latter two findings. The Board affirmed the ALJ's decision and adopted his recommendations. That decision is reported at 249 NLRB No. 15 (1980).

The standard of review in Board cases is whether the Board's determination is supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Conflicts in the evidence are for the Board to resolve and, if supported by substantial evidence, such resolutions must be accepted by this Court. *NLRB v. Pinkerton's Inc.,* 621 F.2d 1322, 1324 (6th Cir. 1980). The same is true for determinations of credibility. *NLRB v. Cement Transport, Inc.,* 490 F.2d 1024, 1029 n.5 (6th Cir.), *cert. denied,* 419 U.S. 828, 95 S.Ct. 47, 42 L.Ed.2d 52 (1974).

Upon review, the Court has examined the record, including portions of the hearing held before the Administrative Law Judge. We find substantial evidence in the record to support the Board's findings of the unfair labor practices listed above. We also find the Board properly applied the guidelines of *NLRB v. Gissell Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969) in ordering the Company to bargain with the Union.

Accordingly, enforcement of the Board's order of April 29, 1980, is hereby granted. Rule 9(d)3, Rules of the Sixth Circuit.

NLRB v. Medical Mutual of Cleveland, Inc.

659 F.2d 726 (6th Cir.), September 17, 1981—248 NLRB 441

On petition to enforce Board Order

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Before KEITH and Martin, Circuit Judges, and PECK, Senior Circuit Judge

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[9] New evidence on the 9(b)(3) issue may materialize during the hearing on Mr. Martin's role in the Guild or during the preparation for that hearing. This opinion should in no way be construed as precluding additional exploration of the 9(b)(3) issued by the Board if the need to do so arises.

The National Labor Relations Board (the Board) is applying to the Court under § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) to enforce its order

against Medical Mutual of Cleveland, Inc. (the Company) issued on March, 13, 1980 to cease and desist from the unfair labor practices found and to reinstate an employee to her former position. Medical Mutual has filed a cross-application for review and to set aside the order. The application has been referred to panel of this Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

In September, 1977, the Union began a drive to organized the Company's employees and, on July 11, 1987, filed a representation petition with the Board requesting a Board-conducted election. By June, 1978, the Company had formed a Communications Committee to combat the Union's organizational efforts among its employees. The Board found a violation of Section 8(a)(1) of the Act, in the interrogation attributed to a Company supervisor. At the beginning of a Communication Committee presentation, the supervisor informed the employees in attendance that "if there is anyone here that doesn't want to be fair and hear the other side of this, then you may leave." In response to this statement, employee Mickey Woods did leave and was subsequently confronted by a supervisor about her reason for leaving. The Board found that the remark "amounted to conduct which, * * * compels employees to make a choice or exhibit the depths of their pro or antiuion feelings * * *."

Beginning in May, 1978, Mary Olsen became an active union supporter. On February 27, 1979 she was placed on probation for low productivity. She was given thirty days to improve her performance or face termination. Olsen offered to resign rather than face the pressure of working on probation. However, Supervisors Lencses and Mendolsohn encouraged her to stay on. Mendolsohn told Olsen that there definitely was a place for her, that the matter could be worked out, and that he'd like to see some improvement in her production over the next thirty days. On March 15, Mendolsohn told her that there were indications that her productivity had increased. On March 20, Mendolson told her he would be away from March 21 to 27 and that Supervisor Rosul would meet with her. However, no meetings took place during that period. Olsen was discharged on March 28, two days after a complaint had issued on the charge filed March 7, 1979 and only a few hours after she had refused to postpone the hearing date.

On April 4, 1979 the General Counsel amended the complaint in the Olsen case to include allegations that Medical Mutual discharged Olsen in violation of Section 8(a)(1) and (4) of the Act. The Board adopted the Administrative Law Judge's finding that Medical Mutual violated Section 8(a)(1) of the Act by coercively interrogating Woods about her union activity. The Board also adopted the Administrative Law Judge's finding that Medical Mutual violated Section 8(a)(1) and (4) of the Act by discharging Olsen on March 28, 1979. The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the order requires the Company to offer Mary Olsen reinstatement to her former position, to make her whole for loss of earnings and to post notices.

The standards of review of Board cases is whether the Board's decision is supported by substantial evidence on the record as a whole, including the body of evidence opposed to the Board's view. *Jim Causley Pontiac v. N.L.R.B.*, 620 F.2d 122, 213 (6th Cir. 1980). This standard of review does not allow the reviewing court to set aside the Board's choice between two conflicting views of the evidence, even though the Court might have reached a different conclusion, if the matter had been before it *de novo*. *Randall v. N.L.R.B.*, 638 F.2d 957 (6th Cir. 1981).

Upon review, the Court has examined the record, including portions of the hearing held before the Administrative Law Judge. We find substantial evidence in the record

to support the Board's findings of the unfair labor practices listed above.

Accordingly, enforcement of the Board's order of April 29, 1980 is hereby granted. Rule 9(d)3, Rules of the Sixth Circuit.

NLRB v. Wilson-Crissman Cadillac, Inc.

659 F.2d 728 (6th Cir.), September 17, 1981—244 NLRB 219

On petition to enforce Board Order

Before KEITH and BOYCE F. MARTIN, JR., Circuit Judges, and PECK, Senior Circuit Judge

This matter has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The National Labor Relations Board (Board) is applying to the Court under § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), to enforce its order against Wilson-Crissman Cadillac, Inc. (the Company) issued on August 14, 1979, to bargain with the Union and to furnish the Union with requested information about unit employees. The Company has filed an answer to the application. The Company refused to bargain with the Union based on its contention that the Board improperly overruled the challenge to the ballot of Carl Roehling because he was either a supervisor within the meaning of the Act or a managerial employee and was thus ineligible to vote. The Union filed an unfair labor practice charge with the Board on May 4, 1979. On May 9, 1979 the General Counsel issued a complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. In its answer, the Company admitted its refusal to meet but denied that it violated the Act by so doing in that it maintained a good faith doubt as to the majority status of the Union. On August 14, 1979, the Board issued its decision and order granting the General Counsel's motion for summary judgment and finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Board's order requires the Company to cease and desist from refusing to bargain with the Union, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's order requires the Company to bargain with the Union upon request, to embody any agreement reached in a signed agreement, to furnish the Union with the information sought with respect to bargaining unit employees, and to post the appropriate notices.

The standard employed by courts reviewing a Board determination of factual issues is whether its findings are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). Upon review of the record it appears that the Board's finding that Roehling is not a supervisory or a managerial employee within the meaning of the Act is supported by substantial evidence.

Section 2(11) of the Act, 29 U.S.C.A. § 152(11) defines "supervisor" in the following manner:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The exercise of any one of the enumerated powers combined with "independent judgment" is enough to make one a supervisor. *Walla Walla Union Bulletin v. N.L.R.B.*, 631 F.2d 609, 613 (9th Cir. 1980). The record supports the Board's finding that Roehling does not have the authority to hire or fire. During the short periods that Roehling is "in charge" of the parts department, he performs routine tasks such as ordering parts when the bin is empty and assigning tasks such as sweeping and emptying waste paper baskets. It appears that he has no control over inventory nor does he participate in formulating or determining policies for the employer with regard to labor relations. It has been held that the mere fact that an employee may give some instructions to others, or that he may command their respect, does not indicate that he must identify with the interest of the employer rather than the employees; the test must be the significance of his judgments and directions. *Stop and Shop Companies, Inc., Etc. v. N.L.R.B.*, 548 F.2d 17,

19 (1st Cir. 1977). There is evidence that Roehling had the title "assistant parts manager" however, the specific job title of the employer is not control-

ling. Courts must examine the employee's actual job responsibility, authority and relationship to management. *Walla Walla Union Bulletin v. N.L.R.B., supra.*

The Supreme Court has defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decision of their employer." *N.L.R.B. v. Yeshiva University,* 444 U.S. 672, 682, 100 S.Ct. 856, 862, 63 L.Ed.2d 115 (1979). This Court has held:

> The determination of an employee's managerial status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his decision must conform to the employer's established policy.

N.L.R.B. v. Retail Store Emp. U., Local 876, 570 F.2d 586, 592 (6th Cir.), *cert. denied,* 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed.2d 109 (1978). The record is devoid of any involvement with labor policies by Roehling. His responsibilities are "minor in nature and not tantamount to those of an employee who formulates, determines, and effectuates his employer's policies." *Illinois State Journal-Register, Inc. v. N.L.R.B.,* 412 F.2d 37, 41 (7th Cir. 1969).

This Court has held that the finding of the Board must be sustained if it is supported by substantial evidence on the record considered as a whole. *N.L.R.B. v. Retail Store Emp. U., Local 876,* 570 F.2d at 589. Accordingly, enforcement of the Board's order is granted pursuant to Rule 9(d)3, Rules of the Sixth Circuit, because the questions on which the decision depends are so unsubstantial as not to need further argument.

NLRB v. Cable Vision, Inc.

660 F.2d 1 (1st Cir.), September 18, 1981; rehearing denied Oct. 7, 1981—249 NLRB 412

On petition to enforce Board Order

Before CAMPBELL, BOWNES and BREYER Circuit Judges

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BREYER, Circuit Judge: This case grows out of a labor dispute between Cable Vision, Inc., a subsidiary of AR Telecommunications, Inc., which sells and installs cable television service in Lewiston, Maine, (the "Company") and Local 2327, International Brotherhood of Electrical Workers, AFL-CIO (the "Union"). On January 17, 1977, the NLRB certified the Union as the exclusive bargaining representative of the Company's seven technicians and installers and its one part-time

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worker. Between February 23, 1977 and April 27, 1978, the Union and the Company held twenty-two collective bargaining sessions. The Union went on strike against the Company from May 1 until June 23, 1978. They did not reach agreement.

The NLRB found that the Company committed several unfair labor practices during this time: it did not bargain in good faith; various of its supervisors in conversations with employees coerced them in the exercise of their organizational rights; and the Company effectively discharged one of its employees because he engaged in union activity. The Board has applied for enforcement of a remedial order[1] based upon these findings.

We have reviewed the record in accordance with the mandate of *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). We uphold findings of fact if supported by substantial evidence on the record as a whole. (Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 477, 71 S.Ct. at 459, *quoting Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)). We sustain the inferences that the Board draws from those facts and its application of statutory standards to those facts or inferences as long as they are reasonable. *Soule Glass and Glazing Co. v. NLRB,* 652 F.2d 1055, 1073 (1st Cir. 1981). And we will not substitute our judgment for that of the Board when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB,* 340 U.S. at 488, 71 S.Ct. at 464, 95 L.Ed. 456. Our review of the record in light of these standards convinces us that the Board's findings are adequately supported and we grant enforcement of the Board's order.

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[1] The Board's Decision and Order is reported at 249 N.L.R.B. 412 (1980).

I.

The Board found that the Company violated section 8(d) of the National Labor Relations Act (the Act) by failing to bargain with the Union in good faith.[2] Rather, in its view, the Company engaged in mere "surface bargaining", or "shadow boxing to a draw", or "giving the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining". *Quoting NLRB v. Herman Sausage Co.,* 275 F.2d 229, 232 (5th Cir. 1960). We have noted that in such a case,

> [t]he question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.

NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied,* 346 U.S. 887, 74 S.Ct. 139, 98 L.Ed. 391 (1953). The record supports the Board's negative answer to the question.

First, the Administrative Law Judge found, and the Board concurred, that the bargaining between the parties was marked by a series of delays caused primarily by the Company. The record supports this conclusion. Indeed, these factors alone go far towards supporting a finding of an unfair labor practice. Only twenty-two bargaining sessions were held over a period of fourteen months—with an average of two weeks and as much as a month passing between each session. The parties averaged only 4½ hours per month at the bargaining table. While this schedule would not be a matter of concern if both parties were pleased with it, such was not the case here. Rather, the Company repeatedly ignored requests by the Union that both the frequency and length of the bargaining sessions be increased and rejected a Union request to accept counter-proposals by mail to expedite the bargaining. Additionally, the record shows that only four of the twenty-two sessions began on time—and most of the delays appear to be attributable to the Company.

Foot-dragging characterized the bargaining process. The Company failed to provide a single written proposal of its own until the fifth session, 3½ months after receiving the Union's proposed agreement. The Company's first proposals on discharge and travel expenses appeared six months into the bargaining. In addition, the Company did not complete data on its health, pension and welfare plan until some three months after the Union's initial request for the information.

At the bargaining sessions, the Company tended neither to accept, reject, nor offer modifications of Union proposals. Instead, it would promise to "study" and "consider" the Union's suggestions, a promise the Company was still freely giving after nearly a year of negotiations during which its own proposals had been submitted and resubmitted with little, if any, change. While an attitude of open-mindedness is a hallmark of good faith bargaining and should be encouraged by both the Board and the courts, the mere statement that a party will "study" and "consider" proposals, repeated *ad infinitum* and combined with other evidence of deliberate delay, gives the impression of a party which is attempting to avoid rather than to induce agreement.

Second, the Company's positions on the substantive issues debated at the bargaining table suggest a lack of good faith. The parties debated sixteen major subjects.[3] In thirteen of the areas, it was possible to determine what the Company's practice was prior to unionization. In ten of those thirteen, the Company sought an agreement less favorable to its employees than its *current* practice. It offered less than "current practice" in relation to wage increases, unpaid personal time, standby work on a holiday, tower work, out-of-town expenses, the pension plan, holiday pay for work before and after a holiday, subcontracting, work week schedule, and vacation periods.

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[2] Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d), 29 U.S.C. § 158(d), states that:

> to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement.

At the same time, however, this "obligation does not compel either party to agree to a proposal or require the making of a concession * * *." *Id.*

[3] The sixteen priority subject were wages/promotion; seniority-layoff; work week; overtime; grievance and arbitration; call out; standby; paid/unpaid absences; tower work; subcontracting; vacations; holidays; expenses; uniforms; pension, health and welfare; and management rights.

During the next twenty-two months of bargaining, each side made proposals and counterproposals. The record suggests that the Union made important concessions in fourteen areas, while the Company's concessions seem minor. In the area of "seniority", for example, the Union initially sought seniority within job classification, two weeks notice and severance pay if there was a lay-off, laying off by seniority with part-time employees and subcontractors going first, recall rights for two years, and a two-week period for a recalled employee to return to work. The Company proposed a lay-off principle that would allow it to keep part-time employees and subcontractors while laying off bargaining-unit members according to length of service and according to "ability and skill to perform in the judgment of the Employer"; it proposed recall rights for three months, and permitted three work days for a recalled employee to return to work. The Union later modified its proposals to allow the employer to use skill and ability in considering whom to lay off; it withdrew its requests for notice and severance pay; and it reduced its demand for recall rights to six months with a ten day period for the recalled employee to return to work. The Company met these modifications by offering to increase its proposed "three work day" return period for a recalled employee to five days. It made no further offer.

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In most key areas the Company remained immovable. With the exception of "grievance procedure", it did not accept any change during the negotiations that would have made the employees better off in any significant respect than the firm's "current practice". It did not change its position on wages or insurance. (Indeed, the Company would not offer to give its employees the annual wage increase that was its current practice, despite significant union modifications of its initial wage request.) It made no counterproposal on the issue of "uniforms". It remained firm as to the essential aspects of its position on a pension plan, call-outs, and sick leave. It insisted upon an extensive management rights clause, which would have significantly curtailed the Union's general powers, and it also insisted upon specific individual restrictions upon such Union activities as grievance arbitration. In sum, the record suggests little meaningful response by the Company to the Union's offers and counteroffers—to the point where, after twenty-two months of bargaining, the parties reached agreement on only one subject: tower work.

While "[a]damant insistence on a bargaining position. * * * is not in itself a refusal to bargain in good faith", *Chevron Oil Co., Standard Oil Co. of Tex. Div. v. NLRB,* 442 F.2d 1067, 1072 (5th Cir. 1971), and use of a company's relative economic strength to exert pressure on a union "is of itself not at all inconsistent with the duty of bargaining in good faith", *NLRB v. Insurance Agents' Union,* 361 U.S. 477, 490–91, 80 S.Ct. 419, 427–28, 4 L.ED.2d 454 (1960), the failure to come close to agreement accompanied by a failure to make meaningful concessions on nearly every subject suggests that something is awry. One major function of collective bargaining is to allow the parties—union and management—*separately* to order their priorities and then to meet and trade off what is less important for what is more important to each side individually. D. Bok and J. Dunlop, *Labor and the American Community* 225 (1970). Thus, one would ordinarily expect meaningful trading and movement—even within the confines of a fixed management budget—particularly when as many as sixteen different complex subject matters are on the table. When no such movement occurs, one wonders why. And, if management has adhered uniformly to proposals predictably unacceptable to the Union, has refused to make meaningful concessions in nearly every area, and has insisted (without clear justification in principle) on maintaining its original positions in these areas (and the Union has not), one has some evidence for concluding that the Company has engaged in surface bargaining instead of bargaining in good faith.

These Board findings on both procedural and substantive matters are supported in the record. They justify a Board finding of failure to bargain in good faith. The circumstances present here are sufficiently close to those at issue in *Reed & Prince,* 205 F.2d at 131 (employer's delay of initial bargaining session, refusal to allow union to post routing notices to members, unjustified delay in providing requested information, adamant refusal to consider key terms without a principled reason, and presenting a seriously deficient and one-sided "proposed contract") as to warrant a similar result. *See K Mart Corp. v. NLRB, 626 F.2d 704, 704–07 (9th Cir. 1980). NLRB v. Wright Motors, Inc.,* 603 F.2d

604, 608—10 (7th Cir. 1979). *See also Alba-Waldensian, Inc.*, 167 N.L.R.B. 695 (1967).

II.

The Board also found that several conservations between two company supervisors, Walter Radvon and Ronald Hammaker, and various employees interfered with, restrained, or coerced the employees in the exercise of their rights to organize, join unions, bargain collectively, and strike, in violation of the Act, Section 8(a)(1).[4] In determining the likely effect of these conversions, the Board correctly examined

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the employer's remarks "from the listener's point of view", *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 105 (5th Cir. 1963), taking into account "the economic dependence of the employees on their employers" and "the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 1941, 23 L.Ed.2d 547 (1969). We believe the conversations were such as to justify a Board finding of violation.

One conversation took place in Cable Vision's office about a year after the Union's certification. Radvon, a supervisor working for Montachusetts Cable, another of AR Telecommunication's subsidiaries, spoke to Richard Vallee, a Cable Vision employee. Radvon told Vallee that Cable Vision's employees were unhappy but Montachusetts' employees had no union and were happy. He stated that if Cable Vision's employees dropped the Union there would be changes. He added that he had once been a member of a union, which had wanted only money and was no good. In response to Vallee's question about what specific changes he might expect if the union were dropped, Radvon replied that he could make no specific promises or say that there would be a raise. The ALJ found that, in context, Vallee might reasonably have believed Radvon to promise impliedly that working conditions would improve if the Union were dropped. His refusal to give a *specific* promise did not demonstrate the absence of an implied, general promise. While Radvon did not work for Cable Vision, he was a supervisor at another AR Telecommunications subsidiary; hence his views expressed in a converation were bound to carry weight. The degree of weight and the likely interpretation to be given to Radvon's statements depends upon context, and an ALJ is likely to understand that context better than is a reviewing court. Though the issue is a close one, given the deference due the Board on this type of question, a majority of the court [5] upholds its finding that Radvon gave an implied, general promise to remedy employee grievances or provide other employee benefits if the Union was abandoned, in violation of section 8(a)(1). *NLRB v. Pilgram Foods, Inc.*, 591 F. 2d 110, 114–17 (1st Cir. 1979).

Another conversation took place in early 1978 when Hammaker, the Company's Director of Operations, rode with employee Lucien Mailhot on his service route. Mailhot apparently brought up the subject of union negotiations. After avoiding the subject for a while, Hammaker asked Mailhot why he had voted for the Union. In response to Mailhot's complaints about management, Hammaker said that management had been changed and that matters would have improved, but now that there was a union "it was going to take some time". Hammaker asked for other comments. Mailhot complained about the firm's policy concerning uniforms. Hammaker noted that there was a new manager, but that Mailhot's complaint about the Company's charge for uniforms would have to be negotiated through the Union. Mailhot asked about his annual raise; Hammaker responded that he would probably not get it "because things had to remain status quo because of the Union."[6] Hammaker asked what the employees wanted and what they hoped to achieve through the Union. Mailhot said that the employees would not give up. Hammaker assured Mailhot that the Company would not penalize him if he dropped the Union. And, with Mailhot reiterating his support for the Union, the conversation ended.

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[4] Section 8(a)(1), 29 U.S.C. § 158(a)(1), makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees", in the exercise of their section 7 rights to organize and to engage in protected concerted activities.

[5] Judge Campbell believes that there is not substantial evidence to support the Board's finding in this regard, and would reverse on this particular matter.

[6] Hammaker testified at the hearing before the ALJ that the employees received merit raises each year, "give or take three months."

Again, the issue is a close one. But, on balance, we believe that the ALJ, primarily responsible for judgments as to credibility, *see NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d 1108, 1112 (1st Cir. 1975), could

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reasonably conclude that this conversation contained elements of restraint, interference or coercion, in that Hammaker drew Mailhot out about his grievances and implied that they might be resolved were there no union, *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d at 114–15. Hammaker impliedly (and wrongly) blamed the Union for a decision to withhold a wage increase, *NLRB v. Otis Hospital*, 545 F.2d 252, 255–56 (1st Cir. 1976).[7] And, Hammaker delved into the strength of Mailhot's union sympathies, *id.* at 256–57; *NLRB v. Sandy's Stores, Inc.*, 398 F.2d 268, 270 (1st Cir. 1968).

Finally, employee Ralph Caron testified that Hammaker and Vallee met him on the job in January 1978. When Carson complained about the lack of a raise, Hammaker said that he could do nothing about it because "there would be outside influences." In response to a question by Caron about his uniform, Hammaker noted that his men at Montachusetts did not pay for their uniforms but Cable Vision's employees did pay. The ALJ, reasonably crediting Caron's assertions over Hammaker's denials, *see NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d at 1112, found that these responses constituted a wrongful effort to blame the Union for the employer's decision to withhold the wage increase, *NLRB v. Otis Hospital*, 545 F.2d at 255–56, and an implied promise that a grievance might be resolved were the Union given up, *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d at 114–15. In sum, we believe in the case of each of these conversations that the ALJ's findings and the Board's decision to adopt those findings were within the confines of the statute and adequately supported in the record.

The most questionable of the Board's determinations is its finding that the Company violated sections 8(a)(1) and 8(a)(3)[8] of the Act when it assigned installer Donald Jandreau to standby duty. During his years with the Company Jandreau worked during his off-hours as a musician at various night clubs, mostly on weekends and an occasional week-night, with each engagement lasting for three or four hours. He also attended rehearsals about twice a week for three to four hours. Jandreau testified that during some months, his income from his musical work exceeded his earrings at the Company. His musical activities were reported in the Company's November-December 1977 newsletter, and Company Supervisor Jim Palmer attended some of his performances. Jandreau refused to accept the standby duty, requiring night and weekend availability, and resigned from the Company. This, in the Board's view, amounted to his "constructive" discharge by the Company and discriminated against him on account of his union activity.

In a dual motive case such as this one, initial inquiry is whether the Board has made a *prima facie* showing that a "significant improper motivation" underlay the Company's action. *Statler Indus., Inc. v. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). Such a showing can rest either on independent evidence of antiunion animus or on the circumstances surrounding the conduct itself. *Id.* at 670. Here we find both sorts of evidence.

First, there is evidence that, prior to Jandreau's assignment, the Company did not assign employees with his limited technical abilities to standby work. The Company installs and maintains cable television systems. It stands ready to respond to emergency calls from its customers. Such calls may reflect a problem with a television set in a customer's home, with the wires connecting that set to the outside trunk lines,

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or with parts of the cable television "system" in the area outside the home. But, since the Company usually dispatched standby workers to the field only after three service calls from an area were received, usually, or at least often, emergency work involved a "system" problem. Those who, like Jandreau, were primarily installers could deal with fairly simple problems related to fine-tuning the television set, to its installation, and to the home/

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[7] *See generally NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 199 (2d Cir. 1969) (where wage "increase were given pursuant to normal Company policy", failure to grant the usual increases during negotiations may be held to constitute "punitive action" by the Company against those engaging in union activities.)

[8] Section 8(a)(3), 29 U.S.C. § 158(a)(3), provides in relevant part that "[i]t shall be an unfair labor practice for an employer by discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization."

trunk wire connections. But, they were not able to deal with most "system" problems. Rather, "system" problems were ordinarily dealt with by technicians, who could service system amplifiers, transformers, relays, main trunk lines, and deal with more complex electronic problems. Thus, it is not surprising that the Company's standby roster originally contained the names of technicians and those installers who had received technician-type training, but not Jandreau.

Second, there is evidence that Hammaker, who assigned Jandreau to standby duty, knew that Jandreau held a job as a part-time musician, that standby duty and musical duty would prove incompatible, and that Jandreau was, therefore, likely to quit. Indeed, Jandreau told Hammaker that Hammaker's predecessor had promised him when he was hired that he would not have to work standby as an installer.

Third, Jandreau was an important figure in the Union. He was chief union steward, the leading organizational activist, the employee representative at contract negotiating sessions, and the most active employee on the picket line.

Fourth, Hammaker assigned Jandreau to standby duty on June 26, 1978, three days after the strike ended. He also incorrectly implied to Jandreau that he was without power to change Jandreau's assignment.

Fifth, the Company's activities during the negotiation sessions and its practices described earlier in this opinion provide some evidence of an antiunion animus.

We think these factors suffice to establish a "significant improper motivation" for the standby duty assignment. The burden therefore shifts to the Company to "prove that it had a good reason, sufficient in itself, to produce" the assignment. *Statler Indus., Inc., v. NLRB,* 644 F.2d at 905, quoting *NLRB v. Eastern Smelting & Refining Corp.,* 598 F.2d at 671. This shift does not impose an overall burden upon the Company of proving itself "innocent" of violating the statute. Rather, it must simply come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation. *NLRB v. Amber Delivery Service, Inc.,* 651 F.2d 57, 69 (1st Cir. 1981). We believe the ALJ—the trier of fact—could reasonably conclude that the Company here failed to do so.

In its efforts to show that it would have assigned Jandreau to standby duty anyway—regardless of any "antiunion motive"—the Company produced evidence that two "installers" had been placed on the standby roster even before the strike, that Jandreau was able to carry out many technical repairs, that technological developments had made "emergency" repairs easier to carry out, that the Company placed eight other installers (hired during the strike) on the standby roster after they had been employed for eight weeks, and that Jandreau was able to "trade" his standby duties with other employees.

The ALJ found this evidence insufficient to overcome the *prima facie* case for several reasons. First, the two employees previously on the standby roster, while called "installer", had significantly more technical training than Jandreau and were effectively "technicians". Second, the technological developments took place in late 1977 (or January 1978 at latest); no change in the nature of the emergency work had taken place since that time; yet the Company did not put installers on standby duty until it approached Jandreau in June. Third, while Jandreau was able to perform many repairs, he had significantly less ability to make "system" repairs than all others who had previously been placed on standby duty. Fourth, (despite the strong support that he assignment of eight other installers to standby duty apparently offers the Company's argument) the eight "strike replacement" workers were not placed on the standby roster until well after Jandreau was placed there (thus calling into question the value of their assignment as objective evidence). The record is silent as to the extent of their technical training. And, during the strike itself, when the Company may have been hard pressed for personnel to perform emergency work, it did not assign installers to standby duty, but, rather, relied upon one technician to perform emergency work.[9]

The record provides evidence in support of the claims and findings by both the Company and the

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[9] The Company argues that during the bargaining the Union agreed, with no objection from Jandreau, to permit all "qualified" employees to perform standby. But that fact does not show that Jandreau expected to be called to standby because, presumably he did not think of himself as "qualified" to do such work.

ALJ. After reviewing it, we would state our conclusion on this issue with caution: although we might not have decided this issue as did the Board were we viewing the matter *de novo,* we cannot say that there was no substantial evidence supporting the ALJ's, and subsequently the Board's, finding that the evidence of "significant improper motivation" outweighed the evidence of proper motive produced by the Company. Therefore, we accept the Board's finding of an unfair labor practice.

For these reasons, we grant enforcement of the Board's order.

NLRB v. Local 825, A.B.C.D. International Union of Operating Engineers

659 F.2d 379 (3d Cir.), September 18, 1981

On motion for assessment of fines against union

Before SEITZ, Chief Judge, and ROSENN and HIGGINBOTHAN, Circuit Judges

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SEITZ, chief Judge: The National Labor Relations Board (the Board) moves this court for an order assessing a fine against Local 825, A.B.C.D. International Union of Operating Engineers (Local 825). The Board alleges that Local 825 disobeyed judgments entered by this court in 1963, 1966, and 1971. The Board also contends that Local 825 failed to comply with a purgation order entered in 1970 after this court found Local 825 in contempt. After the Board filed its motion, this court appointed a master to hear evidence and make recommended findings of fact and conclusions of law. The master found that Local 825 had not disobeyed this court's judgments and purgation order, and he therefore recommended that the Board's motion be denied. The Board filed exceptions to the master's report which we now address.

I. FACTS

The Board's orders, as enforced by this court, direct that Local 825 cease and desist from coercing neutral employees, or from restraining neutral employees, with an objective of causing any neutral employer to cease doing business with a party to a labor dispute. *See. e. g., Local 825, International Union of Operating Engineers,* 138 N.L.R.B. 279 (1962), *enforced,* 322 F.2d 478 (3d Cir. 1963). In 1970 this court found Local 825 in contempt for having violated the court's 1963 and 1966 decrees. *See NLRB v. Local 825, International Union of Operating Engineers,* 430 F.2d 1225 (3d Cir. 1970), *cert. denied,* 401 U.S. 976, 91 S.Ct. 1200, 28 L.Ed.2d 326 (1971). The court directed that Local 825 purge itself of its contempt by, inter alia, complying with the decrees. The order also provided that Local 825's failure to purge itself of contempt would result in compliance fines of $10,000 for each violation of the decrees and of $1,000 for each day that such violation continued. *See NLRB v. Local 825,* 430 F.2d at 1229–30. The Board alleges that Local 825 violated this court's judgments and purgation order by engaging in secondary boycott activity at an East Brunswick, New Jersey jobsite during the period from July 19 to July 30, 1979, and at a Jackson Township, New Jersey jobsite on September 5 and 6, 1979.

A. *East Brunswick Jobsite*

The East Brunswick jobsite is a twenty-five acre commercial development located on Route 18 in northern New Jersey.[1] The rectangular-shaped development runs along Route 18 for approximately 2,000 feet, with the main entrance in the middle of the development. A turn on Route 18 (the "jughandle") is located a short distance to the east of the main entrance.

R. H. Drukker & Co. (Drukker), a nonunion general contractor, had a contract with Sigmacon Corp. (Red Lobster) and the Hartford Company (Hartford) to do site development work in East Brunswick on land owned by Robert Lehmann.[2] Red Lobster's property ran along Route 18 approximately 400 feet from the western end of the jobsite of a point halfway to the

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jughandle. A sign facing Route 18 announced: "Red Lobster Restaurant coming soon."

Drukker completed the initial site preparation for Red Lobster during the week of July 15, 1979. By

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[1] Unless otherwise indicated, the facts set forth in this opinion either were found by the master or are supported by uncontradicted documentary and testimonial evidence.

[2] The Board did not except to the master's reference to Lehmann as "developer and owner" of the East Brunswick jobsite. Indeed, the Board's brief also refers to Lehmann as "owner of the site," citing the master's finding for that point. We see no reason to question this statement of fact if the parties do not.

July 19 Red Lobster was ready to proceed with the construction of its building, and Drukker had moved to the Hartford section in the center of the jobsite, several hundred feet behing the jughandle and about 500 feet from the Red Lobster project. Although a part of the Red Lobster-Drukker contract was yet to be performed, Drukker did not expect to start this work for approximately a month. Therefore, it was not scheduled to perform any work for Red Lobster during the period between July 19 and July 30.

The Board claims that at 6:30 a.m. on July 19, Drukker's employees arrived for work at the Hartford jobsite and encountered between sixty and seventy-five Local 825 members picketing along Route 18. The picket signs carried by the Local 825 members stated that Drukker's employees were receiving "Less Than Local 825's Wages And Conditions[.] We Have No Dispute With Any Other Employer At This Site." Virtually all of the pickets were concentrated along Route 18 from the jughandle to the western end of the Red Lobster property. As a result, they covered the entire southern perimeter of the Red Lobster jobsite, including Red Lobster's entrance to its jobsite, which was located about 100 feet east of its western boundary off Route 18. When the pickets arrived, Durkker's equipment was parked along Route 18, but it was moved to the Hartford site that night and remained there for the rest of the period in issue. Picketing continued through July 30. As many as thirty pickets arrived at 6:00 a.m. each day, but by 8:00 a.m. only about fifteen pickets would remain along Route 18.

On the day the picketing began, Herve Goyette, job superintendent for Red Lobster, asked T. Allen Jones, a Local 825 business agent, why Local 825 was picketing along the perimeter of the Red Lobster jobsite. Jones replied that Drukker was working on the Red Lobster jobsite and had a large contract to do work for Red Lobster. Goyette than told Jones that Drukker's work was completed "at that time" and that Drukker was therefore no longer working on the Red Lobster jobsite. Goyette asked Jones whether he would remove the pickets if Goyette gave him a letter stating that Drukker was not working on the Red Lobster jobsite. Jones replied that if Goyette "could get a letter [Jones] would present it to his people and they would see what would happen." Goyette did not produce the letter.

On July 26, two public utility vehicles arrived at the Red Lobster jobsite to connect the electrical service for Red Lobster. An employee of Drukker testified that the pickets located along the Route 18 frontage "converged" on the trucks as they were turning into the Red Lobster jobsite. The trucks pulled onto the shoulder of Route 18 and left about one-half hour later without having entered the jobsite.

On July 30, Goyette asked Jones whether Red Lobster could proceed with the installation of the foundation for its building if it did not employ nonunion personnel. Jones stated that Red Lobster could proceed, but emphasize that he would extend the picket line back to the Red Lobster location as soon as he saw Drukker working on the Red Lobster jobsite. Jones then pulled the pickets away from the Red Lobster entrance, and work began on the restaurant for the first time since July 19.

A Denny's Restaurant (Denny's) was also being build on the East Brunswick jobsite, but Denny's did not have a contract with Drukker. When the picketing began, Denny's was ready to lay its foundation. Denny's jobsite was located in the middle of the project going from east to west. On July 27, William Castongue, job superintendent for Denny's, saw a truck with a delivery for Denny's drive to the entrance of the jobsite. Castongue saw the driver stop, get out of his truck, and speak to the pickets. Castongue explained that he was unable to hear the conversation between the driver and the pickets because his jobsite was located too far away from the roadway. The truck did not enter the jobsite, and the delivery was not made to Denny's.

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On that same day, Castongue spoke to Jones and asked him "what it would take" for Denny's to be able to "proceed with the project." Jones told Castongue that Denny's could proceed only if it used union people on the job. In reply to Castongue's question whether Local 825 would let Denny's concrete and backhoe people through the picket line if they were union members, Jones replied in the affirmative. He added, however, that "the first time that Drukker put a piece of equipment on [Denny's] job site he'd throw pickets around it." After Castongue agreed to use only union personnel, Denny's masonry subcontractor began work on the Denny's jobsite.

B. *Jackson Township Jobsite*

D. T. Leeds, Inc. (Leeds), a nonunion plumbing and heating contractor, and Arthur J. Ogren, Inc. (Ogren), a general contractor, had separate contracts with the Board of Education of Jackson Township to do work at Goetz Elementary School. On August 27, 1979, pickets appeared at the jobsite carrying signs stating that Local 9 of the Plumbing and Fitters Union (Local 9) had a dispute with Leeds. As a result of this picketing, Leeds set up separate entrances: one was reserved for the employes and suppliers of Leeds; another was set up for the employees and suppliers of all other contractors and employers. The sign establishing the gate reserved for Leeds read: "Entrance No. 2. This entrance for employees, subcontractors, suppliers of D. T. Leeds, Inc. All others use Entrance No. 1." The sign for the neutral gate read: "This entrance not to be used by employees, subcontractors and suppliers of D. T. Leeds. All others use entrance 2." Leeds sent letters to the unions, including Local 825, and to the other contractors engaged on the job, advising them of the establishment of the separate gates and indicating their location. Leeds also informed all of its suppliers that a separate gate was being set up for their use.

On September 5, Local 825 members carrying signs indicating that Leeds did not pay Local 825's area standard wages and benefits picketed the neutral gate. Ogren job superintendent Charles Cox testified that when he arrived at the neutral gate a business agent for Local 825 told him that he would be crossing a picket line if he entered the jobsite. Cox saw the sign identifying the neutral gate behind the business agent, but he did not go to work that day. In the absence of Cox, no work was done on the Ogren job. Chester Hagenbarth, an Ogren officer, testified that he was unable to drive onto the jobsite because the pickets blocked his path. Hagenbarth testified that when he asked the pickets why Local 825 was present, he was told that it was "supporting" the "plumbers' and pipe fitters' efforts to punish the owners for hiring a nonunion contractor." Hagenbarth left the jobsite without entering. Between four and six Local 825 members without picket signs were present across the street from the neutral gate on several occasions after September 5. At no time did Local 825 picket the reserved gate.

II. DISCUSSION

Rule 53(e)(2) of the Federal Rules of Civil Procedure provides that "the court shall accept master's findings of fact unless clearly erroneous." Although the rule literally applies solely to the district courts, we think it should be applied here by analogy. *Accord, OCAW v. NLRB,* 547 F.2d 575, 580 (D.C.Cir. 1976), *cert denied,* 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977); *NLRB v. Remington Rand, Inc.,* 130 F.2d 919, 952 (2d Cir. 1942). Nevertheless, "the mere fact that a [master's] finding is supported by substantial evidence does not prevent its being overturned if the reviewing court, with due regard for the master's opportunity to judge credibility, 'is left with the definite and firm conviction that a mistake has been committed.'" *OCAW,* 547 F.2d at 580 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)). Although the Board would have had to meet the easier burden of "preponderance of the evidence"

if it had chosen to proceed against Local 825 in an administrative unfair labor proceeding, in this civil contempt proceeding the Board must establish by "clear and convincing proof" that Local 825 violated the underlying decrees. *NLRB v. Local 825,* 430 F.2d at 1230.

Local 825 was engaged in primary disputes with Drukker and Leeds. Accordingly, it was entitled to bring pressure to bear upon Drukker and Leeds, but not upon the secondary employers at the East Brunswick or the Jackson Township jobsite. *See NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951). To establish a violation of the decrees, the language of which tracks the wording of section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (1976), the Board must show that Local 825 induced or encouraged a cessation of work by employees or suppliers of a neutral employer with an object of forcing a neutral employer to cease doing business with another employer. *See, e. g., Carrier Air Conditioning Co. v. NLRB,* 547 F.2d 1178, 1188–89 (2d Cir.

1976), *cert. denied,* 431 U.S. 974 97 S.Ct. 2940, 53 L.Ed.2d 1072 (1977). To aid in discerning the fine line that often separates primary and secondary picketing, the Board in *Sailor's Union of the Pacific (Moore Dry Dock Co.),* 92 N.L.R.B. 547 (1950), established evidentiary standards that, while not absolute, are nevertheless helpful in determining whether an object of picketing at a common site was to induce a secondary boycott. Under these standards, picketing may be primary if it (1) is limited to times when the primary employer is present at the common site; (2) is limited to places reasonably close to the location of the primary's work; and (3) discloses clearly that the dispute is with the primary employer. *See id.* at 549.

A. *East Brunswick Jobsite*

The Board challenges the master's legal conclusion that Local 825 engaged in lawful picketing of Drukker from July 19 through July 30, 1979. The Board also specifically excepts to many of the factual findings made and inferences drawn by the master in support of his legal conclusion. We need not address the many exceptions individually, however, because the dispute appears to break down into three principal issues that we believe are determinative of this motion for contempt: (1) whether the master was justified in not finding Local 825's picketing in front of the Red Lobster jobsite to be unlawful; (2) whether the master erred in finding that Local 825 interfered with the delivery of supplies and services to the secondary employers; and (3) whether the master correctly concluded that Jones' statements to Goyette and Castongue did not constitute threats and coercion within the meaning of the decrees.

Local 825's picketing in front of the Red Lobster jobsite was not unlawful, because it did not have a secondary boycott as an object of the the picketing. The Board directs our attention to evidence in the record indicating that Local 825 intended not only to inform the public of its dispute with Drukker, but also to enmesh neutral employers in the dispute. This evidence consists of (1) the physical blocking of the entrance to the jobsite; (2) the presence of pickets on July 27 despite July 26 telegrams informing Local 825 that Drukker would not be working on the 27th; (3) the intimidatingly large number of pickets early in the morning relative to the small number of neutral subcontractors; (4) the smaller number of pickets present during normal business hours when informational picketing would seem most effective; and (5) the continued presence of the pickets at Red Lobster even after Jones had been informed of what may have been an obvious fact—that Drukker was not working there.

The master found that about fifteen pickets generally remained on Route 18 during business hours. We cannot find a record basis for disagreeing with the master's determination that this number was "not excessive or unreasonable" given the dimensions of the jobsite. Nor do we think that the master was clearly erroneous in using the number of pickets present at 8:00 a.m.

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rather than the number of those present at 6:00 a.m. in assessing Local 825's object. The master could reasonably infer an object to inform the public of the primary dispute from the 8:00 a. m. figures and an object to inform the primary employer's employees from the 6:00 a. m. figures.

Furthermore, the fact that Drukker was not working on the Red Lobster jobsite during the picketing is not determinative of object. Red Lobster and Drukker remained under contract throughout the period at issue. Drukker had completed an initial phase of work immediately before the picketing, and it had another phase scheduled within a month. On the first day of picketing, Drukker still had equipment on the Red Lobster jobsite. Goyette had indicated to Jones on July 19 that he would produce a letter confirming his assertion that Drukker was no longer working for Red Lobster, but no letter was produced. Moreover, even when we review the master's finding as a legal conclusion and not as a factual determination, we do not believe that the Board has satisfied its burden of proving by "clear and convincing proof" that Local 825 was motivated by an unlawful object in picketing the Red Lobster jobsite.

We also are unable to disagree with the master's conclusion that Local 825's conduct was not "threatening" or "coercing". The master found both that the pickets did not interfere with the installation of Red Lobster's electrical service on July 26 and that there was insufficient evidence to show that the pickets were responsible for turning away Denny's suppliers. The statutory words "induce or encourage" include every form of influence and persuasion. *See IBEW v. NLRB*, 341 U.S. 694, 701–02, 71 S.Ct. 954, 958, 95 L.Ed. 1299 (1951). Thus, the convergence of the pickets on the utility trucks might support an inference that the truck drivers were restrained or threatened. An equally permissible inference that the drivers simply asked the pickets what was going on and decided to support the union's efforts, however, can be drawn from the fact that the truck drivers pulled onto the shoulder and talked to the pickets. There was testimony that most of the truck drivers did not stop and converse with the pickets, but instead slowed down, saw the picket line, and kept on going. We do not believe on this record that the master clearly erred in drawing the inference that the drivers were neither threatened nor coerced, and certainly the evidence is not clear and convincing proof that the pickets actually coerced the drivers.

Finally, the Board argues that the direct threats made by Jones to Denny's and Red Lobster support a finding of coercion. Jones cautioned Goyette that he would "throw the picket [line] up" if "any nonunion people" returned to work, but he agreed to remove the pickets if Red Lobster used union personnel on the job. Goyette testified, however, that he understood that Local 825 would have to picket Drukker wherever Drukker worked, even if Drukker worked on the Red Lobster jobsite. He also admitted that nether Jones nor Local 825 ever "threatened" him. Indeed, to say that the union threatened Goyette seems to penalize Local 825 for attempting to comply with the *Moore Dry Dock* standards for primary picketing. *See* 92 N.L.R.B. at 549. Jones' statements to Castongue are more difficult to justify: Drukker had not worked for or had any contract with Denny's, and Jones' statements might be seen as a warning to avoid Drukker. It is not clear, however, that the statements made by Jones were anything other than indications of what the union would do if Drukker came onto the Denny's jobsite. Because Castongue initiated the conversation, we are not convinced that the master erred when he refused to find that these conversations constituted "threats" within the meaning of section 8(b)(4)(ii).[3]

In sum, we do not think that the Board proved clearly and convincingly that Local 825 had a secondary boycott as an object of its picketing, that it coerced employees or suppliers of neutral employers not to cross its picket line, or that Jones threatened either Denny's or Red Lobster with an object of preventing their contracting with Drukker. The master made the findings of fact that are essential to support his conclusions, and the Board's evidence does not "leave us with the definite and firm conviction" that the master's findings were wrong.

B. *Jackson Township Jobsite*

The Board challenges both the master's conclusion that the picketing of Leeds by Local 825 constituted lawful area standards picketing and the master's factual findings supporting that conclusion. Analysis of this challenge also breaks down into three issues: (1) whether the master correctly concluded that Leeds failed to establish and post a reserved gate by the time the picketing began; (2) whether the master correctly determined that the union did not hinder secondary employees from entering the common jobsite; and (3) whether the master erred when he refused to find that the union's posting of observers after September 5 indicates that the picketing had a secondary object.

It is well established that a general contractor may, "by the use of separate gates for the purpose of ingress to and egress from the jobsite, lawfully force the union to picket only those 'separate gates.'" *See Local 519, United Association of Journeymen v. NLRB*, 416 F.2d 1120, 1125 (D.C. Cir. 1969). The master, however, found (a) that the sign posted at the neutral gate was confusing and that a neutral gate was not established; (b) that Leeds may have continued to use the "neutral" gate; and (c) that the record did not prove that the sign identifying the neutral gate was posted on September 5 and 6 when the picketing commenced.

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[3] The Board suggests that Local 825 violated this court's decrees and established an unlawful picket line as evidenced by conversations between Rhine Drukker and Jones. In these conversations, Jones allegedly indicated that "there would be trouble" for Drukker if he did not sign a contract with Local 825. The union also allegedly undertook this picketing with only a minimal investigation of Drukker's wage and benefit schedule. The Board further argues that police assistance was necessary to enable Drukker representatives and owner Robert Lehmann to enter the jobsite. Whether these incidents constitute illegal conduct need not concern us here. The Board admits that Local 825 had a primary dispute with Drukker, and this conduct certainly does not violate this court's injunctions against secondary boycotting. Nor do we believe that the incidents with Drukker indicate that Local 825 had a secondary object. The fact that Lehmann was also hindered in entering the jobsite may be evidence of a secondary object, but given the evidence indicating solely a primary object, we do not think this evidence is determinative of the issue.

It does not appear that the misleading signs actually confused anyone, but as David Leeds, who posted the signs, admitted, the sign at the neutral gate did not authorize anyone to use the gate. Moreover, it is not clear that the sign at the neutral gate was posted when Local 825 commenced picketing at the Jackson Township jobsite. The sign identifying the neutral gate was torn down on September 4. There is evidence in Cox's log, although its meaning is disputed, indicating that no sign was posted on the morning of September 5 when Local 825 started picketing. Cox testified that he was "99.9 percent" certain that the sign was up when he arrived for work at 7:45, but because the picket line was already up by that time, his testimony would not necessarily indicate that the sign was posted when the picketing commenced. Some of the Board's evidence indicates that the sign was not posted until 7:15 a. m., well after the picketing had begun. In light of this evidence, we cannot say that the master clearly erred in concluding that the gate was not established and that the sign was not up at the critical time.

There was conflicting testimony whether Local 825 picketed on September 6. At one point in his testimony Cox stated that he saw Local 825 picketing at the neutral gate only on September 5, but he elsewhere said that he went through a picket line on September 6 to get his tools. One Local 9 member testified that September 6 was the only time that he saw Local 825 picket at the neutral gate. Thus, it is not clear that Local 825 picketed on more than one day, and it was not unreasonable for the master to refuse to find that picketing began on that day after the sign was reposted.

We agree that the absence of the primary employer's employees at the gate picketed is evidence of a secondary object. *See NLRB v. Local 254, Building Service Employees,* 359 F.2d 289, 292 (1st Cir. 1966). In *Brown Transport Corp. V. NLRB,* 334 F.2d 30 (5th Cir. 1964), in which the picket signs made clear that picketing was directed only to the employees of the primary employer and no one else, *see id.* at 31, the court held that "[t]here is simply no excuse for picketing where the message is seen by neutral employees of neutral employers but is not seen at all by the employees of the primary employer," *id.* at 39. That, however, is not the situation here. The picketing in this case was aimed at informing both the public and Leeds' employees of the wages and benefits received by the employees. Although Leeds argues that it did not use the neutral gate, there is some suggestion in Hagenbarth's testimony that Leeds' "people were using [the] main gate during the time [the] project was shut down by picketing." Thus, we do not think that the Board has shown by clear and convincing evidence that Local 825's picketing was motivated by a secondary object.

The master found that no one was prevented from entering the jobsite. This finding is fully supported by the record. For example, there is evidence indicating that Local 825 pickets merely informed Cox that he was crossing a picket line. As to Hagenbarth, it is true that when he turned into the site "he could not continue without running [the pickets] over." On the other hand, after talking to the pickets and learning that Cox was not there, Hagenbarth admits that he "just backed out because there was no reason for [him] to be there," not because he was prevented from entering. The Board fails to show that the master clearly erred when he found that Ogren's employees were not restrained from entering the jobsite. While a picket line certainly "induces" employees not to cross, informational picketing is permissible. We do not believe that the Board has proved by clear and convincing evidence that this informational picketing was somehow more coercive than other area standards picketing.

Finally, the Board offers as further proof of Local 825's unlawful object its patrolling without signs across the street from the neutral gate for several weeks after the picketing. There is no requirement that pickets carry signs. The Board argues that "signal picketing," that is, activity that acts as a signal to neutrals that sympathetic action on their part is desired, is unlawful. *See Bridge Workers Local 433 v. NLRB,* 598 F.2d 1154, 1158 and n.6, 1159 (9th Cir. 1979). It is not clear, however, that the observers here were doing anything other than ensuring that Leeds did not use the neutral gate. The observers were not wearing picket signs; they did not identify themselves as Local 825 members; they did not stop anyone from entering the jobsite; they did not talk to anyone; and they were across the street, at least thirty to thrity-five feet away from the main gate.

Although some of the Board's many objections to the master's findings of fact may be meritorious, we believe that the master made the findings that are essential to uphold his conclusions and that those findings are not clearly wrong. As with the East Brunswick jobsite, we do not believe that the Board has shown error in the master's conclusion that the evidence failed to prove clearly and convincingly that Local 825 has violated the underlying decrees. Thus, we adopt the master's report with its recommendation that Local 825 not be adjudged guilty of civil contempt.

III.

The Board's motion for sanctions will be denied.

Rosenn, Circuit Judge, dissenting: I respectfully dissent because I believe the Board proved, by clear and convincing evidence, a classic case of illegal secondary activity and deliberate violations of this court's previous judgments and its purgation order of October 8, 1970. I have a definite and firm conviction that the Master

was mistaken with respect to several critical findings of fact and that his conclusions of law run counter to firmly established principles governing secondary boycotts and common situs picketing. Accordingly, I would reject his recommendations and adjudicate Local 825 is further civil contempt and require it to take the steps in purgation requested in the Board's motion.

I.

A. East Brunswick

The Union's purported "area standards" picketing of R.H. Drukker & Co. ("Drukker") occurred at what was to become the East Brunswick Plaza, a complex of service establishments and office buildings being developed by Robert Lehmann. The Special Master, the Union in its brief to this court, and now the majority have all treated the entire Plaza project as a single jobsite and have accordingly applied principles relevant to common situs picketing to this aspect of the case. I will discuss my views on those principles and their application in Part II of this opinion and for the moment I mention only what I consider to be a serious factual error on which the "common situs" approach is apparently predicated.

In his Finding No. 12, the Master states that "Drukker * * * was engaged in site preparation work at the East Brunswick site, under contract with, *inter alia,* [Hartford, Red Lobster] * * * and Robert Lehman [*sic*], developer and owner of the site * * *." The Master's transcript references to this statment provide no support for the assertion that the entire Plaza tract was owned by Lehmann, and the record reveals a contrary set of facts. Both Rhine Drukker and Castongue, General Superintendent for Denny's, testified that Lehmann did not own the entire tract, but that Denny's and others owned their own development sites. Further, statments made by Herve Goyette, Field Superintendent for Red Lobster, are consistent with the notion that Red Lobster owned the property on which it was building its restaurant.

I therefore believe that this case centers around Union activities on no less than three worksites: Denny's, Red Lobster's, and Hartford. Such an approach is consistent with the geographic features of the development project. The entire Plaza tract fronted on Route 18 for 2000 feet. Red Lobster's frontage accounted for only one-fifth of the total. Denny's was located behind Red Lobster and had no frontage on Route 18. The Plaza tract was divided into ten parcels (Red Lobster and Denny's being located on two of the smallest), in addition to parcels reserved for Lehmann's use for landscaping and water detention sites. The Hartford property, the largest parcel in the development, was 500 feet away from Red Lobster and, like Denny's, had no Route 18 frontage.

Contracting for construction on each of the foregoing sites proceeded separately and independently. Red Lobster engaged R.H. Drukker & Co. ("Drukker") to do the initial site preparation work for a restaurant building. Drukker commenced the work on July 5 and completed it by July 19. It thereupon moved to the Hartford site and accordingly, the Master found that "by July 19, Drukker was working on the Hartford (McIntosh Motor Inn) section of the site, behind the jughandle located approximately in the center of Route 18 frontage." (Finding No. 13)

On July 13, Allen Jones, business agent for Local 825, while driving along Route 18, became aware of Drukker's presence on the Red Lobster site and inquired of the job superintendent "who Drukker was," and the nature of the operation. Leaving his business card, he left word for Drukker to get in touch with him as soon as possible; otherwise, there would be trouble. (Finding No. 14) Although Drukker's superintendent had only a two man crew and two pieces of equipment (Finding No. 13) [1],

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when they arrived for work at the Hartford job site on July 19, there were between 50 to 70 pickets patrolling the entire 400 foot length of the Red Lobster property, including Red Lobster's exclusive entrance to the site. The picket signs, printed in red and black lettering, but with Drukker's name inserted lightly in ink, gave notice that Drukker's employees "at this site are receiving less than Local 825's area standard wages and conditions."

Although Drukker was expected to return to the Red Lobster site in about a month to pave, it did no work for Red Lobster, nor was it scheduled to perform any work, between July 19 and July 30. Its superintendent and two employees and two pieces of equipment were engaged only on the Hartford site during this period. Nonetheless, the pickets continued to patrol each morning thereafter along Route 18 from the "jug handle" to and including the entire length of the Red Lobster site. After the first day 30 to 40 pickets appeared each morning when the men reported for work, diminishing to about 15 by 8:00 A.M. with 5 or 6 pickets at the rear entrance to the development.

When Goyette, Red Lobster's job superintendent, arrived at the Red Lobster site on the morning of July 19, he sought Jones out and informed him that Drukker's work was complete "at that time" and that it was no longer working on the Red Lobster site. When Rhine Drukker, a principal of Drukker, learned of the picketing on July 19, he arranged to meet Jones the following day. At that time Jones asked Drukker about the extent of its work on the East Brunswick development and if he, Jones, could put some of his own men to work. When Drukker indicated concern for the jobs of his employees, Jones said it "would really be impossible" for Drukker's employees to gain admission to Local 825 and that the work would have to be performed by their members. Drukker claims and Jones denies that Jones thereupon gave Drukker a copy of the Local 825 labor contract and requested him to sign it. Although the Master found there was such a meeting between Drukker and Jones, he made no findings as to what was discussed. Nor did he make any findings concerning Drukker's unchallenged testimony that later that morning Jones again asked Drukker to sign a contract with Local 825.

Picketing continued daily until July 30. Goyette again spoke to Jones on July 30 and inquired whether Red Lobster could proceed with the installation of the foundations for its building if it did not employ non-union labor. Jones replied in the affirmative but warned that he would "throw pickets up" once he saw any non-union workers on the Red Lobster site. Thus, with this parting admonition, construction of the Red Lobster building commenced on July 30.[2]

Red Lobster's masonry subcontractors, scheduled to lay the foundations for the building during this period, were unable to perform any work on the job site from July 19 until July 30 because of the picketing. Although the Master made this finding, he also found (Finding No. 22), in the face of evidence to the contrary, that there is "an absolute void in the record on the part of the Board to prove that some violation on the part of Local 825 resulted in the failure of the masonry contractor to appear." However, Goyette testified that the mason-

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[1] Drukker's two pieces of equipment (a bulldozer and compactor) were parked along the Route 18 frontage when the pickets arrived but they were moved later in the day to the Hartford site where they remained for the period between July 19 and July 30. Although the Master made a finding to this effect (Finding No. 13), he subsequently made an inconsistent finding "that defendant continued to have his equipment on the job site (July 27)." (Finding No. 24)

[2] The Master confused Goyette's conversation on July 30 with Goyette's earlier conversation with Jones on July 19. The pickets did not leave this site on July 20 as erroneously found by the Master. (Finding No. 20) Furthermore, the Master's finding that Goyette falsely represented that Drukker had no more work to perform for Red Lobster "since Drukker and Red Lobster had merely pretended that there was no contract between them" was irrelevant. The issue, entirely overlooked by the Master, was whether Drukker had completed its work, at least phase one, and had removed its employees and equipment from the Red Lobster site. There is no evidence in this record that Drukker did any work on the Red Lobster site during the period in issue. On the contrary, there is evidence that Drukker performed no work there between July 19 and July 30.

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ry contractor was unionized and that he would not cross the picket line "and even if he did, then he would be unable to receive any concrete." Goyette also testified that on the morning of July 25, while he was in the trailer office, he was threatened by a large man from the picket line who swore at him and verbally abused him. Because of his fear of bodily injury, he did not return to the job site the next day and remained away until July 30. Goyette conceded that when he showed up on the job site on July 26, the pickets permitted him to pass through, although they did administer a verbal tongue lashing. One of the pickets on the Red Lobster premises called Goyette a "bald headed queer bastard and you come outside and I'm going to beat your goddamn head in." On July 25, public utility vehicles arrived at the Red Lobster site to make the electrical installation. "[T]he pickets converged on the two vehicles and they pulled off onto the shoulder of Route 18" and after waiting a half hour they decided to leave without entering the site.

On July 11, 1979, CBR Developments, a wholly owned subsidiary of Denny's, broke ground on the East Brunswick development for a new facility. The work was to be performed by subcontractors but Drukker was not one of them; it had not performed any work for Denny's. The Denny's site was about 300 feet from the Red Lobster property. On July 19, pickets also appeared at the Denny property and returned daily to picket. Concrete, door frames, and other material bound for the Denny construction were turned away. On July 27 Denny's job superintendent, Castongue, spoke to Jones and asked him "what it would take" for Denny's to be able to "proceed with the project." Although Denny's had no relationship whatsoever with Drukker, Castongue testified that Jones told him that the only way Denny's was going to do any work was if it "used union people on the job. He was very adamant about that and repeated that we would have to be union all the way."

Although the Master found that "Local 825 had a labor dispute at the East Brunswick site only with Drukker," (Finding No. 28) the Master concluded that there was no credible evidence that the pickets were responsible for the turning away of Denny's suppliers. He reached this conclusion by holding that direct evidence of what the pickets said to the truckdrivers was necessary to find inducement. After Castongue agreed to use union labor only, Denny's masonry subcontractor commenced work on Denny's site for the first time since the picketing began.

B. The Jackson Township School Site

In the spring of 1979, Leeds, a non-union contractor, commenced plumbing and drainage work and Ogren, a general contractor, undertook general construction work on an addition to the Goetz School pursuant to a contract with the Township Board of Education. Because of picketing by Local 9, Plumbers and Pipefitters Union, and by Local 8-9 of the International Association of Heat and Frost Insulators, commenced about the end of August, Leeds set up separate entrances at the Goetz School, reserving one exclusively for Leeds and its suppliers (entrance No. 2) and designating the other entrance (entrance No. 1) for all other subcontractors and suppliers. Simultaneously, Leeds sent letters to the two locals, the school board, and the other contractors notifying them of this action and fixing the location of the gates. On August 27 Leeds wrote to its suppliers informing them of its separate entrance on the Trenton-Lakewood Road accompanied by a map and a request to use this entrance No. 2 for all deliveries. On August 29 Leeds wrote to Local 825, the school board, and all other contractors giving notice of the separate gates, and advising them that the entrance "now in use by all contractors will remain in use and be designated No. 1 to be used by all other contractors, etc., but not by D.T. Leeds, Inc." The letter concluded with a request that Local 825 picket Leeds at entrance No. 2.

The Board's evidence pertaining to the picketing at the school site is unrefuted; Local 825 did not present any evidence. This evidence establishes that on September

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5, Local 825 picketed the neutral gates on Patterson Drive with signs stating that Leeds did not pay Local 825 area wages and standards. When Cox, Ogren's job superintendent, arrived at the site on the morning of September 5 and found Local 825 picketing the neutral entrance, he stopped at the picket line. White, a business agent for Local 825, came over, introduced himself, and told Cox he would be crossing a picket line if Cox went to work. Cox withdrew and returned the next day to get his tools to work elsewhere. In his absence, no work was performed by his work crew under the Ogren contract. Furthermore, Ogren's subcontractors failed to work. When Cox returned for his tools on September 6, he again saw pickets at the neutral gate.

When Hagenbarth, an officer of Ogren, arrived at the neutral gate on September 5, he saw 15 to 20 pickets at the entrance. The pickets occupied the roadway to the entrance and thereby obstructed his ability to enter the job site. When he inquired of the pickets why Local 825 was there, he was informed that it was "supporting the plumbers' and pipefitters' efforts to punish the owners for hiring a nonunion contractor." Hagenbarth drove around to the Leeds' reserve gate and found pickets there from the two other locals. However, Local 825 never picketed this reserve gate. After September 6, four to six members of Local 825 lingered across from the main (neutral) gate without signs where they sat on their cars. Although the language on the gate signs was inartistically drafted, the undisputed evidence is that it left no confusion among the employees on the job site as to which gate they were to use. The gate signs were torn down on September 4, but were restored by Leeds' foreman, Alessandrini, about 7:15 A.M. on September 5.

II.

The decrees entered by this court in 1963 and again in 1966 against Local 825 prohibited, *inter alia,* the Local, its officers, agents, and representatives from "inducing or encouraging any individual" employed by any employer to engage in a strike or refusal in the course of his or her employment to transport or otherwise handle or work on any goods or materials or perform any services; "or threatening, restraining, or coercing any employer where, in either case, and object thereof is to force or require * * * any employer or persons to cease doing business with * * * any other employer or persons."[3]

On October 8, 1970, we entered a further decree against Local 825, its officers, agents, and representatives enforcing another order of the Board adjudging them in civil contempt for having violated the court's decrees entered in 1962 and 1963 and directed Local 825 to purge itself of the civil contempt. *NLRB v. Local 825, International Union of Operating Engineers,* 430 F.2d 1225 (3d Cir.), *cert. denied,* 401 U.S. 976, 91 S.Ct. 1200, 28 L.Ed.2d 326 (1970). Thereafter, on October 27, 1971, this court entered an additional decree enforcing another order of the Board issued February 13, 1967. Our order of October 27, 1967, barred Local 825, its officer, agents, and representatives from

> inducing or encouraging any individual employed by * * * any * * * person engaged in commerce or an industry affecting commerce to engage in a strike or a refusal in the course of his employment to perform any services; or threatening, forcing, or restraining * * * any * * * person engaged in commerce or industry affecting commerce, where, in either case, an object thereof is to force or require * * * any * * * person * * * to cease doing business with * * * any other person.

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Because of serious Congressional concern over the coercive involvement of third parties in labor disputes not their own, Congress in 1959 amended the National Labor Relations Act by adding section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B):

> This concern was focused on the "secondary boycott" which was conceived of as pressure brought to bear, "not upon the employer who alone is a party [to a dispute] but upon some third party who has no concern in it" with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands.

NLRB v. Local 825, International Union of Operating Engineers, 400 U.S. 297, 302–03, 91 S.Ct. 402, 405–06, 27 L.Ed.2d 398 (1971) (footnotes omittted).

Local 825 ostensibly picketed the Red Lobster and Denny's construction sites to inform Drukker's employees and the public, according to the picket signs, that workers "operating power driven construction equipment at this job site are receiving less than Local 825's area standard wages and conditions." But there is no evidence in this record that Local 825 had any reliable basis for this information. It failed to verify with Drukker or any reliable source the information it was disseminating.[4] Furthermore, Denny's had not engaged Drukker to do any work for it; it had no contract with Drukker. None of Drukker's equipment was on Denny's property, nor were any of its employees. If the picketing was purely informational and not intended to induce or encourage anyone performing services for Red Lobster or Denny's to cease doing so, picketing nevertheless continued at the Red Lobster site even after Drukker had completed the first phase of its work there and had removed all of its equipment. For the following period of 11 days, a period when only the masonry subcontractor, Troy Stifler, was scheduled to lay the foundations, the pickets appeared daily en masse. If this was simply innocent informational picketing, one must ask how Local 825 can account for 50–75 pickets massed along Red Lobster's 400 foot front, particularly when the primary contractor and his employees were no longer there? Even if they were, the presence of 50–75 pickets reveals more than an informational purpose, especially when the employer had only two employees and a supervisor on the site to be informed. The picketing effectively shut down the Red Lobster and Denny's construction as the subcontractors refused to work and the suppliers refused to cross the picket line.

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[3] This court enforced a broad order entered in 1963 against Local 825, *NLRB v. Local 825, International Union of Operating Engineers,* 322 F.2d 478 (3d Cir. 1963), when general counsel for the NLRB excepted to the narrower order of the trial examiner in the proceedings reported in Local 825, International Union of Operating Engineers, 138 NLRB 279 (1962). The Board agreed with General Counsel that a broad order was necessary "because of the extent to which [Local 825 and the named officers] have demonstrated a proclivity to engage in unlawful secondary activities in furtherance of their disputes with these and other primary employers." *Id.* at 280 (footnotes omitted).

As alluded to earlier, I believe the Master, the Union, and the majority rely improperly on principles applicable to common situs picketing in gauging the legality of the Union's actions in this case. The picketing at East Brunswick Plaza affected ongoing work at no less than three independently owned job sites, each of which was under development by separate general contractors. Two of those contractors and owners had no contacts with the primary employer during the time the pickets were patrolling their job sites. To sustain the legality of the Union activity affecting Red Lobster and Denny's is no different, in my view, from announcing a rule of law authorizing a labor organization to shut down construction on a group of homes being built separately by individual owners merely because the Union has a dispute with an electrician wiring someone else's home across the street. It requires little sustained consideration, and no citation of authority, to realize that such a result completely frustrates Congress' intent in enacting section 8(b)(4)(B).

However, even if application of *Moore Dry Dock*[5] standards were appropriate to this case, and there had been compliance with them, where the activities or statements of the union reveal any illegal secondary purpose, such conduct is unlawful. *Texas Distributors, Inc. v. Local Union No. 100*, 598 F.2d 393, 398 (5th Cir. 1979); *Local Union No. 369, International Brotherhood of Electrical Workers*. First, Local 825 did not comply with the *Moore Drydock* standards because at the time of the picketing—July 19 to July 30—Drukker, the primary employer, was not engaged in any business activity on the Red Lobster or Denny's site. That being so, the picketing on these properties could not have been within the sight of employees of the primary employer to persuade them. Thus, the only reasonable conclusion to be drawn is that the purpose of the picketing was to apply pressure to the neutral employees. "A picket line is a potent instrument." *Superior Derrick Corporation v. NLRB*, 273 F. 2d 891, 896 (5th Cir. 1960), and in the long history of the trade union movement, "it has a special message of its own. To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of 'unfairness' on those engaged in activities behind the picket line." *Id.* at 896. In the instant case, this is illustrated by Red Lobster's masonry contractor's refusal to cross the picket line and his recognition that even if he did, concrete suppliers would not.

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Picketing Denny's premises, when the primary contractor Drukker was neither there nor under contract, and the Red Lobster's premises after the primary employer has, as the Master found, moved his equipment and employees to the motel site, could not have been informational. The picketing amounted to a direct application of pressure on vulnerable neutral companies to induce them—at the very least, to encourage them—to cease or refrain from doing business with Drukker.[8]

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[4] The Master's finding that Local 825 engaged in area standard picketing was predicated on the testimony of the business agent Jones that several of his pickets, none of whom he could identify, told him that Denny's was not paying the area standard. Jones admitted that he "never spoke to Drukker at all before putting up the picket lines."

[5] *Sailors' Union of the Pacific*, 92 N.L.R.B. 547 (1950); see maj. op., typescript at 8.

> The intended breadth of the words "induced or encouraged" in section 8(b)(4)(A) is emphasized by their contrast with the restricted phrases used in other parts of section 8(b) * * *. The scope of "induced" and especially of "encouraged" goes beyond each of them.

International Brotherhood of Electrical Workers v. *NLRB*, 341 U.S. 694, 703, 71 S.Ct. 954, 959, 95 L.Ed. 1299 (1951). Thus, an allowance of picketing of neutral employers, regardless of how peaceful the picketing may be, "would be to open the door to the customary means of elicting the support of employees to bring economic pressure to bear on their employer." *Id.* It would be destructive of the purpose of section 8(b)(4). Implicit in the 1959 amendment to section 8(b)(4) of the Taft-Hartley Act, 29 U.S.C. § 158(b), is a Congressional recognition of the devastating effect secondary picketing can have on a neutral employer.

The object of the picketing can shed considerable illumination in ascertaining whether Local 825 induced or encouraged employees, subcontractors, and suppliers of Red Lobster and Denny's to refuse to work on their construction. The statute and our previous judgments forbid any activity which seeks to induce or encourage a person not the primary employer or an employee of his to take some action as to refuse to perform services or to do business with the primary employer.

> The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees and neutral parties do take action sympathetic with strikers and do put pressure on their own employers.

Seafarers International Union v. NLRB, 265 F.2d 585, 590 (D.C. Cir. 1959). One of the most effective means of applying such pressure it to picket a neutral place of business, relying on the union adherent's traditional aversion to crossing a picket line. The purpose of our decrees, as it is of the statute, is to protect unoffending employers from this extraordinary presure.

The Master concluded that Local 825 engaged in lawful area standards common situs picketing of Drukker from July 19 to July 30, but he made no attempt to analyze the purpose of the picketing at the Red Lobster and Denny's properties. Some questions that immediately confront us and to which the Master provided no answers are: first, could it truly have been area standards informational picketing when Jones had no information on what Drukker was paying his employees or what their standards of employment were? Jones says he relied for this information on what one of his pickets told him. Second, considering that Drukker merely had a bulldozer and compactor operated by only two employees, did it require 50 to 75 pickets to patrol 400 feet of Red Lobster property for informational purposes, particularly when Red Lobster had an exclusive entrance to its property? Third, if this was simply informational picketing and not an appeal for a secondary boycott, was massive picketing required at the Red Lobster property when in fact Drukker had no equipment or employees there?

The Master found that the large number of pickets was required because they were patrolling 2,000 feet along the highway. However, the only construction on that 2,000 feet at that time was on the Red Lobster property. There is no evidence of any construction at the time of any other site fronting Route 18 in the development. The Master saw no impropriety because Red Lobster had a contract with Drukker for performance of additional work at some subsequent time. But how can the existence of such a contract lend credence to informational picketing when the primary employer has no employees on the premises of the neutral employer to be enlightened? Furthermore, Drukker had no contract with Denny's, had never done any work for them, and none of its employees were on Denny's property. Nonetheless, Denny's was still the victim of Local 825's campaign for enlightenment. The Master gave these facts no consideration whatsoever and makes no allusions to them. The conclusion is inescapable that the picketing campaign had the planned and expected effect of denying the services of all union workmen and suppliers of the neutral employers unless they committed themselves to disassociate then and in the future from Drukker or other non-union workmen. As soon as this illegal objective of the picketing had been achieved, the pickets were removed.

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[8] The Union apparently draws solace from testimony of Denny's Castongue that his company had no intention of doing business with Drukker. The Union apparently believes that such testimony necessarily precludes attribution of an illegal object to the picketing because Denny's, as a neutral, had no way of pressuring Drukker. In light of the Denny's picketing, however, the clear import of Jones' statements to Castongue was that if *any* non-union workers, especially Drukker, appeared on the Denny's site, operation would be shut down.

There are other factors, also ignored by the Master, which point to Local 825's calculated plan to violate this court's decrees and which do not support the Local's claim of innocent, informational picketing. First, if its activities were merely informational, no explanation is offered for Jones insistence to Drukker that the work to be performed be rendered by Local 825 members and that membership was not available for Drukker's employees in this local. "The result is that [Local 825's] picketing in order to attain its ultimate purpose, must have included among its objects that of forcing [Red Lobster] to terminate [the] subcontract." *NLRB* v. *Denver Building & Construction Trades Council,* 314 U.S. 675, 688, 71 S.Ct. 943, 951, 95 L.Ed. 1284 (1951).

Second, on July 30 Jones withdrew Local 825 pickets from the Red Lobster property when their project superintendent assured Jones he would use only union labor to lay the foundation. Jones, however, threatened to "throw pickets up" if any non-union workers appeared at the site. This definitely demonstrates that Jones was interested in cutting off business with non-union contractors, not the mere dissemination of information.

Third, when Denny's job superintendent, Castongue, inquired of Jones on July 27 "what it would take" to be able to proceed with their construction, he was repeatedly warned by Jones that Denny's could do so only if they "used union people on the job." Here, too, when Denny's agreed to use union labor, its masonry subcontractor was for the first time permitted to commence work since the picketing began. Again, it is obvious that the picketing was not merely informational. On the contrary, the picketing was blatantly intended to induce Red Lobster to discontinue business with Drukker, a non-union contractor, and it succeeded. The picketing had also been intended to induce or encourage Denny's to refrain from using non-union contractors and subcontractors and there too it succeeded.

Finally, the Master completely ignored direct testimony from Castongue that he was threatened and abused as he crossed the line and while working at the Red Lobster site. This is not mere information, it is plainly and simply threats and coercion directed at a neutral employer. The picketing was intended to appeal to secondary employees not to cross the picket line or to perform services despite the lack of any presence of the primary contractor on the premises of the neutrals, and it met with obvious success. As an appeal to secondary employees, it was illegal. *NLRB v. Denver Building and Construction Trades Council,* 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951).

III.

Local 825's activity at the East Jackson site falls within the same proscriptions of the law and this court's previous orders. When Leeds first encountered picketing at the school site, it immediately established two separate entrances. It reserved one for its employees and suppliers; it set up the other employees of all other contractors and their employers. Leeds scrupulously adhered to its reserve gate. Although the signs designating the gates were not drafted precisely, they were supported by letters to all interested parties, including Local 825, that clearly identified the separate entrances.

The Master, however, found that the sign posted caused such confusion that it failed to establish a reserve gate. His references to the record, however, do not support this finding. In fact, the uncontradicted evidence is to the contrary. Cox, the construction superintendent for Arthur Orgen, Inc., the general contractor, personally refused to cross the picket line except with the consent of Local 825 to pick up his tools. He testified that the signs did not create confusion among the employees on the job site. Leeds under cross-examination, also testified that "nobody was confused at the site."[7]

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[7] This testimony is further supported by the testimony of David Ochs, in charge of the picketing on this development for the International Association of Heat and Frost Insulators, Local 89, this his local picketed Leeds at the main entrance to the project on September 4 and 5. But after those dates they picketet only at "the restricted gate" on the Trenton-Lakewood Road. For the remainder of their picketing, they never picketed the main gate although Ochs appeared there to observe what was going on. At the main gate the only picketing he observed was by Local 825 pickets carrying signs and by no other union.

The Master, obviously uncomfortable with his finding, further compounded the error with an alternate finding that even if it be assumed that a reserve gate was established "it cannot be found by clear and convincing evidence that Leeds' employees and other contractors were not also using the neutral gate instead of the reserve gate which they attempted to establish." (Finding No. 36) This finding incomprehensibly places the burden of proof on the Board to negatively establish what otherwise should be an affirmative defense of the Union, if it exist at all. The record is absolutely devoid of any evidence that Leeds or its contractor were using the neutral gate once the reserve gate was established.

Although the Master found that on September 5 Local 825 picketed the main entrance on Patterson Drive (Finding No. 36), he was unable to find that the sign attempting to establish a reserve gate was posted "since there was great confusion even among the witnesses for the Board as to whether the picketing was done on September 5, or September 6, and further whether the sign attempting to establish the reserve gate was even posted at the time." (Finding No. 36) Ochs, in charge of the picketing for the Heating and Pipefitters Local, testified to the contrary, stating that he observed picketing at the main gate September 5 and 6. Cox also contradicted the Master's finding. He even sought Local 825's permission to cross the picket line on September 6 to withdraw his tools. Hagenbarth's testimony also contradicted the Master's finding. No evidence in the record supports it.[8]

It is firmly established that in common situs construction, one contractor may establish separate gates for the purpose of ingress and egress from the job site and thereby lawfully force the union to picket only a neutral gate. *Local 519 v. NLRB,* 416 F.2d 1120, 1125 (D.C.Cir.1969). To carry out the legislative purpose embodied in the secondary boycott amendments, a union must under such circumstances limit its picketing to areas reasonably proximate to the gate used by the primary contractor's employees and suppliers. *See Local 761, International Union of Electrical, Radio, and Machine Workers, v. NLRB,* 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed.2d 592 (1961); *Markwell and Hartz, Inc, v. NLRB,* 387 F.2d 79, 81–83 (5th Cir. 1967), *cert. denied,* 391 U.S. 914, 88 S.Ct. 1808, 20 L.Ed.2d 653 (1968). The record in this case clearly and convincingly establishes that Local 825 picketed the neutral gate; it never picketed the gate reserved for Leeds. The absence of Leeds' employees at the main gate is evidence of the secondary objective of the picketing. *Painters District Council No. 38,* 153 N.L.R.B. 797, 800–01 (1965); *NLRB v. Local 254, Building Service Employees,* 359 F.2d 289, 291 (1st Cir. 1966). "There is simply no excuse for picketing where the message is seen by neutral employees of neutral employers but is not seen at all by the employees of the primary employer." *Brown Transport Co. v. NLRB,* 334 F.2d 30, 39 (5th Cir. 1964).

Accordingly, I would reject the recommendations of the Master and adjudicate Local 825 in further civil contempt and require that it take the steps in purgation requested in the Board's motion.

Penisula Shipbuilders' Association v. NLRB

NLRB v. Newport News Shipbuilding and Dry Dock Company

Newport News Shipbuilding and Dry Dock Company v. Peninsula Shipbuilders' Association

663 F.2d 488 (4th Cir.), September 21, 1981—253 NLRB 721

On action for declaratory judgment

Before PHILLIPS, MURNAGHAN and ERVIN, Circuit Judges

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[8] In a feeble effort to support his finding, the Master seized upon a small portion of Cox's testimony given under cross-examination that the signs had been torn down before Cox reported for work and were not present thereafter. Cox's amplified testimony, however, revealed that he personally did not observe the signs being torn down since he did not report for work until about a half hour after the signs had been restored by Alessandrini, Leeds' plumbing foreman. The record shows that the gate signs were torn down during the day of September 4 and that Alessandrini replaced them on September 5 about 7:15 A.M. immediately after starting his work. Cox testified that he was almost 100 percent certain that the signs were up when he arrived for work at 7:45 A.M. on September 5 and he described seeing it behind White, the business agent, as he spoke to him. This testimony is uncontradicted, and there is no testimony to indicate that the sign identifying the main gate was not posted on September 6. In substance, the Master's finding depends on Cox's testimony concerning an entry in his log indicating "no signs on main entrance" on September 6. Cox explained, however, that this entry referred *not to a gate sign,* but *to picket signs.*

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James Dickson Phillips, Circuit Judge: Before us are consolidated proceedings that grow out of the refusal by Newport News Shipbuilding & Dry Dock Company (Company) to honor revocations of dues check-off authorizations by certain of its employees while they were represented by Peninsula Shipbuilders' Association (PSA). The refusal was based upon the employees' failure to use revocation forms furnished by PSA as required by section 23.2 of the collective bargaining agreement between the Company and PSA, and to follow certain other special procedures for revocation unilaterally imposed by PSA.

In a declaratory judgment action brought in district court by the Company aganist PSA and affected employees, the district court held *inter alia* that the revocation provision was valid as a matter of contract law and justified the Company's refusal. In No. 81-1412, the National Labor Relations Board (Board), as intervenor in that action, appeals the district court's judgment.

Following the district court's entry of judgment, the Board in an unfair labor practice proceeding against the Company and PSA held that the revocation provision was invalid both facially and as applied by PSA and the Company. On this basis the Board concluded that both the Company and PSA had violated section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158, by enforcing the provision and by continuing to check off and receive PSA dues from employees who had sought to revoke their authorizations by means other than those provided in the collective bargaining agreement and as imposed by PSA. The Board issued a cease and desist order and held the Company and PSA jointly and severally liable to reimburse those employees who had effectively revoked their check-off authorizations on non-PSA forms. In No. 80-1012, PSA petitions to review and set aside those portions of the Board's decision and order which run against it and the Board cross-applies for enforcement. In No. 81-1179, the Board applies for enforcement of those portions of its decision and order which run against the Company.

We grant enforcement to the Board's order and hold invalid any portion of the district court's declaratory judgment in conflict with the remedial aspect of that order.

I

In 1975, the Company and PSA entered into a collective bargaining agreement covering the Company's approximately 19,000 production and maintenance employees. The contract was effective until June 30, 1978, and, by its terms, was extended until October 28, 1978, when the Board certified the United Steelworkers of America (Steelworkers) as the employees's bargaining agent and the winner of a representation election held in January 1978.[1] Between the election and certification dates, the Company recognized PSA as the employees' bargaining representative and it continued to check off PSA dues from the payroll checks of employees who had authorized such deductions under section 23.1 of the collective bargaining agreement.[2] The authorizations on forms furnished by PSA provided for the checkoff of $2.00 weekly until revoked by the employee in writing. During that same time, the Company received letters from 214 employees, on forms furnished by the Steelworkers, revoking their dues checkoff authorizations. The Company notified PSA that it would honor the revocations, but PSA threatened to sue the Company for breaching section 23.2 of the collective bargaining agreement[3] which required revocations to be on forms furnished by PSA. Consequently, the Company continued to check off and remit dues to PSA.

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[1] The election outcome was disputed. In late 1979, this court ruled that the Steelworkers had won. *Newport News Shipbuilding and Dry Dock Co. v. NLRB*, 608 F.2d 108 (4th Cir. 1979).

[2] *Section 23.1. Check Off and Transmittal.* Upon the written individual and voluntary authorization in accordance with the law of an employee who is a member of the Association, and in no way as a condition of employment, the Company will make payroll deduction of the required monthly dues (uniform in amount) of the Association in accordance with the said authorization. The Company will deliver the sums so deducted to the Association, upon its written receipt therefor.

[3] *Section 23.2. Revocation of Check Off Authorization.* (a) Any such dues check off authorization [as provided by section 23.1] shall not be for a period of time greater than one year or the termination date of this Agreement, whichever is the sonner. A revocation of such authorization shall be by use of the form furnished by the Association (in duplicate) and shall be delivered either to the Association or to the head of the Company's Personnel and Industrial Relations Division. If such revocation is to be effective upon the termination date of this Agreement, it shall be delivered within the last fifteen (15) days of the term of this Agreement.

(b) The above-mentioned authorization, the receipt and notice of cancellation shall be in form and substance satisfactory to the Company.

PSA then sent the 214 employees certified letters informing them that under the contract only PSA forms could be used to revoke checkoffs and that they must come by the PSA office on weekdays between 8:00 a.m. and 4:30 p.m. to sign those forms. PSA also issued a "Report to the Membership" on February 12, 1978, setting forth the same information. Eventually 56 of the 214 employees revoked checkoffs on PSA forms and the Company complied. Other employees testified, however, that it was difficult to obtain PSA forms because they either worked evening or night shifts when the union hall was closed or they had to go to the office, located outside the shipyard, during their noon lunch hour. The forms were not made available to employees at the plant—for example, through distribution by Company personnel or shop stewards. Finally, a few employees testified that they did not sign Steelworker revocation forms received by the Company and that they never intended to resign their PSA membership. All dues checkoffs terminated when the contract ceased on October 28, 1978.

On October 18, 1978, ten days before the contract expired, the Steelworkers filed unfair labor practice charges with the Board, alleging that the Company was violating subsections 8(a)(1) and 8(a)(3) and PSA was violating subsections 8(b)(1)(A) and 8(b)(2) of the NLRA, 29 U.S.C. § 158, by continuing to check off the dues of employees who revoked on non-PSA forms. In response, the Board informed the Company that a complaint would issue against it, but orally advised that the Board intended to dismiss the charges against PSA. Subsequently, on November 16, 1978, the Company filed a declaratory judgment action in district **491** court against PSA, its business manager, and the 158 employees who attempted to revoke their checkoff authorizations on non-PSA forms.[4] The action sought a judicial construction of article XXIII of the collective bargaining agreement, in particular to determine what procedures under section 23.2 were necessary to revoke checkoff authorizations and whether PSA must indemnify and defend the Company under section 23.3.[5]

While the declaratory judgment action was pending in district court, the Board issued unfair labor practice complaints against the Company and PSA,[6] on January 12 and July 2, 1979, respectively, alleging *inter alia* that enforcing section 23.2 of the collective bargaining agreement unlawfully interfered with the employees' section 7 rights, 29 U.S.C. § 157. The Board then moved to intervene in and to stay the district court action pending the outcome of the unfair labor practice proceeding. Although the district court permitted the Board to participate at the hearing as an *amicus curiae*, in a decision issued October 24, 1979, it denied the Board's motion to intervene. The district court found the 158 employees, who failed to appear, in default. It then noted that no party challenged the validity of section 23.2 under the NLRA, but rather that the parties agreed the section was lawful. The district court therefore neither reached that issue nor considered it in interpreting section 23.2 as a matter of contract law. On the merits, the district court gave a declaratory judgment that section 23.2 was valid and binding in the case before it; that the Company accordingly was entitled to continue checkoffs not revoked on PSA forms; and that the Company was to be defended and indemnified by PSA under section 23.3. The Board appealed the denial of its motion to intervene and we reversed, granting the Board party status to perfect an appeal in order to protect its interests as the primary tribunal for the adjudication of unfair labor practices. *Newport News Shipbuilding and Dry Dock Co. v. Peninsula Shipbuilders' Association,* 646 F.2d 117 (4th Cir. 1981).

Armed with the district court decision, the Company appeared at the beginning of the unfair labor practice hearings to state that PSA would defend and indemnify it. The Company thereafter did not participate in the Board proceeding. PSA moved for dismissal of the unfair labor practice proceeding because either the district court's findings of fact were res judicata or principles of collateral estoppel barred the proceeding. *Newport News Shipbuild-*

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[4] Jurisdiction was based on sections 301 and 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 185, 186, and 28 U.S.C. §§ 1331, 2201–2202.

[5] *Section 23.3. Indemnification.* The Association shall indemnify, defend and hold the Company harmless against any claim or liability arising out of the administration of this Article.

[6] The Regional Director initially dismissed the charge against the PSA but, after a successful appeal by the Steelworkers, he issued a complaint.

ing and Dry Dock Co., No. JD-403-80, slip op. at 10 (July 10, 1980) (*appended to* 253 N.L.R.B. No. 96). The administrative law judge (ALJ), however, noted that the issue before the district court was one of contract interpretation and the district court neither decided nor purported to decide the unfair labor practice question which would, of course, be within the Board's exclusive jurisdiction. *Id.* at 18. Accordingly, he denied the motion.

The ALJ next addressed the validity of section 23.2 of the collective bargaining agreement under subsection 302(c)(4) of the Labor Management Relations Act (LMRA), which permits the employer to withhold and remit dues to a union "*Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year or beyond the termination date of the applicable collective agreement, whichever occurs sooner; * * *." 29 U.S.C. § 186(c)(4). The ALJ found that section 23.2 was facially unlawful because it required the employee to use only forms furnished by PSA, thus imposing a requirement over and above those of subsection 302(c)(4), in contravention of *Felter v. Southern Pacific Co.,* 359 U.S. 326, 79 S.Ct. 847, 3 L.Ed.2d 854 (1959). In *Felter,* the Supreme Court had held that a contract provision, requiring an employee to use a form provided by the union in order to revoke his checkoff authorization, violated subsection 2 Eleventh (b) of the Railway Labor Act [7] because it imposed requirements beyond those of the statute and limited the individual employee's freedom to authorize or reject checkoff of his union dues. In finding *Felter* to be dispositive of this case, the ALJ emphasized that the *Felter* Court considered subsection 2 Eleventh (b) to be quite similar to subsection 302(c)(4) of the LMRA. *Id.* at 332 n.10, 79 S.Ct., at 852 n.10. The ALJ alternatively found that section 23.2 of the collective bargaining agreement was unlawful as applied. There was no general distribution of or access to the PSA revocation forms, neither the PSA constitution nor union bylaws mentioned the procedure for checkoff revocation; there was no formal notification to employees before 1978 as to how they could obtain the forms; and the employees could revoke only by personally appearing at the PSA hall. These were further restrictions on the employee's individual freedom of decision than those imposed by the collective bargaining agreement.

The ALJ therefore concluded that the Company violated subsections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C § 158(a)(1), (3), by maintaining and enforcing section 23.2 and by continuing to check off PSA dues after receiving revocations. He also concluded that PSA violated subsections 8(b)(1)(A) and 8(b)(2), 29 U.S.C. § 158(b)(1)(A), (2), by maintaining and enforcing section 23.2, by causing the Company to continue to check off the dues of employees who submitted revocations, and by receiving and retaining those dues.

The Board affirmed the ALJ's findings and conclusions, ordered the Company and PSA to cease and desist from their unlawful conduct, and held them jointly and severally liable to reimburse the employees who had effectively revoked their checkoff authorizations on non-PSA forms. *Newport News Shipbuilding & Dry Dock Company,* 253 N.L.R.B. No. 96 (Dec. 12, 1980).

II

The validity of section 23.2 of the collective bargaining agreement—as a matter of contract or labor law—was raised in both the proceedings now before us. At issue specifically was the clause requiring an employee to use a form furnished by PSA in order to revoke his checkoff authorization. In the declaratory judgment action the district court found this requirement to be valid and binding upon the contracting parties; in the unfair labor practice proceeding, the Board found it invalid both facially and as applied as a matter of national labor law. Because the Board's jurisdiction to determine whether the provision is an unfair labor practice under the NLRA is primary and exclusive, we review its decision as the dispositive one to the extent the adjudications are in conflict.

We affirm the Board's finding that section 23.2 was invalid under the LMRA as applied in this case and, therefore, we do not reach the question whether under *Felter v. Southern Pacific Co.,* 359

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[7] Subsection 2 Eleventh (b) of the Railway Labor Act permits a carrier and a union to enter into an agreement for dues checkoffs "*Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, * * * which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner." 45 U.S.C. § 152 Eleventh (b).

U.S. 326, 79 S.Ct. 847, 3 L.Ed.2d 854, such a contract provision is on its face, *per se* violative of the LMRA.[8] In addition to its conclusion

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that the contract provision is facially invalid the Board held alternatively that the revocation procedure as actually enforced constituted an unfair labor practice under the total circumstances. There is substantial evidence on the record as a whole to support this finding. Employees had no easy, general access to PSA forms; before 1978, they were not informed as to how they should revoke their checkoff authorizations short of the clause in section 23.2 requiring the use of a PSA form; and they had to appear personally at the PSA hall in order to sign the forms and possibly to resign their PSA memberships. While there is no evidence that employees who sought to revoke were harassed at the PSA office, this additional requirement clearly could dampen the employee's freedom to choose or revoke checkoff of his union dues as provided in subsection 302(c)(4) of the LMRA, 29 U.S.C. § 186(c)(4).

Contesting the Board's findings and conclusions on this ground, PSA argues that these additional requirements were reasonable because it had serious doubts as to the authenticity of the revocations. Some forms lacked written signatures, a few employees later testified that they did not sign Steelworker forms or did not intend to resign their PSA memberships, and PSA at the time was hotly contesting the outcome of the representation election with the Steelworkers. Because of these doubts and in order to ascertain which revocations were genuine, PSA sent the 214 employees letters detailing the revocation process—appearing in person at the PSA hall to sign a PSA revocation form.

So runs PSA's argument, but when the record is assessed there is little or no evidence that PSA was motivated by any concern for ascertaining the authenticity of the revocations. PSA never mentioned its doubts to the employees or to the Company, a number of the checkoff authorization cards lacked written signatures which PSA never questioned, and the Company did not find the revocations fraudulent on their faces because it accepted them and notified PSA that it would honor them. As the Supreme Court noted in *Felter,* authenticity disputes are not unusual particularly when there is a contest between unions, but "[i]f the company suspects fraud or forgery in a revocation, it is within its power informally to check the matter with the employee." 359 U.S. at 335, 79 S.Ct. at 854. The checkoff authorization cards—the actual assignment contracts between the individual employees and the Company—did not authorize PSA to reject revocations under any circumstances, including doubts as to their authenticity. Therefore, we must reject PSA's contention that its actions were reasonable in this case.

Because there is substantial evidence that section 23.2 was applied unlawfully, we grant full enforcement to the Board's order, including that portion requiring the Company and PSA, as parties jointly and severally liable, to make reimbursement of the checked-off dues to the 141 employees who have verified their revocations on non-PSA forms and to those other employees who may now be determined to have executed similar effective revocations. To the extent that the district court's judgment might be interpreted to exonerate either PSA or the Company from any liability to make reimbursement to these employees under the Board's order, or otherwise to conflict with

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this opinion, we hold that it is invalid and of no effect.[9]

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[8] The Board found that *Felter* compelled the conclusion that section 23.2 is facially invalid under section 302(c)(4) of the LMRA, 29 U.S.C. § 186(c)(4), and that by maintaining and enforcing the contract, both the Company and PSA committed unfair labor practices. The Company and PSA argue that *Felter* is inapposite because the wording and legislative histories of subsections 302(c)(4) of the LMRA and 2 Eleventh (b) of the Railway Labor Act are significantly different; the Board and courts have given subsection 302(c)(4) a more liberal reading than subsection 2 Eleventh (b); the requirement of a particular revocation form is only a minor, nonburdensome clerical detail; and the employees, as members of the union which negotiated section 23.2, are barred from challenging its validity. Disposition of these contentions would require us to determine whether a violation of subsection 302(c)(4), perhaps controlled by the Supreme Court's decision in *Felter*, constitutes an unfair labor practice under section 8 of the NLRA, 29 U.S.C. § 158. *See NLRB v. Cameron Iron Works, Inc.*, 591 F.2d 1, 3 (5th Cir. 1979); *In re Salant & Salant, Inc.*, 88 N.L.R.B. 816, 817–18 (1950). For the reasons stated, however, we need not reach this question.

[9] The Board, in appealing the judgment of the district court, contends that the court lacked jurisdiction because there was neither a case nor controversy before it—PSA and the Company were aligned on the interpretation of section 23.2—and that, alternatively, the district court abused its discretion by not deferring to the Board's primary jurisdiction or by not staying its action pending resolution of the unfair labor practice proceeding. Regardless of the Company's and PSA's positions as to section

Continued

ENFORCEMENT GRANTED.

23.2 of the contract, the issue of the Company's rights to defense and indemnification under section 23.3 of the collective bargaining agreement presented a live case to the district court. The district court also had jurisdiction under section 301 of the LMRA, 29 U.S.C. § 185, to address any issues of pure contract interpretation. While, with the advantage of hindsight, we may feel that the district court's better course would have been to stay its action, we cannot say that its decision to proceed was an abuse of discretion. Accordingly, the district court judgment is a valid one, except insofar as it conflicts with remedial aspects of the Board's order entered in a proceeding as to which its jurisdiction was exclusive. We need not attempt to delineate the precise jurisdictional line between the two adjudications, it being sufficient simply to confirm by this decision the primacy of the Board's remedial order to the extent any conflict might exist. Specifically not addressed in this opinion, hence neither affirmed nor rejected, is the Board's conclusion that the disputed provision is *per se* invalid under *Felter*. That issue we reserve for another day.

Tanforan Park Food Purveyors Council and the Hapsmith Company v. NLRB

656 F.2d 1358 (9th Cir.), September 21, 1981—239 NLRB 1061

On petition to review Board Order

Before ANDERSON, FLETCHER and FERGUSON, Circuit Judges

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FERGUSON, Circuit Judge: Two corporations appeal a bargaining order of the National Labor Relations Board

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("NLRB"). They claim that they were erroneously determined to be joint employers and erroneously denied a new election or evidentiary hearing. We remand for consideration of the accuracy of a Samoan translation used during the election process; on all other issues, we affirm the NLRB order.

I.

Tanforan Park Shopping Center ("Tanforan") operates a shopping center in San Bruno, California. The center contains a restaurant complex consisting of various tenant restaurants around a common area. The tenants are by lease required to belong to Tanforan Park Food Purveyors Council ("Council"), a non-profit corporation which operates the common area for the tenants' mutual benefit. Council employs busboys, supply persons, janitors, and dishwashers. These unit employees comprise the bargaining unit which the Union in this case[1] sought to represent.

Tanforan hired the Hapsmith Co. ("Hapsmith") to manage its entire complex, including the restaurant area. Hapsmith also discharges Tanforan's lease obligation to provide administrative assistance to Council. Hapsmith employs Jack Kuks to conduct the day-to-day affairs of the restaurant common area.

The Union won the election to represent the unit employees in January, 1978. Afterwards, Hapsmith and Council filed objections to the Union's conduct prior to the election and the Board's conduct of the election. The Regional Director overruled these objections without a hearing. The NLRB denied the subsequent requests for review and ordered Council and Hapsmith to bargain with the Union. Council and Hapsmith refused to do so and the NLRB subsequently found that they had violated the National Labor Relations Act.

Hapsmith and Council, as petitioners here, dispute that order. They find error with the NLRB's determination that they are joint employers. They also claim error with the Regional Director's refusal to order a new election based on objections to the Union's campaign material. They assert that, at the least, the Regional Director should have ordered a hearing on these objections.

II.

The NLRB found Hapsmith to be a joint employer of Council's employees. Petitioners seek to excuse their admitted refusal to bargain with the Union by challenging that NLRB determination. Their challenge fails.

Whether a corporation possesses sufficient indicia of control to qualify as a joint employer "is essentially a factual issue * * *." *Boire v. Greyhound Corp.*, 376 U.S. 473, 481, 84 S.Ct. 894, 899, 11 L.Ed.2d 849 (1964). The facts of this case accordingly warrant extensive exposition. The NLRB determination of joint employment will be upheld unless it is "arbitrary and capricious." *NLRB v. Red-More Corp.*, 418 F.2d 890, 894 (9th Cir. 1969).

Petitioners present the facts as follows. Council pays the unit employees' worker's compensation insurance premiums and social security payments, assesses the tenants for expenses, and bears all the expenses for maintenance, utilities, and real estate taxes. In addition, unit employee wages, salaries, and fringe benefits are set and paid for by Council through accounts which bear its name. Hapsmith, by contrast, imposes no pricing or other restrictions, does not contribute to restaurant common area expenses, and has no authority to hire, fire, or otherwise influence terms and conditions of unit employees' employment. Finally, unit employees have their own lockers and break area, their personnel files are kept in a Council office, and Kuks' office is separate from Hapsmith's office.

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[1] The Union, Local 340, San Mateo Bartenders and Culinary Workers Union, AFL-CIO, is not a party to this litigation.

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The NLRB offers the following facts. The Council, which is composed of a representative of each tenant plus a Hapsmith representative, meets only sporadically and plays little role in daily business, including employee supervision and labor relations. Its manager, Kuks, hires and fires all unit employees, sets their wage rates and vacation, holiday, and work schedules, and supervises them. Kuks was hired by Hapsmith, and all his incidents of employment are solely under Hapsmith's control. He serves at Hapsmith's pleasure—Council once tried to have him fired, but failed. Kuks supervises Council's bookkeeper, who is also a Hapsmith employee. Moreover, Council payroll checks may be signed only by Kuks or two other Hapsmith employees.

The NLRB makes the additional points that Hapsmith has the right to have any unit employee fired and that it may make rules and regulations governing use and operation of the common area.

In comparing these various factual claims and eliminating those which are irrelevant, conflicting, or conclusory, the following picture emerges. Council employs the unit employees and controls various incidents of ownership. Hapsmith, through the agency of its employee, Kuks, hires and fires all unit employees, sets their wage rates and vacation, holiday, and work schedules, and supervises them. Hapsmith can accordingly be treated as a joint employer.

"A joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining." *Sun-Maid Growers of California v. NLRB,* 618 F.2d 56, 59 (9th Cir. 1980). The areas within Hapsmith's control—wage rates, vacation, holiday, and work schedules, and employee supervision—lie within the core of mandatory collective bargaining. *See, e.g., Maas & Feduska, Inc. v. NLRB,* 632 F.2d 714, 717–18 (9th Cir. 1979); *Gallenkamp Stores Co. v. NLRB,* 402 F.2d 525, 529 n.4 (9th Cir. 1968). Hapsmith must therefore be considered a joint employer.

That conclusion follows far more strongly than is required by the "arbitrary and capricious" standard which governs review of NLRB determinations of joint employment, *NLRB v. Red-More Corp., supra,* at 894. Indeed, the breadth of Hapsmith's control over fundamental areas of mandatory collective bargaining makes its position as a joint employer emerge *a fortiori* from *Boire, Sun-Maid,* and *Gallenkamp, supra,* in which cases a determination of joint employment was made from lesser indicia of joint control.

III.

Council and Hapsmith (hereinafter "employers") objected to various campaign statements presented to unit employees. They claim that the election should be set aside and the order to bargain denied or, alternatively, that a hearing on the issue must be held. The Regional Director overruled these objections. We reverse and remand in part and affirm in part the NLRB order.

This court may overturn the decision of the Regional Director if it determines that she abused her discretion in reviewing the facts. *NLRB v. J.R. Simplot Co.,* 322 F.2d 170, 171 (9th Cir. 1963). If the employees have been prevented from freely registering their choice in a representation election, the court may set the election aside and deny enforcement of the NLRB order. *NLRB v. Winchell Processing Corp.,* 451 F.2d 306, 310 (9th Cir. 1971). Further, the court may require a hearing on a lesser showing than that required to overturn the election. Employers need only assert facts which would, if true, require a new election. *NLRB v. G.K. Turner Associates,* 457 F.2d 484, 487 (9th Cir. 1972).

A. *The Alleged Preferential Treatment Based on Pre-Election Support*

The employers object to statements made in the Union letter sent to the employees dated January 10, 1978. The letter allegedly implies that employees who are not Union members cannot vote to ratify a Union contract. Furthermore, the employers claim that the letter conditions a waiver of Union dues on the employee's pre-election support of the Union.

The NLRB will set aside elections when a union promises to treat union members differently from other employees in return for pre-election support. *Knapp-Sherrill Co.,* 71 N.L.R.B. 1547 (1968). The Supreme Court has held that if a union promises to waive dues because of pre-election support, the election will be set aside. *NLRB v. Savair Mfg. Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973). Furthermore, the election should be set aside if the fee waiver is communicated in such a confusing fashion that it implies that waiver hinges on pre-election support. *NLRB v. Aladdin Hotel Corp.,* 584 F.2d 891, 893 (9th Cir. 1978).

The disputed statements do not violate these principles of the election process. The letter states that a Union contract must be ratified by "you, the members, before it is adopted." It also states that dues will be delayed until at least "thirty-one days after the members approve their contract." These statements refer to the Union members' ability to ratify the contract and to defer fees for a month. Neither is conditioned on joining the Union prior to the election. Nor do they deny the same rights to other employees. Absent a showing that the Union promised differential treatment in return for pre-election support, the employer's conclusory assertions do not support setting aside the election.

B. *The Alleged Misrepresentation of Material Facts*

The employers also claim that the Union materially misrepresented benefits employees would receive. In the January 10 letter, the Union described benefits members received at a nearby market. The employers did not demonstrate, however, that the statements in the letter are material misrepresentations of fact. Instead, they allege that part-time workers might have been confused about their own rights.

An election will be set aside if the Union has misrepresented information to the voters. *Hollywood Ceramics Co.,* 140 N.L.R.B. 221 (1962). The party contesting the election must allege that the information is false and material. *NLRB v. Snokist Growers, Inc.,* 532 F.2d 1239 (9th Cir. 1976). The employers' allegations of misrepresentation manifestly do not meet that standard.

C. *The Notice of the Election and the Ballot*

Finally, employers claim that the translation from English into Samoan of the official NLRB notice of election, prepared for the thirteen native Samoan unit employees, was erroneous. The English to Samoan translation used in this election is the official one promulgated by the NLRB for use in American Samoa. The employers submitted to the Regional Director a retranslation of the ballot from Samoan back into English, prepared by a native Samoan employee. This retranslation reads:

> Do you want someone to argue or to stand for you?
>
> * * * *
>
> Under the National Labor Relations Act all the employees should have an agent to their own people to bring someone to represent or help their own organization on their job. To argue for them throught their own representatives, to work together with them, who against in the progress of anyone or all these things unless the Union and the Management in any states who permitted this agreement, according to the government for the safety of the Union says that all employees should an [sic] are suppose [sic] to join the Union.

The employers claim that this retranslation suggests that the Samoan version of the notice is garbled and confusing.

The NLRB has proclaimed itself particularly "concerned with the protection of its procedures designed to provide fair elections." *Columbia Tanning Corp.* 38 N.L.R.B 1252 (1978). In addition, the NLRB has an affirmative duty to present election notices to employees in languages they will understand. *Marriott In-Flite Service Div. of Marriott Corp. v. NLRB,* 417 F.2d 563, 567 (5th Cir. 1969), *cert.* denied, 397 U.S. 920, 90 S.Ct. 929, 25 L.Ed.2d 101 (1970); *Fibre Leather Mfg. Corp.,* 167 N.L.R.B. 393 (1967). This goal is not met if the presentation, in whatever language, is incomprehensible to the reader.

If the above retranslation presented by the employers is accurate, then it is likely that confusion resulted among the Samoan employees. Employers assert that such confusion would be so great as to undermine the election process. This assertion, if true, would require setting aside the election. Given the duty of the Board to protect its own procedures, and to present *comprehensible* election notices to employees, we hold that the Board was in error in denying an evidentiary hearing on the issue of the Samoan translation. Hence, we remand so that the NLRB may hold a hearing on this claim.

We **REVERSE AND REMAND** on the issue of the Samoan translation. In all other respects, the NLRB order is **AFFIRMED.**

FLETCHER, Circuit Judge, concurring: I concur in the result reached by the majority but I write separately to make clear my understanding of our holding in Part III C.

The employers made only one claim below regarding the Samoan translation of the sample ballot. They alleged that the translation conveyed the impression that the Board endorsed the Union. In support of this contention, the employers submitted two retranslations from the Samoan. Only one of these, the retranslation prepared by the Samoan employee, appears to support the claim.[1]

The Regional Director rejected this challenge to the election on the ground that a perfect translation from English into Samoan was not to be expected, because Samoan does not have the vocabulary necessary to render the technical language of federal labor law. She held that the translation was not so misleading as to prevent employees from making an informed choice in the election.

Translation is not an exact science. When the Board supplies employees with foreign language election notices and ballots, however, the translation must provide those who do not read English with the basic information necessary to an informed choice. *See Marriott In-Flite Service Div. of Marriott Corp. v NLRB,* 417 F.2d 563, 564 (5th Cir. 1969). Contrary to the employers' assertion here, an exact correspondence between the English version and the translation is neither possible nor necessary.

According to my understanding, we remand this case to the Board because the Samoan employee's affidavit, if believed, tends to show that the Samoan ballot suggested Board endorsement of the Union. Since nearly half of the 27 bargaining-unit employees were Samoan, misinformation on this issue might have prevented them from making an informed choice in the election. This issue should not have been resolved by the Board without an evidentiary hearing. At the hearing, the Board should determine whether the translation was so misleading or confusing as to suggest Board endorsement of the Union, and, if so, whether it prevented the employees from understanding the choices available to them.

NLRB v. World Evangelism, Inc.

656 F.2d 1349 (9th Cir.), September 21, 1981; rehearing denied December 2, 1981—248 NLRB 909

On petition to enforce Board Order

Before SKOPIL and FARRIS, Circuit Judges, and CURTISS,* District Judge.

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FACTS

SKOPIL, Circuit Judge: In October 1978 World Evangelism, Inc. ("WEI") acquired the El Cortez Center, a building complex occupying roughly one city block. The Center consisted of three motels, a swimming pool, a convention center, and a tower containing offices, hotel rooms, and restaurants. Prior to the acquisition, Handlery Hotels operated the Center, employing between five and nine engineers to operate its mechanical system, including electrical, plumbing, heating and refrigeration, and the swimming pool. The engineers were represented by Operating Engineers Local 501 ("Local 501"), and covered by a contract in force from November 1, 1977 to November 1, 1980.

Shortly before the takeover WEI decided to retain the engineers. It did not state whether it would adopt Handlery's contract. It notified Local 501 that it would not be a "successor" owner. When the engineers heard this, they notified Local 501's Business Representative, Brown, that they would resign unless WEI adopted Handlery's contract. WEI requested them to wait util its Executive Vice President, David Cerullo, could meet with them.

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[1] The disputed paragraph is quoted by the majority, *supra* slip op. p. 4704, p. ——.

*The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

Undisputed evidence showed that at the meeting Cerullo claimed that the telegram had been sent to Local 501 by mistake. He stated that Local 501 should draft a contract and return it to him. The engineers agreed to continue working. Further content of the discussion is disputed. The Administrative Law Judge ("ALJ" credited the testimony of the Union witnesses that Cerullo spoke in terms which would lead a reasonable person to conclude an agreement had been reached on the contract and only formal steps of drafting and signing remained.

Brown returned with a copy of the standard San Diego Hotel Industry form contract which Handlery had signed. He discussed the specimen contract with WEI General Manager Rose, whom Cerullo had designated as his representative. Rose expressed problems with the non-discrimination clause, claiming that WEI reserved the right to discriminate on the basis of religion. Brown stated that the Union had no such right but that satisfactory language could probably be arranged. Brown promised to furnish Rose a completed clean copy of the contract along with fringe benefit trust subscription forms.

During the next two months WEI did not sign the contract nor communicate with Local 501. Brown spoke with Rose about reports that WEI was paying the engineers less than the contract rate. He was assured that the matter would be "looked into."

In December 1978, WEI notified Local 501 that it had not adopted Handlery's contract and did not want to sign the contract Brown had tendered. It still was concerned by the non-discrimination clause. WEI promised to interview the engineers regarding permanent jobs, suggesting for the first time that it considered them temporary employees.

WEI paid the engineers lower-than-contract wages. It also failed to contribute to the fringe benefit trusts referred to in the contract. WEI did not recognize nor bargain with Local 501 about these changes in the engineers' terms and conditions of employment.

PROCEEDINGS BELOW

The National Labor Relations Board ("the Board"), affirming the ALJ, held that the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151 et seq., applied to WEI and that WEI violated sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5), (1), by unilateraly changing terms and conditions of employment and by withdrawing recognition from and refusing to bargain with Local 501. 248 NLRB 909 (1980).

The Board ordered WEI to cease and desist, recognize Local 501, sign the pre-existing contract, and make whole employees for wages lost due to the refusal to implement that agreement.

ISSUES

1. Did the Board properly assert jurisdiciton over WEI?
2. Does substantial evidence support the Board's finding that WEI is a successor employer?
3. Does substantial evidence support the Board's finding that WEI adopted Handlery's collective bargaining agreement?

DISCUSSION

I. Standard of Review.

We must enforce the Board's order if the Board correctly applied the law and if the Board's findings of fact are supported by substantial evidence in the record viewed as a whole, even if we might have reached a different conclusion based on the same evidence. *E. g., NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir. 1981); *Stephens Institute v. NLRB,* 620 F.2d 720, 726 (9th Cir.), *cert.* denied, ——— U.S. ———, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980). We must consider both supporting evidence and contradictory evidence. *Nevis Industries, Inc., supra; Stephenson v. NLRB,* 614 F.2d 1210, 1214 (9th Cir. 1980). We will not overturn credibility determination unless shown to be incorrect by a clear perponderance of the evidence. *NLRB* v. *Max Factor & Co.,* 640 F.2d 197, 204 (9th Cir. 1980), *cert. denied,* ——— U.S. ———, 101 S.Ct. 2314, 68

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L.Ed.2d 840 (1981). The Board's interpretation of the Act is entitled to considerable deference, and must be upheld if reasonably defensible. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979); *Nevis Industries, Inc., supra.*

II. Jurisdiction.

The Board has power to prevent commission of unfair labor practices by "any persons * * * affecting commerce." 29 U.S.C. § 160(a). This gives the Board the broadest jurisdiction permitted under the Commerce Clause. *NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963); *NLRB v. Children's Baptist Home,* 576 F.2d 256, 258 n.1 (9th Cir. 1978).

The Board asserts jurisdiction over non-profit religious organizations engaged in operations that are "in the generally accepted sense, commercial in nature," and if the time spent by the unit employees on commercial activities is more than *de minimis. First, Church of Christ, Scientist,* 194 NLRB 1006, 1008 (1972). To focus its resources, the Board, in its discretion, has adopted jurisdiction guidelines expressed as a dollar amount of business volume. *Children's Baptist Home, supra.* The guideline for motels is $500,000 annual gross revenue. *NLRB v. Cofer,* 637 F.2d 1309, 1312 (9th Cir. 1981); *Floridian Hotel of Tampa, Inc.,* 124 NLRB 261, 264 (1959).

The Board found that WEI engaged in substantial commercial activities which were unrelated, except as a revenue source, to WEI's religious activities. WEI continued Handlery's contracts with two interstate airlines to provide hotel rooms on a priority basis for flight crews on layover. WEI continued to make motel rooms available to the transient public. The airline and transient lodgers are not screened for conformity to WEI's tenets, nor is their behavior at the hotel monitored. WEI leased out 25,000 square feet to 18 commercial tenants. While WEI's long-range plan is to use the Center exclusively for religious purposes, it conceded that that is not presently feasible.

The Board also found that a substantial portion of the engineers' time was spent on WEI's commercial activities. They worked throughout the complex on tasks required as much for the commercial activities as for the religious ones. WEI's gross revenue is within the Board's jurisdictional guidelines. WEI stipulated that its motel receipts would exceed $500,000 annually.

There is substantial evidence supporting the Board's findings that the Center is, at present, a commercial operation, and that the engineers spent a substantial portion of their time on commercial activities.

A finding of Board jurisdiction in this case will not offend *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). The narrow question addressed in that case was whether the Act gives the Board jurisdiction over teachers in church-operated schools. 440 U.S. at 507, 99 S.Ct. at 1322. In finding no jurisdiction, the Court relied in part on the fact that the Board had only recently reversed itself and asserted jurisdiction over private schools, after the most recent significant amendment of the Act. As a result, Congress had not passed upon the Board's action. *Id.* at 497–98, 505–06, 99 S.Ct. at 1317, 1321. The Court also noted that "the critical and unique role of the teacher in fulfilling the mission of a church-operated school" raised grave constitutional questions about the Board's assertion of jurisdiction. *Id.* at 501, 504, 99 S.Ct. at 1319, 1320. Consequently, the Court construed the Act not to grant jurisdiction over teachers in church-operated schools. *Id.* at 507, 99 S.Ct. at 1322.

In contrast to its practice with regard to private schools, the Board has long asserted jurisdiction over non-profit religious organizations engaged in commercial operations. *See Christian Board of Publications,* 13 NLRB 534, 547 (1939), *enf'd,* 113 F.2d 678 (8th Cir. 1940). In 1947 Congress rejected

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proposed amendments to exempt all non-profit organizations from the Act. Congress appeared to ratify the Board's assertion of jurisdiction at least as to the commercial activities of non-profit organizations. H.R.Rep.No. 510, 80th Cong., 1st sess. 31–32 (1947), *reprinted in* I NLRB, Legislative History of the Labor Management Relations Act, 1947, at 535–36 (1948). *See NLRB v. Wentworth Institute,* 515 F.2d 550, 554–55 (1st Cir. 1975).

The First Amendment protects freedom to believe and freedom to act. The first is absolute. The second is "subject to regulation for the protection of society." *Cantwell v. Connecticut,* 310 U.S. 296, 303–04, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). *See also McDaniel v. Paty,* 435 U.S. 618, 626–27, 98 S.Ct. 1322, 1327–28, 55 L.Ed.2d 593 (1978). Regulation of the freedom to act must not unduly infringe the protected freedom. *Cantwell v. Connecticut, supra* 310 U.S. at 304, 60 S.Ct. at 903; *McDaniel v. Paty, supra* 435 U.S. at 628, 98 S.Ct. at 1328.

The minimal infringement of WEI's freedom of operation is clearly outweighed here by the Act's role of promoting labor peace. Requiring WEI to recognize a union would not contravene its religious tenets. Nor would WEI's religious tenets compel it to commit an unfair labor practice. There has been no showing that recognizing a union would significantly impede WEI's ability to propagate its beliefs. *See St. Elizabeth Community Hospital v. NLRB,* 626 F.2d 123, 128–29 (9th Cir. 1980) (Sneed, J. dissenting). *See also Yott v. North American Rockwell Corp.,* 501 F.2d 398, 403 (9th Cir. 1974) (clause requiring union membership of Seventh Day Adventist not unconstitutional); *Cap Santa Vue, Inc. v. NLRB,* 424 F.2d 883, 891 (D.C. Cir. 1970) (applying Act to employer with religious objections to collective bargaining not unconstitutional). *But cf. Catholic Bishop of Chicago v. NLRB,* 559 F.2d 1112, 1123–25 (7th Cir. 1977), *aff'd on other grounds,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (unconstitutional to apply Act where unionization would inhibit a religious group's ability to propagate its beliefs).

The Board properly assumed jurisdiction over WEI. WEI's operations were commercial, and its unit employees spent a substantial portion of time engaged in commercial activities. The limited exception to jurisdiction carved out in *NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533, is not applicable to this case.

III. WEI as a Successor Employer.

A new owner of a business must recognize and bargain with a representative of employees covered by a collective bargaining agreement if found to be a "successor employer." *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 281, 92 S.Ct. 1571, 1579, 32 L.Ed.2d 61 (1972); *Kallmann v. NLRB,* 640 F.2d 1094, 1100 (9th Cir. 1981). A successor employer is one who conducts essentially the same business as the former employer, and a majority of whose work force are former employees, or would have been former employees absent an unlawful refusal to hire. *Kallmann, supra.* A successor employer commits an unfair labor practice by refusing to bargain with the previously recognized union unless it can show either that the union in fact no longer represents a majority of the members of the bargaining unit, or that there are circumstances affording a reasonable basis for good-faith doubt about the majority. *NLRB v. Edjo, Inc.,* 631 F.2d 604, 607 (9th Cir. 1980). There is substantial evidence in the record supporting the Board's finding that WEI is Handlery's successor. It retained all of the bargaining unit employees. It continued to operate the Center's hotel facilities and its commercial leasing operations. The unit employees continued to work at the same location performing the same tasks.

A successor employer is ordinarily free to set initial terms and conditions of

employment without first bargaining with the incumbent union. Where, however, it is perfectly clear that the successor plans to retain substantially all the employees, the successor must consult with the union before altering terms and conditions. *Burns International Security Services, Inc. v. N.L.R.B.,* 406 U.S. at 294–95, 92 S.Ct.at 1585–86, 32 L.Ed.2d 61; *Kallmann,* 640 F.2d at 1102. When the successor does not evince an intention to modify the pre-existing terms before expressing willingness to rehire incumbents, the employer must consult with the union before altering employment terms. *Bellingham Frozen Foods, Inc. v. NLRB,* 626 F.2d 674, 678–79 (9th Cir. 1980), *cert. denied,* ——— U.S. ———, 101 S.Ct. 941, 67 L.Ed.2d 110, 111 (1981).

Here it was perfectly clear that WEI intended to retain all of Handlery's engineers at their previous jobs. WEI was required to consult with the employees' bargaining representative before altering the terms of the pre-existing contract. WEI admittedly paid wages to the engineers which were lower than those prescribed by Handlery's contract. It also admittedly discontinued contributing to the employees' fringe benefit trusts. It took these steps without prior notice or bargaining with the Union. WEI violated sections 8(a)(5) and (1) of the Act by unilaterally altering terms and conditions of employment.

IV. Adoption of the Handlery Contract.

A successor employer is not required to observe the terms of its predecessor's contract. A sucessor may choose to accept its predecessor's agreement. *Burns International Security Services, Inc.*, 406 U.S. at 291, 92 S.Ct. at 1584; *Kallmann*, 640 F.2d at 1103. *See also Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 763 (9th Cir. 1981).

In determining whether parties agreed to a contract, the Board is not bound by technical questions of traditional contract interpretation. The Board is free to use general contract principles adapted to the collective bargaining context to determine whether the two sides have reached an agreement. *NLRB v. Electra-Food Machinery, Inc.*, 621 F.2d 956, 958 (9th Cir. 1980); *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141–42 (9th Cir.), *cert. denied*, 429 U.S. 895, 97 S.Ct. 257, 50 L.Ed.2d 179 (1976). We review the Board's finding as to the existence of an agreement as a question of fact, governed by the substantial evidence standard of review.

In this case, the ALJ credited the testimony of the Union witnesses that Cerullo spoke in terms which would lead a reasonable person to conclude that agreement had been reached. The ALJ also relied upon WEI's subsequent actions. It apparently acquiesced in Brown's statement that he and Rose had reached agreement on contract terms. WEI brushed aside Brown's questions about the wages the engineers were receiving. It failed to indicate an inability to reach an agreement for over two months. The ALJ found this inconsistent with the belief that only negotiations were underway. The ALJ interpreted the discussions regarding the non-discrimination clause as a gratuitous, post-agreement concession by Brown to Rose, rather than an indication that WEI had not bound itself to the Handerly contract.

WEI does not contend that a clear preponderance of the evidence requires reversal of the ALJ's credibility determinations. Those determinations, along with WEI's post-agreement conduct, constitute substantial evidence supporting the finding that WEI adopted Handlery's contract. By failing to implement the terms of that contract, WEI violated sections 8(a)(5) and (1) of the Act.

CONCLUSION

The Board properly asserted jurisdiction over WEI. Substantial evidence supports the Board's finding that WEI is a successor employer. Because it was perfectly clear that WEI intended to retain the engineers,

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WEI violated sections 8(a)(5) and (1) by altering terms and conditions of employment without consulting with their representative. Substantial evidence supports the Board's finding that WEI adopted Handlery's contract. Its failure to abide by the contract's terms violated sections 8(a)(5) and (1).

The Board's order is ENFORCED.

NLRB v. Wright Line, a Division of Wright Line, Inc.

662 F.2d 899 (1st Cir.), September 21, 1981;
rehearing denied October 13, 1981; certiorari
denied 455 U.S. 989—251 NLRB 1083

On petition to enforce Board Order

Before CAMPBELL, BOWNES and BRYER, Circuit Judges

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LEVIN H. CAMPBELL, Circuit Judge: Bernard Lamoureux, an activist in the Teamsters' two unsuccessful campaigns to organize Wright Line's employees, was discharged from his job as a shop inspector, ostensibly because he submitted an inaccurate record of the times at which he performed inspections on December 29, 1977. Upon Lamoureux's complaint, the Board found that Wright Line had discharged him because of his union activity, in violation of section 8(a)(3) of the National Labor Relations Act. The Board ordered Wright Line to reinstate Lamoureux with back pay. We enforce the Board's order.

I.

Wright Line manufactures computer storage products to the specifications of customers, including government agencies. Lamoureux began working for Wright Line in 1966 and, with the exception of a period between 1971 and 1973, was employed there continuously until his discharge on December 30, 1977. The Board found, with substantial record support, that Lamoureux's work, throughout this period unitl December 29, 1977 was satisfactory or better. For the last two years of his employment, he worked in the company's Inspection Department, inspecting completed parts for quality and conformity to specifications. This position required that he keep records on two forms: the Inspection Report, which stayed with the blueprint for the inspected part, and the Daily Activity Sheet, on which he recorded the time of each inspection and which he submitted to his supervisor after each day's work.

In 1976, Lamoureux contacted Teamsters Local 170 and initiated an organizational drive among Wright Line's employees. The Board supportably found that Lamoureux was visibly active in the union campaign. An election was held on August 27, 1976, and Lamoureux served as an alternative observer for the union, which lost the election. A second campaign was conducted in the fall of 1977, and Lamoureux was again active. An election was held on October 20, 1977; the union lost again. The Board supportably found that Wright Line management conducted an aggressive (although not necessarily unlawful) campaign against the union, and that management was well aware of Lamoureux's activism, certain supervisors having made "gratuitous remarks" to him about it.

The Board found, on the basis of substantial evidence, that Lamoureux's discharge occurred as follows: on the morning of December 29, 1977, Plant Superintendent Southard asked Supervisor Forte to check on Lamoureux, reporting that he had seen Lamoureux entering the men's room carrying a newspaper. Forte went to Lamoureux's two assigned departments and walked between them until Lamoureux appeared some 35 minutes later. Forte then returned to his office, saying nothing to Lamoureux, and noted the times of Lamoureux's absence. Forte had made no attempt to locate Lamoureux, neither looking in the men's room nor using the plant's page system, although Lamoureux's job included several tasks which would require him to leave his departments for short periods. Later the same day, Forte had occasion to be in Lamoureux's department and did not find him there. About 30 minutes later he found Lamoureux at a workbench inspecting a part. Forte again made a record of the incident but did not ask Lamoureux to explain.

The next morning, Fort checked Lamoureux's Daily Activity Sheet and noted Lamoureux report that he had made several inspections during the time when Forte had failed to find him in his departments. Forte presented this information to his own supervisor, who stated that this indicated a "dischargeable offense." The two consulted higher officials, who told them that they "could discharge" Lamoureux if his account substantiated the charge. Forte prepared a written report of the incident, had Lamoureux's final paycheck prepared, and then summoned Lamoureux to a meeting with himself and two others. Confronted with the charge, Lamoureux admitted that "the times weren't accurate and they never were," stating that "if you want them right to the second, I can put them right to the second," and asserting that the real reason for the confrontation was his union activity. The supervisors denied this charge and discharged Lamoureux, saying that they no longer considered him trustworthy.[1]

II.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), provides that,

> (a) It shall be an unfair labor practice for an employer
>
> (3) by discrimination in regard to hire or tenure of employment or any terms or condition of employment to encourage or discourage membership in any labor organization.

This provision is supplemented by section 10(c) of the Act, 29 U.S.C. § 160(c), which authorizes the Board to take remedial action, with the following limitation:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

Section 8(a)(3) imposes a prohibition on employers which is simple to state but often difficult to apply in practice: they may not discharge an employee bacause of his union activity; but they may and should apply their usual rules and disciplinary standards to a union activist just as they would to any other employee. Hence, in a given discharge case it must be decided whether the employer acted because of the employee's union affiliation, or whether he acted because of some factor unrelated to the employee's union status. *Local 357, International Brotherhood of Teamsters v. NLRB,* 365 U.S. 667, 675, 81 S.Ct. 835, 839, 6 L.Ed.2d 11 (1961) (test is "true purpose" or "real motive").

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[1] The Wright Line managers did not then and do not now contend that Lamoureux did not actually perform any of the inspections he reported. Their complaint was and is only that he "falsified" his report of the timing of his inspections.

Often, of course, there are competing explanations of why an employee was fired. Board counsel will point to evidence of antiunion motivation. The employer will cite some instance of misconduct, and will deny having been motivated by any other consideration. In such a situation, the Board needs to determine not only whether the asserted misconduct occurred, but whether, even so, it effectively produced the discharge. The employer will doubtless lose if the asserted misconduct is shown not to have occurred. But suppose it occurred? In such event, Board counsel will argue that it was insufficient cause for discharge—that a non-activist would have been retained notwithstanding the offense. The employer, on the other hand, will deny this, and will insist, moreover, on his right, as the employer, to determine what conduct is or is not acceptable.

The Board's approach to these cases—sometimes, although without complete accuracy, termed "mixed motive" cases—has been the source of a continuing controversy among the circuits and between the Board and this court. In the present case, the Board has taken a new approach. Relying on *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471(1977), and precedent from this circuit, the Board announced the following rule: general counsel must first "make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a 'motivating factor' in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21. Applying that test here, the Board found that the prima facie case had been made and that Wright Line failed to prove that it would have taken the same action regardless of Lamoureux's union activity. Wright Line challenges the Board's new approach and its application here as contrary to the provisions of the statute and beyond the powers of the Board in that it places the burden of persuasion on the employer. We are thus called upon to pass on the validity of the Board's new rule as well as on its application to this record.[2]

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We start by observing that the Board's new rule seems better than its old one. Previously the Board would find a violation of section 8(a)(3) and order reinstatement whenever it concluded that the discharge was even partially motivated by opposition to union membership. Under this approach, a discharge was improper even if it would have occurred absent the illegal motivation, *e.g.*, the employee may have committed an infraction so serious that any employee—union or non-union—would have been fired. This partial motivation test—as the Board now acknowledges—placed "the union activist in an almost impregnable position once [anti-]union animus has been established." Activists could not be discharged for conduct that would be unforgivable in the case of another employee. The result was to immunize union activists against legitimate discipline for genuine offenses, and to deprive employers of the freedom to apply their own rules uniformly to all their employees. *See NLRB v. Wilson Freight Co.,* 604 F.2d 712 (1st Cir. 1979); *NLRB v. Eastern Smelting & Refining Corp.,* 598 F.2d 666 (1st Cir. 1979); *Liberty Mutual Insurance Co. v. NLRB,* 592 F.2d 595 (1st Cir. 1979); *Hubbard Regional Hospital v. NLRB,* 579 F.2d 1251 (1st Cir. 1978); *NLRB v. Rich's of Plymouth, Inc.,* 578 F.2d 880 (1st Cir. 1978); *Stone & Webster Engineering Co. v. NLRB,* 536 F.2d 461 (1st Cir. 1976); *NLRB v. Fibers International Corp.,* 439 F.2d 1311 (1st Cir. 1971); *NLRB v. Billen Shoe Co.,* 397 F.2d 801 (1st Cir. 1968); *NLRB v. Lowell Sun Publishing Co.,* 320 F.2d 835 (1st Cir. 1963).

In response to the Board's handling of these cases, we have repeatedly urged the Board to go beyond the employer's obvious wish to be rid of an activist and to inquire into the question of actual cause, giving serious consideration to the employer's legitimate business reasons for discharging the employee. *See e.g., NLRB v. Lowell Sun,* 320 F.2d at 841 (Aldrich, J., concurring) (employer's knowledge that discharge will have pleasing result not to be confused with actuating motive). We have expressed this concern by insisting that the Board find the protected activity to be the "dominant motive" for the discharge. *See, e.g., NLRB v. Fibers International,* 439 F.2d 1311; *NLRB v. Lowell Sun,* 320 F.2d 835 (Aldrich, J., concurring); *NLRB v. Whitin Machine Works,* 204 F.2d 883, 885 (1st Cir. 1953) (reinstatement warranted if protected activity "weighed more heavily" than other factors); and cases cited in these opinions. Elaborating on the meaning of this test, we have held that the Board may order reinstatement only after finding that the discharge would not have occurred in the absence of the protected activity. *NLRB v. Fibers International,* 439 F.2d at 1312 n.1 & 1315.

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[2] Our review of the Board's factual findings is limited to determining whether they are supported by sustantial evidence. 29 U.S.C. § 160(e). But the Board's adoption of the *Mt. Healthy* test, to the extent that it establishes a new standard or set of legal presumptions, is a ruling of law which we review for legal error, giving due deference to the Board's expertise in interpreting the act it administers.

The Supreme Court's decision in *Mt. Healthy v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471, followed by *Givhan v. Western Line C[illegible]lidated School District,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), seemed to us to lend strong support to our analysis in the *Fibers International* case.

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In cases since *Mt. Healthy,* we have relied on its expression of the "but for" standard, abandoning our earlier "dominant motive" language. *Statler Industries, Inc. v. NLRB,* 644 F.2d 902 (1st Cir. 1981); *NLRB v. Eastern Smelting & Refining Corp.,* 598 F.2d 666, 671 (1st Cir. 1979); *Coletti's Furniture, Inc. v. NLRB,* 550 F.2d 1292 (1st Cir. 1977). We came to recognize that the existence or not of a casual link between union activity and the employee's injury—or, as section 8(a)(3) puts it, the existence of anti-union "discrimination in regard to hire or tenure of employment"—was most accurately determined by asking whether the discharge would have occurred "but for" the protected activity. If the discharge would have occured *absent* the protected activity, it is clear no unfair practice existed since a bad motive without effect is no more an unfair labor practice than an unexecuted evil intent is a crime. While *Mt. Healthy* involved employee activity protected by the Constitution rather than by the NLRA, it presented issues of causation, harm and remedy very similar to those raised in the labor context, and the Court expressed the same concerns that we have voiced in labor cases.[3] The lower court in *Mt. Healthy,* like the Board in past labor cases, had ordered reinstatement on a finding that the protected activity was one of two reasons for the decision to discharge the employee. The Court's dissatisfaction with the result was exactly what ours had been: that the employee who engaged in protected conduct would thereby be placed in a better position than he would have held if he had not done so, and his employer's freedom to apply legitimate performance standards would be impaired by the activist's favored position. *Id.,* 429 U.S. at 285–87, 97 S.Ct. at 575–76. To avoid these results while protecting the employee's rights, the Court ruled that reinstatement should be ordered only upon a finding that the employee would not have been discharged but for the protected conduct. In labor cases, as in constitutional cases, we think the "but for" test is the correct substantive standard for evaluating the propriety of a reinstatement order.[4]

Wright Line does not appear to quarrel with this substantive test. Its challenge is to the Board's apparent adoption of *Mt. Healthy's* allocation of the burdens of proof. *Mt. Healthy* held that once the plaintiff had shown his protected activity to have been a "substantial" or "motivating" factor, "the court should have gone on to determine whether the Board [of Education] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.,* 429 U.S. at 287, 97 S.Ct. at 576. *See also Givhan v. Western Line,* 439 U.S. at 416, 99 S.Ct. at 697. Wright Line contends, citing section 10(c) of the National Labor Relations Act,[5] the Board's regulation 101.10(b),[6] and section 7(c) of the Administrative Procedure Act,[7] that the Board lacks authority to place any burden of proof on the employer. Wright Line argues that

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[3] For discussion of the analogy between *Mt. Healthy* and section 8(a)(3) cases, see Michael S. Wolly, "What Hath *Mt. Healthy* Wrought." 41 Ohio State L.J. 385–99 (1980); and William H. DuRoss, "Toward Rationality in Discriminatory Discharge Cases: The Impact of *Mt. Healthy Board of Education v. Doyle* Upon the NLRA," 66 Georgetown L.J. 1109 (1978).

[4] We have applied the same substantive test to evaluate a claim for reinstatement by an employee allegedly discharged in violation of the Age Discrimination in Employment Act. *Loeb v. Textron,* 600 F.2d 1003, 1019 (1st Cir. 1979).

[5] Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

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these provisions require the Board to prove the employer's guilt by a preponderance of the evidence, and that the Board's burden-shifting approach instead requires the employer to prove his innocence.

We have no difficulty accepting the Board's formulation that *some* kind of a "burden" devolves upon the employer once the general counsel has made a prima facie showing that protected conduct was a motivating or substantial factor in the discharge decision. 251 NLRB No. 150, at 20–21. Indeed, in *Statler Industries v.* NLRB, this court approved the general causation analysis expressed in the Board's Wright Line opinion. 644 F.2d at 905. On further reflection, however, we disagree with the Board on the narrow issue of defining the exact nature of the burden which the employer thus acquires. Section 10(c), as well as the Board's own regulation, make clear that the general counsel must prove the employer's guilt by a preponderance of the evidence to warrant a finding that an unfair labor practice has occurred.[8] We think the only burden which may be acceptably placed on the employer is a "burden of production," that is a burden of coming forward with credible evidence to rebut or meet the general counsel's prima facie case. This, in effect, is the position we took recently in other cases although without actually characterizing the employer's burden as one of "production" rather than "persuasion." *NLRB v. Amber Delivery Service,* 651 F.2d 57 (1st Cir. 1981); *NLRB v. Cable Vision,* 660 F.2d 1 (1st Cir. 1981). We said in those cases that once the general counsel has established a basis for finding an improper motive, the employer must merely "come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB v. Amber Delivery Service,* 651 F.2d at 69; *NLRB v. Cable Vision,* at 8.

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Professor Wigmore distinguishes between the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ulitimate issue in a case by a preponderance of the evidence as follows:

> ["A"] 'prima facie' case * * * need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts

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[6] 29 C.F.R. § 101.10(b) provides in part:

> The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act.

[7] Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556, provides in part that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

[8] The Board relied on *NLRB v. Great Dane Trailers,* 388 U.S.C. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), in which the Court held that "once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *Id.,* at 34, 87 S.Ct. at 1797. *Great Dane,* which involved a challenge to an overall policy of the employer rather than to a single discharge, is inapposite here. Where an overall policy concededly does discriminate against protected activity, the Board must balance the employer's justification against the employee's interest, and it may fairly require the employer to demonstrate the genuineness and strength of its asserted business reason. But here the issue is whether the discharge was in fact discriminatory—whether it was caused by protected activity or whether some other factor was operative. *Great Dane* has no application. *See* L. Janofsky, "New Concepts in Interference and Discrimination under the NLRA," 70 Colum.L.Rev. 81, 96 (1970).

The Board also invokes the portion of section 10(c) quoted at the beginning of this section, regarding discharges for cause, citing Congress' rejection, in drafting this provision, of proposed language barring reinstatement unless the "weight of the evidence shows that such individual was not suspended or discharged for cause." H.R. 3020, 80th Cong., 1st Sess., § 10 (1947). Quoting passages from debate on this provision, the Board argues that Congress intended to keep the burden of showing cause where Congress understood that it had been—on the employer. 93 Cong.Rec. 6677–78 (remarks of Senator Taft); 93 Cong.Rec. 7683 (remarks of Senator Ball). Wright Line argues, citing other passages of debate and quoting the Conference Report on the bill, that Congress did indeed intend to keep the burden where it was—on the Board. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947); 93 Cong.Rec. 6677–78 (colloquy between Senators Taft and Pepper). We find the legislative history as well as the statutory language inconclusive on the question of burden of proof. This provision of section 10(c) served to reaffirm the substantive standard that was already implicit in section 8(a)(3) and that we have repeatedly urged on the Board: reinstatement is not warranted if the discharge was actually the result of "cause" rather than of unlawful discrimination, even though "cause" might coincide with union activity to which the employer is hostile. *See* NLRB v. *Eastern Massachusetts Street Ry. Co.,* 235 F.2d 700, 709 (1st Cir. 1956) ("The purpose of this provision is to make it abundantly clear that the Board is not to interfere with the exercise by employers of their traditional right to discharge employees for adequate cause."). The question of burden of proof is addresed only in the "preponderance" language of the preceding sentence of section 10(c); that provision requires the general counsel to prove the violation by a proponderance of the evidence.

back to the party having the burden of proof. * * *."

9 Wigmore on Evidence § 2487, at 282 (3d ed. 1940), *quoting Speas v. Merchant's Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924).

Put another way, the general counsel's initial, prima facie showing creates a kind of presumption that an unfair labor practice has been committed. At this point, the employer risks losing his case unless he rebuts the presumption with evidence of his own. The Board may properly recognize this by stating that the employer (who alone has access both to the reason he discharged the employee and any corroborative evidence) now comes under a "burden" to produce evidence of a "good" reason for the discharge. The imposition of this limited burden, however, does not shift to the employer the burden of proving that an unfair labor practice has not occurred. Rule 301 of the Federal Rules of Evidence very aptly describes the scope of the duty involved in rebutting presumptions in civil cases as "the burden of going forward with evidence to rebut or meet the presumption," and distinguishes this duty from "the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Fed.R.Evid. 301. Thus, the employer in a section 8(a)(3) discharge case has no more than the limited duty of producing evidence to balance, not to outweight, the evidence produced by the general counsel.

The Board may properly provide, therefore, that "Once [a prima facie showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 NLRB No. 150, at 20-21 (footnote omitted). The "burden" referrred to, however, is a burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation.[9]

We recognize that the Supreme Court's language in *Mt. Healthy* appeared to place an affirmative burden of persuasion on the employer. We further recognize that this court's acceptance of *Mt. Healthy* in some previous cases may have suggested that we, too, saw the burden upon the employer as in all situations, a burden of persuasion.[10] A closer look at *Mt. Healthy,* however, indicates a critical difference between that case and most labor cases. This difference does not affect the substantive utility of the "but for" analysis there employed, but does affect the nature of the employer's burden.

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In *Mt. Healthy,* the employer conceded that he had fired the employee for speech activity which was later found to be fully protected under the first amendment. Thus, the "but for" test was not used, as it is in the typical labor case, as a part of the process of deciding whether a violation of protected rights had occurred. Rather, the "but for" test applied only *after* such a violation had been proven by the employer's own admission. The employer's claim, then, was a true affirmative defense to a rehiring order—*i.e.,* the employer contended that notwithstanding his violation of the Constitution reinstatement was improper as a remedy because the employee had also been involved in an altercation with another teacher, an argument with cafeteria employees, and an incident in which he made obscene gestures to female students. The employer argued that these incidents, which were totally independent of the protected speech activity, justified the employee's dismissal *notwithstanding* the fact that the employer had violated the employee's constitutional rights.[11] The employer's claim was

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[9] The Board appears to recognize that the general counsel must always establish the existence of an unfair labor practice by a preponderance of the evidence, but then confuses the issue by mislabeling the employer's burden as an "affirmative defense." 251 NLRB No. 150, at 18 n. 11. The employer's duty, however, is merely a burden of producing rebuttal evidence and thus in no way resembles a true affimative defense. Moreover, the Board's Reference to its own "prima facie case" may suggest that the general counsel should prevail upon a showing of something less than a preponderance of evidence that the counsel's version of disputed facts is the true one. Let there be no mistake here either. The burden of persuasion on all issues of disputed facts rests at all times with the general counsel.

[10] *Statler Industries,* 644 F.2d 902 (1st Cir. 1981), for example, suggested that an employer in a section 8(a)(3) discharge case bears the burden of persuasion in proving that there would have been no discharge but for an employee's protected activity. *Id.,* at 905 n.4. On this narrow issue regarding the burden of proof, we disaffirm our previous ruling and adopt the analysis set forth in this opinion. Also, to the extent that *NLRB v. Eastern Smelting & Refining Corp.,* 598 F.2d 666 (1st Cir. 1979), can be read to impose a burden of proof on the employer, it, too, is hereby overruled. Nevertheless, we do hold that the Board is justified, after a prima facie showing by the general counsel, in requiring the employer to produce evidence showing "that it had a good reason, sufficient in itself, to produce the discharge." *Id.,* at 671.

[11] A similar claim might, on rare occasions, be raised in some labor cases. For example, where an employer fires a person for union activity,

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thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance.

By contrast, in the typical labor case (and in the present case), the employer vigorously disputes the determining reason for the discharge. These cases therefore do not involve true affirmative defenses going to the appropriateness of the remedy, nor would the "but for" analysis be employed to determine the existence of such an affirmative defense. Rather, the "but for" test is in such cases a convenient formula for deciding whether or not an unfair labor practice has actually occurred—*i.e.*, for deciding if the determining motive of the discharge was anti-union animus or some valid business reason. The "but for" standard requires a determination by the Board, based on all the evidence, that, wholly apart from an alleged illegal motive, the employer would (or would not) have discharged the employee for the conduct ascribed to him by the employer. If the discharge would have taken place irrespective of the anti-union motive, no unfair labor practice took place: if the discharge would not have taken place, it is clear that the determining reason for the discharge was the protected activity, not the reason given by the employer.[12] With respect to this ultimate question of a determining causal link between the bad motive and the discharge, the burden of persuasion remains always with the general

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counsel. In the course of its inquiry, however, the Board and the ALJ are entitled to place a burden of production on the employer in the manner already described once a sufficient prima facie showing of illegal motive is made by the general counsel. *Cf. Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (stating that burden of persuasion on the issue of discriminatory intent in Title VII cases remains always with the plaintiff).

It may be said by way of concluding our discussion on this point, that labels concerning burdens of "persuasion" and "production" are not, as a practical matter, likely to be very important in most of these cases. Decision will usually turn on a weighing of all the evidence. But this weighing, under the Board's new formulation, will include a careful consideration of the employer's "good" reason as well as of the general counsel's evidence of improper motive. This approach will assure that due consideration is given to all facets of the case.

III.

Applying these principles to Wright Line's discharge of Bernard Lamoureux, we find substantial evidence to support a conclusion by the Board, on the preponderance of the evidence, that Lamoureux was discharged because of his union activity.[13] We therefore affirm the Board's finding that Wright Line violated the Act in discharging Lamoureux, and that Lamoureux is entitled to reinstatement with back pay.

As background to the discharge, the general counsel presented evidence that Lamoureux was a leading union advocate and that Wright Line management was aware of Lamoureux's role. The evi-

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in clear violation of section 8(a)(3), but a few days later discovers the employee had, unknown to anyone, been embezzling money, the employer may be justifiably required to prove, by a preponderance of the evidence, that a reinstatement order for his unfair labor practice is inappropriate. The employer there is not defending on the ground that the discharge was properly motivated, but rather on the theory that, notwithstanding the commission of an unfair labor practice, he should not have to take the particular person back. *Cf. NLRB v. Savin Business Machines Corp.,* 649 F.2d 89, 93 (1st Cir. 1981) (employee's participation in robbery after unlawfully motivated discharge would have great bearing on right to reinstatement). It should be emphasized, however, that this is the rare case. Typically, employers and the general counsel point to the same or to related evidence and ascribe difference inferences of motivation. In this more normal situation, the general counsel must prove, by a preponderance of the evidence, that the employer had an illegal motivation *and* that the employer would not have fired the employee anyway for a valid business reason.

[12] Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with anti-union animus discharges an employee he would not have fired "but for" the employee's union activity. We think that even employers who do not particularly like unions nevertheless comply with the law so long as they treat all their employees—union and non-union—alike.

[13] Although the Board arrived at their conclusion by the use of a standard with which, in some respects, we disagree, we see no reason to remand this case for new findings. The ALJ in this case conclusively found that the company's alleged legitimate reason for discharging Lamoureux "has no validity at all" and "was false." There is substantial evidence to support these findings. Moreover, the company here, unlike the school board in *Mt. Healthy* and *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 693 (1979), did not allege a series of wholly distinct events, some of which were unrelated to protected activity and which might "admit of the argument" that the employer would have discharged Lamoureux despite his union activity. *Id.*, at 417 n.5, 99 S.Ct. at 697 n.5. Thus, no remand is necessary in this case.

dence showed that management was aggressive in its opposition to the union and that management's hostility was on occasion directed at Lamoureux in particular.[14] The general counsel also presented evidence of the circumstances surrounding the discharge itself. These circumstances, taken together and in the light of this background, support the Board's inference that the company was watching Lamoureux for any transgression that might provide an opportunity for discharge, and that it seized on Lamoureux's otherwise trivial offense to effectuate its true purpose of getting rid of an activist.

The evidence showed that Southard had asked Forte to check on Lamoureux, who was entering the men's room with a newspaper, even though this conduct violated no company rule and even though Lamoureux had no history of laxity to warrant suspicion. Forte's "checking" consisted of measuring and documenting Lamoureux's absence; it did not include looking in the men's room or paging Lamoureux, even though Lamoureux's job was such that he might have been absent for a legitimate purpose. When Forte found Lamoureux after another absence later in the day, he did not ask for an explanation, although he apparently considered the absence significant enough to merit recording. From these facts, the Board could reasonably infer that Southard and Forte were primarily interested in building a case against Lamoureux rather than simply assuring that he attend properly to his work.

The events following Forte's review of Lamoureux's time report also support the inference of impropriety. Rather then confronting Lamoureux directly, as might be expected of a supervisor who discovers an apparent transgression by an otherwise satisfactory long-term employee, Forte immediately consulted higher officials. These managers' first response was that the offense was "dischargeable"; they made the decision to discharge Lamoureux even before discussing the matter with him. By the time Lamoureux was called in, Forte had prepared his final paycheck and drafted a memorandum for the file. When Lamoureux finally received a chance to explain, his defense apparently fell on deaf ears. He conveyed no inability or unwillingness to make accurate time reports; rather his response suggested that he had not done so because he had not considered it important, and that he would do so if desired. Nevertheless, he was not warned or reprimanded, but discharged. From this and other evidence, mentioned hereinafter, the Board could reasonably infer that the inaccurate time report was seized upon to justify action taken for another reason.

This inference might have been overcome had there been evidence establishing that Wright Line would have fired employees in Lamoureux's position (whether or not union activists) for this sort of infraction. For example, it might have been proven that Wright Line was a consistently strict employer who commonly fired employees for rule violations no more serious than this, or else that this was in fact a violation very detrimental to its business which warranted discharge. Had this been done—had it been established that apart from union activity, Lamoureux would have been discharged for making such a time report—a finding for the employer would have been indicated. But no such conclusion was required on this record. Wright Line relies on its rule against "knowingly altering or falsifying production time reports."[15] It emphasizes its use of Daily Activity Reports to verify performance of inspections, to evaluate individual inspectors, and to monitor staffing levels. But the Board concluded, with ample support in the record, that the time of each inspection, as opposed to the fact that each was done and the number done in a day, had no bearing on any of these calculations and received no notice from management. Lamoureux testified, and the Board was entitled to believe, that he had never been instructed to record times exactly, that he had never heard of any employee being critized for inaccurate reporting of times, and that the general practice among inspectors was to record times in "round figures." The Board could conclude from the evidence that Lamoureux's offense affected no significant inter- **909** est of his employer, and no interest that Wright Line had treated as significant.[16]

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[14] There was testimony that the company distributed reproductions of newspaper articles derogatory to the Teamsters Union, including one article relating the murder indictment of an official of another Teamsters local. There was also evidence of a letter to employees in which the company president stated that Wright Line's "chances for survival and growth would be seriously hurt by the presence of a union," and evidence of three incidents during the 1977 campaign involving Lamoureux. On one such occasion, Supervisor Forte called Lamoureux to his office and charged him with "pressuring someone to vote union"; Forte later retracted the statement. On another occasion, Forte saw Lamoureux counting his pay and asked "What's that? Union campaign funds?" In a third incident, a foreman told Lamoureux that "Everybody knows you're the union kingpin." Wright Line contends that the Board's reliance on these incidents is improper, since the Board has not alleged that any of them involved an unfair labor practice by the company, and since some may involve expression protected by the first amendment. We have held, however, that anti-union statements "plainly within [management's] rights * * * do lend a significance to otherwise ambiguous events when the question is whether a given course of conduct was actuated by anti-union animus." *NLRB v. Lowell Sun*, 320 F.2d at 840. The incidents cited, whether lawful or not, do not prove that Lamoureux was discharged because of his union activity. But they do show that the company knew of his activity and was displeased by it; they thus provide a relevant background for analyzing the circumstances of the discharge.

[15] The rule, which also prohibits falsifying "payroll records, or punching another employee's timecard without supervisory approval," provides that a first infraction "may" be punished by discharge or by any lesser disciplinary infraction, such as suspension or a warning. Of course, where an employer enforces a valid rule in an even-handed manner, there is usually no violation of the Act. *See Texas Instruments v. NLRB*, 637 F.2d 822 (1st Cir. 1981) (finding that employee violation of valid rule prohibiting disclosure of confidential information justified discharge because such activity is not protected by section 7).

Wright Line asserts that Lamoureux's "falsehood" proved him untrustworthy, and therefore unworthy of the reliance it must place on its inspectors. Clearly a showing of dishonesty would cause most employers to discharge an employee. The Board could reasonably doubt, however, that an employer would lose its trust in such a long term, satisfactory employee on the basis of an inaccuracy that cost the employer nothing and gained the employee nothing. Lamoureux's time report, under these circumstances, suggests no intention to falsify; at worst it demonstrates carelessness on a matter of little significance.

Further, the evidence showed that Wright Line's past practice in handling similar offenses had been quite different. The Administrative Law Judge found, based on testimony regarding the time required to perform inspections, that reports submitted by other inspectors contained "easily discernible" inaccuracies; yet no other inspector was ever disciplined in any way for inaccurate time reports. There was also evidence of an incident in which Wright Line's Chief Inspector had another employee punch her time card, a violation of the same rule. *See* note 15, *supra.* Even though such conduct strongly suggests deliberate falsification to cover an unexcused absence at the employer's expense, the Chief Inspector received only a warning; she was not discharged. There was evidence that Wright Line had discharged two employees for dishonesty, but both instances involved conduct amounting to outright theft from the company. One of these employees, an accountant, had embezzled funds, while the other, a saleman, had falsified his reports so as to collect unearned commissions. On this evidence, the Board was warranted in perceiving a difference between Wright Line's responses to Lamoureux's offense and its handling of comparable incidents of misconduct. The Board could reasonably infer from this that some other factor was involved in Lamoureux's case; and the background of Lamoureux's activism and the company's animus could be thought to supply the missing factor.

Further support for the Board's conclusion as to Wright Line's motivation comes from the ALJ's incredibility judgments. To rebut the inference of improper motive, Wright Line presented the testimony of three of the officials involved in the discharge. Each related his own view of the incident, denying any concern for Lamoureux's "untrustworthiness," as shown by his false time report. The ALJ stated that, from the demeanor of the witnesses as well as from "the record as a whole * * * I do not believe that they were truthful in revealing the 'real reason' for Lamoureux's discharge." The ALJ's evaluation of Forte's testimony is particularly specific. He found that Forte appeared generally honest, until questioned about Lamoureux's discharge. "Here, being a generally truthful man, he showed physical signs of disassembling." The ALJ's credibility judgments must stand unless they are unreasonable, which these are not. Under these circumstances, the witnesses' untruthfulness strengthens the inference of unlawful motive. *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966).

On this record, the Board was justified in finding that the general counsel had proven, by a preponderance of the evidence, that Wright Line discharged Lamoureux because of his union acitivity, in violation of section 8(a)(3) of the Act.

The petition for enforcement is granted.

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[16] It is, of course, the employer's judgment of the importance of time records, and not the Board's judgment or our own, that matters. An employer is entitled to make and enforce his own rules, however foolish they may appear to the Board, as long as he does not base personnel decisions on union status. *See, e.g., Liberty Mutual Insurance Co. v. NLRB,* 592 F.2d at 603. Nevertheless, where the issue is what motivated a decision to discharge, the apparent insignificance of a particular rule, along with the employer's histroy of treating it as unimportant, support an inference that something more was involved than just a breach of that rule.

Atlas Metal Parts Co., Inc. v. NLRB

660 F.2d 304 (7th Cir.), September 22, 1981—252 NLRB 205

On petition to review Board Order

Before PELL, Circuit Judge, MARKEY, Chief Judge of the U.S. Court of Customs and Patent Appeals,* and WOOD, Circuit judge.

MARKEY, Chief Judge: Atlas Metal Parts Co., Inc. (Atlas) petitions to review, and the National Labor Relations Board (board) Cross-petitions to enforce, the board's order of September 17, 1980. The board found Atlas guilty of violating Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act. We modify.

BACKGROUND

Negotiations

Atlas is a small shop, employing 35 persons in the preparation of metal parts for other manufacturers. In 1956, it recognized Local 806, Allied Industrial Workers of America, AFL-CIO (Union) as the collective-bargaining representative of its employees. Atlas and Union entered into successive collective-bargaining agreements, the most recent (the 1977 contract) covering March 1, 1977 to March 1, 1978.

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Bargaining on a new agreement began February 1, 1978,[1] when Union proposed 24 changes in the 1977 contract. On February 15, Atlas countered with 36 proposed changes. During the next six weeks, the parties met five more times, engaging in the give and take of collective bargaining.

All contracts since 1957 contained a union security clause, requiring employees to join the Union and to maintain membership therein after 45 days of employment. Beginning in 1967, the contracts also provided for checkoff of union dues. Atlas wished to eliminate the security and checkoff provisions and to replace them with an affirmative freedom of choice provision concerning Union membership.[2]

By April 3, Atlas had retreated from 34 of its original demands and the only issues separating the parties were union security and checkoff.

On April 6, the employees struck. The parties met five times during the 13-week strike. At the first meeting, on April 20, Union submitted and Atlas agreed to four new proposals seeking guarantees for striking employees. Union security and check-off continued, however, to separate the parties.

No progress was made on May 1 and 16. Union increased its wage demand on June 6, and its accident/sickness benefits demand on June 30. Atlas countered by reintroducing several original proposals on June 30.

By letter dated July 11, Union advised it was terminating the strike as of July 14, and offered on behalf of all striking employees to return to work on July 17. Atlas responded that it would recall returning strikers on a seniority basis as work became available. It did not offer to terminate replacement employees to make room for returning strikers.

On August 4, Union wrote to Atlas, requesting the names, dates of hire, and classifications of all active employees, and the names of employees who resigned or were terminated since the strike began. Union's letter included: "The Union further requests to know whether the Company has contracted out work, to whom and for how long. We are further requesting copies of any agreements of subcontracting." Union advanced no reasons for its requests. On August 7, Atlas replied that it would comply with the first two requests. Concerning the third, Atlas said, "with respect to contracting out work, the Company has done this for many years."

The parties met on seven more occasions between August 4, 1978 and February 13, 1979. During that period, Union dropped its proposals for union security and check-off. Atlas adhered to several of its original proposals.

Between April 3, 1978 and February 6, 1979, Atlas took these unilateral actions on the dates indicated:

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*The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, is sitting by designation.

[1] Events described in the text occurred in 1978 unless otherwise stated.

[2] Atlas' proposed clause reads: The Union and the Company agree that whether an employee belongs to the Union or doesn't belong to the Union is a matter of personal choice for each individual employee. Employees do not have to belong to the Union or pay a fee to the Union in order to work at the Company.

1. An April 3, 1978 wage increase of 7½ per cent to all employees;
2. A May 1, 1978 increase in accident and sickness benefit from $84 to $91 per week;
3. An August 1978 work rule change—suspension of the third step in the progressive disciplinary procedures for absences (namely, 3-day layoffs);
4. An October 1, 1978 wage increase to all employees of 3½ per cent;
5. An October 1, 1978 elimination of the AIW Pension Fund and unilateral grant of a wage increase in lieu thereof;

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6. A February 6, 1979 implementation of a general wage increase of 4 per cent;
7. A February 6, 1979 increase of shift differential from 20 cents to 22 cents per hour;
8. A February 6, 1979 increase of life insurance coverage from $4,000 to $10,000.
9. A February 6, 1979 institution of payment for employees' safety glasses and increase from $5 to $7 in the allowance for safety shoes; and
10. A February 6, 1979 increase in direct payments to employees in lieu of payments to the AIW Pension Fund from 17 cents to 22 cents.

Employee Behling

Behling was a Union signatory to the 1977 contract and chairman of the 1978 bargaining committee. Before the strike, he worked as a tool and die maker. After the strike he was reinstated as janitor-utility man, the best job then available. In late August, he applied for but was denied assignment as a truck driver. On September 10, he became a die grinder, at the established pay rate for that job. When Behling performed die-making tasks thereafter he was paid at the higher die-making rate.

Barr's Remark to Behling

In August, Behling was talking with two other employees just before quitting time. Supervisor Barr, standing about 30 feet from Behling, yelled at him to stop talking about union business on company time.

Employee Rigdon

Rigdon testified that in February, after he had succeeded in getting a job rerated by filing a grievance, supervisor Barr "told me that I should stop filing a grievance on jobs. And if I did that, I would make more money and things would run a lot smoother. And if I did not, he would give me * * * dirty jobs which means bad-rated jobs". Rigdon testified that Barr repeated the statement in early March, after Rigdon had been successful in another grievance. According to Rigdon, Barr's assistant, Peltier, approached him and told him "basically the same thing as [Barr] told me in the morning".

Proceedings

On September 29, complaints were issued based on charges filed by the Union under Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act. A hearing was held on May 7–10, 1979 before an Administrative Law Judge (ALJ). In his December 13, 1979 decision, the ALJ found that: (1) Atlas violated Section 8(a)(5) by negotiating without intent to reach agreement, by taking unilateral actions during negotiations, and by refusing to furnish information relevant and necessary to Union's representative function; (2) the strike was caused and prolonged by Atlas' bad faith bargaining; (3) Atlas violated Sections 8(a)(1) and 8(a)(3) by delaying employee Behling's reinstatement to the tool room until September 10, by reducing his wages at that time, and by denying him the position of truck driver; and (4) Atlas violated Section 8(a)(1) by promulgating a discriminatory rule against talking about the Union and by threatening employee Rigdon.

On September 17, 1980, the board affirmed the ALJ's findings and further found that Atlas violated Section 8(a)(1) and 8(a)(3) by discriminatorily denying reinstatement to unfair labor practice strikers who had unconditionally offered to return to work.

OPINION

An order of the board will be enforced by this court if there is substantial evidence on the record as a whole supporting it. *N.L.R.B. v. Truck Drivers, Oil Drivers, Etc.*, 630 F.2d 505, 507 (7th Cir. 1980) and cases cited therein. We will not lightly disregard the evaluation of facts by the board "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose

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findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). Due deference to the findings of the board, however, does not mean abdication of our duty of judicial review. *Id.* at 490; *N.L.R.B. v. Truck Drivers, Oil Drivers, Etc.*, 630 F.2d at 507; *Liberty Mutual Insurance Co. v. N.L.R.B.*, 592 F.2d 595, 602 (1st Cir. 1979). We are not empowered to rubber-stamp the board's order when, as here, review of the record shows that major portions of that order simply are not supported by substantial evidence. *N.L.R.B. v. Adam & Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977).

Bad Faith Bargaining

The Board's emphasis on Atlas' having agreed to union security and checkoff in prior contracts suggests the view that those provisions thus became sacrosanct and not subject to negotiation in future contracts. A "once in, forever in" concept, however, has no basis in logic or law. Indeed, the board's position would encourage employers to *oppose* union security, checkoff, and similar union-desired provisions in initial contracts, fearing that "once in", such provisions would be "forever in".

An employer is entitled to advance a position sincerely held,[3] notwithstanding the employer's having taken a different position at an earlier time. *N.L.R.B. v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978). Union security and checkoff are mandatory subjects of bargaining, and "[a] party * * * is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party". *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973). As stated by this court in *Capitol Aviation, Inc. v. N.L.R.B..*, 355 F.2d 875, 877 (7th Cir. 1966):

> [T]hat the Union offered repeated modifications of its demand for a union security clause did not operate, as the Board seems to believe, to make Capitol's stand on freedom of choice for individual employees improper.
>
> * * * * *
>
> The Board considered that Capitol's firm position on the union security and contract term issues outweighed its flexibility on more than 80 other issues, which the Board dismisses as equivalent to "concessions here and there".

Here, the board disregarded Atlas' concessions on 34 of its 36 proposals initially advanced. On the eve of the strike, Atlas was willing to reach agreement on all issues except union security and checkoff. With respect to those two issues, "refusal to bargain cannot be equated with 'refusal to recede from an announced position' advanced and maintained in good faith". *Church Point Wholesale Grocery Co.*, 215 N.L.R.B. 500, 502 (1974), *affirmed sub nom., Oil, Chemical and Atomic Workers International Union, AFL-CIO v. N.L.R.B.*, 538 F.2d 1199 (5th Cir. 1976).[4]

Moreover, Atlas presented uncontradicted evidence that its proposed clause on freedom of choice is virtually identical to the clause agreed to by another local of Union in a contract with another employer.[5]

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Ignoring the evidence, the board arrived at a finding of bad faith by characterizing Atlas' freedom of choice proposal as "unreasonable, redundant and inflammatory" and as "predictably unacceptable" to the Union.

In *Chevron Oil Co. v. N.L.R.B.*, 442 F.2d 1067, 1072 n. 10 (5th Cir. 1971), a company's good faith was evidenced in part by its having successfully negotiated contracts containing the challenged provisions with three other affiliates of the same union. Similarly, in *Cagle's Inc.*, 588 F.2d 943, 234 N.L.R.B. 1148, 1158 (1978), *enforced in part,* 588 F.2d 943 (5th Cir. 1979), the board held: "The Union having accepted this provision in the Macon contract, it cannot be said that Respondent's offer to incorporate it in the contract then being bargained for with the Union was of a type that 'no self-respecting union * * * could reasonably be expected to accept' ".

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[3] Throughout bargaining, Atlas consistently asserted the same reason for wanting to eliminate union security and checkoff, viz., so that employees would have a free choice concerning Union membership.

[4] The contrast between the instant facts and those in *N.L.R.B.* v. *Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979), relied on by the board, is illuminating. There, in finding bad faith, this court emphasized that the employer had made no bona fide concessions on substantial issues and no defense of its extreme proposals, adhered to for six months.

[5] In an August 22, 1977 agreement between S–B Manufacturing Co., Ltd. and Union's Local 659, the pertinent clause reads:

> Neither the Company nor the Union will discriminate against or coerce or fine or discipline any employee because the employee:
>
> . . . . .
>
> 2. Belongs to the Union, or
> 3. Doesn't belong to the Union.
>
> Employees do not have to belong to the Union or pay a fee to the Union in order to work at the Company.

Compare Atlas' proposed clause in note 2, *supra*.

During the strike, Union increased its demands on wages and accident/sickness benefits, and Atlas responded by reintroducing several original proposals. The board condemned only the action of Atlas, ignored the conduct of Union, and disregarded the effect on the parties' relative economic strengths of Atlas' successful weathering of the strike. It is not illegal for a party to take advantage of a shift in economic strength in a bona fide attempt to obtain agreement on original proposals seen as furthering its best interest. Here, after the strike, it was not illegal for Atlas to use it dominant bargaining position in seeking contract terms most favorable to it.

The courts and the board have recognized that an employer's successful weathering of a strike changes the bargaining parties' positions. In *N.L.R.B. v. Alva Allen Industries, Inc.*, 369 F.2d 310, 318 (8th Cir. 1966), the court found no bad faith bargaining where the parties had reached agreement on about 80% of the issues, were apart on wages and union security when the employees struck, and negotiations continued but the employer remained adamant on union security, because "it is only natural that the Company, sensing its strong position, will bargain with increasing toughness and will be less inclined to make concession to the Union." Similarly, in *O'Malley Lumber Co.*, 234 N.L.R.B. 1171, 1179 (1978), the board said: "Where an employer's economic power increases through the successful weathering of a strike, it is not unlawful for an employer to use its new-found strength to secure contract terms that it deems beneficial".

We hold that the board's finding of bad faith bargaining by Atlas under Section 8(a)(5) is not supported by substantial evidence in the record as a whole, and accordingly deny enforcement of that portion of the board's order.

Unilateral Changes

The board found that Atlas violated Section 8(a)(5) by unilaterally instituting changes in wages and other terms of employment without bargaining to impasse. That finding, however, rested on the board's unsupported finding of bad faith bargaining. Having bargained in good faith to impasse before instituting unilateral changes, Atlas was entitled to make those changes consistent with its last proposals during bargaining. *United Fire Proof Warehouse Co. v. N.L.R.B.*, 356 F.2d 494, 497 (7th Cir 1966). Enforcement of the portion of the order relating to unilateral changes must therefore be denied.

Subcontracting Information

The courts have held certain types of information, for example, wage data on unit employees, so intrinsic to the core of the employer-employee relationship as to be presumptively relevant. *Emeryville Research Center v. N.L.R.B.*, 441 F.2d 880, 887 (9th Cir 1971); *Curtiss-Wright Corp. v. N.L.R.B.*, 347 F.2d 61, 69 (3d Cir. 1965). Unless the presumption is rebutted in such cases, an employer must provide the re

quested information. Conversely, when the requested information is not ordinarily pertinent to a union's role as bargaining representative, but is alleged to have become pertinent under particular circumstances, the union has the burden of proving relevance before the employer must comply. *San Diego Newpaper Guild v. N.L.R.B.*, 548 F.2d 863, 867 (9th Cir. 1977).

Here, the board found that Atlas violated Section 8(a)(5) by refusing to furnish the requested information on subcontracting. Before us, the board is content to rely on the conclusory statement that "information as to subcontracting is presumptively relevant, such information is *prima facie* required to be produced and, rather than the Union being required to show the relevance of its request, the Company bears the burden of showing a lack of relevance". We disagree. We are cited to no evidence, and the record contains none, indicating that information on subcontracting is so intrinsic to the employer-employee core relationship as to make it presumptively relevant in all cases. That such information may be relevant under special circumstances seems clear but is of no moment here where no such special circumstances have been shown. Union made no effort to explain the relevance of the information sought in its letter of August 4, 1978, and no explanation was forthcoming thereafter. Absent some showing of a basis for holding the requested information so intrinsic as to be presumptively relevant, or a union showing of relevance, enforcement of that part of the order relating to a refusal to supply information must be denied.

Reinstatement of Strikers

The right to reinstatement of economic strikers differs from that of unfair labor practice strikers. An employer's responsibility to reinstate economic strikers is limited to the employer's legitimate staffing requirements. *Chauffeurs, Teamsters & Helpers "General" Local No. 200, AFL v. N.L.R.B.*, 233 F.2d 233, 238 (7th Cir. 1956). Upon an unconditional offer to return to work, unfair labor practice strikers are entitled to immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions. *N.L.R.B. v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 754 (7th Cir. 1981).

The board found that the strike was caused and prolonged by Atlas' bad faith bargaining, making it an unfair labor practice strike. Accordingly, the board found Atlas obliged to offer immediate and full reinstatement to returning strikers, and held its failure to make room for them by terminating replacement employees a violation of Sections 8(a)(1) and 8(a)(3). We disagree. As above set forth, Atlas bargained in good faith before and during the strike. Hence there was no unfair labor practice and Atlas was entitled to treat returning strikers as economic strikers. There is no evidence that it failed to do so.

The board erroneously labelled Behling an unfair labor practice striker. Because he was an economic striker, Atlas was not required to ensure his immediate return to the tool room by discharging a replacement employee. Moreover, Atlas exercised legitimate business judgment in classifying him as a die grinder, not a die maker, when he did return to the tool room. Atlas President Fenlon testified without contradiction that, during the strike, Atlas began using a new type die not producible in its plant, and that there was correspondingly less work in the tool room. As the record shows, changed business conditions eliminated the need for full-time die makers and no one was employed in that position after the strike.

Finally, the board erred in finding a violation in the refusal to offer Behling a job as truck driver. An employer not motivated by anti-union animus may freely exercise its business judgment in hiring decisions, and the board should not substitute its judgment for the employer's. *N.L.R.B. v. Wells Fargo Armored Service Corp.*, 597 F.2d 7, 11 (1st Cir. 1979). Here, Atlas was aware in late August that a spot would open soon for Behling in the tool room, where he had worked previously and wished to return. No warrant appears for requiring the training of two employees for the truck driver job. On September 10 Behling moved into the tool room. On the facts of record here, those parts of the order relating to reinstatement cannot be enforced.

Barr's Remark to Behling

Substantial evidence on the record as a whole supports the board's Section 8(a)(1) violation determination based on Barr's remark to Behling in August. As the board found, there was no previous rule against talking in Atlas' plant. Hence Barr's promulgation of a discriminatory rule prohibiting employees from talking about union matters constituted a violation.

Threats to Rigdon

Substantial evidence on the record as a whole supports the board's Section 8(a)(1) violation determination based on the threats to Rigdon. There were conflicts in the testimony of Rigdon, Barr, and Peltier. Nonetheless, the board properly accepted the view of the ALJ, who evaluated the demeanor and credibility of all the witnesses.

Conclusion

We modify the board's order[6] by deleting paragraphs 1(a), 1(b), 1(c), 1(e), 2(a), 2(b), 2(c), 2(d),

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[6] The board added paragraph 1(c), 1(e), and 2(d) to the ALJ's recommended order. We designate the resultant combination "the board's order".

2(e), 2(f), and 2(g) thereof. We expect that the board will appropriately amend the "Notice to Employees" to be posted at Atlas' plant.

Enforcement is granted in part and denied in part.

MODIFIED, AND AS MODIFIED, ENFORCED.

NLRB v. Eldorado Manufacturing Corporation and United Steelworkers of America, AFL–CIO

660 F.2d 1207 (7th Cir.), September 24, 1981—249 NLRB 646

On petition to enforce Board Order

Before CUMMINGS, Chief Judge, CUDAHY, Circuit Judge, and WYATT, Senior District Judge*

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CUMMINGS, Chief Judge: The National Labor Relations Board has petitioned us pursuant to Section 10(e) of the National Labor Relations Act (Act) (29 U.S.C. § 160(e)) to enforce its May 20, 1980, order against the Eldorado Manufacturing Corporation (the Company) and the United Steelworkers of America, AFL–CIO (the Union).[1] The order requires the Company to offer reinstatement with back pay to two discharged employees, Jerry Miller and Allen Davidson, with the Union jointly and severally liable with the Company for reimbursement of the lost wages. The Union was also required to notify the Company that the Union has no objection to the reemployment of Miller and Davidson. Both the Company and the Union were directed to post certain notices. We deny enforcement because the discharges were justified by the misconduct of the two former employees.

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I

The Company operates a small plant in Eldorado, Illinois, that produces valves for machinery. Its eleven production and maintenance employees are represented by the Union. Their contract is administered at the basic level by an employee-elected bargaining and grievance committee consisting of the shop steward and two committeemen.

Since at least the summer of 1978, the eleven employees were divided into two antagonistic groups. One group (the Davidson-Miller faction) was led by Allen Davidson and Jerry Miller and included employees Tom Horton, Gordon Donnelly, Jeff Beam and Leon Wiseman. The other group (the Pennell-Cox faction) consisted of Bud Pennell, Bob Cox, Ivan Butler, Charlie Daniels and Fred Anderson. The Davidson-Miller faction was openly hostile and vulgar to members of the other faction and engaged in such conduct as:

> "abusive, obscene and vicious language, feigned vomiting gestures; breaking the other faction's coffee cups; intentionally wasting company-provided coffee so that the other faction could not drink coffee; and breaking a Company chair so that employee Cox could not sit on it while operating his machine in the plant" (App. 57).

Davidson also destroyed a part from Cox's motorcycle. According to Davidson, his group's behavior was caused by the other group's "taking sides with the company" (Tr. 202–203). Davidson admitted that the Pennell-Cox faction did not engage in comparable conduct (Tr. 202–203). Davidson also admitted that from time to time, Plant Manager Herschel Hiller heard complaints about Davidson's and Miller's misconduct and warned them especially that their jobs were in jeopardy if they persisted in such conduct.

In November 1978, the Davidson-Miller faction initiated a recall of Ivan Butler, a member of the Pennell-Cox faction, as shop steward. The employees voted to replace Butler with Leon Wiseman, then a member of the Davidson-Miller faction, and elected Davidson and Horton, another member of the Davidson-Miller faction, to serve as his committeemen.

On February 13, 1979, the employees began a strike against the Company over the terms of a new contract. The strike concluded on April 2, 1979, with the execution of a new two-year contract. The new contract was negotiated by the employees' bargaining and grievance committee (Wiseman, Davidson and Horton) with the assistance of Union Representative Richard Blackburn. During the strike, Miller and Davidson became dissatisfied with Wiseman's performance as steward.

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*The Honorable Inzer B. Wyatt, Senior Judge of the Southern District of New York, is sitting by designation.

[1] Only the International Union is a party to this case. No complaint was filed against the Local Union by the Board's General Counsel. The Board's decision and order are reported at 249 NLRB No. 88.

Miller felt that Wiseman was not picketing enough, and Davidson thought that Wiseman was not taking a sufficiently strong position in the contract negotiations. Antagonism between the Davidson-Miller faction and Wiseman, who by this time was taking his coffee breaks with the Pennell-Cox faction, was aggravated by the so-called "key incident." Prior to the strike, several employees had keys to the plant so that they could begin work even if Plant Manager Hiller arrived late. During the strike, some employees, including Wiseman, agreed among themselves not to accept keys when they returned to work. Thus, if Hiller were late, the employees could leave and collect four hours' "call-in" pay. However, shortly after the strike ended, Wiseman accepted a key from Hiller and showed it to Miller. Miller threatened that if Wiseman used the key Miller would see to it that the door would not open again. Three or four days later, the lock on the door was jammed and had to be replaced, even though Wiseman had returned the key to Hiller.

After the strike the Davidson-Miller group increased its disruptive and abusive behavior and now included Wiseman as one of its targets. Davidson admittedly yelled at Plant Manager Hiller, greased the other group's tools and lathes, broke their coffee cups and sought to prevent them from drinking coffee, physically harassed them and called them "suck ass" and "company sucks." Miller admittedly greased the handles of Wiseman's and other employees' machines, gave Wiseman "the finger," feigned "sucking and vomiting sounds at Wiseman," held his nose when Wiseman walked by, called Wiseman a "company suck" and threatened to slash Wiseman's and Pennell's automobile tires. He also told Plant Manager Hiller that he did not operate the plant correctly. Davidson had received several warnings from Hiller concerning his efforts to prevent the Pennell-Cox group from drinking coffee (Tr. 201–202).

In mid-April, Miller and Horton circulated a petition to remove Wiseman as shop steward and replace him with Davidson. The petition was put aside when majority support was not forthcoming.

On April 27, Davidson filed a grievance claiming that Plant Manager Hiller had on the previous day performed some bargaining unit work. At Davidson's request, Wiseman called a grievance meeting with Hiller. At the meeting, Pennell, who had been with Hiller at the time of the disputed events, supported Hiller's claim that he had not done bargaining unit work. Davidson then went to the lunchroom and placed sand in Pennell's salt shaker. On April 30, at a second grievance meeting called at Davidson's insistence and concerning the same matter, Hiller accused Davidson of being a troublemaker and stated that the Davidson-Miller group was raising petty matters. Contemporaneously, Miller drew two extremely obscene pictures of Wiseman, one with Union Representative Blackburn and the other with Hiller. At Miller's suggestion, Davidson and Jeff Beam, one of Davidson's supporters, hung the drawings at Wiseman's workplace. A few days later, Pennell, who had worked for the Company for 20 years, told Hiller that he, Pennell, could not continue to work for the Company in view of the disruptive situation there.

On May 4, Bob Cox demanded a shop meeting concerning a dispute between him and Davidson about the operation of a machine tool. Hiller agreed with Cox's position and told Davidson to stop causing trouble. Davidson thereupon told Hiller that if he addressed Davidson in the future, Davidson wanted his union representative present. When Hiller pointed out that Wiseman was present, Davidson retorted, "I said any time, Jack."[2] At that point Hiller gave Davidson a written warning slip for disobedience. Also on May 4, Davidson threatened Cox by raising a broom at him. Miller stated in the hearing before the Administrative Law Judge (ALJ) that approximately one week before his discharge he also was warned by Hiller concerning his troublemaking (Tr. 58–59).

On May 7, the employees held a union meeting at the plant with Union Representative Blackburn present. Davidson called the meeting in an attempt to oust Wiseman as shop steward. According to Davidson, Wiseman was lax in calling grievance meetings. When a majority of those present refused to vote Wiseman out, Davidson and Horton resigned from the grievance committee. Pennell and Cox were elected to replace them. Shortly thereafter, Miller admitted to Pennell that Miller was not operating his lathe at full speed and was going to see "that the door is shut on this place." Pennell told Hiller of this threat. On May 10, possibly as a protest to the new grievance committee, Miller, Davidson and Horton went to the table occupied by the Pennell-Cox faction during lunch and dumped soda pop all over the table and spat soda thereon.

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[2] Hiller's first name is Herschel.

On the morning of May 11, Miller again smacked his lips, held his nose and made other vulgar gestures and faces at Wiseman, causing Wiseman to become pale and sick-looking. Wiseman then decided to ask Plant Manager Hiller for a vacation and accordingly asked grievance committee members Cox and Pennell to accompany him to Hiller's office. Thereupon, a one and one-half to two-hour meeting took place with Hiller. At that meeting Wiseman complained to Hiller that he needed a two-week vacation immediately to avoid a

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nervous breakdown because the Davidson-Miller behavior was affecting his work and personal life so much that he did not even know if he could return to the Company after his vacation. He told Hiller of the continuous abuses to which he had been subjected in the five weeks after the strike ended on April 2. Cox and Pennell agreed that the harassment had gotten out of hand. Both Pennell and Cox said they would quit if the chaotic conditions in the plant were not corrected. One of the three told Hiller that Anderson and Butler were also fed up and wanted to quit. Both Anderson and Butler previously had complained to Hiller about the actions of Davidson and Miller (Tr. 318–319). All participants in the meeting denied that the three employees present asked Hiller to discharge Davidson and Miller.

After the conclusion of an ensuing meeting with Miller and Davidson, Hiller discharged them on the ground that they had harassed Company employees to the extent of disrupting the work force. He explained at the September 1979 hearing on the complaint before the ALJ that essential senior employees would otherwise have left the Company.

After Miller and Davidson learned that they were being terminated, they sought the assistance of the grievance committee, and Wiseman arranged a meeting for them with the committee and Union Representative Blackburn on May 15. At that meeting, Davidson and Miller admitted that they were responsible for harassing the plant employees. Blackburn told Miller and Davidson that they did not have a good chance of being reinstated, but that he would talk with Hiller and, if unsuccessful, would "go through the [grievance] procedure." Davidson said that he wanted to write his grievance (Tr. 153) and had the necessary grievance forms (Tr. 229) and both he and Miller understood the grievance procedure (Tr. 525), but Miller stated that he had secured other employment on May 11 and consequently did not want his job back. Blackburn asked Davidson not to file a grievance for about a week so that Blackburn could talk to Hiller first. Both Davidson and Miller were familiar with the grievance machinery.

A few days later, Blackburn and the Union attorney spoke to Hiller, who refused to reinstate Davidson and Miller. After trying unsuccessfully to reach Wiseman, Blackburn called Cox and told him to tell Wiseman to notify Davidson and Miller that Hiller would not agree to take them back and that they could go ahead with their grievances. Wiseman subsequently spoke to Davidson and inquired if he had the necessary grievance forms. Davidson said he did and requested from Wiseman the Local Union's number, which was 14812 (General Counsel Exhibit 2 at p. 14). Later, when Wiseman stopped at Davidson's home to give him the requested number, Davidson said he didn't need it. His next move was in July when he filed his initial charges with the Labor Board. As the ALJ found,

> "there was no 'attempt' by the discriminatees to file written grievances and there was no refusal by the Union to accept them" (App. 20).

On the basis of the foregoing record,[3] the ALJ concluded after a hearing that the Union violated Section 8(b)(2) and (1)(A) of the Act by causing the discharges of Davidson and Miller because of their intra-union activity; that the Union violated Section 8(b)(1)(A) of the Act by failing to notify Miller and Davidson that it was willing to process their grievances; and that the Company had violated Section 8(a)(1) and (3) of the Act by discharging Miller and Davidson at the Union's demand. The Board affirmed the ALJ's decision and adopted his recommended order with two minor modifications.

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[3] As in *Midwest Stock Exchange, Inc. v. National Labor Relations Board*, 635 F.2d 1255, 1263 (7th Cir. 1980), our discussion of the facts follows the Administrative Law Judge's findings where based on substantial evidence but not when based on scintilla evidence or when contrary to the record.

II

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to

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"restrain or coerce * * * employees in the exercise of the rights guaranteed in Section 7 * * *" of the Act.[4] Section 8(b)(2) makes it an unfair labor practice for "a labor organization or its agents * * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection 8(a)(3)." Subsection 8(a)(3) provides in pertinent part that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." Thus it is unlawful for a union or its agents to cause an employer to discharge an employee because of his opposition to the union leadership or its policies. *e.g., Local No. 444, Iron Workers v. National Labor Relations Board,* 426 F.2d 229, 230 (7th Cir. 1970). Here the Board concluded that the Union committee such an unlawful act on the basis of findings that Wiseman, acting as an agent of the Union, delivered an ultimatum to Hiller to discharge Davidson and Miller because of protected intra-union activities. These findings are not supported by substantial evidence.

First, as the Supreme Court explained in *Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212, 217, 100 S.Ct. 410, 414, 62 L.Ed.2d 394, to hold a union liable for the acts of its agents, "it must be clearly shown * * * that what was done was done by their agents in accordance with their fundamental agreement of association."[5] The Court added that to establish a union's liability under the doctrine of *respondeat superior* evidence must be offered that the "International Union instigated, supported, ratified, or encouraged" the activity in question. 444 U.S. at 218, 100 S.Ct. at 414, quoting with approval 582 F.2d 1346, 1351 (3d Cir. 1978) in the same case. In the present case, there is nothing in the record to show that Wiseman, Pennell and Cox were acting "in accordance with their fundamental agreement of association" or that the Union "instigated, supported, ratified or encouraged" the discharges. These three employees were elected by their fellow employees rather than designated by the Union under the collective bargaining agreement and were present at the May 11 meeting as individuals on behalf of themselves and other employees distressed by Davidson's and Miller's misconduct. Indeed, far from the Union's endeavoring to cause the discharges, its agent Blackburn attempted to have Miller and Davidson reinstated four days after the discharges took place.

Second, the record does not support the Board's finding that Wiseman presented Hiller with an ultimatum to discharge Miller and Davidson. Indeed, all four participants in the meeting testified to the contrary and the unrebutted evidence shows that the resolution of the discipline problem was left with Hiller. The fact that Wiseman commented to employees Horton and Beam after the meeting that "he had to do it" does not support an inference that he demanded their discharges since it is entirely compatible with his testimony and the testimony of others that he had simply reached the point where he felt he had to complain about the continuing harassment.

Finally and most importantly, the record does not support the finding that Wiseman, Pennell and Cox sought to have Davidson and Miller punished because of protected intra-union activities. The complaints of Wiseman, Pennell and Cox concerned the manner in which Davidson and Miller had chosen to vent their contempt for the Pennell-Cox faction. The Board, however, found that Miller's and Davidson's

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misconduct was "not so obstreperous or obstructive as to prevent Wiseman from performing his job as Steward" (App. 12) and that their offensive and vulgar behavior did not justify the action taken by Wiseman, Pennell and Cox (App. 17). We cannot agree. While employees are afforded considerable leeway in their expression of disagreement with union or employer policies, this case does not present an isolated moment of intemperate behavior or misconduct committed in the course of internal union functions, but a continuing pattern of petty, vulgar and disruptive acts in the workplace that goes well beyond the scope of protection afforded by the Act. See *Sullair P.T.O., Inc. v. National Labor Relations Board,* 641 F.2d 500 (7th Cir. 1981); *National Labor Relations Board v. Truck Drivers, Oil Drivers, Etc.,* 630 F.2d 505 (7th Cir. 1980), certiorari denied *sub nom. Gilmer v. Truck Drivers,* ——— U.S. ———, 101 S.Ct. 1740, 68 L.Ed.2d 225; *American Telephone & Telegraph Co. v. National Labor Relations Board,* 521 F.2d 1159 (2d Cir. 1975); *National Labor Relations Board v. Red Top, Inc.,* 455 F.2d 721 (8th Cir. 1972); *Indiana Gear Works v. National Labor Relations Board,* 371 F.2d 273 (7th Cir. 1967). The ALJ acknowledged that Davidson's and Miller's acts had created anarchy and could not be condoned but concluded that a violation of the Act had nevertheless occurred because motivation for the action of Wiseman, Pennell and Cox "was based *in part* upon discriminatory elements" (App. 17, emphasis supplied). However, the Board itself has rejected the "in part" test for discriminatory discharges and adopted the test developed by the Supreme Court in *Mt. Healthy City School Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. See *Wright Line, A Div. of Wright Line, Inc.,* 251 NLRB No. 150, 105 LRLM 1169 (1980); see also *Sullair P.T.O., Inc., supra; Stein Seal Co. v. National Labor Relations Board,* 605 F.2d 703 (3d Cir. 1979); *Liberty Mutual Insurance Co. v. National Labor Relations Board,* 592 F.2d 595 (1st Cir. 1979). Under the *Mt. Healthy* test, a *prima facie* case of discrimination is rebuttable by a showing of justification. Here the record overwhelmingly shows that the discharges were justified. Therefore, even assuming that the Union requested the discharges, there was no violation of Sections 8(b)(2) and (1)(A).

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[4] Section 7 of the Act provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act." 29 U.S.C. § 157.

[5] This quotation from *Carbon Fuel Co.* came from an opinion of Chief Justice Taft in *Coronado Coal Co. v. Mine Workers,* 268 U.S. 295, 304, 45 S.Ct. 551, 554, 69 L.Ed. 963.

The dissent contends that the May 11 meeting was a "misuse of Union * * * power." We disagree, for Union representatives can be and here were proper vehicles for communicating employee dissatisfaction to management, even concerning the disruptive actions of other employees. There was no unfair labor practice because the complaints of the Union representatives were entirely legitimate.

III

As follows from the foregoing discussion, the Board's finding that the Company violated Section 8(a)(1) and (3)[6] of the Act by discharging Miller and Davidson is also unsupported by substantial evidence. The ALJ found that Plant Manager Hiller discharged the two employees principally because of Wiseman's demand, but was receptive to the demand because he was annoyed by Davidson's having complained that Hiller had performed bargaining unit work. The ALJ acknowledged that Hiller would have been justified in discharging Miller and Davidson for misconduct, but found that the discharges were not so motivated since Hiller had previously acquiesced in the misconduct by not disciplining or

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discharging Miller and Davidson earlier.[7] This finding is contrary to the uncontroverted evidence that Hiller spoke to Miller and Davidson on several occasions about their misconduct both before and after the strike and that Hiller did not previously take formal disciplinary action because he believed the situation would "settle down" after a new contract was signed. Thus rather than indicating anti-union bias, Hiller's failure to act against Davidson and Miller earlier shows exceptional tolerance of intra-union disagreement. In fact, the situation after the strike deteriorated to the point where Hiller believed he was faced with a choice of losing valuable senior employees or letting Miller and Davidson go.

The Board in its brief argues that there "were no out-of-the-ordinary occurrences in the shop between May 7, the date of the Union meeting at which Wiseman's ouster was sought, and May 11, when Wiseman and the [two other] Union committeemen demanded that Hiller fire Miller and Davidson" so that the "inference is compelling" that the discharges were motivated by Davidson's and Miller's participation in protected activities (Br. 20–21). However, the Board (and the ALJ) conveniently overlook the facts that Wiseman had known about the attempt to oust him since mid-April, that some time between May 7 and May 11, Pennell reported to Hiller that Miller was not operating his lathe at full speed and intended to see "that the door is shut on this place,"[8] that on May 10, Miller and Davidson poured and spat soda pop on the table at which the Pennell-Cox faction was eating; and that the May 11 meeting was immediately precipitated by Miller again making obscene gestures directed at Wiseman.

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[6] Section 8(a)(1) provides:

[7] For example, the ALJ recognized that Miller's threat to see "that the door is shut on this place" would justify Miller's discharge under *Tama Meat Packing Corp.,* 230 NLRB 116 (1977) if Hiller had acted on it immediately, instead of discharging Miller four days later (App. 16).

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act." 29 U.S.C. § 158(a)(1).

Section 8(a)(3), as noted in the text, *supra,* provides in pertinent part:

"(a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." 29 U.S.C. § 158(a)(3).

The Board's case against the Company rests at bottom on the apparent notion that blatant misconduct once tolerated at all must be tolerated forever. However, as this Court has previously stated, "[t]here must be room in the law for a right of an employer somewhere, sometime, at some stage, to free itself of continuing, unproductive, internal, and improper harassment." *National Labor Relations Board v. Truck Drivers, supra,* 630 F.2d at 509. To ascribe any motive to these discharges other than a long overdue intolerance of Davidson's and Miller's offensive and disruptive acts would be to indulge in unwarranted speculation. Neither the Board nor this Court can decide cases on such a basis. *Midwest Stock Exchange v. National Labor Relations Board,* 635 F.2d 1255 (7th Cir. 1980). Accordingly, we hold that the Company discharged Miller and Davidson for good cause and did not violate Section 8(a)(1) and (3) of the Act.

IV

Finally, we cannot agree with the Board that the Union violated Section 8(b)(1)(A) by failing to notify Miller and Davidson that it was willing to process their grievance over the discharges. Liability for failure to process discharge grievances cannot attach unless the grievances would have been meritorious and unless the Union's failure to process was in bad faith. *Hines v. Anchor Motor Freight Co.,* 424 U.S. 554, 570, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231, *Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842. The grievances here were, as discussed above, not meritorious because the discharges were for just cause based on serious misconduct and therefore not a violation of the collective bargaining agreement. In addition, there was no bad faith shown on the part of the Union.

Following the May 11 discharges, Wiseman scheduled a meeting for Miller and Davidson on May 15 with himself, the two other grievance committeemen, and Union Representative Blackburn. At that meeting, Blackburn told Davidson and Miller that they had little chance of being reinstated, but that he would talk to Hiller and that if Hiller would not agree to reinstatement Blackburn would process their grievances. Miller stated that he had another job and did not want to file a grievance. Davidson indicated that he wanted to write his grievance and had the necessary grievance forms and Blackburn knew that Davidson was familiar with the grievance procedure. Within a few days, Blackburn spoke unsuccessfully to Hiller and then informed Wiseman (through Cox) that Davidson and Miller could file their grievances. It is true that Wiseman never relayed this message to Miller, but it was plainly unnecessary to do so since Miller had already stated that he did not want to file a grievance.[9] While Wiseman did not relay Blackburn's message to Davidson in exact terms, apparently because he simply assumed that Davidson was going ahead with the grievance, he did contact Davidson to inquire if he had the necessary grievance forms. Davidson said that he did and that he did not need the Local Union's number, which he had previously requested from Wiseman. Since Blackburn had already told Davidson and Miller that he would process their grievances if his efforts to have Hiller to agree to reinstatement failed and since Davidson knew that Hiller had not agreed to reinstate him, it would be absurd for us to conclude, as the Board would have us do, that Davidson believed the Union would not process his grievance. Yet, as the ALJ found, Davidson never filed a written grievance and did not contact Blackburn or any other union official about doing so. Because the Union never refused to accept the grievance and would in any event have been justified in doing so, it was erroneous for the Board to conclude that the Union vio-

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[8] See note 7 *supra.*

[9] Significantly, the complaint herein was based on charges filed by Davidson alone (App. 1).

lated Section 8(b)(1)(A) for bad faith handling of Davidson's and Miller's grievances.

Here the Board has saddled the Company and Union with joint and several liability to make whole any loss of wages sustained by Miller and Davidson (App. 24–25, 26). By analogy to suits under Section 301(a) of the Labor Management Relations Act (29 U.S.C. § 185(a)), such liability should be imposed only if the discharges were contrary to the collective bargaining contract and if the Union breached its duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570–571, 96 S.Ct. 1048, 1059, 47 L.Ed.2d 231.[10] Neither factor was present here. Likewise, the record does not show that any Section 7 rights of Miller and Davidson were responsible for their discharge. Enforcement will be denied.[11]

CUDAHY, Circuit Judge, dissenting: There is no question that substantial evidence supports the Board's order here. The majority has simply elected to credit, rely on or emphasize other evidence or to draw different inferences from the evidence than the Board and has quite flagrantly substituted its judgment for that of the Board.[1]

1216

The majority says that, "The Board's case against the Company rests at bottom on the apparent notion that blatant misconduct once tolerated at all must be tolerated forever." At 1214. This is not the point at all; the point is that plant manager Hiller hardly raised a hand against Davidson and Miller, leading Union "radicals," until the leaders of the newly dominant "conservative" faction met with him for two hours to demand the ouster of their rivals and adversaries. Recently there had been much bad blood between shop steward Wiseman and the Davidson-Miller element, and Wiseman switched factions to the Cox-Pennell contingent. There is certainly abundant evidence, applying *Mt. Healthy* or any other relevant test, to support a conclusion that the principal and proximate (if not the only) cause of the discharges of Davidson and Miller was the urgings of shop steward Wiseman and grievance committee members Cox and Pennell, which met with the prompt and sympathetic acquiescence of plant manager Hiller.[2] After all, Davidson and Miller were not fired, or seriously threatened with firing for misconduct with other employees, *see* note 1, *supra*, until *immediately* after Wiseman, Cox and Pennell—the Union powers—closeted themselves with Hiller for almost two hours.[3]

In fact, before May 1979, in the four and a half years of his being plant manager, Hiller had never discharged an employee or even issued a warning or formal reprimand because of misconduct in the shop. The Administrative Law Judge and the Board concluded that, "employee discipline, whether management-imposed or self-imposed, in the plant, at all material times, was anarchic * * * [but that] Hiller [knew] of these derelictions in his shop, but openly ignored the situation on the ground that either it would improved [sic] or abate." App. at 15. Hiller even failed to take action when informed that Miller was not operating his machine at full speed and that Miller threatened to shut the Company down, App. at 16, actions that would have clearly justified discharging Miller.

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[10] This rule was recently reiterated in *United Parcel Service, Inc. v. Mitchell*, —— U.S. ——, ——, 101 S.Ct. 1559, 1563–64, 67 L.Ed.2d 732, and *Clayton v. International Union, U.A.W.*, —— U.S. ——, ——, n.15, 101 S.Ct. 2088, 2096, n.15, 68 L.Ed.2d 538.

[11] All arguments not expressly discussed in this opinion have, nevertheless, been duly considered. They have been found either wanting in merit or insufficiently important to warrant extended discussion. Their discussion would not have altered this decision.

[1] For example, the Administrative Law Judge and the Board found that, "[a]lthough the evidence shows that the Miller-Davidson faction (of which Wiseman was a member until after the strike ending April 2, 1979) appeared to be the more aggressively vulgar, there is no dispute on this record that each faction behaved badly to and irritated the other." App. at 4.

The Administrative Law Judge and the Board also noted that,

> [Hiller's] *one act* of disciplining Davidson, on May 4, for insubordination, stemmed not from Davidson's misconduct with co-employees (which was the gravamen of Wiseman's and Pennell's complaints), but rather from a direct confrontation with Hiller himself. Miller's conduct with respect to Hiller, in any event, in no way precipitated Wiseman's demand for Davidson's and Miller's discharges and I reject Hiller's assertion at the hearing that it was an underlying cause for the two discharges.

App. at 18 (emphasis supplied).

[2] The Board concluded that

> Hiller discharged Miller and Davidson *only* because of the urging of Respondent-Union, which urgings found an entirely sympathetic ear in Hiller because of Hiller's desire, as a matter of Respondent-Employer's interest, to rid itself [sic] of two employees who were continually showing dissatisfaction and causing him 'aggravation' because of his alleged contract violations in doing unit work.

App. at 16 (emphasis supplied). This analysis *at the very least* supports the view that, without the urgings directed at the Company by the Union leaders, there would have been no firings. The Company, therefore, has not carried its burden under *Mt. Healthy*.

"[T]he District Court should have gone on to determine whether the [employer] had shown by a preponderance of the evidence that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct." *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

[3] The analysis of the testimony by the Administrative Law Judge (and the Board) is that,

> whereas Wiseman specifically denied that he asked for their discharges, I credit Cox that Wiseman threatened to quit because of the abuse from 'those two,' naming Davidson and [Miller] and I have credited Horton and Beam who testified, without contradiction, that later on the same date, May 11, after Miller and Davidson had been discharged, Wiseman told them 'I had to do it.' This has no reference, in my estimation, other than to the fact that Wiseman had urged Hiller to discharge Miller and Davidson.

App. at 15.

Wiseman, Cox and Pennell, who demanded the discharges, were the only Union officials ordinarily on the premises. It is, therefore, disingenuous in the extreme to suggest that they were not agents of the Union, fully clothed with apparent authority. They *were* the Union for all practical purposes at Eldorado.[4] This case is important because, as perceived by the Board and based on the evidence, the Company did the bidding of the Union in destroying what had become its dissident faction. The majority seems to be unconcerned about the import of this dangerous collusion, provided there is evidence that the faction destroyed is uncouth and obnoxious.

To me the misuse of Union and Company power[5] to violate the rights of employees who at the time are in ill favor with the shop steward (whom they have tried unsuccessfully to replace) and the grievance committee (which has been turned over to their rivals) is of controlling significance in this case. Whether the employees fired were incidentally irritating and obnoxious should not be determinative. We should not allow concern for factory decorum to blind us to injustice in the abuse of power. Of course, under other circumstances, it might have been acceptable to fire Davidson and Miller for misconduct. But here no one appears to have thought of that course until the victims had a falling out with the shop steward and Davidson and Horton were replaced by their adversaries as committeemen. Company power should not be used as an instrument of Union politics.

There is also substantial evidence to support the Board's finding that the Union failed to accept and process the Miller and Davidson grievances when Union representative Blackburn committed the matter to the tender loving care of Wiseman—a prime antagonist of the terminated duo.[6]

I therefore respectfully dissent.

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[4] The Board stated that

> The uncontradicted evidence shows that these three employees [Wiseman, Cox and Pennell] and their predecessors represent the unit (together with the Union business agent Richard Blackburn, where matters concern negotiation of terms of a collective-bargaining agreement) in collective bargaining and individual unit employees in their grievances with Respondent-Employer pursuant to the terms of the collective-bargaining agreements between Respondents.

App. at 3 n. 1. This state of facts established a prima facie agency of the three to act for the Union in matters of discharges and grievances.

[5] The majority's defense of "Union representatives * * * [as] proper vehicles for communicating employee dissatisfaction to management, even concerning the disruptive actions of other employees," at 1213, conveniently ignores the spectacle of the Company's ultimate weapon of discharge in the service of Union power directed at a competing Union faction. Substantial evidence and inferences properly drawn from it support the Board's view.

[6] The Board found that, although Miller said at a grievance meeting on May 15, 1979, that he did not want his job back, he also said he wanted his backpay. The majority is therefore incorrect in its assumption that Miller had abandoned his grievance. App. at 31-32 n. 4.

NLRB v. Greyhound Lines, Inc.

660 F.2d 354 (8th Cir.), September 25, 1981—251 NLRB 1638

On petition to enforce Board Order

Before HENLEY and ARNOLD, Circuit Judges, and BECKER,* Senior District Judge

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HENLEY, Circuit Judge: This case is before the court on application of the NLRB for enforcement of its order against Greyhound Lines, Inc. (the Company), based on findings that Greyhound violated Section 8(a)(1) of the National Labor Relations Act of 1947 (the Act), as amended, 29 U.S.C. § 151 *et seq.*, by suspending two employees, Benner and Jenson, because they issued a press release announcing the intent of employee drivers to strictly obey the speed limit over the Labor Day weekend.

Benner, one of the Company's drivers and a local union official in Minneapolis, met with other drivers at a rest stop in Wisconsin in mid-July, 1979. The drivers discussed the pressures they were experiencing meeting time schedules under the new 55 mile-per-hour speed limit. They also discussed a recent company announcement, rescinded shortly thereafter, that three new driver jobs would require successful bidders to work seven days a week without overtime pay. They considered the possibility of adhering without exception to the 55 m.p.h. speed limit over the Labor Day weekend to protest these matters. Benner later discussed this idea with Jenson, a union steward based in Minneapolis, but no action was taken at that time.

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*The Honorable William H. Becker, United States Senior District Judge, Western District of Missouri, sitting by designation.

On August 7, Benner noticed a letter on the drivers' bulletin board urging support for a group of approximately forty Salt Lake City drivers who had received discharge notices as a result of a wildcat strike. Thinking that this might rekindle interest in the "slowdown," Benner and Jenson, after a brief investigation, concluded that drivers approved the proposed action. On August 20 or 21, they prepared an interview-type press release announcing a planned observance of the 55 m.p.h. speed limit over the Labor Day weekend. On August 25, Benner saw another posted letter concerning the dismissal of the Salt Lake drivers. Benner contacted people who were said to have confirmed the information in both letters although, in fact, only six of the drivers were actually dismissed and they were later reinstated with suspensions. On August 26, Benner distributed the following press release to the media:

> Head: GREYHOUND DRIVERS TO SET LABOR DAY PACE
>
> Greyhound drivers nationwide will drive strictly within the 55 mile-per-hour speed limit through the Labor-Day weekend to save fuel and set an example for other drivers.
>
> Several members of the State Highway Patrols have commended the drivers for this effort.
>
> It is well known that on rare occasions Greyhound drivers will slip over the 55 mph limit to accommodate their passengers after departure delays, bus breakdowns, inclement weather and other unexpected delays.
>
> Veteran-driver and Union Steward, Jerry Jenson said "over 350 drivers interviewed last week from coast to coast unanimously supported the plan which is expected to result in some connecting departure delays."
>
> Jensen declined to comment when asked if the "Slowdown" had anything to do with a recent attempt to work regular-run drivers seven days a week without overtime, the dismissal of 36 drivers three weeks ago in Salt Lake City who were protesting alleged contract violations, or with Greyhound's numerous runs that are impossible to operate within the 55-mph speed limit.

On September 6, Benner and Jenson received disciplinary notices with fourteen-day suspensions for "words or acts of hostility to the Company, or words or acts which result in damage to the Company's reputation, property or services and for divulging affairs of the Company without approval."

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The NLRB issued a complaint on October 12, 1979, charging respondent with violations of Section 8(a)(1) of the Act. On September 8, 1980, the Board affirmed the findings and conclusions of the ALJ that the Company, by disciplining Benner and Jenson, had violated Section 8(a)(1) of the Act. The Board further adopted the ALJ's order to cease and desist the unfair labor practice, rescind the disciplinary notices, award back pay to Benner and Jenson, and post an appropriate notice. In resisting enforcement of this order, the Company contends that the Board's finding that respondent violated Section 8(a)(1) is not supported by substantial evidence on the record as a whole.

In discussing respondent's contention, we must bear in mind the proper standard of review, as stated by this court in *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963).

> It is not the function of this Court to try the case de novo or to substitute its own appraisal of the evidence for that of the Board. If the Board has conceived the law correctly, if it has not acted arbitrarily or capriciously, and if its findings are supported by 'substantial evidence on the record considered as a whole,' they are conclusive and binding on this Court even though we might have made different findings upon an independent consideration of the same evidence.

311 F.2d at 451, *citing* 29 U.S.C. § 160(e) *and Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). *See Osceola County Co-Operative Creamery Ass'n v. NLRB*, 251 F.2d 62, 63–64 (8th Cir. 1958).

It is argued by respondent that not all concerted activity is protected by Section 7. Among the unprotected categories of activities are those "characterized as 'indefensible' because they * * * show a disloyalty to the workers' employer which * * * [is] unnecessary to carry on the workers' legitimate concerted activities." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17, 82 S.Ct. 1099, 1104, 8 L.Ed.2d 298 (1962). *See NLRB v. Local Union No. 1229 (IBEW)*, 346 U.S. 464, 477, 74 S.Ct. 172, 179, 98 L.Ed. 195 (1953). Respondent concedes that employee communications to the public may be protected, that is, "defensible," if they are directly related to an ongoing labor dispute, are not a disparagement of the Company's reputation or the quality of the Company's product, and are not maliciously motivated. *See Local 1229, supra; Allied Aviation Service Co. of New Jersey, Inc.*, 248 N.L.R.B. No. 26, 103 L.R.R.M. 1454 (1980), *enf'd*, 636 F.2d 1210 (3d Cir. 1980); *Stephens Institute*, 241 N.L.R.B. No. 133, 101 L.R.R.M. 1052 (1979). It is respondent's position that the press release issued by Benner and Jenson does not fall within this range of protected communications.

First, respondent argues that there was no ongoing labor dispute. There was no evidence that any grievance had been filed, although grievance procedures under the collective bargaining agreement were in effect at that time. However, there were statements by the Board that Benner had complained unsuccessfully to the Company on several occasions regarding the schedule problems. 29 U.S.C. § 152(9) defines labor dispute as including "*any controversy* concerning terms, tenure or conditions of employment." (Emphasis added.) Given this broad definition, we conclude that the Board's finding is supported by the evidence of discussions and actions preceding and in preparation for the proposed "slowdown" over the Labor Day weekend in protest of company policies and actions.

Second, respondent contends that even if there existed an ongoing labor dispute, the press release was not a communication directly related to the dispute and was therefore unprotected. The reason stated in the press release itself for the "slowdown" was to save fuel and set an example. Respondent submits that the only reference in the press release of employee grievances was in the fifth paragraph and that Jenson's refusal to comment on the matters mentioned therein should not be considered a "communication" relating to the dispute. The Board, however, takes the position that by refusing to comment, Jenson was indirectly conveying the employees' message that the proposed "slowdown" was, in fact, a protest against the enumerated company actions and policies.

In *Allied Aviation*, the Board stated that "the touchstone [is] not whether the communication constituted a virtual carbon copy of the specific arguments raised with the respondent, but [is], rather, whether the communication was *a part of and related to* the ongoing labor dispute." 103 L.R.R.M. at 1456 (emphasis in original). Regardless of the reasons stated in the release itself, it is clear from the discussions and actions preceding the release that the "slowdown" was in protest of the enumerated grievances, and it is likely that the reference to the grievances in the last paragraph of the release would suggest such a relationship to the reader. We therefore find substantial evidence to support the Board's finding that the press release was related to the ongoing dispute.

Third, respondent contends that the press release constituted a public disparagement of the Company's product and reputation and was therefore unprotected. *See Local 1229*, 346 U.S. at 474, 74 S.Ct. at 177; *Allied Aviation*, 103 L.R.R.M. at 1456. Respondent asserts that the statement regarding expected connecting departure delays indicates to the public that Greyhound's service would be inadequate over the holiday weekend. The press release also implies that Greyhound condones or encourages exceeding the speed limit in order to avoid or to minimize delays, although, in fact, Greyhound provides in the Drivers' Rule Book that drivers must obey all posted speed limits and "]*w*]*hen late, stay late.*" (Emphasis in Rule Book.) Respondent argues that the statements and accompanying insinuations constitute a disparagement of Greyhound's services and reputation.

The Board, on the other hand, characterized the reference to expected delays as a simple statement that, as a result of the drivers' strict observance of the speed limit to protest the Company's actions, some delays might occur. The Board found that the release did not contain any insults or negative insinuations about the Company's services or integrity with respect to its customers.

In comparing the statements in the press release to others that have been found protected and unprotected, we cannot disagree with the Board's finding that the statements fall short of an unprotected disparagement. *Compare Allied Aviation, supra* (letters to customers that employer's procedures were unsafe, protected), and *Community Hospital of Roanoke Valley, Inc. v. NLRB,* 538 F.2d 607 (4th Cir. 1976) (statement in television interview that hospital was understaffed, protected), *with Local 1229, supra* (handbills criticizing employer's local programming, unprotected).

Finally, respondent argues that the release is not protected because it was maliciously motivated. *See Allied Aviation,* 103 L.R.R.M. at 1456. As evidence of malice, respondent relies on Benner's statement that "things would really be screwed up if we held to 55 for any period of time." Respondent also points out that the press release contained false statements regarding the alleged dismissal of the Salt Lake drivers and the seven-day work week proposal, which had been rescinded before the release. This disregard for the truth, respondent contends, is additional evidence of Benner's and Jenson's malicious motive.

The Board again viewed the actions challenged by respondent in a different light. Benner's statement was interpreted as merely a prediction of the potential effectiveness of the proposed "slowdown" rather than as evidence of an intent to harm the Company. The Board further found that Benner had attempted to confirm the dismissal of the Salt Lake drivers and was relying on the information he had received from people in Salt Lake City. We cannot say the Board's finding of no malicious motive is not supported by the record.

We recognize that the "lines defining [Section 7 rights] have of necessity been painted with broad strokes." *Hugh H. Wilson Corp. v. NLRB,* 414 F.2d 1345, 1347 (3d Cir. 1969), *cert. denied,* 397 U.S. 935, 90 S.Ct. 943, 25 L.Ed.2d 115 (1970). Neverthe-

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less, upon a de novo review of the circumstances in this case, we might well have reached a different decision. It is difficult to understand, for example, why Benner, a union official, and Jenson, a union steward, would not initially pursue relief through union procedures. An effort to communicate with the Company might have, at the very least, prevented the false statements concerning the dismissal of the Salt Lake drivers and the seven-day work week from being included in the release.

As stated earlier, however, we are constrained by the applicable standard of review from substituting our own judgment for that of the Board and are required to uphold the Board's findings if they are supported by substantial evidence of the record as a whole and if the Board has not acted arbitrarily or capriciously. Upon examination of the record in this case, we are unable to say that the Board's findings do not meet this standard.

Accordingly, the order of the Board will be enforced.

NLRB v. Charles H. McCauley Associates, Inc.

657 F.2d 685 (5th Cir.), September 28, 1981–248 NLRB 346

On petition to enforce Board Order

Before GODBOLD, Chief Judge, FRANK M. JOHNSON, JR. and ANDERSON, Circuit Judges

686

GODBOLD, Chief Judge: This is a § 8(a)(1) and (3) case involving a single employee, Richard Beck. The Board seeks enforcement of its order. Up to 1979 Beck had worked for Charles H. McCauley Associates, Inc., an architectural firm, for about seven years as a draftsman. The company's volume of work, and hence its work force, had materially declined during the 1970's.

In January 1979 Beck talked with fellow employee Tate about improving working conditions, particularly with respect to the frequency of wage increases. Beck asked Tate what he thought the company's response would be if someone tried to organize a union.

In February 1979 Beck had a similar conversation with fellow employee Conville. They also discussed the termination of another employee, and Beck asked "what's going to happen to us?" Beck noted that the company had once been large but had become small, and he expressed concern for employees' continued tenure. Beck told Conville that "somebody might try to organize a union one day" and asked Conville what he thought of this.

There is no evidence that any of these conversations between Beck and fellow employees came to the attention of management.

During February Beck had discussions with the company concerning terms of a proposed new written employment agreement, which Beck thought contained errors. The agreement was changed to accord with Beck's contentions and he signed it.

In late February Beck prepared an inter-office memorandum addressed to the company's officers and supervisors—the chairman of the board, president and vice president—in which he requested a meeting with these three persons. Before he submitted the memo Beck showed it to Tate and said he was going to hand it in and request a meeting. Beck told Tate that he was ready to have a meeting with the officers "to discuss better working conditions and better wages and better benefits and see what they would think about it for you and I and all the rest of the employees." Beck asked Tate whether he would like to accompany him into the meeting and told Tate that if the company was not willing to be fair and give them a better contract he [Beck] "was going to bring up the possibility of trying to possibly get an outside third party to come in and try to bargain for [them]."

Beck submitted his memorandum to the company officials, and shortly thereafter he met with them. Tate did not attend. Following is what occurred at the meeting under the facts as found by the Board. Beck expressed concern over the reduction in force of the company and expressed fear for his job security. He expressed objections to the wage agreement that he had earlier signed, contending that it was unfair, one-sided, incorrect and inadequate and that he and his fellow employees needed something better. He asked for a written employment contract that would guarantee him a job for as long as the company was in operation and he did his work. Beck complained about what he felt were unfair actions by the company in laying off more experienced and better educated draftsmen while retaining others with less experience and seniority. He asserted that the company had reduced the hours of some draftsmen while allowing others to work full weeks and even overtime. He questioned the company's practice concerning wage increases and objected to the absence of cost of living increases and to the necessity for employees to specifically request an increase or threaten to leave the company in order to get a raise. He objected to revisions in the company's retirement plan, to the failure to absorb increases in employees' health insurance premiums, and to the discontinuance of the practice of giving Christmas bonuses. He asked for reinstitution of a four and one-half day work week rather than the five day work week in effect and said that other employees wanted the same thing but would not come in and request it. Beck stated that he was seeking a better contract for all employees, not just for himself, that he wanted a fair contract and better benefits for all the employees.

The board chairman told Beck the company would consider his points. To Beck's request for a written contract guaranteeing him a job as long as the company operated and he did his work, the president responded that "union or no union, neither you nor [I] as president, nor any other employee was going to get the type of employment contract that [Beck] wanted." Beck then stated that there was a failure of communication, that he was going to discuss with fellow employees the matters he had raised and see if he could get their thoughts together on a contract to submit to the company. The chairman forbade Beck to discuss with other employees the matters that had been discussed in the meeting. When Beck repeated that he was going to talk with other employees about the things discussed in the meeting the chairman again told Beck that he was forbidding it and that if Beck had such discussions the company would consider terminating him.

Beck told the officers that the company left him no alternative except to contact the local union representative to come in and try to bargain. The chairman responded by forbidding Beck to contact any type of union representative and stating that the company "will not tolerate a union," and saying that neither Beck nor any other employee would have the type of contract that Beck wanted, that the matters they had discussed would not be discussed with any union representative. When the chairman asked Beck whether he was serious in what he had said he would do, Beck responded that he had to try to get some job security for himself and his fellow employees. The chairman then discharged Beck on the spot. At this meeting there was no mention of any deficiency in Beck's work or behavior.

The company's version of the meeting was along the following lines. Beck expressed concern for his job security and asked for a written contract guaranteeing him employment as long as there was work and he did his job. Beck insisted he would get a written contract or seek union assistance. The president told him that union or no union there would be no written contract. Management insists that Beck only sought a written agreement covering himself, but they acknowledge that he mentioned health benefits, pension rights and wage increases for himself and other employees.

The company contends that Beck was chronically absent from work and tardy and was a marginal employee from whom it would not accept unreasonable personal demands. The demands made in the meeting were the straw that broke the camel's back.

The initial issue is whether Beck was engaged in activity that is protected by the National Labor Relations Act. The company urges that he was not engaged in protected activity but rather was seeking solely **688** personal gain and had neither the support of his fellow employees nor authority to represent them. "[I]ndividual griping and complaining are not protected concerted activity." *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717–19 (5th Cir. 1973); *Southwest Latex Corp. v. NLRB*, 426 F.2d 50, 56 n.3 (5th Cir. 1970). "[I]t must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees." *Buddies* at 718. Under the facts as found by the Board, Beck, in addition to demanding a lifetime contract for himself, sought improvement of various working conditions for all employees in areas of health benefits, pension rights, wage increases, bonuses and lay-off policy. When management rejected his requests he expressed an intention to discuss the problems with other employees. Before Beck went to the meeting he had discussions, described above, with other employees concerning some of the matters that he later brought up in the meeting. Unlike purely personal complaints in *Buddies* and *Southwest Latex* these were complaints advanced on behalf of all employees though without their express support. They were clearly a predicate for possible group activity, unlike the actions of troublemakers in *Buddies*. The Board's determination that Beck was engaged in concerted activities is supported by substantial evidence and is not inconsistent with Fifth Circuit precedent. The company's arguments to the contrary are essentially attacks on credibility determinations and on inferences drawn by the Board.

The Board order must be enforced insofar as it requires the company to notify employees that it will not forbid union activities, not threaten to discharge (or discharge) employees for union activities and not interfere with or restrain or coerce employees in the exercise of their § 7 rights.

The evidence adequately supports the Board's findings of violation of § 8(a)(1) and (3). The Board made out a prima facie case, and the burden shifted to the company to establish that the same action would have been taken in the absence of protected conduct. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB No. 150, 105 LRRM 1169 (1980). Unquestionably Beck had a bad record for tardiness and had been warned about it. He was, however, permitted to make up lost time on Saturdays and Sundays. The Board found that the discharge was not based upon his tardiness. It found that the company had tolerated Beck's attendance problems and had never considered them serious enough to warrant an official reprimand. Moreover at Beck's salary review some six months previously, although tardiness was discussed, Beck was given a raise. Tardiness was not mentioned at the meeting at which Beck was fired.

The Board found that Beck's description of the meeting most accurately described what occurred. No basis is shown for our interfering with this credibility determination. Having made this credibility choice, the Board concluded that Beck's attendance problems were neither the sole reason nor any significant part of the reason for his discharge.

Based on its findings the Board correctly found that Beck was entitled to reinstatement. The company asserts that the Board erred in refusing to accept as evidence on the charges of unfair practices an offer of reinstatement that it says was sent to Beck a month after his discharge. This was not error. Reinstatement was not relevant to the unfair practice proceedings except as discussed below with respect to the remedy.

The letter allegedly sent to Beck offering reinstatement, and Beck's reply, are before us only as exhibits tendered but not admitted. In the interest of judicial and administrative efficiency we comment upon them because they may affect further proceedings. The company asserts that the offer of reinstatement was drafted by an NLRB field attorney and, with inconsequential changes, was sent to Beck. This tendered exhibit offers "immediate, full and unconditional reinstatement" without reprisals and with payment of lost pay. The purported

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reply by Beck declines to accept unconditional reinstatement and refers to conditions that, in a previous letter, Beck has imposed on his reinstatement.

This passage of correspondence, if proved genuine, affects not only compliance proceedings but the remedy. The remedy ordered by the Board requires the company to post a notice that it will offer Beck immediate and full reinstatement without loss of seniority or other rights and privileges and make him whole for lost earnings. If Beck has been offered reinstatement, as appears likely, and he has refused it, as also appears likely, there is no basis for requiring the company to publicly promise to do what it already has done. Before proceeding with the remedy the Board should settle this issue, and if it finds reinstatement has been offered and refused there should be deleted from the notice required to be posted the reference to offering Beck reinstatement. Also, if reinstatement has been offered and refused, Beck should be entitled to back pay for only the period of approximately one month between the discharge and the reinstatement offer.

The Board order is ENFORCED in part and the case is REMANDED to the Board for further proceedings.

Irvin H. Whitehouse & Sons Co. v. NLRB

659 F.2d 830 (7th Cir.), September 28, 1981—252 NLRB 997

On petition to review Board Order

Before PELL, Circuit Judge, MARKEY, Chief Judge,[*] and WOOD, Circuit Judge

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PELL, Circuit Judge: This case is before the court on the petition of Irvin H. Whitehouse & Sons Co. (Whitehouse) to review and set aside a final order of the NLRB (the Board) issued against Whitehouse on September 20, 1980. The Board has cross-applied for enforcement. The Board's decision and order, reported at 252 N.L.R.B. No. 140 (1980), found that Whitehouse had violated § 8(a)(1) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(1), by the discriminatory discharge of and refusal to rehire two employees, and ordered make-whole pay and the posting of appropriate notices. The issue presented by the case is whether the arbitration provision of the parties' collective bargaining agreement was sufficient to create an implied no-strike obligation as to safety disputes.

I.

Whitehouse is a union-shop painting contractor located in Louisville, Kentucky. Its local collective bargaining agreement requires it to enter into and abide by local collective bargaining agreements wherever it performs work. From May to December 1977, White house was engaged as a subcontractor performing work in El Paso, Illinois. Pursuant to its local collective bargaining agreement Whitehouse entered a Memorandum of Understanding with Painters' Local Union No. 157 which had jurisdiction over the El Paso site.

A. *The Collective Bargaining Agreement.*

The collective bargaining agreement gives the authority to "adjust disputes and grievances that may arise," and "to interpret this agreement so as to give force and effect to the intent, purpose and meaning of this agreement," to a Joint Local Trade Board (the Trade Board). The contract provides that disputes and grievances shall

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be referred for resolution first to the Trade Board, and ultimately, should the Trade Board fail to agree, through several steps to final and binding arbitration by a third party. The contract provides for enforcement of the decisions of the Trade Board and arbitrator by assessment of liquidated damages, penalties prescribed by the agreement for particular violations, or, in case of violation by a contractor, by designation of that contractor as an "unfair contractor." The contract also contains an "Occupational Safety Clause," which provides that the parties "will cooperate in the prevention of accidents and in protection and promotion of the safety and health of employees." This clause does not specify penalties for its violation, although other clauses specify fines or prescribe specific corrective action for their violation.

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[*] Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

B. *The Refusal to Work.*

Between May and July 1977, Whitehouse employee Delmar Cook made several safety complaints to Whitehouse's Project Director at the El Paso site, Harold Arnold. Some of these complaints were acted upon and corrected; for example, after Cook complained that ladders did not have rubber shoes to prevent slipping, lifts were brought in to replace the ladders. Cook also complained about the lack of protective gloves after employee Albert Davidson suffered chemical burns on his hands from paint thinner. Arnold originally refused to provide gloves, but when Cook threatened to contact the Union Business Agent, Arnold relented and provided the gloves. Arnold did not remedy the other conditions complained of, which related to fire hazards in the trailer which Whitehouse maintained at the site for use as an office, storage area, and changing and cleanup room for the painters.[1]

On July 19, Arnold passed out timecards to the employees for them to check the number of hours worked the previous week. Cook noted that he had been credited for only two hours for the day on which he drove Davidson to the hospital for burn treatment. Cook contended that he should have been paid for four hours. Arnold disagreed. Cook refused to sign his timecard. Cook called the Union Business Agent to complain that evening. The Business Agent in turn called Arnold, who remained adamant. Shortly after Arnold informed Cook of this conversation at the side the next day, July 20, Cook told his fellow employees he was ill, and left the job site without informing Arnold.

Before Cook reported for work the next day he filed an OSHA complaint against Whitehouse, based on the uncorrected violations he had previously complained of to Arnold. When Cook reported for work that day, Arnold chastised him for failing to report to him before leaving the previous day. Cook reiterated his complaints about working conditions.

Cook then asserted that he would not work in the unsafe conditions. Davidson agreed with Cook, and the two employees changed from their painting clothes back into their street clothes. Arnold warned them that he would not take them back if they walked off the job, but the employees left the job site. They attempted to return the next day, and on three subsequent occasions, but were refused admittance. Whitehouse subsequently replaced them with two other union painters.

C. *Post-Refusal Proceedings.*

An OSHRC inspector visited the job site the day after Cook and Davidson walked off the job, and cited Whitehouse for the violations alleged in Cook's complaint, but did not impose a fine. After Whitehouse refused to reinstate the two employees, the Union filed charges with the Trade Board alleging that Whitehouse had refused to correct safety violations at the site, and had violated the contract by failing to accept Cook and Davidson for further employment. The Trade Board imposed a $250 fine for each violation, but did not order affirmative relief.

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D. *The NLRB Proceedings.*

An Administrative Law Judge (ALJ) found that Whitehouse had violated § 8(a)(1) of the Act by discharging and refusing to reinstate Cook and Davidson for engaging in protected concerted activity, specifically, a walkout to protest Whitehouse's failure to correct unsafe working conditions.[2] The Board affirmed in a two to one decision, holding that the parties did not intend the contract's arbitration provision to extend to the Occupational Safety Clause, and that implication of a no-strike clause which would render the walkout unprotected was improper. In ascertaining the intent of the parties the Board relied primarily upon the perceived inadequacy of the contract's remedial provisions as to safety violations, and the parties' reliance upon OSHRC to settle safety disputes as evidence that they relied upon extra-contractual means of seeking safety-related remedies. Member Penello dissented, noting that the contract provided for enforcement of its provisions in a final and binding manner, and therefore met the Supreme Court's test for implying a no-strike obligation.

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[1] Cook's other complaints specified the lack of a no-smoking sign in the trailer, open cans of thinner and paint, lack of fire extinguishers, and dangerous proximity of welding to naphtha drums stored just outside the trailer.

[2] The ALJ also found a violation of § 8(a)(3) of the Act. The Board reversed, finding no anti-union animus.

Whitehouse contends the Board erred in concluding that the arbitration provision did not extend to safety disputes and therefore did not create an implied no-strike obligation. It urges that the contract provisions give rise as a matter of law to an implied no-strike obligation, and that any strike or walkout in violation of that obligation was unprotected, and that the employees could therefore be lawfully discharged for breaching that obligation.

II.

Determination of whether the arbitration provision of a collective bargaining contract extends to safety disputes, and thus gives rise to a no-strike obligation as to those disputes, requires construction of the contract under accepted principles of traditional contract law, and in light of the basic policy of national labor legislation favoring the arbitral process as a substitute for economic warfare. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105, 82 S.Ct. 571, 577–78, 7 L.Ed.2d 593 (1962). In *Lucas Flour* and in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 94 S.Ct. 629, 38 L.Ed.2d 583 (1974), the Supreme Court established the principles governing the existence and scope of implied agreements not to strike.

We note preliminarily that although interpreting a written instrument is a matter of law in which we are not obliged to follow the interpretation of the Board, *see, e.g., Celanese Corp. v. NLRB*, 291 F.2d 224, 226 (7th Cir. 1961), *cert. denied*, 368 U.S. 925, we generally exercise our usual deference to the Board's expertise in this regard. *Moore v. Sunbeam Corp.*, 459 F.2d 811, 817 & n.10 (7th Cir. 1972). Such deference is limited in this situation, however, and extends only insofar as the Board interpretation is supported by the language of the agreement and relevant and necessary extrinsic evidence. *W-I Canteen Service, Inc. v. NLRB*, 606 F.2d 738, 747 (7th Cir. 1979).

The first requisite for implication of a no-strike obligation is that the contract impose upon both parties the duty of submitting to final and binding arbitration. *Lucas Flour*, 369 U.S. at 105, 82 S.Ct. at 577–78; *Gateway Coal*, 414 U.S. at 374–75, 94 S.Ct. at 635. As noted above, this collective bargaining agreement required referral of both parties' grievances and disputes to the Trade Board for resolution, and ultimately to an arbitrator if the Trade Board could not agree. The contract is explicit as to the effect given to the arbitration decision: "When a decision is reached either by the * * * Trade Board, by the conciliator or by the arbitrator, such decision shall be final and binding upon all parties." This agreement thus satisfies the first element of the *Lucas Flour-Gateway Coal* test.

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The second element required for inference of a no-strike obligation as to a particular matter is that the matter be one which it has been agreed will be covered by the compulsory terminal arbitration. *Lucas Flour*, 369 U.S. at 106, 82 S.Ct. at 578. The *Gateway Coal* decision addressed itself to this question in precisely the context posed by the instant suit, *i.e.*, whether a dispute over safety was governed by an arbitration provision. The Court first noted the broad language of the arbitration clause, which reached "any local trouble of any kind aris[ing] at the mine." 414 U.S. at 376, 94 S.Ct. at 636. The Court held, "On its face, this contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire." *Id.* The Court then rejected the reasoning of the Court of Appeals, which had enforced the Board's order on the basis of a putative public policy disfavoring arbitration of safety disputes. On the contrary, the Court held, the presumption of arbitrability first enunciated in the *Steelworkers*[3] trilogy applies to safety disputes in the same manner as it does to other areas of potential management-labor dispute. The presumption of arbitrability over such disputes is so strong, the Court went on to hold, that in the absence of any express provision excluding a particular grievance from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." 414 U.S. at 376 n.10, 94 S.Ct. at 636 n.10. We find this reasoning applicable and controlling in the present case.

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[3] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

While the agreement at issue here did not contain the "any local trouble" phrase construed in *Gateway Coal,* it did grant the Trade Board the broad power to adjust disputes and grievances that might arise between the parties, and to interpret the contract so as to give effect to its purposes. As noted above, this contract explicitly provides for the protection of promotion of the safety and health of employees. The specific inclusion of such aims as one of the purposes of the contract is perhaps more compelling evidence of the parties' intent to arbitrate such disputes than is the sweeping, but more general language of *Gateway Coal.* Construing the contract as a whole and in light of the presumption of arbitrability, *see Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 279, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956); *W–I Canteen,* 606 F.2d at 745, we find the contract unambiguously and on its face includes safety disputes within the scope of the arbitration provisions. Nor is there the type of express exclusion from arbitrability the *Gateway Coal* Court held would be required to negate such an inference. We hold therefore that the arbitration provision of the collective bargaining agreement does extend to disputes over safety, and that the Board erred by ruling to the contrary. We are unpersuaded by the Board's reasoning to the contrary.

The Board held that the presumption of arbitrability was rebutted by the fact that the health and safety clause was silent on the amount of liquidated damages to be levied for its violation, and failed to provide any affirmative remedial alternative to imposition of a fine. The Board reasoned that since the agreement's remedial provisions were not explicitly linked to the safety clause, there was "doubt as to the parties' intentions with respect to arbitration of safety grievances." [4] Slip Op. at 4. We believe the analysis of dissenting Member Penello is the more appropriate expression of the law as enunciated by the Supreme Court:

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> My colleagues in the majority conclude that the contractual provision limiting remedies for violations of the agreement to fines or liquidated damages constitutes inadequate consideration upon which to predicate an implied no-strike agreement under the Supreme Court's decision in *Lucas Flour.* They would adopt the [ALJ's] finding that there was no *quid pro quo* present from which a no-strike agreement could be implied under *Gateway Coal.* Therefore, in the absence of a no-strike agreement rendering the walk-out unprotected, the majority finds that Respondent violated Section 8(a)(1) of the Act by discharging Cook and Davidson for engaging in a protected strike over unsafe working conditions. I disagree. There is nothing in either *Lucas Flour* or *Gateway Coal* to support the majority's conclusion that the Supreme Court would consider the adequacy of the remedies in the arbitration clause of the contract to have any bearing upon whether a no-strike obligation would be implied, and the majority has cited no cases in support of this novel proposition.
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> I see no reason to create an additional criterion for determining whether the parties intended that a no-strike agreement be implied when there is no support for this proposition in either case law or national labor policy. The Supreme Court expressed no concern in *Lucas Flour* or *Gateway Coal* as to the actual mechanics of the system by which the parties elected to enforce their agreement, so long as the system ultimately resolved disputes in a final and binding way. This is in accord with the strong national policy favoring the arbitration of labor disputes as a substitute for industrial strife.

Slip Op. at 10, 13–14. (Footnotes omitted.) We further note that the Court was explicit in *Gateway Coal* that "[d]outs should be resolved in favor of coverage," 414 U.S. at 380 n.10, 94 S.Ct. at 638 n.10 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 583, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960)). We believe the collective bargaining agreement, read as a whole, reflects on its face a desire to insure labor peace and avoid resort to economic weapons by submitting disputes over issues within its confines to final and binding arbitration.

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[4] Some clauses of the contract explicitly link themselves to the arbitration procedure, while the Occupational Safety Clause does not. Whatever tenuous negative implication might be gleaned from this omission does not rise to the level of the express negation required by *Gateway Coal,* 414 U.S. at 380 N.10, 94 S.Ct. at 638 n. 10.

We hold, therefore, that the contract, read as a whole and in light of the presumption of arbitrability, unambiguously provides for arbitration of safety disputes. In light of the traditional contract principle, *see Lucas Flour,* 369 U.S. at 105, 82 S.Ct. at 577–78, that extrinsic evidence of the intent of parties to a contract need only be considered when the provisions of the contract itself are ambiguous, we need not reach the question whether the Board erred in its weighing of such matters. We do note, however, that as Member Penello points out in dissent, the Board's finding of reliance on extra-contractual resolution of safety disputes is contradicted by the behavior of the parties in this suit, for the Union did submit its safety grievance to the Trade Board for resolution. Any inference to the contrary of the arbitrability of safety disputes is highly speculative and unsupportable in light of the well-settled presumption of arbitrability.

III.

Once a determination is made that a dispute is subject to arbitration, the obligation not to strike over that matter is considered to be coterminous. *Gateway Coal,* 414 U.S. at 382, 94 S.Ct. at 639. Coterminous interpretation means that if the subject of a work stoppage is covered by the arbitration provisions of the contract, then the stoppage violates the no-strike clause. *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326,* 624 F.2d 1182, 1185–86 (3d Cir. 1980). The walkout by Cook and Davidson thus violated the contractually-imposed obligation not to strike over safety matters, but rather to submit them to the arbitration process. *Gateway Coal,* 414 U.S. at 380–87, 94 S.Ct. at 638–41; *see Delaware Coca-Cola Bottling* at 1185–86.

A work stoppage carried out in violation of a no-strike clause is not protected activity under the Labor Act, and may

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give rise to discharge, *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 246, 82 S.Ct. 1318, 1323–24, 8 L.Ed.2d 462 (1962); *Moore v. Sunbeam Corp.,* 459 F.2d 811, 816 (7th Cir. 1972); *Artim Transportation System, Inc. v. NLRB,* 396 F.2d 359, 365 (7th Cir. 1968), regardless of whether the no-strike obligation is expressed in the contract or implied from the duty to arbitrate, *Inland Steel Co. v. Local Union No. 1545. United Mine Workers,* 505 F.2d 293, 299 (7th Cir. 1977), *overruled in part on other grounds, Zeigler Coal Co. v. Local Union No. 1870, United Mine Workers,* 566 F.2d 582 (7th Cir. 1977), *cert. denied,* 436 U.S. 912, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978). Because Cook and Davidson walked out in violation of the implied obligation not to strike over safety disputes, Whitehouse did not violate § 8(a)(1) of the Act by discharging and refusing to rehire them.

The Board asserts that employee protests over safety are always protected activity, relying on *NLRB v. Washington Aluminum,* 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) (employees refused to work in 11 degree weather; no no-strike obligation); *Brown & Root, Inc. v. NLRB,* 634 F.2d 816 (5th Cir. 1981) (employees wished to wait for rain to stop before working with electrical equipment); *Wheeling-Pittsburgh Steel Corp. v. NLRB,* 618 F.2d 1009 (3d Cir. 1980), *cert. denied,* ——— U.S. ———, 101 S.Ct. 859, 66 L.Ed.2d 801 (1981) (employees refused to operate crane after observing unsafe condition; collective bargaining agreement provided for such temporary cessation); *NLRB v. Modern Carpet Industries, Inc.,* 611 F.2d 811 (10th Cir. 1979) (employees refused to handle radioactive lead; no no-strike obligation); *NLRB v. Leslie Metal Arts Co.,* 509 F.2d 811 (6th Cir. 1975) (employees walked out when threatened by another employee; no no-strike obligation); *Union Boiler Co.* [*v.*], 213 N.L.R.B. 818, *enforced,* 530 F.2d 970 (4th Cir. 1975) (no no-strike obligation). These cases are all distinguishable from the instant situation in that they are either situations in which a safety hazard suddenly arose and presented an immediate threat, or in which no arbitration provision existed for resolution of safety disputes and the parties were required to fall back upon their economic weapons. The instant case does not present a situation where employees temporarily ceased work until a novel and immediately threatening situation was corrected, but rather one in which employees chose to protest the existence of conditions which had apparently existed from day one of the job by withholding their services completely. This was a method of protest they had given up in return for binding arbitration. We find that *Gateway Coal* is virtually indistinguishable from this case, and thus regardless of whether a temporary work stoppage is ever justified by sudden and immediate danger to employees, that the walkout in this situation was unprotected.

For the foregoing reasons we grant the petition to review and set aside the order of the NLRB, and deny the Board's cross-application for enforcement.

REVIEW GRANTED; ENFORCEMENT DENIED.

NLRB v. Decibel Products, Inc.

657 F.2d 727 (5th Cir.), September 30, 1981—248 NLRB 1337

On petition to enforce Board Order

Before THORNBERRY, COLEMAN and AINSWORTH, Circuit Judges

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COLEMAN, Circuit Judge: On June 1, 1979, Decibel employees at its Dallas plant voted 82 to 58 in favor of representation by UAW. Decibel challenged certain election procedures but the National Labor Relations Board certified the Union as the exclusive representative of the workers.

Claiming that Union certification was improper, Decibel refused to bargain with the UAW. On December 10, 1979, UAW filed an unfair labor practice charge against Decibel. The Board investigated the charge and at the culmination of its administrative process, on April 22, 1980, found Decibel to be in violation of Section 8(a)(5) and (1) and Sections 2(6) and (7) of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* It ordered Decibel to bargain with the UAW. The Board seeks enforcement of this order.

For the reasons stated *post,* we deny the Board's petition to enforce. We set aside the certification. We remand with the instruction that the Board consider *all the evidence in the record,* and that it reconsider the Regional Director's report in the light of that evidence.

The issue presented in this case has recently been confronted and decided by the Sixth Circuit in *N.L.R.B. v. North Electric Company, Plant No. 10,* 644 F.2d 580 (1981). We agree with the reasoning applied and the result reached in that case.

In the instant case, Decibel argued that improper election practices infected the election and that a new election should be held. It contended that when an N.L.R.B. official in charge of the election carried the ballots, during the counting process, to a private office for the purpose of making a telephone call, outside the view of election observers, she destroyed the secrecy of the ballot box and thus fatally tainted the election. It was further contended that Union partisans, wearing T-shirts displaying the words "Vote UAW" and "Vote Yes UAW", paraded back and forth in view of the voters, creating a circus atmosphere, amounting to illegal electioneering near polling stations, citing *Clausen Baking Company,* 134 N.L.R.B. 111 (1961). Finally, it is contended that a Union observer held up a clenched fist to voters, tending to create an atmosphere of fear and compulsion.

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For the reasons immediately to follow, we do not reach the merits of these arguments. We find ourselves unable to do so because in its consideration of this case the Board considered nothing but the Regional Director's report. It did not review the record. *See N.L.R.B. v. North Electric Company, Plant No. 10, supra.*

Decibel's objections had been made the subject of an administrative investigation. Based upon the investigation and upon affidavits submitted by Decibel, the Regional Director for the N.L.R.B. made a determination against the Company, which was submitted to the Board by the Director's report. In deciding whether to affirm or reverse the Regional Director's decision the panel reviewed nothing but the report. It did not review the affidavits which had been submitted by Decibel and did not examine the entire record compiled by the Regional Director. It denied Decibel a hearing. Instead, it granted the motion of the General Counsel for a *summary judgment,* overruling Decibel's objections.

We do not agree with the Board argument that in remanding this case for a consideration of the complete record we are in conflict with our prior decision in *Birmingham Ornamental Iron Company v. National Labor Relations Board,* 615 F.2d 661 (5th Cir., 1980). In that case the panel held that the objections filed by the employer were so lacking in factual detail that they might be denied both by the Regional Director and the Board entirely without recourse to the administrative record, that is, to any part of it. The panel then proceeded to hold that it did not need "to decide whether, if sufficient factual allegations are stated in the exceptions to the District Director's report to meet these requirements, the provisions of section (g) require the inclusion of the affidavits in the Regional Director's file as a part of the record on review".

The panel then observed that "the failure to include affidavits as applied to the Regional Director is not a *per se* basis for setting aside the District Director's report", citing *N.L.R.B. v. Dobbs House, Inc.*, 613 F.2d 1254 (5th Cir., 1980), another case in which the decision of this question was pretermitted.

Leaving aside whether the foregoing statement was necessary to the *Birmingham* decision, we need not go so far here as to say that we are laying down a *per se* rule. What we do note is that as in *National Labor Relations Board v. North Electric Company, supra,* there were allegations here of threats and intimidation of the voting employees, as well as a most unusual handling of the ballot box during the counting process.

In keeping with the rationale of *North Electric* we hold that in this case the Board should have had the entire record before it while considering its decision.[1] In our opinion, to hold otherwise would deny the employer procedural due process and would countenance an abuse of discretion by the Board.

Enforcement denied, without prejudice.

Certification of the Union set aside.

Remanded to the Board with instructions that along with the Regional Director's report it shall also consider the entire record compiled in connection with the report.

IT IS SO ORDERED.

THORNBERRY, Circuit Judge, specially concurring: Although I do not disagree with the majority's result in this case, I am troubled by its reliance on *NLRB v. North Electric Company, Plant No. 10,* 644 F.2d 580 (6th Cir. 1981). In *North Electric,* the Sixth Circuit held that "it is an abuse of discretion for the Board to adopt the report of the Regional Director without reviewing the evidence relied upon by the Regional Director." *Id.* at 584. Further, the *North Electric* court held that the Regional Director must transmit the entire record to

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the Board in order to facilitate the Board's review of the evidence. *Id.* at 583, 584. In short, the court established a per se rule under 29 C.F.R. § 102.69(g).

As I understand the majority, we do not and cannot accept the per se rule of *North Electric.* In *Birmingham Ornamental Iron Company v. NLRB,* 615 F.2d 661 (5th Cir. 1980), this Circuit held that "the failure to include affidavits as applied to the regional director is not a *per se* basis for setting aside the district director's report." *Id.* at 667 (emphasis in original), *citing NLRB v. Dobbs House, Inc.,* 613 F.2d 1254 (5th Cir. 1980). I agree, however, that "if sufficient factual allegations are stated in the exceptions to the district director's report . . . the provisions of section (g) require the inclusion of the affidavits in the regional director's file as a part of the record on review." 615 F.2d at 667. In this case, the allegations of vote counting improprieties and of intimidation of the voting employees are sufficient to require the transmission of the record to the NLRB for Board consideration.

Hi-Craft Clothing Co. v. NLRB

660 F.2d 910 (3d Cir.), October 1, 1981—251 NLRB 1310

On petition to review and cross application for enforcement of Board Order

Before ALDISERT and WEIS, Circuit Judges, and RE, Chief Judge*

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WEIS, Circuit Judge. The National Labor Relations Board ordered reinstatement of a supervisor who had been discharged because of his threat to institute Board action against his employer. Despite the fact that the National Labor Relations Act excludes supervisors from its ambit, the Board contends that enforcement of the right of access to its procedures justifies an expansive interpretation of its authority. We reject that statutory interpretation and, concluding that the Board had no jurisdiction, deny enforcement of its order.

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[1] In the ultimate, by considering nothing but the Regional Director's report, the Board allowed the Director to decide the case instead of making its own determination, based on the record as a whole.

*Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

James J. Jiorle charged that he had been dismissed by his employer, Hi-Craft Clothing Company, in violation of § 8(a)(4) of the Act. After a hearing, an Administrative Law Judge recommended that Jiorle be reinstated with back pay. A three member panel of the Board, one member dissenting, adopted the ALJ's recommendations.

At the hearing, the parties stipulated that Jiorle was a supervisor. The ALJ resolved some factual disputes about events that had occurred, and found that the controversy centered on whether Hi-Craft had promised to pay Jiorle a $1,000 annual bonus when he was hired. For two years in succession, Jiorle received only $500, and he was convinced that Hi-Craft was reneging on its agreement. When the company proposed a profit sharing arrangement instead of the bonus, he became indignant and said he was "going to the Labor Board" to see what could be done to help him. Once the company owners realized that Jiorle was serious, he was discharged.

The ALJ found that the reason for Jiorle's termination soon became known to the other employees, and that Hi-Craft could reasonably have expected this to occur. Although acknowledging that as a supervisor Jiorle was not entitled to protection under the National Labor Relations Act, the ALJ held that the company's action produced a coercive effect on the employees' right of free access to the Board and in their exercise of other guarantees provided by the Act. The ALJ also accepted General Counsel's alternative argument that even supervisors should be protected when seeking to invoke the Board's processes. The Board agreed with the latter point, relying on its earlier decision in *General Services, Inc.*, 229 N.L.R.B. 940 (1977), *enf. denied*, 575 F.2d 298 (5th Cir. 1978),[1] and said that "it is the Board's function, and not the employer's, to decide whether the individual is covered by the Act and his claim has merit."

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Dissenting Member Truesdale pointed out that in the *General Services* case, a divided Board had in effect adopted a subjective approach by extending protection to a supervisor who was unsure of his status. As the dissenting opinion noted, this was contrary to the objective standard used in other areas, such as those in which the Board determines whether an employer violated § 8(a)(3) by discharging an alleged supervisor. In that line of cases, subjective good faith is irrelevant—the parties proceed at their own risk. The dissent also observed that "access to the Board is not an incantation that can somehow transform a supervisor into an employee and confer statutory rights upon a class of individuals that Congress has expressly excluded from the Act's coverage."

In addition to its contentions that factual matters were improperly resolved against it, the employer on appeal argues that the Board had no jurisdiction to act because the supervisor was acting only on his own behalf. In seeking enforcement, the Board contends that promoting unimpeded access to its processes requires that any person seeking assistance be protected—including a supervisor who is not otherwise covered by the National Labor Relations Act. In conclusion, the Board urges that its interpretation of the Act be accepted as "permissible if not actually required."

I

We begin with the question often presented in administrative appeals—the deference a reviewing court should accord to an agency's statutory interpretation. The respect required in a given case may be determinative of the outcome, for if great weight is given to an agency's interpretation, it must be given effect even if the court would have decided otherwise in the first instance. *NLRB v. United Insurance Co.,* 390 U.S. 254, 260, 88 S.Ct. 988, 991, 19 L.Ed.2d 1083 (1968). The reviewing court's role is an uncertain one despite the fact that the Administrative Procedure Act provides that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions * * *." 5 U.S.C. § 706 (1976).

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[1] In its opinion the Board cited the decision in its own reports, but failed to indicate that the Court of Appeals for the Fifth Circuit, in an unpublished opinion, disagreed with the Board's reasoning and refused to enforce the order. Incomplete citations of this nature are misleading to the reader and are subject to justifiable criticism.

The failure to cite the Court of Appeals decision may be an indication of the Board's feeling that it should apply its own rulings on a national basis, and that it therefore will not defer to the reviewing courts. The theory may be that the Board would prefer to have uniform agency rulings in effect across the country despite contrary court holdings. This is an approach similar to that adopted by the Internal Revenue Service and the Postal Service. Indeed, in at least one instance, the Board has refused to abide by a ruling from this court in a subsequent case in which the same legal point was at issue. *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 968–69 (3d Cir. 1979).

We suggest that in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well. This shopping practice should be subjected to searching and critical review. *See Goodman's Furniture Co. v. United States Postal Service*, 561 F.2d 462, 465 (3d Cir. 1977) (Weis, J., concurring); *cf. American Medical International, Inc. v. HEW*, No. 79-1460, slip op. at 10–13 (D.C. Cir. Aug. 14, 1981).

Early in the history of American administrative law, the Supreme Court took a restrictive view of the respective functions of agency and reviewing court. In *Federal Trade Commission v. Gratz,* 253 U.S. 421, 427, 40 S.Ct. 572, 574, 64 L.Ed. 993 (1920), the Court said, "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include." That flat statement, however, eventually gave way to an approach that gave deference to an agency on the theory that it was the instrumentality created by Congress to carry out a policy expressed in broad statutory terms. Thus, in 1948, the Court in another FTC case said that it would give "great weight to the Commission's conclusion" that certain conduct was an "unfair method of competition." *FTC v. Cement Institute,* 333 U.S. 683, 720, 68 S.Ct. 793, 812, 92 L.Ed. 1010 (1948).

Application of this deferential standard, however, has not been consistent, even with respect to particular agencies. The acceptance given decisions of the NLRB by the Supreme Court has hardly been steadfast, and the passage of time has not revealed a trend toward one preferred position. In *Bayside Enterprises, Inc. v. NLRB,* 429 U.S. 298, 303, 97 S.Ct. 576, 580, 50 L.Ed.2d 494 (1977), for example, the Court acquiesced in the Board's contention as "a reasonable interpretation of the statute," consistent with the Board's prior holdings and the Secretary of Labor's construction, even though the issue could have, with equal reason, been resolved either way.

Similarly, *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944), said a Board determination that "specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Accord NLRB v. United Insurance Co.,* 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968). In *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978), the Court cautioned "[t]he judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." (footnote and citations omitted).

On the other side are cases such as *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 499, 80 S.Ct. 419, 432, 4 L.Ed.2d 454 (1960), where the Court declined the opportunity to expound a detailed delineation of the respective functions of court and agency, and said, "We think the Board's resolution of the issues here amounted not to a resolution of interests which the Act left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer, but they must be sure the question has been asked."

In *American Ship Building Co. v. NLRB,* 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965), the Court refused to yield to the Board's finding of an unfair labor practice when an employer "locked out" its employees after a bargaining impasse had been reached. The Court was "unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon." *Id.* at 318, 85 S.Ct. at 967. *See also NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980).

Further citations to cases on the topic would only serve to confirm Judge Friendly's observation in *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), that it is time to recognize that there are two lines of Supreme Court decisions on the subject which are analytically in conflict "with the result that a court of appeals must choose the one it deems more appropriate for the case at hand." *Id.* at 49 (footnote omitted).

After the Supreme Court affirmed the *Dellaventura* case without referring to Judge Friendly's comments, Professor Kenneth Culp Davis wrote, "The Supreme Court evidently has made a deliberate choice to let its two lines of cases continue to stand." Thus, "[t]he answer to the question whether the Court will use the rational basis test on a problem of applying law to established or undisputed facts is yes and no, with no guide as to when it is yes and when it is no." [2] K. Davis, Administrative Law of the Seventies 311–12 (1980 Supp.).

A canvass of the authorities at least makes one point clear. A reviewing court may not simply abdicate its responsibility by mumbling an indiscriminate litany of cases that extends "great deference to administrative conclusions." There is more to the judicial role. "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown,* 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965).

In determining what degree of deference is appropriate, an appraisal of several factors should be made. In some cases, a distinction has been made between whether the issue is factual or legal. If the latter, then one may expect less deference to the agency and a more independent review by the courts. The difficulty that emerges, however, is that it is not always easy to detect the line between legal and factual issues in an administrative proceeding. *See generally,* W. Gellhorn & C. Byse, Administrative Law 251–57 (7th Ed. 1979). In most instances, the matter is one of "mixed law and fact."

The law-fact test has been criticized as being "too simplistic," *United States v. The J. B. Williams Co.,* 498 F.2d 414, 431 (2d Cir. 1974), *quoting Artvale, Inc. v. Rugby Fabrics Corp.,* 363 F.2d 1002, 1005 (2d Cir. 1966), and Professor Davis maintains that in recent years there has been a deemphasis in the distinction between the two. He comments that the majority and the dissenters on the Supreme Court may reach opposite conclusions by choosing between the two tests without explaining why either is correct. K. Davis, Administrative Law of the Seventies § 30 (1976).

Nevertheless, utilization of the dichotomy still has some value and in a situation where there are no factual disputes, there is a tendency toward a less inhibited approach by the courts. Thus, in *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 120, 100 S.Ct. 2051, 2062, 64 L.Ed.2d 766 (1980), the Court refused to accept an administrative agency interpretation, saying, "This case presents a narrow legal issue that is readily susceptible of judicial resolution."

At times, the nature of the question determines the standard to be applied. If the issue falls outside the area generally entrusted to the agency, and is one in which the courts have a special competence, i. e., the common law or the constitutional law, there is little reason for the judiciary to defer to an administrative interpretation. *Piper v. Chris Craft Industries,* 430 U.S. 41 n.27, 97 S.Ct. 949 n.27 (1977); *Institute for Scientific Information, Inc. v. United States Postal Service,* 555 F.2d 128, 132 (3d Cir. 1977).

Even if the question does involve interpretation of a statute which is considered within the "specialized" knowledge of an administrative agency, the courts are still not free to relinquish their responsibility of judicial review. As the Court said in *American Ship Building Co.,* "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." 380 U.S. at 318, 85 S.Ct. at 967. Blind acceptance of agency "expertise" is not consistent with responsible review.

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[2] The extent to which courts should substitute their judgment for that of an agency is an underlying problem which has not adequately been resolved and cannot be done here. Professors Davis and Jaffe present diverging views on this point.

In Davis' assessment, the Supreme Court's continuance of inconsistent lines of cases is an indication of the Court's preference for its own unguided discretion in each case. This unacknowledged discretionary power, according to Davis, however, is not necessarily undesirable. K. Davis, Administrative Law of the Seventies 312 (1980 Supp.).

Professor Jaffe, on the other hand, is of the opinion that judicial review of administrative action should be "cautionary," and advocates a "clear purpose" of the statute as the standard of review to be employed. According to Jaffe, "What it means very simply * * * is that where *Judges* are themselves *convinced* that a certain reading, or application, of the statute is the *correct*—or the only *faithful*—reading or application, they should intervene and so declare. Where the result of their study leaves them without a definite preference, they can and often should abstain if the agency's preference is 'reasonable.'" L. Jaffe, Judicial Control of Administrative Action 572 (1965). For a discussion and critique of these views, *see Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law,* 31 Vand.L.Rev. 91, 116–19 (1978).

When the agency diet is food for the courts on a regular basis, there is little reason for judges to subordinate their own competence to administrative "expertness." For example, the issues in social security disability cases are hardly unfamiliar to judges who try or review personal injury tort cases on a regular basis.

Recognition that an agency is not the exclusive repository of technical expertise may, in part, account for the Supreme Court's reluctance on occasion to accept the SEC's interpretation of the Securities Acts, a field in which the courts are often the forum for disputes between private litigants. As Justice Powell wrote in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America v. Daniel,* 439 U.S. 551, 566, n.20, 99 S.Ct. 790, 800, n.20, 58 L.Ed.2d 808 (1979), "deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history. On a number of occasions in recent years, this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts." (citations omitted).

When, however, an agency has been entrusted with wide discretion in a technical area, such as the Truth in Lending Act, and Congress has specifically designated the agency as the primary source for the interpretation and application of the statute, a different standard often applies. There, "judges ought to refrain from substituting their own interstitial lawmaking for that of the [agency], so long as the latter's lawmaking is not irrational." *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 568, 100 S.Ct. 790, 798, 63 L.Ed.2d 22 (1980).

Another important facet of administrative interpretation comes to the fore when the agency construes its own authorization statute. There the Court has been less inclined to be influenced by administrative constructions. In *Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), the restrictive approach is apparent:

> "Although an agency's interpretation of the statute under which it operates is entitled to *some* deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.' *Teamsters v. Daniel,* 439 U.S. [551, 556] n.20, 99 S.Ct. 790, 800 n.20, 58 L.Ed.2d 808 (1979) * * *. [E]ven if HEW has attempted to create such an obligation [of affirmative action] itself, it lacks the authority to do so."
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> *Id.* 442 U.S., at 411-12, 99 S.Ct., at 2369-70 (emphasis added).

In *FCC v. Midwest Video Corp.,* 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979), the same reservation was expressed. "Though the lack of congressional guidance has in the past led us to defer—albeit cautiously—to the Commission's judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited." *Id.* at 708, 99 S.Ct. at 1445. *See also Volkswagenwerk Aktiengesellschaft v. FMC,* 390 U.S. 261,

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272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968).

The more intense scrutiny that is appropriate when the agency interprets its own authority may be grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission. Not surprisingly, therefore, an agency ruling that broadens its own jurisdiction is examined carefully.[3]

When the agency has participated in the legislative activity leading to its authorization, generally more respect will be accorded the administrative interpretation. If the construction is longstanding, it is often considered more authoritative because those who have had matters before the agency have come to rely upon its interpretation, *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974). Needless to say, however, if the construction is erroneous, mere repetition will not make it correct. *See FMC v. Seatrain Lines, Inc.,* 411 U.S. 726, 745, 93 S.Ct.

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[3] As one commentator aptly observed: "It is basic that an administrative agency is a creature of statute, and can only act within the jurisdiction conferred by its enabling act. Although the courts will respect authorized agency action, an assumption of jurisdiction or action that is ultra vires and beyond the scope of the delegated authority will be set aside." Dickinson, Administrative Justice and Supremacy of Law 41 (1927).

1773, 1784, 36 L.Ed.2d 620 (1973); *Institute for Scientific Research v. United States Postal Service, supra.*

II

It is against this background that we reach the issue in this case. Section 8(a)(4) of the National Labor Relations Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act." 29 U.S.C. § 158(a)(4) (1976). Section 2(3) says that "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor * * *." 29 U.S.C. § 152(3) (1976).

A.

A straightforward reading of these two portions of the statute leads to the conclusion that Jiorle, an admitted supervisor, is not protected, since he is expressly excluded under the definitional section. The Board, however, contends that the anti-discrimination section of the Act should be given a liberal construction to effect its purposes and relies upon *NLRB v. Scrivener,* 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972), and *Nash v. Florida Industrial Commission,* 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967).

In *Scrivener,* the Supreme Court sustained the Board's position that § 8(a)(4) protected an employee who had given a written statement to a field examiner but had not filed a charge or testified at a formal hearing. Finding the approach to § 8(a)(4) generally to have been a liberal one designed to keep open channels of information to the Board, and finding no substantial countervailing considerations, the Court accepted that interpretation.

The Board places much emphasis on the board language used in *Scrivener* and *Nash* in discussing § 8(a)(4), especially where the Court says that "all persons" must be free from coercion in reporting unfair labor practices to the Board. 389 U.S. at 238, 88 S.Ct. at 365. Although those cases did extend the scope of § 8(a)(4)'s protection beyond the precise wording of the statute, they did so for the benefit of an employee—an individual clearly within the Act's coverage.

More closely related is an earlier case from the Court of Appeals for the Fifth Circuit, where the court enforced an order requiring reinstatement of a supervisor who had testified before the Board on behalf of protected employees, *Oil City Brass Works v. NLRB,* 357 F.2d 466 (5th Cir. 1966). The court found that the retaliation imposed on the supervisor infringed the ability of employees to have him testify on their behalf and, accordingly, trenched upon the free exercise of their right to "a congressionally

provided, effective administrative process." It was this interference with the employees' § 7 rights that violated § 8(a)(1).

Several differences, however, exist between the *Oil City Brass Works* situation and that presented here. The court of appeals based its decision on the fact that employees' rights were affected, not just those of the supervisor. Secondly, the remedy was necessary because of a violation of § 8(a)(1), not § 8(a)(4) as in the case at hand. The issue confronting us—that of the right of a supervisor to invoke the protection of § 8(a)(4) with respect to a charge of his own, unrelated to employees of the company, thus has not been addressed by an appellate court in a published opinion.

The Board here relied on its own case, *General Services, Inc.,* in finding a violation of the Act. There, a man named McCracken, unsure of his status as a supervisor, filed a charge asserting that he had been dismissed because of union activity. A Board investigation revealed that he was indeed a supervisor and therefore had no remedy. However, the Board concluded that, for purposes of § 8(a)(4), he was to be considered an "employee" and the company could not refuse to reinstate him because he had initiated a charge. The opinion recited that the Taft-Hartley Amendment, which removed supervisors from the definition of "employees," did not change the wording of § 8(a)(4). Since supervisors in pre-Taft-Hartley days were within § 8(a)(4), therefore, the Board majority held that they continued to be so after the amendments of 1947. Significantly, the Court of Appeals for the Fifth Circuit, which had decided *Oil City Brass Works,* refused to enforce the order of reinstatement.

B.

Because of the lack of authority in this area, we must conduct our own analysis of the legislative history and of related Board and Court precedent to determine whether the Board's conclusion can be justified. This necessitates a consideration of the remedial nature of § 8(a)(4) and the restrictive definition of employee that excludes supervisors in § 2(3).

In its early years, the Board followed a wavering course in determining whether supervisory personnel came within the coverage of the National Labor Relations Act. In *Packard Co. v. NLRB*, 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947), the Court upheld the Board's contention that it had jurisdiction over supervisors. Congress disagreed, and promptly enacted the Taft-Hartley law amending the National Labor Relations Act.

The Senate and the House reports made it very clear that "[s]upervisors are management people * * *. They abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security.'" H.R.Rep.No. 245, 80th Cong., 1st Sess., 16–17 (1947). In disapproving the Board's interpretation, the House Report commented: "What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." *Id.* at 17 (emphasis in original).

In *NLRB v. Bell Aerospace Co.*, the Court reviewed this legislative history and rejected the Board's ruling that the agency had jurisdiction because certain buyers were not managerial employees. The Board was instructed to apply a more limited definition in keeping with the intent of the Taft-Hartley amendment to exclude managerial personnel. 416 U.S. at 289, 94 S.Ct. at 1769. Thus, in delineating the category of persons excluded, the Court construed the Amendment liberally. *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 661–62, 94 S.Ct. 2023, 2027–28, 40 L.Ed.2d 443 (1974), employed a similar philosophy. There the Court held that remedies granted by the state to supervisors for discharges because of union membership were preempted by the Taft-Hartley Act.

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In a third case, *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 803–05, 94 S.Ct. 2737, 2743–45, 41 L.Ed.2d 477 (1974), the Court once again emphasized the statutory limitation by holding that the Board could not prevent a union from disciplining its supervisory members for performing bargaining unit work during a strike.[4] The majority did note a number of cases in the courts of appeals where the Board action in favor of supervisors had been approved, but only in instances where the discharges were found to have interfered with employee rights. When only the supervisor's interests are at stake, it is clear that the intent of the Taft-Hartley Amendments is to deny jurisdiction to the Board.

Although the ALJ accepted the theory that the employer's action inspired such fear that employees would hesitate to invoke their own rights, the Board does not rely on that approach and does not press it on appeal. In any event, that premise at best is of dubious validity, as the opinion in *Oil City Brass Works* convincingly demonstrates.

C.

The legislative history and decisional law demonstrate convincingly that we should reject the Board's assumption of jurisdiction in this case and its quest for this court's "deference" to agency expertise. What is present here is an unadorned legal issue and, for present purposes, undisputed facts. This is not a question of the Board applying a broad statutory term to a specific set of facts, but is a case of straightforward statutory construction.

Although the Board is granted wide discretion because of its special competence in dealing with labor problems, there are limitations on that power when the agency is engaged in construing its own authority. In this instance, moreover, the Board's interpretation of §§ 2(3) and 8(a)(4) was not a longstanding one, but was of recent origin.

On a plain language basis, the thrust of the statute is clear: Section 2(3) excludes supervisors from the protection of the Act. Even were there an ambiguity, the legislative history makes it clear that Congress was in earnest in excluding such persons from coverage. The limited exception that *Oil City Brass Works* permitted does not exist here. No rank and file employees' interests were even tangentially at stake, but only Jiorle's personal grievance.

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[4] In *American Broadcasting Co. v. Writers Guild of America*, 437 U.S. 411, 98 S.Ct. 2423, 57 L.Ed.2d 313 (1978), the Court did hold that the Board could prevent a union from disciplining supervisory members because of supervisory work performed during a strike. The rationale was that the union was interfering with employer rights of loyalty of managerial employees granted by § 8(b)(1)(B).

Once Jiorle's status was conceded, there was only one course for the Board to follow and that was to dismiss the claim. The Board had no authority to grant relief to Jiorle, just as a court has no power to adjudicate once it determines that it lacks jurisdiction over the merits. *Firestone Tire & Rubber Co. v. Risjord,* ——— U.S. ———, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). The Board's power came to an end when its lack of jurisdiction became a matter of record. Devoid of power to adjudicate the merits of the underlying grievance because of the supervisor's status, it may not assert a power to protect its process—an abstract right to encourage, vindicate, or protect the right of access to its procedures.

The right of access to the federal courts for vindicating federal rights is more highly prized than access to any other federal institution. The article III courts constitute the citadel for the vindication of rights and privileges guaranteed by the Constitution, statutes, administrative regulations, and case law. But unless we have jurisdiction to adjudicate the underlying specific case or controversy, we cannot manufacture jurisdiction for the sole purpose of vindicating an abstract right of access to the court system. If an article III court cannot assume jurisdiction to protect an abstract right, a board which is the creature of limited statutory authority, *a fortiori,* cannot be said to possess such extensive power. Con-

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sequently, we will grant the petition for review and will deny the Board's petition for enforcement.

North Suburban Blood Center v. NLRB

661 F.2d 632 (7th Cir.), October 1, 1981—251 NLRB 733

On petition to review and cross application for enforcement of Board Order

Before Pell and Sprecher, Circuit Judges, and East,* Senior District Judge

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Pell, Circuit Judge: North Suburban Blood Center (NSBC or Center) has petitioned this court, pursuant to 29 U.S.C. § 160(f), to review and set aside an order of the National Labor Relations Board (Board or NLRB) which determined that the Center had violated 29 U.S.C. §§ 158(a)(1) and (5) by refusing to bargain with the union certified as the collective bargaining representative of the petitioner's full and regular part-time distribution driver and dispatch employees,[1] and directed the Center to bargain with the union. The Board has cross-applied for enforcement of its order.

The union sought certification as the exclusive bargaining representative of NSBC's driver and dispatch employees pursuant to 29 U.S.C. § 159(c). At the representation hearing before the Board's Regional Director, the Center objected to this unit definition as contrary to a Congressional directive to avoid undue proliferation of bargaining units in health care institutions. The Regional Director rejected NSBC's contention and determined that the Center was not a health care institution under § 152(14) of the Act. On that basis, he refused to apply considerations regarding the proliferation of bargaining units and directed an election. Ultimately, after the election, the Regional Director certified the union as the exclusive bargaining representative of the Center's drivers and dispatchers. After the Center refused to bargain, the union filed the unfair labor practice charges here at issue. The sole question decided in this appeal is whether the North Suburban Blood Center is a health care institution within the meaning of 29 U.S.C. § 152(14).[2]

The Nature of the Employer's Business

The North Suburban Blood Center is a nonprofit entity formed by thirteen hospitals in Chicago's north and northwest suburbs to meet the total blood requirements of the participating hospitals. NSBC represents the consolidation of the internal blood bank operations of the hospitals which established the Center with their own funds to serve more efficiently and economically the blood needs of all of the hospitals jointly. Soon after NSBC was established, it was incorporated as a separate nonprofit organization, but it still retains organizational connections with the thirteen hospitals. The Center's Board of Directors is comprised of a hospital administrator or physician of each individual hospital, and a blood bank director or pathologist from each hospital serves on NSBC's Medical Advisory Board. The president and medical director of the Center is a physician licensed in Illinois and certified by the American Board of Pathology.

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*William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

[1] The Board's Decision and Order is reported at 251 N.L.R.B. No. 98 (1980). This decision was based upon findings made by the Board's Regional Director in the prior representation hearing.

[2] Because of our disposition of the case we need not address the disputed issue of the propriety of the Board's inclusion of two on-call drivers in the bargaining unit.

Donor recruiting and blood collection, processing, storage, inventory control, and distribution, previously performed separately by each hospital, are now consolidated into a unified operation carried out by the NSBC. The Center obtains blood from donors at its own facility located in Glenview, Illinois, at hospital facilities it uses,[3] or through exchange agreements with blood banks serving other hospitals. In addition to acquiring blood, the Center purchases blood-related supplies in bulk for the hospitals.

The Center maintains laboratories for testing, processing, and preparing blood at the Glenview facility. In addition, the Center's administrative vice-president, Dan Connor, testified that NSBC operates a reference and consultation laboratory to which the hospitals can send problem cases when "they want to cross-match [blood] . . . and for whatever reason they have difficulty having the cross-matching compatible because the donor or the patient may have some irregular antibodies because of the previous transfusions * * *. [At the reference laboratory] we screen it against various known antiserums and then screen the donor for blood to come up with compatible blood for that patient that will not result in a transfusion reaction."

Other functions performed by the Center include diagnostic testing of patient specimens, consultation by the Center's Medical Director with physicians regarding particular patients, and the provision of blood and blood products for specific patients when requested by a physician from one of the hospitals. The Center can perform a plasma extraction procedure known as a "plasma freeze."[4] Center employees also draw blood from "autologous" donors—those who come to have blood drawn for their own use, such as persons with rare blood types whose blood is extracted for their own future surgery. In addition, some people come to the Center for "therapeutic phlebotomies," which involve the removal of excess red blood cells, at the order of their attending physicians. In these cases, the blood removed is not used for later transfusions. Such donors are really receiving treatment as patients, although these treatments constitute a very small percentage of the Center's overall activity. Finally, NSBC's medical director treats any donors experiencing complications at the Center.

Status of Health Care Institutions Under the Act

Prior to the 1974 amendments to the National Labor Relations Act (Act), nonprofit hospitals were explicitly exempted by § 152(2) from the Act's definition of "employers" subject to the Act's coverage. Although blood banks were not statutorily exempt from the Act, the Board occasionally had declined to assert jurisdiction over blood banks when it determined that the blood bank was "intimately related" to the patient care at the exempt hospitals.[5] In 1974, Congress removed the nonprofit hospital exemption from § 152(2) and added a new subsection 152(14), which reads: "The term 'health care institution' shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged persons." Although nonprofit hospitals now are subject to the Act's coverage as health care institutions, a determination that an entity is a health care institution requires unions of those organizations to abide by particular provisions added to the Act in 1974 designed to minimize disruption of patient care services.[6]

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[3] Some of the hospitals have not retained any blood donor facilities on premises. Others maintain space for the Center's use, but NSBC provides its own equipment and staff. Still other hospitals use their own facilities and staff, but operate under the ultimate direction of the Center.

[4] This procedure involves extracting a person's blood, which is then centrifuged to separate the blood elements—white and red blood cells, plasma, and platelets. Depending upon the needs of the person, some portion of the blood is removed and the rest returned. The entire process consumes from one to three hours.

[5] In *Inter-County Blood Banks, Inc.*, 165 N.L.R.B. 252 (1967), the Board declined to assert jurisdiction over a blood bank which primarily serviced nonprofit hospitals then exempt from the Act because it found, under the particular facts of the case, that the employer's operations were "intimately related to the operations of the hospitals to which it supplies blood for the treatment of patients * * *." *Id.* at 253. There, the blood bank maintained 13 donor centers most of which were located in hospitals served by the blood bank. The hospitals supplied the space at no charge, but the blood bank operated the donor centers with its own equipment and staff. In *American National Red Cross*, 211 N.L.R.B. 587 (1974), however, the Board asserted jurisdiction where the operation of the employer's blood program occurred off the hospitals' premises and served both exempt and nonexempt hospitals. The Board found that the employer's operations were unlike those found intimately connected with exempt hospitals in *Inter-County*. We express no opinion as to the appropriateness of such findings under prior law or under the 1974 amendments, but only cite these examples to illustrate the status of blood banks under Board decisions prior to the 1974 amendments to the Act.

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Additionally, if the petitioner is found to be a health care institution, the Board must abide by a Congressional directive that

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB no. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]
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> [1] By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision.

S.Rep.No.93–766, 93d Cong., 2d Sess. 5 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad.News 3946, 3950; H.Rep.No.93–1051, 93d Cong., 2d Sess. 7 (1974). *See, e.g., Mary Thompson Hospital, Inc. v. NLRB,* 621 F.2d 858 (7th Cir. 1980); *NLRB v. Mercy Hospital Association,* 606 F.2d 22 (2d Cir. 1979), *cert. denied,* 445 U.S. 971, 100 S.Ct. 1665, 64 L.Ed.2d 248 (1980); *NLRB v. West Suburban Hospital,* 570 F.2d 213 (7th Cir. 1978).

A major purpose of the 1974 amendments was to minimize "the potential for increased disruption of health care delivery resulting from increased labor activity by employees of health care institutions now that their activities were protected" by the Act. *NLRB v. IBEW,* 548 F.2d 704, 711 (7th Cir.), *cert. denied,* 434 U.S. 837, 98 S.Ct. 127, 54 L.Ed.2d 99 (1977).[7] In *NLRB v. St. Francis Hospital,* 601 F.2d 404, 411 (9th Cir. 1979), the Ninth Circuit acknowledged that

> In considering legislation to amend the Act, it was immediately recognized that the health care industry was unique and that disruptions caused by organizational drives and related activities at a hospital were a far more serious concern than at an industrial plant given the grave nature of medical care and the fact that "Hospital care is not storable." S.Rep. No.93–766, 93rd Cong., 2d Sess. 39 (1974), 2 [1974] U.S.Code Cong. & Admin.News, pp. 3946, 3953 (individual views of Sen. Dominick).

The Board's Decision

Although we would not approve the automatic denial of health care institution status to an employer merely because it was a blood bank, neither do we conversely read the Act as amended categorically to require that every blood bank be classified as a health care institution. The facts of each case will vary, and each case must be reviewed individually. The Board's findings in any case must be upheld if supported by substantial evidence. *American*

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Diversified Foods, Inc. v. NLRB, 640 F.2d 893, 894 (7th Cir. 1981). Under the facts of this case, we cannot uphold the Board's determination as supported by substantial evidence.

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[6] A proviso to Section 158(d) pertaining to bargaining for a new contract where a previous contract is in effect but about to expire contains notice requirements which are increased by thirty days for health care institutions. This section also extends the period during which strikes and lockouts are prohibited by 30 additional days for health care institutions. Finally, when bargaining for an initial contract, parties to a dispute must participate in state and federal mediation services, and must give 30 days notice of the dispute to these services if a health care institution is involved.

Subsection 158(g) requires ten days notice to the institution and the Federal Mediation Service before strikes or picketing are allowed at a health care institution. Section 169 allows employees of such institutions to pay dues to nonreligious charitable funds in lieu of union dues if that person's religion "has historically held conscientious objections to joining or financially supporting labor organizations." Finally, § 183 allows the Director of the Federal Mediation Service to convene an impartial Board of Inquiry to assist in resolving labor dispute impasses involving health care institutions where "a threatened or actual strike or lockout * * * [will] substantially interrupt the delivery of health care in the locality concerned * * *."

[7] Rep. Erlenborn underlined Congress' concern for avoiding undue disruption of health care services.

> I think much credit is to be given to the House and Senate sponsors of the legislation this year in recognizing the unique situation of the health care industry and the damage that can occur to a community if there is an unwarranted interruption of the health care delivery services, particularly if that interruption comes without sufficient notice to accommodate the community by providing alternative health care delivery during the period of the strike.

120 Cong.Rec. 16,902 (1974).

The Regional Director relied upon the authority of *Sacramento Medical Foundation Blood Bank,* 220 N.L.R.B. 904 (1975), and *San Diego Blood Bank,* 219 N.L.R.B. 116 (1975), to deny health care institution status to NSBC. *Sacramento Blood Bank* was an independent nonprofit corporation serving the blood requirements of approximately forty hospitals and health care institutions in the area. The Board's decision in that case did not reveal whether the blood bank performed any services beyond recruiting donors, testing, processing, and distributing blood. The Board's entire analysis of health care institution status in that case was a one-sentence footnote stating that "[w]e also rely on *San Diego Blood Bank, supra,* in finding that the Employer is not a health care institution within the meaning of the 1974 health care amendments (P.L. 93-360)." 220 N.L.R.B. at 904.[8]

In *San Diego Blood Bank,* 219 N.L.R.B. 116 (1975), the employer was an independent nonprofit corporation 80% of whose services supplied the blood needs of five nonprofit hospitals, and which overall served twenty-nine hospitals. As in *Sacramento Blood Bank,* the Board did not reveal whether the San Diego blood bank provided any services other than the recruiting of donors, and the processing and distribution of blood. In *San Diego,* the Board devoted a single paragraph to determining the health care institution issue:

> We also find that the Employer is not a health care institution within the meaning of the 1974 amendments. The legislative history makes it clear that the special provisions of the Act applicable to health care institutions relate to "patient care situations" and not "purely administrative health connected facilities." See 120 Cong.Rec. H4594 (daily ed., May 30, 1974); 120 Cong.Rec. S7310 (daily ed., May 7, 1974). Since supplying blood to hospitals obviously does not involve patient care, blood banks are not health care institutions within the meaning of the amendments.

219 N.L.R.B. at 116 n.17.

The parties have not cited, nor has this court found, any other Board cases which would shed more light on the issue, nor does it appear there are any Court of Appeals decisions determining the status of blood banks under the 1974 amendments.

The Regional Director's reliance, in the case at bar, on *Sacramento Medical Foundation Blood Bank* and *San Diego Blood Bank* is not compelling because (1) the record shows that the NSBC carried on activities beyond the recruitment of donors, processing, and distribution of blood, and (2) in any event, the Board's superficial analysis in those cases illustrates its disregard for Congress' concern to promote stability in patient care delivery through the 1974 amendments. While we recognize that Congress vested the Board with the responsibility for developing federal labor policy in the health care field, *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978), the Board cannot ignore Congressional intent. *See NLRB v. Mercy Hospital Association,* 606 F.2d 22, 24 (2d Cir. 1979), *cert. denied,* 445 U.S. 971, 100 S.Ct. 1665, 64 L.Ed.2d 248 (1980); *St. Vincent's Hospital v. NLRB,* 567 F.2d 588, 590 (3d Cir. 1977).

The legislative history indicates that the crucial factor in the definition of health care institutions is patient welfare:

> The scope of the application of the amendment is meant to include patient care situations and is not meant to include purely administrative health connected facilities. As an example, an insurance company specializing in medical coverage would not fall under the scope of these amendments, but would remain under general coverage of the act. An administrative facility or operation within a hospital, however, would be within the scope of the amendments as there would be a connection directly and indirectly with ongoing patient care. The crucial connection is the welfare of the patients and such connection would in certain cases be mere geographical proximity to ongoing patient care.

120 Cong.Rec. 13,559 (1974) (remarks of Sen. Taft).

In the instant case, the Regional Director found that "no patient care occurs at the facility." He noted, for example, that the only persons who had participated in the "plasma freeze" procedure up to the time of the Board hearing had been staff members and not patients, and that although money had been set aside to establish an outpatient transfusion service for hemophiliacs, this program was not yet in operation. It is true that as of the date of the hearing, only staff members had actually participated in the plasma freeze procedure, but Dr. Farrales, the Center's Medical Director, also indicated that this process was evolving through its start-up phase: "[t]here have been freezes done at North Suburban where we did it on donors. We had donors from our staff. The machine has been purchased. The room has been set and so we are in the process of developing." The Regional Director ignored the existence of autologous donors who have blood extracted for their own future use. In oral argument, the Board characterized these people as healthy persons, not patients, and reasoned that in the event of a labor dispute, autologous donors could simply reschedule their blood extraction. Although rescheduling might ordinarily be possible, we can envision situations where the donor's operation has to be performed in the immediate future.

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[8] The Union cites *Greene County Chapter American Red Cross and Springfield Regional Red Cross Blood Center,* 221 N.L.R.B. 776 (1975), which similarly confines its analysis of health care status to a footnoted citation to *San Diego Blood Bank. Id.* at 776 n.3.

The Board's requirement that patient care physically occur *at* the Glenview facility, in any event, sidesteps the purpose of the Act's amendments. The legislative history indicates that geographical proximity may convert a purely administrative facility into a health care facility if located *within* a hospital because then "there would be a connection directly and indirectly with ongoing patient care." 120 Cong.Rec. 13,559 (1974) (remarks of Sen. Taft). But the converse does not necessarily follow. The fact that NSBC is located apart from any one hospital, precisely because it is designed to serve thirteen hospitals, cannot *a fortiori* deprive it of health care institution status if the Center is in fact integrally related to patient care and not purely administrative. The fact that patients are not generally treated at the facility does not itself mean that the Center is purely administrative if in fact a disruption in services would seriously impair patient welfare, the central concern of the amendments.

We reject the Board's argument that the nature of a blood bank's services is analogous to those of pharmaceutical suppliers or hospital laundry services in that all these enterprises supply essential goods and services but do not provide "patient care." While a strike at a pharmaceutical supplier or laundry service could force a hospital to seek alternative sources of supply involving some inconvenience and possibly a greater price, a labor disruption at NSBC could have a much more serious impact since blood is a crucial commodity which may not always be as fungible as other items.[9] A steady supply of blood of the required types is absolutely crucial to patient welfare. The hospitals in this case maintain no significant independent stockpiles of blood. Moreover, as previously discussed, the Center in this case provides consultation and other services beyond the collection, processing, and distribution of blood. NSBC is a nonprofit organization which, in reality, is simply a consolidation of the separate blood banks of the thirteen hospitals, each of which is represented on the Center's Board of Directors. The blood services provided in this case logically deserve the greater protections against labor disruption provided by Congress in the 1974 amendments.[10]

For the reasons expressed herein, the petition to set aside the Board's order is granted and the Board's cross-application for enforcement is denied. Because we find that the Center is a health care institution within the meaning of the Act, the Board must follow Congress' directive against the undue proliferation of bargaining units in the health care industry when considering the appropriate bargaining unit in any further proceedings. *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858 (7th Cir. 1980).

PETITION TO SET ASIDE GRANTED; ENFORCEMENT DENIED.

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[9] In the context of product liability law, for example, several states have recognized the unique nature of blood as a product and have acknowledged by legislation the critical need to assure patients an unimpeded blood supply. These states have declared the supply of blood to be a service, and not a sale, in order to avoid strict liability for contaminated blood. *See, e.g., Cal. [Health & Safety] Code* § 1606 (West); Mich.Stats.Ann. § 14.15 (9121) [M.C.L.A. § 333.9121].

[10] Because we are addressing the wholly unique situation of blood services, we are not persuaded by the Board's comparison of NSBC with the laboratories in *Boston Medical Laboratory, Inc.*, 235 N.L.R.B. 1271, 1271 n.2 (1978), and *Damon Medical Laboratory, Inc.*, 234 N.L.R.B. 333, 334 n.1 (1978), where the Board found the testing of human medical specimens not to involve patient care for purposes of the 1974 amendments. *Boston Medical* relied upon *Damon* which, in turn, had based its ruling upon *San Diego Blood Bank* and *Sacramento Medical Foundation Blood Bank*, stating that laboratory operations are "analogous" to blood banks. While we would not consider such a glib comparison to be compelling, we express no opinion as to the propriety of the Board's findings in *Boston Medical* or *Damon*, or likewise, the similar findings in *Center for Laboratory Medicine*, 234 N.L.R.B. 387, 387 n.3 (1978), cited by the Union, in which the Board also relied upon *Damon*.

NLRB v. Metal Container Corporation

660 F.2d 1309 (8th Cir.), October 7, 1981—249

On petition to enforce Board Order

Before Ross and **Arnold**, Circuit Judges, and **Hanson**,* Senior District Judge

Arnold, Circuit Judge: The National Labor Relations Board petitions this Court for enforcement of its order of June 12, 1980, ordering Metal Container Corporation to cease and desist from refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local No. 1 (IBEW), as the exclusive bargaining representative of the production-support electricians at its Arnold, Missouri plant. The company's refusal to bargain is based on its contention that a separate unit of maintenance electricians at this facility is inappropriate and that the only appropriate unit is a "wall-to-wall" production-and-maintenance unit. We enforce the Board's order.

I.

Metal Container Corporation's facility at Arnold, Missouri, manufactures two-piece aluminum beer cans for its parent company, the Anheuser-Busch Corporation. The Arnold facility is a high-speed, totally automated plant with three computer-controlled production lines, each of which has the capacity of making 800 cans a minute. The plant operates 24 hours a day, seven days a week. This is a new plant with no prior bargaining history.[1] The Arnold facility is the newest of three beer-can manufacturing facilities operated by the Company, the other two being located in Jacksonville, Florida, and Columbus, Ohio. Employees in those two plants, which also use the two-piece manufacturing process, are represented on a plant-wide, "wall-to-wall" basis with no separate craft units.

Nationwide, 71 out of 72 can plants using the two-piece process[2] have wall-to-wall production-and-maintenance units. The one two-piece plant with a separate electricians' unit is located in St. Louis, Missouri, and this separate unit is an extension of the bargaining structure already in place at a three-piece plant operated by the same company, American Can Corporation.[3] In the plants which manufacture cans using the three-piece process, there is a history of separate craft units. The three-piece process is not a high-speed or highly integrated manufacturing procedure. It is not a continuous-flow process, and various phases of production can be interrupted without adversely affecting other phases. Jobs are more compartmentalized. The two-piece process, on the other hand, is a completely automated, continuous-flow manufacturing process. The equipment is closely coupled in a continuous line, and all production equipment is controlled by a central computer. Raw materials fed into machines emerge twenty-five minutes later as finished beer cans complete with lithographed labels.

The IBEW represents approximately 800 maintenance electricians in the St. Louis, Missouri, area. Three electrician bargaining units represented by the IBEW are at three-piece can plants, and the fourth is at the two-piece American Can plant where a separate bargaining unit was established by agreement of the parties. The union maintains an apprenticeship program.

The production-support electricians at the Arnold facility spend approximately 80% of their time doing preventive maintenance on the production line. The maintenance is scheduled by the electrical supervisor days or even weeks in advance and is done in accordance with a written check list. There was conflicting testimony as to the degree of skill required to perform this job. The electrical engineer described the work as repetitive and routine. Members of the proposed unit testified that it required a high degree of skill and knowledge of the electrical field. While performing preventive maintenance, the electricians work alone, although they may talk with the production workers in attempting to determine how a machine is operating and whether there is any malfunction or trouble. There was testimony that 50% of this preventive maintenance work is non-electrical or requires a combination of skills involving mechanical, pneumatic, hydraulic, and electrical systems. The other 20% of the electricians' time is spent in the separate electrical shop making repairs, on the production line troubleshooting, or making repairs in other parts of the plant.[4]

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*The Hon. William C. Hanson, Senior United States District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] Four other unions petitioned for plant-wide production-and-maintenance units. The United Steelworkers of America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers intervened in the representation proceeding in support of the company's contention that only a wall-to-wall unit was appropriate. They are not parties to this enforcement proceeding.

[2] The two-piece process produces a seamless can with an integral bottom and an aluminum top. The older three-piece-can process produces a can with a separate bottom which is assembled by the customer.

[3] Before the hearing officer the parties stipulated that the separate electricians' unit at the new American Can plant in St. Louis was formed by agreement of the parties without Board sanction or approval.

The company does not require journeyman status or licensing of applicants. Company officials testified that they looked for basic electrical skills plus experience in other areas such as mechanical, hydraulic, and pneumatic systems. Experience in another high-speed manufacturing process is also considered valuable. The plant's electrical engineer who participated in the interviewing process testified that applicants were questioned about their electrical knowledge, and that the four electricians hired were "highly skilled."

The electricians are supervised both from within and from outside their craft. Their preventive-maintenance schedules are prepared by the electrical supervisor, and he and the electrical engineer are in the plant

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available to supervise or give technical advice to the electricians from 8 to 5 Monday through Friday. Since the plant operates continuously, however, some of the electricians on the night shift may not see either the electrical supervisor or the engineer for two or three weeks at a time. The two shifts are over-lapped by thirty minutes for a joint meeting of incoming and outgoing workers. The meetings provide continuity and allow those who have just finished their shift to brief those coming on about possible problems. These meetings are conducted by the production supervisor, and the electricians are required to attend. While working on the production line doing maintenance, the electrician is not closely supervised and essentially works alone, but if supervision is needed, it is provided by the shift superintendent. The shift superintendent has the authority to countermand the electricians' written instructions and also to discipline them up to and including dismissal, though this authority is rarely exercised. The two electricians assigned to each shift work separately, not together, and come in contact with production workers frequently.

Both the physical layout and the personnel structure of the plant are designed to foster an integrated work environment in which all employees, both production and maintenance, work together to maintain the uninterrupted operation of the production line. The company has a program for cross-training employees in aspects of production outside their regular assignments. The cross-training has a limited effect on the electricians' craft status. Employees in other classifications have not been trained to do major electrical work; and the production-support electricians, after initial training, will work on the production line only in emergencies. On days known as "maintenance day" one of the three lines is closed down for complete inspection and maintenance. On those days, the electricians will work with other employees in teams. Only electricians perform major electrical repair work.

All conditions of employment and fringe benefits are uniform for hourly employees throughout the plant. All use the same entrance and punch the same timeclock. Production-support electricians have the top pay scale for hourly employees, and have a separate wage scale and progression rate.

After a hearing, the Regional Director issued his decision and direction of election in which he found that the electrician unit petitioned for by the IBEW was an appropriate unit, and that it would be separately certified if the maintenance electricians voted for the IBEW in the required election.[5] The company filed with the Board a request for review of the decision, which was denied for failure to raise substantial questions requiring review. At the election on October 31 and November 1, 1980, the production-support electricians voted four to nothing in favor of IBEW representation.

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[4] The electricians are responsible for maintenance and repair of all electrical equipment in the plant, not just the production line. When there is a malfunction on the line, the computer signals the area where the problem is occurring. It is then up to the electrician to diagnose the problem. Defective parts are quickly removed to prevent shutting down the line. Repairs are then made either in the shop or, if necessary, the part is returned to the manufacturer for repair.

[5] The electricians had the choice of voting for separate representation, or for representation in the production-and-maintenance unit, or for no union.

After certification of the IBEW by the Regional Director, the company refused to bargain. (Bargaining has commenced with the union representing the production-and-maintenance unit). On January 2, 1980, the IBEW filed an unfair-labor-practice charge against the company, which the Board upheld on summary judgment. This enforcement procedure followed.

II.

Although the company makes numerous arguments challenging the Board's characterization of the evidence and alleged failure to weigh competing factors, we think that this case hinges on one basic question: Whether the highly integrated nature of the company's operation has destroyed the community of interest necessary to support the designation of a separate craft unit.[6]

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Both section 9(b) of the National Labor Relations Act[7] and a long line of Board precedents recognize that the special interests of skilled craft employees may warrant a separate bargaining unit for such employees. *See, e. g., Atlantic Richfield Co.,* 231 N.L.R.B. 31 (1977). The Board and the courts have developed a "community of interest" analysis to guide the Board in selecting viable bargaining units that will effectuate the section 7 policy of employee self-determination. See, *e. g., NLRB v. J. C. Penney Co.,* 559 F.2d 373, 375 (5th Cir. 1977). The most common community-of-interest factors are "such factors as bargaining history, operations integration, geographic proximity, common supervision, similarity in job function, and degree of employee interchange."[8] *Ibid.* Craft-unit determinations are made on a case-by-case basis after a weighing of all relevant factors, and no rigid test can or should be devised. *Mallinckrodt Chemical Works, supra,* at 398.

Review of the Board's unit certification is limited to a determination of whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support. *NLRB v. Target Stores, Inc.,* 547 F.2d 421, 423 (8th Cir. 1977). To set aside a Board certified unit, the employer must show that the designated unit is a not appropriate. It is not enough to show that another kind of unit would have been more appropriate. *NLRB v. J.C. Penney Co., supra,* 559 F.2d at 375. A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matters been before it *de novo." Hy-Vee Food Stores, Inc. v. NLRB,* 426 F.2d 763, 764 (8th Cir.), *cert. denied,* 400 U.S. 879, 91 S.Ct. 120, 27 L.Ed.2d 116 (1970), quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

The Regional Director weighed the relevant factors as follows (citations omitted):

> In view of the record as a whole, including the fact that there is no history of bargaining in a plant-wide unit including the production support electricians at the Employer's Arnold, Missouri, Facility, although there is a plant-wide unit history of bargaining at the Employer's two other facilities and at 71 2-piece can plants in the United States, and a separate maintenance electrician craft unit history of bargaining in 4 can plants in the St. Louis Metropolitan Area, one of which is a 2-piece can plant, the fact that the IBEW has a specialized experience representing maintenance electricians, the fact that the production support electricians are highly skilled electricians, exercise substantial independent judgment in the performance of their work, and are the only classification which performs major electrical repair work, and the fact that production support electricians are primarily supervised within their own craft lines, and despite the integrated nature of the Employer's operation, the fact that production support electricians will rou-

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[6] A true craft has been defined as a unit consisting of "a distinct and homogeneous group of skilled journeymen craftsmen, working as such, together with their apprentices and/or helpers. To be 'a journeyman craftsman,' an individual must have a kind and degree of skill which is normally acquired only by undergoing a substantial period of apprenticeship or comparable training." *American Potash & Chemical Corp.,* 107 N.L.R.B. 1418, 1423 (1954).

[7] 29 U.S.C. § 159(b), in part, provides: "The Board shall decide in each case whether, in order to assure the employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant, or subdivision thereof * * *."

[8] When a union seeks to carve out a unit of craft workers from a previously established collective-bargaining unit, the Board is guided by *Mallinckrodt Chemical Works,* 162 N.L.R.B. 387, 397 (1966). While not controlling in a non-severance situation, the *Mallinckrodt* test has been applied by the Board in determining whether an appropriate craft unit should initially be established. *Anheuser-Busch, Inc.,* 170 N.L.R.B. 46 (1968).

tinely perform work not traditionally categorized as electrical, the production support electricians' contact with other employees, the similarity of their benefits and working conditions with those enjoyed by other employees, the Employer's policy of cross-training employees, the lack of a requirement that production support electricians be journeymen, and the fact that the production support electricians may receive some supervision from outside their craft, I find that the production support electricians constitute an appropriate craft unit.

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After reviewing the evidence presented to the Regional Director, we are convinced that the production-support electricians at the company's Arnold plant have retained sufficient characteristics of a separate craft unit to justify the Board's certification under our limited scope of review. There is no rigid rule that a high-speed industrial environment automatically destroys a separate community of interest among craft workers. The Board addressed this contention in *Atlantic Richfield:*

> Where * * * there is no history of bargaining on a more comprehensive basis, neither the integrated nature of a production process nor the fact that skilled employees must coordinate their operations with other employees in achieving maintenance goals is, in itself, sufficient to preclude the formation of a craft unit.

Atlantic Richfield Co., supra, 231 N.L.R.B. at 32. Integration of a manufacturing process is one factor to be considered in unit determinations.

> But it is not in and of itself sufficient to preclude the formation of a separate craft bargaining unit, unless it results in such a fusion of functions, skills, and working conditions between those in the asserted craft group and others outside it as to obliterate any meaningful lines of separate craft identity.

E.I. DuPont de Nemours and Co., 162 N.L.R.B. 413, 419 (1966). We think the Board has permissibly found that the Arnold plant's mode of operation has not so fused "functions, skills, and working conditions" as to preclude a separate craft unit. We rely particularly on the fact that the electricians are the *only* plant employees who make major electrical repairs and have primary responsibility for the electrical maintenance of the entire plant. Plant officials testified that at the first sign of trouble on the line the electrician is the first person called, because he has the greatest skill in diagnosing production malfunctions. There is ample evidence that the electricians exercise independent judgment in determining when, where, and in what order repairs will be made. The electricians' supervisors seemed to take pride in the sophisticated combination of skills required to keep the electrical components of the computer-controlled production line running smoothly. The fact that the electricians do most of their electrical work in the production area does not prevent them from being a "distinct and homogeneous group of skilled journeymen craftsmen." While the electricians are required to have knowledge of mechanical, pneumatic, and hydraulic components, they use these skills within the context of their primary function at the plant—electrical maintenance. The requirement that they have other skills in addition to electrical knowledge does not diminish the fact that the core requirement for the job was extensive training and/or experience as electricians.[9]

Metal Container cites three cases as governing Board precedent. *Joseph Schlitz Brewing Co., Container Division,* 192 NLRB 553 (1971); *Kaiser Aluminum & Chemical Corp.,* 177 NLRB 682 (1969); *Joseph Schlitz Brewing Co.,* 16–RC–4263 (1966) (unreported decision). In each of these cases the Board denied separate craft units in plants using the two-piece process. Metal Container contends that the Board's decision in the present case is an arbitrary departure from these precedents. When the Board departs from prior precedent without explanation, its decisions have been held arbitrary as a matter of law. *NLRB v. Meyer Label Co.,* 597 F.2d 18 (2d Cir. 1979).

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After reviewing the Board's decisions in these three cases, we conclude that none of them represents inescapably conflicting Board precedent. In the 1971 *Schlitz* case the electrical and electronic repairmen worked with production employees 85 to 90% of the time, shared common work benches, frequently interchanged job functions, and were not required to have any special education or experience for the job. In the 1966 *Schlitz* case the electricians seeking separate craft status were hired "to perform a broad spectrum of overall maintenance functions," and their duties were found by the Board to be "not sharply distinguishable from those performed by other maintenance employees." [10] In *Kaiser,* a separate lithographers' unit was requested. The lithographers worked directly on the production line, were not separately supervised, spent a substantial amount of time on nonprinting tasks, and used a dry-offset process which required less skill than traditional lithographic printing. We cannot say that the facts in these three cases are "indistinguishable from the facts present here," as the Second Circuit found in *Meyer Label Co., supra,* 597 F.2d at 20. None of the Board's decisions involving two-piece can plants rules out the appropriateness of a separate craft unit in all such plants. Each plant has its own characteristics, and, while the overwhelming trend in the industry, nationwide, is toward wall-to-wall production-and-maintenance units,[11] that is but one factor to be considered by the Board when it focuses upon a particular plant and its employees.

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[9] All four electricians hired at the time of the hearing had extensive training and experience which will not be recounted here. The lack of a formal apprenticeship or training program does not bar a craft determination when extensive experience is required. No other class of employees is required to have electrical knowledge.

Metal Container also calls our attention to a recent Board decision denying a separate electricians' craft unit in another highly integrated manufacturing industry. *Procter & Gamble Paper Products Co.,* 251 N.L.R.B. 77 (1980). Several factors distinguish the *Procter and Gamble* decision. There the Board found that 50% of the electrical work in the plant was performed by over 200 other technicians who had some electrical skills. While the Procter and Gamble electricians were the most highly skilled electricians in the plant and spent 100% of their time doing electrical work, they worked in teams with other maintenance and production workers and did not function as a separate group. There was also movement in and out of the unit, with production workers moving into the electrician jobs. Here, in contrast, all four electricians were hired as electricians, they are responsible for all the major electrical repair work, they do not work in teams except on "maintenance day," and there has been no movement into or out of the class. On the whole, this case is closer, on its facts, to other craft unit certification cases in which the Board has certified a separate craft unit. *Lianco Container Corp.,* 177 N.L.R.B. 907 (1969) (only electricians in the unit perform electrical work; no aprenticeship but electrician experience required); *Atlantic Richfield Co.,* 231 N.L.R.B. 31 (1977) (unit employees hired as skilled employees, no transfers out of unit, most electrical work done by unit employees); *Anheuser-Busch, Inc.,* 170 N.L.R.B. 46 (1968) (experience and license required; highly integrated production line does not obliterate separate craft identity).

In summary, we hold that there is substantial evidence in the record as a whole to support the Board's conclusion that the production-support electricians at the company's Arnold facility are an appropriate collective-bargaining unit. We base that conclusion on the fact that despite the highly integrated nature of the plant's operation the electricians are highly skilled, highly paid workers who exercise independent judgment and who are primarily supervised from within their own craft. We recognize, of course, that a plant-wide unit would also have been appropriate. When two or more units are appropriate, employee choice is a relevant factor. *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 156, 61 S.Ct. 908, 914, 85 L.Ed. 1251 (1941).

Accordingly, we enforce the Board's order.

ROSS, Circuit Judge, concurring: In my opinion, the decision of the Board to certify IBEW as the representative of a separate unit (of four electricians) is both unwise and in direct opposition to the practice of 71 of the 72 plants engaged in wall-to-wall production using the two-piece process, including Metal Container's other two plants. (See pp. 1310 and 1311 of this opinion.)

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[10] Only one paragraph of the 1966 *Schlitz* decision is devoted to the petition for a separate electricians' unit. There is insufficient information from which to make a detailed comparison with the present case.

[11] In response to our post-argument order of June 16, 1981, the Board has filed an analysis of the 73 two-piece can manufacturing plants known to have bargaining units. Relevant information was unavailable for 36 of the plants. In 26 plants a wall-to-wall unit was stipulated to by the parties and approved by the Board. Several units were established by Board decisions in which separate craft status was not an issue. In five cases the Board denied separate craft status. Three of these cases involved lithographers, one was a request for a separate maintenance unit, and the other was the 1966 *Schlitz* case discussed above. The three lithographer cases and the maintenance case are of limited relevance to the issue of the appropriateness of a separate electricians' unit. In another *Schlitz* case, No. 12-RC-1126 (1961) (unreported decision), the Board found a separate unit of electricians appropriate and capable of severance from a maintenance unit.

Inasmuch as consistency in making such unit determinations is neither followed by the Board nor required under many of the applicable cases, I find myself having to agree that the substantial evidence rule has been minimally complied with here even though its application is an affront to ordinary logic and common sense. The practical result will be to give the IBEW unit of only four employees an inordinate amount of leverage in contract negotiations even though a substantial majority of the 110 production employees may have ratified a negotiated labor agreement.

Robert J. Wilson, Reg. Dir. v. Liberty Homes, Inc.

664 F.2d 620 (7th Cir.), October 7, 1981; rehearing and rehearing en banc denied February 1, 1982—500 F. Supp. 1120

On petition for injunctive relief under Section 10(j)

Before BAUER and CUDAHY, Circuit Judges, and BARTELS, Senior District Judge*

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CUDAHY, Circuit Judge: This case is before the court on the appeal of Liberty Homes (the "Company") and the cross-appeal of the National Labor Relations Board (the "Board") from an order of the United States District Court for the Western District of Wisconsin. The district court's order granted, in substantial part, and denied, in part, a petition for a temporary injunction filed on behalf of the Board by Robert J. Wilson, Regional Director of the Eighteenth Region of the Board (the "Regional Director") pursuant to Section 10(j) of the National Labor Relations Act (the "Act"). 29 U.S.C. § 160(j) (1976). On April 30, 1980, the Board issued a complaint charging that the Company had coercively interrogated and threatened its truck driver employees concerning their Union activities in violation of Section 8(a)(1) of the Act; discriminatorily subcontracted for the performance of the truck drivers' over-the-road delivery work and discharged the drivers in violation of Section 8(a)(3) of the Act; and unlawfully refused to recognize and bargain with the drivers' exclusive bargaining representative in violation of Section 8(a)(5) of the Act. The Board also authorized the Regional Director to file a petition requesting affirmative injunctive relief against the Company pursuant to Section 10(j) of the Act pending the resolution of the Board's unfair labor practice charges.[1]

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Following an evidentiary hearing on the Regional Director's petition, the district court concluded that there was reasonable cause to believe that the Company had violated Sections 8(a)(3) and 8(a)(5) of the Act and that the requested injunctive relief on these counts was just and proper. As a result, the court issued an order requiring the Company to resume its trucking operations, to offer reemployment to the nine discharged truck drivers and to recognize and bargain with the Union. However, finding no reasonable cause to believe that the Company had committed an independent Section 8(a)(1) violation, the district court refused to order the Company to cease and desist from engaging in further interrogations, threats and discriminatory discharges. The Company now appeals from the issuance of the affirmative injunctive order, and the Board cross appeals from the denial of the cease and desist order. We affirm that portion of the district court's order which directs the Company to restore its driving operations at the Dorchester plant, to offer reinstatement to the nine discharged drivers and to bargain with the Union. We reverse the district court's denial of the cease and desist order and remand with instructions to issue an order providing such relief.

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*The Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, is sitting by designation.

[1] Shortly before the date of issuance of this opinion, Respondent informed this court that the National Labor Relations Board had recently issued its decision and order *dismissing* these unfair labor practice charges on the merits. *Liberty Homes, Inc.*, 257 N.L.R.B. No. 169 (Sept. 17, 1981). Respondent argued that this order of the Board dismissing the Sections 8(a)(3) and 8(a)(5) charges confirmed its position that the district court had erred in issuing its temporary injunction. (The Board upheld, however, the Section 8(a)(1) charge.) We have considered the Board's decision and order on the *merits* of the unfair labor practice charge (as requested by Respondent) but do not find that decision dispositive of the issue before us—whether the district court's finding of *reasonable cause* was *clearly erroneous. See Hendrix v. International Union of Operating Engineers. Local 571*, 592 F.2d 437, 442–43 (8th Cir. 1979).

In light, however, of the Board's action exonerating Respondent on the merits, we have, in a subsequent unpublished order, directed that our opinion and judgment in this case be vacated as moot and that the cause be remanded to the district court with directions to dissolve the injunction under the authority of *Sears Roebuck & Co. v. Carpet Layers, Local Union No. 419*, 397 U.S. 655, 90 S.Ct. 1299, 25 L.Ed.2d 637 (1970). See ——— F.2d ——— (7th Cir. 1981).

I

The Company, headquartered in Goshen, Indiana, is engaged in the manufacture, sale and distribution of mobile homes in eight plants throughout the country. The instant dispute arose at the Dorchester, Wisconsin plant, where the Company employed nine truck drivers to transport mobile homes manufactured there to dealers in other states. These drivers were not represented by any labor organization.

In 1973, the Union (Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 446, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) attempted to organize the drivers and filed a petition with the Board for a representation election. Shortly thereafter, the Company began to subcontract the shipment of mobile homes manufactured at the Dorchester plant to independent carriers and discharged all of the drivers. The Union filed unfair labor practice charges with the Board alleging that the Company violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. Although there was insufficient evidence for the Regional Director to conclude that the Company's decision to subcontract was motivated by antiunion animus, he issued a complaint charging that the decision to subcontract was unlawfully accelerated by the advent of the Union. The complaint was dismissed, however, after the Company and the Union entered into an informal settlement agreement which included backpay for the discharged drivers. *See* Record at 120–24.

Approximately two years later, the Company decided to resume its trucking operations at the Dorchester plant and to limit the use of common carriers to an "as needed" basis. By July of 1979, the Dorchester plant had hired nine drivers and operated a fleet of 14 gasoline powered trailer trucks. During 1979 alone, the Company equipped four of these trucks with expensive new radial tires and purchased two brand new trailer trucks for use at the Wisconsin facility. In addition, the Company installed a second 10,000 gallon gasoline storage tank to insure the availability of fuel for its carrier fleet.

During the spring of 1979, the drivers became increasingly concerned about their working conditions and began to discuss the possibility of union representation. Driver Merlin J. Ramker informed Tom Potts, the Company supervisor responsible for driving assignments, that the drivers were "disgusted with the way management was handling things" and would have to join the Union if things did not change. Record at 66–67. Potts warned Ramker that it would be a "critical mistake" for the drivers to seek representation "because all it would do was create problems." Record at 67. In early September, Ramker was called into Potts' office and questioned by the supervisor about a union organizing campaign among the drivers. Ramker denied any knowledge of union activity despite the fact that the drivers were seriously discussing union representation at that time. Record at 68.

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Potts also approached Kenneth Ploeckelman for information on the drivers' union meetings. Ploeckelman, originally hired by the Company in 1970, had been active in the drivers' 1973 attempt to secure union representation. He was dismissed with the other drivers involved in that campaign when the Company decided to subcontract its carrier work. Ploeckelman was the only one of those dismissed drivers who was subsequently rehired by the Company when it resumed carriage operations in 1975. Like Ramker, Ploeckelman told Potts that he knew nothing about a union organizing effort and further commented, "I know what will happen if we join." Record at 50.

Potts similarly questioned Loren J. Metz, an acquaintance of Potts who had been hired as a driver for the Company on July 17, 1979. In mid-August, Potts called Metz at home and asked if he knew anything about a union meeting scheduled for that evening. Although Metz said no, Potts advised him "as a friend, don't go." Record at 74. On a different occasion, Metz was given a message to report to Potts' office before leaving work. Again, Potts pumped Metz for information on any union meetings or activities. Potts suggested that Metz "could move up the ladder faster as a driver" if he did not attend these meetings. He also warned that "the Company would never go along with * * * a Union." He figured there would be "a different way of transporting the homes." Record at 85. When Potts discovered several weeks later that Metz had signed a Union authorization card, Potts chastised Metz for failing to keep Potts informed about union activity. Record at 83.

On September 23, 1979, all of the drivers except Metz attended a lengthy meeting with Union business agent, Jerome Hansen, and signed authorization cards which designated the Union as their collective bargaining agent. Hansen obtained a signed card from Metz the following morning and then arranged a meeting with William Zabrosky, manager of the Company's Wisconsin Division and chief operational officer at the Dorchester plant. Hansen informed Zabrosky that the drivers had unanimously designated the Union as their collective bargaining agent and requested that the Company voluntarily recognize and bargain with the Union. Record at 31. Zabrosky explained that he did not have the authority to grant recognition and added that the Union's request was rather "ironic" because the Company was "looking into eliminating the transportation department * * * and negotiating for outside carriers to haul their mobile homes." Record at 32. Hansen indicated that Zabrosky's response was strangely reminiscent of the 1973 situation and asked if Zabrosky was again about to fire the employees. Zabrosky said he would prefer to use the word "terminate." *Id.*

Zabrosky reiterated that he was "gathering information from outside carriers" to determine whether it would be more profitable for the Company to subcontract the hauling work at the Dorchester plant. Record at 33. He showed Hansen a letter from his files dated March 1, 1979, which contained the proposed cartage rates of a carrier awaiting ICC approval for interstate hauling. After observing that no contract had been signed, Hansen stated that it appeared as if the employees would be fired, "the same as they were in 1973." Record at 34. Zabrosky repeated that he would prefer to use the word "terminate." *Id.*

On September 26, 1979, the Union filed a petition with the Board seeking a representation election among the driver employees. The Regional Director conducted a hearing on the matter on October 12, 1979. On the basis of Company testimony given at that hearing, the Regional Director concluded that the Company's decision to subcontract its hauling operations preceded the drivers'

designation of the Union as their collective bargaining agent. He therefore dismissed the Union's petition on the grounds that "it would not effectuate the policies of the Act to conduct an election at this time." Co. Ex. 2 attached to Answer to Section 10(j) petition. Although the Company offered to bargain with the Union regarding the effect of the subcontracting decision on the drivers, the Union refused to "negotiate [the drivers'] jobs away." Record at 38.

The Company terminated all nine drivers on November 2, 1979. The trailer trucks based at the Dorchester plant were then towed to other Company facilities for use in their continuing hauling operations.[2] In the meantime, the Union filed unfair labor practice charges with the Board alleging that the Company had violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act by coercively interrogating and threatening the employees concerning their union activities, by discriminatorily deciding to subcontract its hauling work and to discharge the drivers and by unlawfully refusing to bargain with the drivers' exclusive bargaining agent, the Union. These charges were subsequently dismissed, however, due to insufficient evidence. The Union appealed the dismissal to the General Counsel's Office of Appeals. On April 9, 1980, after a full review of the matter, the General Counsel sustained the Union's appeal and remanded the case to the Regional Director for the issuance of a complaint. Shortly after the complaint issued on April 30, 1980, the Regional Director obtained Board authorization to file a petition in the district court for temporary injunctive relief pursuant to Section 10(j) of the Act.

The court conducted a hearing on the Regional Director's petition on May 30, 1980, and issued its decision on the basis of the record developed there. The court found that the Regional Director had reasonable cause to believe that, prior to the drivers' union activities, the company intended to continue delivering its mobile homes with its own trucks and drivers and that the Company's decision to subcontract that work and to discharge its drivers was motivated, at least in part, by its antipathy to union representation of its drivers in violation of Section 8(a)(1) and 8(a)(3) of the Act. The court further found that reasonable cause existed to believe that a majority of the drivers had designated the Union as their collective bargaining representative and that the Company violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union while engaging in conduct making a fair representation election impossible. Accordingly, in order to restore the status quo ante and preserve the Board's ability to remedy these violations, the court ordered the Company to resume its trucking operations at the Dorchester plant, to recall its discharged drivers and to recognize and bargain with the Union.

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[2] At the time of the hearing before the district court, five of the trucks were being used at the Company's Thomasville, Georgia plant, and five were in use at its Kansas plant. The three trucks sent to the Syracuse, Indiana plant had been sold, and one of the trucks had been wrecked. Record at 116.

Although the District court found that supervisor Potts questioned several employees about their organizing efforts and warned them against supporting the Union, the court found insufficient evidence to support a finding of reasonable cause to believe that Potts' activities were coercive within the meaning of Section 8(a)(1) of the Act. Hence, the court concluded that an order directing the Company to cease and desist from coercively interrogating, threatening and discriminatorily discharging its truckdriver employees was unnecessary, because "the conduct which petitioner seeks to enjoin is already made illegal by the Act, and the Act provides an adequate procedure for redressing violations." ***Wilson v. Liberty Homes, Inc.***, 500 F.Supp. 1120, at 1128 (W.D. Wis. 1980).

Both the Company and Board filed timely appeals. Although the district court denied the Company's request for a stay pending appeal, the court granted the Company's motion for an additional thirty days to comply with the order. This court similarly refused to stay the injunction pending the outcome of this appeal.

II

Section 10(j) of the Act vests the Board with the discretion to petition the district court for appropriate temporary relief upon the issuance of a complaint (against either an employer or a labor union) charging an unfair labor practice. The court is then empowered to grant "such temporary relief or restraining order as it deems just and proper." 29 U.S.C. § 160(j) (1976).[3] This section, added to the Act in 1947, was designed to permit the courts to alleviate the harm which may befall the victims of unfair labor practices during the considerable time gap between the filing of a complaint by the Board and the issuance of its final decision. ***Muniz v. Hoffman***, 422 U.S. 454, 466, 95 S.Ct. 2178, 2185, 45 L.Ed.2d 319 (1975) (*quoting* S.Rep. No. 105, 80th Cong., 1st Sess. 8 (1947)). Under this statutory scheme, the issues before a district court in a Section 10(j) proceeding are: (1) whether there is "reasonable cause" to believe that the party in question committed the alleged unfair labor practice(s); and (2) whether the relief requested is "just and proper."

A. Reasonable Cause

A Section 10(j) proceeding is ancillary to the unfair labor practice case from which it stems. The purpose of such a proceeding is to preserve or restore the status quo and prevent the frustration of national labor policy pending the resolution of the charges before the Board. *Levine v. C & W Mining Co.*, 610 F.2d 432, 436 (6th Cir. 1979); *Squillacote v. Meat & Allied Food Workers, Local 248*, 534 F.2d 735, 741–42 (7th Cir. 1976); *Angle v. Sacks*, 382 F.2d 655, 659–60 (10th Cir. 1967). As a result, the district court is not permitted to decide the merits of the underlying unfair labor practice claims. *Humphrey v. International Longshoreman's Ass'n*, 548 F.2d 494 (4th Cir. 1979); *Squillacote v. Graphic Arts International Union Local 277*, 513 F.2d 1017 (7th Cir. 1975). Instead, the court must determine whether there is reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which the Regional Director proceeds is substantial and not frivolous.

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[3] Section 10(j) of the Act provides:

> (j) The Board shall have power, upon issuance of complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j)(1976).

Squillacote v. Graphic Arts International Union, 540 F.2d 853, 858–59 (7th Cir. 1976).

Although Section 10(j) does not describe or define this "reasonable cause" standard, the courts agree that the evidentiary burden on the Regional Director in a 10(j) proceeding is not as great as the burden on the Board in an enforcement action. If the evidence viewed in the light most favorable to the Regional Director [4] could reasonably support a finding that a violation of the Act has occurred,[5] the Regional

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Director has discharged his "relatively insubstantial" burden,[6] and the district court may grant appropriate relief. Since the district court's "reasonable cause" determination is a factual finding, it may not be disturbed on appeal unless clearly erroneous. *Squillacote v. Graphic Arts International Union Local 277,* 513 F.2d 1017 (7th Cir. 1975); Fed.R.Civ.P. 52(a).

In the instant case, we conclude that the district court's determinations with respect to the Sections 8(a)(1), 8(a)(3) and 8(a)(5) claims are not clearly erroneous. The evidence adduced at the hearing before the district court establishes reasonable cause to believe that the Company violated Sections 8(a)(3) and 8(a)(1) of the Act by subcontracting for the delivery of mobile homes manufactured at its Dorchester plant and by discharging all nine of the drivers employed at that plant in retaliation, at least in part, for their union activity. The record equally supports the court's finding that there is reasonable cause to believe that the Company's unlawful conduct rendered a fair election impossible so that the Company's refusal to bargain with the Union on the basis of authorization cards signed by each of the drivers violated Section 8(a)(5) of the Act. After carefully reviewing the evidence in this case, however, we find that there was also reasonable cause to believe that Supervisor Potts coercively interrogated and threatened several drivers concerning their union activity in violation of Section 8(a)(1).

1. The Section 8(a)(3) Claim

Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate with respect to tenure of employment for the purpose of discouraging membership in a labor organization. 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights to organize and bargain collectively through representatives of their own choosing. 29 U.S.C. § 158(a)(1) (1976). It is well settled that an employer violates both of these sections by "subcontracting part of an integrated business and dismissing the persons employed therein if the action is motivated at least in part by anti-union considerations." *NLRB v. Townhouse T.V. & Appliances, Inc.,* 531 F.2d 826, 828–29 (7th Cir. 1976); *NLRB v. George Roberts & Son, Inc.,* 451 F.2d 941, 945–46 (2nd Cir. 1971); *NLRB v. National Food Stores, Inc.,* 332 F.2d 249 (7th Cir. 1964).

As the district court noted, the employer's motivation for subcontracting its operations and discharging the drivers thus becomes the critical element in the controversy. For, a violation of Section 8(a)(3) occurs only if the Company knew that the drivers were engaged in union activity prior to the time the subcontracting decision was made and if the employer's motive for terminating the drivers was to punish them for seeking union representation. *Alton Arlan's Dept. Store, Inc. v. NLRB,* 355 F.2d 513 (7th Cir. 1966). We agree with the district court that there was reasonable cause to believe that both of these conditions were met in the instant case.[7]

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[4] The Regional Director should be given the benefit of the doubt when disputed issues of fact are determinative of the existence of reasonable cause in a Section 10(j) proceeding. *Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976); *Seeler v. Trading Port, Inc.,* 517 F.2d 33, 37 (2d Cir. 1975); *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union,* 494 F.2d 1230, 1245 (2d Cir. 1974).

[5] *See Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976). We find no merit in the Company's argument that the *Squillacote* "could support" standard is inapposite here because *Squillacote* involved the issuance of a mandatory injunction under Section 10(*l*) rather than a discretionary injunction under Section 10(j). In deciding whether to grant injunctive relief, the district court should apply the same standards in 10(j) cases as it does in 10(*l*) cases. *Squillacote v. Meat & Allied Food Workers, Local 248,* 534 F.2d 735, 743 (7th Cir. 1976); *Seeler v. Trading Port, Inc.,* 517 F.2d 33, 36 (2d Cir. 1975); *Boire v. International Brotherhood of Teamsters,* 479 F.2d 778, 787 (5th Cir. 1973); *Minnesota Mining & Manufacturing Co. v. Meter,* 385 F.2d 265, 269 (8th Cir. 1967).

[6] *See Levine v. C & W Mining Co.,* 610 F.2d 432, 435 (6th Cir. 1979); *Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976); *Hirsch v. Building & Construction Trades Council of Philadelphia & Vicinity,* 530 F.2d 298, 302 (3d Cir. 1976); *Boire v. International Brotherhood of Teamsters,* 479 F.2d 778, 792 (5th Cir. 1973).

[7] The Company claims that the Regional Director has the greater burden of proving by substantial evidence on the record as a whole that

Continued

The record indicates that the Company was aware of the Union organizational campaign during its infant stages in the summer of 1979. Supervisor Potts questioned at least three different drivers on several occasions about rumors of Union meetings. He advised these men that union representation was a "critical mistake" and warned of the consequences of such a decision. Regardless whether Potts' activities constitute an independent violation of the Act, they nevertheless demonstrate the Company's knowledge of the employees' union activity and the Company's animus toward that activity.

Although the Company maintains that it had been considering the elimination of the Dorchester transportation department for several months before the Union's September demand for recognition, the Company made no commitments to outside carriers until after the Union filed its unfair labor practice charges in late October. The Company produced no books, records, proposals, statements or memoranda to substantiate the testimony of its Wisconsin Division manager that the decision to subcontract was made in mid-August.[8] The only proposal from an outside carrier produced by the Company in support of its position was dated March 1, 1979, and was submitted by a carrier that lacked the legal authority to transport the mobile homes interstate. The Company even concedes that it did not pursue this matter beyond the carrier's submission. In addition to this document, the Company produced copies of its visitors register which indicated that representatives of two common carriers had visited the Dorchester plant in May and August. In view of the fact that the services of these carriers had been used by the Company on an "as needed" basis in the past and that it was a common practice for carrier representatives to make business courtesy calls, the visitors register can hardly be regarded as strongly persuasive evidence that the Company either was considering subcontracting or had decided to subcontract its Dorchester transportation work to outside carriers before the Union's bargaining request.

Finally, there is no indication in the record that Company supervisors informed any of the Dorchester employees before the Union's bargaining demand of the possibility that the Company would once again subcontract its driving work. Moreover, the Company's conduct in the months immediately preceding the Union's demand evidenced a contrary intent. Thus, while the Company claims it was losing money on the Dorchester hauling operation because its gasoline powered trucks could not economically transport the mobile homes manufactured at the Wisconsin facility, the Company purchased two new gasoline powered trucks for the Dorchester plant, installed a new 10,000 gallon gasoline storage tank to fuel its trucks, outfitted four of the trucks with new radial tires and hired 5 drivers.[9]

The timing of the Company's sudden, unannounced decision to subcontract, occurring so abruptly on the heels of the Union's demand for recognition, is itself strong evidence of an illegal motive. *See NLRB v. Sutherland Lumber Co.*, 452 F.2d 67, 69 (7th Cir. 1971); *Angwell Curtain Co. v. NLRB*, 192 F.2d 899, 903 (7th Cir. 1951). When this evidence is combined with Potts' clear reflection of the Company's antipathy toward the unionization of the drivers and the Company's strikingly similar response to the 1973 unionization effort, the district court properly determined that there was reasonable cause to believe that the Company's decision to subcontract its hauling operations and discharge the drivers violated Section 8(a)(3) of the Act.

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the Company's actions were motivated by anti-union animus. *NLRB v. Charles Batchelder Co.*, 646 F.2d 33 (2d Cir. 1981). This burden, however, is applicable only to a determination of the merits of a Section 8(a)(3) claim. "In a Section 10(j) or 10(*l*) case, the court need not, indeed should not, make a finding of employer motivation. It need only find a reasonable cause for belief that there was such a motivation." *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902 (3d Cir. 1981).

[8] Like the district court, we do not feel compelled "to accept as true the self-serving statements of [the Company's] representatives merely because they are uncontradicted," particularly when the record as a whole casts reasonable doubt on the accuracy of these statements. *Wilson v. Liberty Homes*, 500 F.Supp. 1120 (W.D. Wis. 1980). *Accord, Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[9] The five drivers were hired by the Company on the following dates:

Peter J. Marchinek—February 26, 1979
Merlin J. Ramker—February 26, 1979
Arthur B. Streu—April 20, 1979
Roger C. Kell—May 14, 1979
Loren J. Metz—July 17, 1979

2. The Section 8(a)(5) Claim

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. § 158(a)(5) (1976). The duty to bargain arises when a labor organization becomes the designated representative of the affected employees. *Linden Lumber v. NLRB,* 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974). Under ordinary circumstances, a union demand for recognition based upon signed authorization cards from a majority of the employees does not create a duty to bargain. *Id.* at 305, 95 S.Ct. at 432. Thus, the Company's refusal in the present case to voluntarily recognize and bargain with the Union does not, *by itself,* constitute an unfair labor practice.

When an employer has committed unfair labor practices which render a fair election unlikely, however, authorization cards comprise the most reliable measure of the employees' preference on the representation issue and thus support a duty to bargain. *Id.* at 301, 95 S.Ct. at 430; *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 610, 89 S.Ct. 1918, 1938, 23 L.Ed.2d 547 (1969). By subcontracting its hauling operation and dismissing all nine drivers, the Company has effectively destroyed the proposed bargaining unit and obviated the possibility of holding an election at all. Even if the Board resolves the refusal to bargain issue in the Union's favor, the possibility of conducting a fair election in this environment is remote. Although the Board must ultimately determine whether the Company's actions constitute unfair labor practices sufficient to give rise to a duty to bargain, the district court properly determined that there was reasonable cause to believe that the Company's refusal to bargain in this case violated Section 8(a)(5).

3. The Section 8(a)(1) Claim

Section 8(a)(1), which prevents employers from interfering with, restraining or coercing employees in the exercise of their right to organize, does not *per se* prevent an employer from questioning employees about unionization. *NLRB v. C & P Plaza Dept. Store,* 414 F.2d 1244 (7th Cir.), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 756, 24 L.Ed.2d 754 (1969). Employee interrogation only rises to the level of an 8(a)(1) violation if the questions asked, when viewed from the employee's perspective, could reasonably coerce or intimidate the employee with regard to union activities. *NLRB v. Gulf-Wandes Corp.,* 595 F.2d 1074 (5th Cir. 1979); *NLRB v. Douglas Division, Scott & Fetzer Co.,* 570 F.2d 742 (8th Cir. 1978). The test is not whether the employee was actually coerced, but whether the questions would tend to coerce. *NLRB v. Varo, Inc.,* 425 F.2d 293 (5th Cir. 1970). In determining the effect of an employer's interrogation on an employee, the courts should consider, *inter alia,* (1) the background of the employer-employee relationship, (2) the questioner's identity, (3) the nature of the information sought, (4) the place and method of the interrogation and (5) the truthfulness of the reply. *NLRB v. Donald E. Hernly, Inc.,* 613 F.2d 457 (2d Cir. 1980); *First Lakewood Association v. NLRB,* 582 F.2d 416, 418 (7th Cir. 1978); *Florida Steel Corp. v. NLRB,* 529 F.2d 1225 (5th Cir. 1976).

In the instant case, the district court found that a Company representative, Tom Potts, interrogated several of the drivers and warned them against supporting the Union. The court indicated, however, that the extent to which these questions were coercive depended largely upon the manner in which the drivers perceived Potts' authority within the Company. Since the district court was unable to determine the extent of Potts' actual or perceived authority, the court could not find reasonable cause to believe that an 8(a)(1) violation had occurred.

We have carefully reviewed the record, however, and conclude that the district court's finding was clearly erroneous. The Company stipulated that Potts was a supervisor within the meaning of the Act. In addition, there is evidence which indicates that Potts had significant control over the shipment of mobile homes manufactured at the Dorchester plant. As dealer relations manager, Potts was primarily responsible for assigning the drivers to their respective runs. Since the drivers were paid by the "loaded mile," Potts played a central role in the remuneration of the employees he questioned. Under these circumstances, it would be reasonable for the drivers to assume that Potts had some influence in the Company's decisions reflecting the cost and profitability of the Dorchester hauling operations.

Moreover, the record clearly indicates that the drivers perceived that they were threatened by

Potts' interrogations and warnings. After Potts twice cautioned Ramker that it would be a "critical mistake" for the drivers to unionize, Ramker, who had contacted the Union on behalf of the drivers, falsely denied any knowledge of union activity.[10] Driver Kenneth Ploeckelman, the only employee rehired after the Company's 1973 decision to subcontract, also falsely denied any union involvement. Ploeckelman assured Potts that "[he knew] what would happen if [the drivers] joined [the Union]." The drivers' apparent desire to withhold Union information from Potts (more than likely fueled by memories of the Company's reaction to the 1973 union organizing effort) strongly suggests a fear of reprisal from the Company for such activity. Section 8(a)(1) was designed to prevent the occurrence of precisely this type of employer coercion and intimidation. As a result, we conclude that there is reasonable cause to believe that the Company violated this section of the Act.

B. Just and Proper Relief

Once the district court determines that there is "reasonable cause" to believe that the Act has been violated, Section 10(j) permits the court to grant "such temporary relief or restraining order as it deems just and proper." 29 U.S.C. § 160(j) (1976). This court has indicated that three factors must be considered when determining the appropriateness of Section 10(j) relief: (1) traditional equitable considerations such as the need to preserve or restore the status quo; (2) the need to prevent frustration of the basic remedial purposes of the Act; and (3) the degree to which the public interest is affected by a continuing violation. *Squillacote v. Meat & Allied Food Workers, Local 248,* 534 F.2d 735, 744 (7th Cir. 1976). Appellate review of relief fashioned by the district court upon a finding of reasonable cause is limited to a determination whether the district court abused its discretion in granting such relief. *Id.* at 743–44.

In the instant case, the district court ordered the Company to restore its trucking operation, to offer reinstatement to the truck drivers and to recognize and bargain with the Union pending the resolution of the unfair labor practice charges under consideration by the Board. After reviewing the record in light of the three factors outlined above, we cannot conclude that the district court abused its discretion by fashioning this type of temporary relief in this case. On the contrary, we believe that the court should also have issued an order instructing the Company to cease and desist from engaging in further violations of the Act. Although these remedies may appear stringent, we agree with the district court that "allowing [the Company's] allegedly illegal conduct to continue until the Board acts would create a substantial risk of devastating and permanent harm of the sort that 10(j) of the Act was intended to prevent." *Wilson v. Liberty Homes,* 500 F.Supp. 1120, at 1129 (W.D.Wis.1980).

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1. The Restoration-Reinstatement Order

The district court's order directing the Company to resume its trucking operations at the Dorchester plant and to rehire the nine discharged drivers was appropriate relief in the instant case. Where the court has reasonable cause to believe that particularly flagrant unfair labor practices have been committed, just and proper relief includes any remedy ordinarily fashioned by the Board in an unfair labor practice proceeding, despite the fact that a final decision by the Board is still pending. *Morio v. North American Soccer League,* 632 F.2d 217 (2d Cir. 1980). In cases involving discriminatory conduct, the Board has traditionally ordered restoration of the status quo ante unless the wrongdoer can demonstrate that such a remedy would endanger its continued viability. *Hood Industries, Inc.* 248 NLRB 597, 103 LRRM 1540 (1980); *Lion Uniform, Janesville Apparel Division,* 247 NLRB No. 112, 103 LRRM 1264 (1980); *C–F Air Freight, Inc.,* 247 NLRB No. 60, 103 LRRM 1156 (1980), *enf'd by unpublished order,* 636 F.2d 1203 (2d Cir. 1980).

Here, the Company has failed to demonstrate that the district court's restoration orders threatens its viability. Upon discontinuing the Dorchester hauling operation, the Company merely transferred the trucks to other locations and continued to use them in active service. It is no more expensive to return the trucks to the Dorchester plant than it was to remove them in the first place.[11] Moreover, the Company chose to dispose of the trucks while unfair labor practice proceedings were pending and a resumption order was a foreseeable risk. The Company cannot now complain that the risk subsequently materialized to its detriment.

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[10] As this court noted in *Jays Foods, Inc. v. NLRB,* 573 F.2d 438 (7th Cir. 1978):

> [U]ntruthful or noncommittal responses [are] evidence of the employees' anxiety over management's reaction to their union activity. Anxiety is symptomatic of fear and it is unlawful to question so as to instill fear. *See Self-Reliance Ukrainian American Cooperative Association v. NLRB,* 461 F.2d 33, 36 (7th Cir. 1972).

Id. at 444.

We are also not persuaded by the Company's claims that it cannot operate the Dorchester transportation department safely and efficiently with gasoline powered trucks. The Company uses identical trucks to haul mobile homes manufactured at its other plants, and common carriers employed by the Company use gasoline powered trailer trucks on many occasions for the same purpose. Record at 118-19. In the absence of documentary evidence to support the Company's contention,[12] we cannot conclude that temporary restoration of the hauling operation would cause substantial and potentially devastating hardship to the Company.

On the contrary, we find that the restoration order issued in this case is essential to restore the status quo and to assure the efficacy of the Board's final order. Unless interim relief is provided, there is a strong likelihood that if and when the Board does order the Company to resume its trucking operations, the delay inherent in the Board's processes will cause that order to be ineffective. The Company may have sold or otherwise disposed of the trucks, and the drivers, entitled to reinstatement, may have moved or secured other employment. A restoration order issued by the Board under these circumstances might be regarded as unduly burdensome to the employer and unenforceable. *See Jays Foods, Inc. v. NLRB,* 573 F.2d 438 (7th Cir.), *cert. denied,* 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978); *NLRB v. Townhouse T.V. & Appli-*

ances, Inc., 531 F.2d 826 (7th Cir. 1976); *NLRB v. American Mfg. Co.,* 351 F.2d 74 (5th Cir. 1965); *NLRB v. Major,* 296 F.2d 466 (7th Cir. 1961). As a result, the Board would be unable to provide an adequate remedy to the discharged drivers, and the Company would be allowed to frustrate the policies of the Act by escaping legal sanctions for its unlawful conduct.

The harm caused by a failure to grant interim relief in this case would also extend to the Union and to unionism in general. As the district court noted:

> [The] Union will be harmed because the unit it once represented will have been irremediably dissipated. Unionism in general will be harmed because these drivers, having suffered as a consequence of their association with a union may decide to avoid any involvement with unions in the future. Moreover, truck drivers and other employees at [Company] plants throughout the country may take this incident as a warning * * * that if they choose to deal with the Union, they risk severe retaliation for which the Board can provide no effective remedy.

Wilson v. Liberty Homes, 500 F.Supp. 1120, at 1128-1129 (W.D.Wis.1980).

Finally, we note that absent a restoration order, any other interim relief would be of little value to either the employees or the Union. Any bargaining conducted following the dispersal of the trucking fleet would appear only in theory to involve negotiations for the resumption of the trucking operation and the reinstatement of the drivers. In such bargaining, the Union would no longer represent any active bargaining unit; the base of Union support would be scattered to the four winds. Negotiations about conditions of employment under these circumstances would be academic. On the other hand, if trucking operations have been restored in the interim, the Company will have a real economic incentive to negotiate about the terms of its retention, and the Union will have a substantial membership as a base for meaningful bargaining.

After considering all of these factors, we believe that the economic and operational impact of the restoration order on the Company is not weighty in comparison with the damage inflicted, in the absence of such an order, on the employees, the

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[11] The Company dispersed a fleet of 14 trucks. Ten of them were transferred to other locations, three were sold and one was wrecked. While it seems possible for the Company to substantially resume its operations by merely transferring the ten remaining trucks back to the Dorchester plant, the district court calculated the maximum capital outlay required to restore the fleet to its full strength. Assuming that the purchase price of a trailer truck unit is approximately $15,000 (as did the district court), four trucks would cost the Company $60,000. In view of the size of the Company, the extent of its operations and the nature of the violations purportedly committed here, we do not believe that this figure, which does not take into account the benefit the Company received upon the original sale of the trucks, represents an unfair or unduly burdensome expenditure requirement. In any event, the Company may be able to restore trucking operations at Dorchester without buying any new trucks (through leasing, transfer of trucks from other locations or other means). Further, the Company may not need 14 trucks at Dorchester to restore operations and to absorb the terminated drivers.

[12] *See* note 6 *supra.*

Union and the Board (through loss of its effectiveness). Restoration of the status quo ante, even if it requires the Company to resume a business activity which it has forsaken, is not too strong a response to these allegedly flagrant improprieties. Therefore, we conclude that the district court did not abuse its discretion by issuing an interim restoration-reinstatement order here.

2. The Bargaining Order

The district court's order directing the Company to recognize and bargain with the Union as the exclusive collective bargaining agent of the Dorchester drivers is also proper relief. The Board generally issues "a bargaining order to remedy a Section 8(a)(5) violation where an employer has committed independent unfair labor practices which make the holding of a fair election unlikely." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610, 89 S.Ct. 1918, 1938, 23 L.Ed.2d 547 (1969). Such an order is also appropriate relief in a Section 10(j) proceeding. *Morio*, at 218. As the Court of Appeals for the Second Circuit explained in *Seeler v. Trading Port*, 517 F.2d 33 (2d Cir. 1975):

> [W]hen the Regional Director makes a showing, based on authorization cards, that the union at one point had a clear majority and that the employer engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible, the district court should issue a bargaining order under Section 10(j). In such a case, the election process has been rendered so meaningless by the employer that the authorization cards are a clearly superior gauge of employee sentiment. A bargaining order then becomes a just and proper means of restoring the pre-fair labor practice status quo and preventing further frustration of the purposes of the Act.

Id. at 40.

In the instant case, all nine drivers executed Union authorization cards prior to the Union's request for recognition. After refusing either to recognize or to bargain with the Union, the Company subcontracted its hauling operations and discharged the drivers. The district court concluded that there was reasonable cause to believe that the Company's actions constituted unfair labor practices sufficiently egregious to prevent the possibility of a fair election and ordered the Company to bargain with the Union pending a final decision by the Board. We agree with the district court that in the absence of such an order,

> [t]he basic remedial purpose of the Act is apt to be frustrated in two ways. First, in the time it takes for the Board to finally rule on these charges and obtain enforcement of any consequent orders, support among the truck drivers for the Union may have eroded; erosion of support for the Union in turn may unfairly diminish the Union's bargaining strength if and when [the Company] is compelled to bargain with it. Second, the longer [the Company] is permitted to avoid negotiating with the Union, the longer the truck drivers will be denied the benefits of a collective bargaining agreement. This is an especially important consideration since the benefits the drivers seek are not economic only, but also concern the safety of their working conditions. Moreover, since a bargaining order requires only that [the Company] bargain, and not that it reach any particular agreement, [the Company will not suffer any irreparable harm from such an order.

Wilson v. Liberty Homes, 500 F.Supp. 1120, at 1131 (W.D.Wis.1980).

This court enforced a bargaining order under almost identical circumstances in *NLRB v. Townhouse T.V. & Appliances, Inc.*, 531 F.2d 826 (7th Cir. 1976). In that case, we observed that

> the Company discharged every driver because of his union activity and destroyed the bargaining unit by contracting out its work. No conduct more drastic, or more likely to have lingering, ineradicable effect can be imagined. Accordingly, the Board did not abuse its discretion in concluding that the Union's authorization cards provide a more reliable measure of the employees' desires than would an election, and that a bargaining order would best effectuate the policies of the Act.

Id. at 830. Although this case involves Section 10(j) relief rather than enforcement of a final order of the Board, our position on the nature of the Company's conduct and the propriety of a bargaining order has not changed. We do not believe that the district court abused its discretion by directing the Company to recognize and bargain with the driver's Union.[13]

3. The Cease and Desist Order

Finally, the district court declined to issue an order directing the Company to cease and desist from further coercing, interrogating, restraining or discriminating against its employees in violation of the Act. The court concluded, "the conduct which [the Regional Director] seeks to enjoin is already made illegal by the Act, and the Act provides an adequate procedure for redressing violations. Accordingly, it is unnecessary to enjoin such conduct." *Wilson v. Liberty Homes,* 500 F.Supp. 1120, at 1128 (W.D.Wis.1980). We believe that this con-

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clusion misinterprets the nature of Section 10(j) relief, and, as a result, the district court abused its discretion in denying the cease and desist order.

Unfair labor practices may always eventually be remedied by the Board. If the mere availability of ultimate unfair labor practice sanctions were held to obviate the need for interim relief, there would be no need for Section 10(j). Congress determined, however, that there may be circumstances in which interim relief, including a cease and desist order, may be necessary to prevent further violations of the Act pending resolution of the charges by the Board.

In the instant case, there is no guarantee that the Company will not resume its unlawful conduct when the employees exercise their right to bargain collectively under the district court's injunction. Any new unfair labor practice charges would have to be litigated through new, and probably lengthy, Board proceedings. Hence, the Company could continue to intimidate the employees and hamper effective union representation during the court imposed negotiations. An order enjoining the Company from committing future violations of the Act imposes no undue hardship on the Company and provides an effective means of eliminating the possibility of additional unlawful conduct.

Accordingly, we affirm the district court's order directing the Company to resume its trucking operations at the Dorchester plant, to reinstate the nine discharged drivers and to recognize and bargain with the Union as the driver's exclusive bargaining representative. We reverse the district court's order denying the Regional Director's request for a cease and desist order and remand with direction to enter such an order.

Beverly Enterprises, d/b/a Beverly Manor Convalescent Centers v. NLRB

661 F.2d 1095 (6th Cir.), October 8, 1981—242 NLRB 751

On petition to review Board Order

Before LIVELY and KEITH, Circuit Judges, and RICE,* District Judge.

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RICE, District Judge: Beverly Enterprises (Beverly), a California corporation, operates one of its convalescent care centers in Petoskey, Michigan. The Petoskey center is capable of providing 24-hour basic and skilled nursing services for up to 120 resident patients.

In this case, Beverly seeks review of an order by the National Labor Relations Board (the Board) directing Beverly to cease and desist from refusing to bargain with the certified exclusive collective bargaining representative of certain employees at the Petoskey home. Beverly admits the refusal to bargain but maintains that the

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Board's order should be set aside because the bargaining unit certified by the Board, upon which the order is predicated, is incorrect. By cross-application, the Board seeks enforcement of its order.

I

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[13] We find no merit to the Company's argument that an employer is under no obligation to bargain about "the decision to cease operations where a business shutdown is motivated by economic considerations." Co. Br. at 27. The Company confuses a decision to shut down a business operation with a decision to remain in business but to subcontract for the performance of a portion of the work formerly done by bargaining unit employees. While the former is not a mandatory subject of bargaining (at least where there is no anti-union animus), the latter is. *First National Maintenance Corp. v. NLRB,* ——— U.S. ———, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); *NLRB v. Townhouse T.V. & Appliances, Inc.,* 531 F.2d 826, 830–31 (7th Cir. 1976).

*The Honorable Walter H. Rice, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Beverly's Petoskey facility is a one-story structure divided into three residential wings. The residents at the home are assigned among the wings according to the degree of care they require. Patients in the new south wing generally require more care than those in the north wing, and patients in the south wing generally require less care than those in either the new south or north wings.

The nursing staff at Petoskey consists of seven registered nurses (RNs), seven licensed practical nurses (LPNs), one graduate nurse (GN), and approximately thirty-five aides and orderlies. The nursing service department operates on three shifts with staff assignments made among the wings during each shift in order to achieve a level of coverage appropriate for the time of day and required degree of patient care. For example, there is generally no more than one aide or orderly assigned to the south wing during any given shift, but there may be as many as four aides or orderlies and two nurses assigned to the new south wing during the same shift. Similarly, the nurses assigned to the new south wing are ordinarily RNs, although an LPN or the GN may be assigned there during the afternoon or night shift; the north wing nurses are ordinarily LPNs or the GN, but an RN may be assigned there on occasion.

Beverly uses a "charge nurse" system to oversee nursing care on the wings. Normally, the RNs, LPNs, and GN are all designated as charge nurses, and have the responsibility of overseeing patient care on the wings and during the shifts to which they are respectively assigned. When two nurses are assigned to a particular wing during a given shift, one of them will assume the role as *the* charge nurse. The charge nurse on the new south wing also oversees the south wing since there is ordinarily no nurse assigned to that wing. Moreover, if no nurse is assigned to the north wing, as has happened during certain shifts in the past, the new south wing charge nurse will oversee patient care on all wings.

The aides and orderlies answer to the charge nurse for their wing. The charge nurses ordinarily report directly to the Director of Nursing who, in turn, reports to the Administrator of the facility. The Administrator and the Director generally work weekday hours paralleling the day shift. When the Administrator and Director are away from the home, the new south wing charge nurse is the most responsible employee at the facility.

Beverly also employs a single Ward and Central Supply Clerk at Petoskey. The supply clerk is responsible for the medical supplies inventory and prepares billing data for patient charges. The clerk's office is located on the new south wing, which is physically remote from the administrative offices. Medical supplies are stored in a room on the north wing but, from time to time, the clerk releases supplied from the storeroom for inventory at the nurses station on the north and new south wings. Items of supply delivered to the nurses station have charge slips attached which are filled in with the patient's name when the items are used. The supply clerk maintains billing control through these slips and must contact the nurses regarding discrepancies. The nurses contact the supply clerk when in need of specific supplies. The supply clerk also assists the center's social worker in reviewing medical records, and fills in for the Administrator's secretary during absences.

II

In July, 1978, the United Steelworkers of America, AFL–CIO–CLC (the Union), filed two petitions[1] with the Board seeking certification as the exclusive bargaining representative for certain employees at the Petoskey center, including LPNs and the supply clerk. The petitions were consolidated and, on September 20, 1978, following three days of hearings, the Board's Regional Director issued a Decision and Direction of Election. In that Decision, the Regional Director determined that LPN charge nurses at Petoskey are not "supervisors" under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, and that the Ward and Central Supply Clerk at Petoskey has a "substantial community of interest" with other service and maintenance employees. The Regional Director therefore concluded that LPNs and the supply clerk would be included in the bargaining unit. The Board denied Beverly's request for review of the Regional Director's decision.

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[1] In one petition, the Union sought to represent "[a]ll service and maintenance employees including Licensed Practical Nurses * * *" but excluding "professional employees and supervisor at defined in the Act." In the second petition, the Union proposed a separate unit consisting solely of LPN's. The second petition was mooted by the parties' stipulation at the hearing that, if LPNs were not supervisors, it would be appropriate to include them in the first petition's unit.

The representation election was held on October 18, 1978. Thirty-one out of fifty-four ballots cast favored the Union, with one ballot challenged. Beverly's objections to the conduct of the election were overruled. The Union was certified by the Regional Director as the exclusive bargaining representatives of service and maintenance employees at Petoskey, including LPNs and the supply clerk, on December 1, 1978.

Thereafter, Beverly refused to bargain with the Union. On June 4, 1979, in unfair labor practice proceedings based upon Beverly's refusal to bargain, the Board declined to reconsider inclusion of the LPNs and supply clerk in the bargaining unit as certified in the 1978 representation proceedings. Since Beverly otherwise admitted its refusal to bargain with the Union, the Board issued its order directing Beverly to bargain.

This Court has jurisdiction over Beverly's petition for review, and the Board's cross-application for enforcement of the June 4, 1979, order pursuant to section 10 of the NLRA, 29 U.S.C. § 160. Because Beverly admits its refusal to bargain but justifies its conduct solely upon the over-inclusiveness of the certified bargaining unit, our review is effectively and appropriately directed only to the correctness of the Regional Director's September 20, 1978, bargaining unit determination, upon which the Board's June 4, 1979, order is based.[2] *See Boise v. Greyhound Corp.*, 376 U.S. 473, 476–77, 84 S.Ct. 894, 896–97, 11 L.Ed.2d 849 (1964).

III

Section 2(11) of the NLRA, 29 U.S.C. § 152(11), defines a "supervisor" as:

> * * * any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The kinds of supervisory authority enumerated in section 2(11) are in the disjunctive but, regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor. *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 580–82 (6th Cir. 1965); *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 87 (6th Cir. 1964). Supervisors are not employees under the NLRA, 29 U.S.C. § 152(3), and no employer may be required to bargain with his supervisors, 29 U.S.C. § 164(a).

In 1974, Congress indicated its awareness of the difficulties in applying the section 2(11) definition of supervisor to profession-

als in the health care field. The problem in application is due to the fact that health care professionals often exercise certain kinds of supervisory authority in treating those under their care, but they do so in the exercise of independent *professional* judgment not always strictly "in the interest of the employer." Nonetheless, Congress declined to amend section 2(11) to exclude health care professionals from the definition of supervisor, as was suggested at the time of the 1974 NLRA Health Care amendments. Rather, the Senate Labor Committee report accompanying the 1974 law indicated that the proposed exclusion was thought "unnecessary because of existing Board decisions." S.Rep.No. 766, 93d Cong., 2d Sess. ———, *reprinted in* [1974] U.S. Code Cong. & Ad.News 3946, 3951. The Committee expressed its approval of pre-1974 Board Decisions in the following manner:

> The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.

Id.

The question of supervisory status is "a mixed one of fact and law." *Cf. NLRB v. Yeshiva University*, 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1980) (respecting the similar, judicially-crafted exception for "managerial" employees). However, as should be evident from the array of criteria within section 2(11), the inquiry is predominantly factual. Further,

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[2] For this reason, where the meaning allows, we refer to the Board and Regional Director interchangeably.

> [e]veryday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board.

N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111, 130, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944) (citations and footnote omitted). For this reason, the Board's factual findings are conclusive upon review "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e), (f).

To the extent that the Board's conclusion upon its factual findings involve determinations of law, the Supreme Court has also said:

> Undoubtedly, questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of the specific application of a broad statutory term [e. g., "supervisor"] in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.

Hearst Publications, supra at 130–31, 64 S.Ct. at 860 (citations omitted). Thus, in sum, "the Board's determination that specified persons are 'employees' [or 'not supervisors'] under this Act is to be accepted if it has 'warrant [support] in the record' and a reasonable basis in law." *Id.*

In the present case, the Regional Director recognized that the evidence at the representation hearing regarding the supervisory authority of LPNs was "somewhat contradictory." Specifically, the Regional Director pointed to conflicting testimony regarding the existence of LPN authority: (1) to independently call in extra help, approve overtime, approve absences, and release employees early; (2) to submit effective evaluations of employees which have a bearing on promotions or wage increases; and (3) to actually discipline employees, or submit effective disciplinary reports which have a bearing on the discipline actually given employees. Despite the conflicting evidence, the Regional Director concluded that the LPN's exercise of authority in the first category of supervisory activities is purely routine, involving no independent judgment, and that the LPN's participation in the evaluation and disciplinary process, within the second and third categories, is more in the nature of a reporting function, not amounting to *effective* recommendations of appropriate personnel action.

Beverly challenges the Regional Director's findings in each of these areas as "clearly erroneous." On balance, however, we think that Beverly seeks review of the Regional Director's credibility determination and his assessment of the *conflicting* evidence presented to him, rather than a review based on the sufficiency of support for what the Regional Director did find. The statute precludes Beverly's approach to these matters. We must defer to the findings below if supported by substantial evidence on the record as a whole, "even though we might have decided the matter differently ourselves had the matter been presented *de novo.*" NLRB v. St. Francis Hospital, 601 F.2d 404, 422 (9th Cir. 1979).

For example, Beverly questions the Regional Director's treatment of an incident involving an employee who showed up for work late and in an intoxicated condition. The evidence indicated that an LPN ordered the employee to leave, saying something like "I do not want to ever see you again." Beverly says that this amounted to the discharge of the employee by that LPN, and the incident should, therefore, be viewed as an example of the supervisory authority of LPNs at Petoskey. However, the evidence also indicated that the center's Administrator was immediately informed of the incident, directed the LPN to document it, and then contacted the employee the next day to terminate him. The Regional Director reasonably concluded from this evidence that the *Administrator* discharged the employee, albeit upon the LPN's report, and that the LPN neither discharged him nor effectively recommended such action.

Similarly, Beverly questions the Regional Director's account of the Administrator's testimony indicating that LPNs have had certain kinds of supervisory authority, of the type within the first category, above, "if at all, only since May of [1978]." We do not think, as Beverly contends, that this account indicates a misunderstanding of the Administrator's testimony, or that it ignores the significance of present authority under the law. As we read the Regional Director's decision, that account, in context, does not accept the Administrator's testimony, but merely characterizes it in its best light for comparison with other evidence on the record submitted by Beverly, which evidence did not sufficiently show that there had been any change in LPN authority in May, 1978, contrary to the Administrator's testimony.

We need not detail Beverly's other contentions regarding LPN authority in the three categories enumerated above. Ultimately, the question is not whether the LPNs at Petoskey have authority to adjust other employee schedules in accordance with the vagaries of manpower needs. They certainly do, at least on occasion, and the Regional Director so found. The crucial question is whether the exercise of such authority is routine or involves independent judgment. The Regional Director found that in each instance, the exercise of authority was routine. This finding has warrant or support in the record taken as a whole and will not be disturbed. Similarly, the question is not whether the LPNs play any part in the employer's determination to retain, reward, or discipline other employees. The LPNs certainly do participate in these personnel actions, by submitting evaluations and disciplinary reports, and the Regional Director so found. The crucial question is whether the LPNs participation in these personnel actions amounts to *effective* recommendations that the retention,

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reward, or discipline be given. The Regional Director found that they did not. Again, these findings have warrant or support in the record and will not be disturbed.

IV.

The Board's conclusion regarding the nature of LPN authority, in the three categories of supervisory activity enumerated, above, is not the only subject of our review. The Regional Director also found, without dispute, that the LPNs at Petoskey have authority to independently assign and direct the work of aides and orderlies within their wings. But the Regional Director noted that the exercise of this authority is "based on the Charge Nurse's assessment of the employee's abilities and the needs of the patients." He further stated:

> In determining whether various nursing personnel are supervisors, the Board has cautioned that the Congressional directive to distinguish true supervisory authority from the "professional" judgment and discretion involved in patient care by RNs and LPNs must not be ignored. [Citation omitted] * * *. [T]he LPNs here make assignments of work, report infractions, write evaluations, in conjunction with their patient care responsibilities. On balance, I find the LPNs' duties to be primarily those concerned with patient care and their actions to be taken pursuant to that care, and not as the product of independent judgment.

As explained below, we have a substantial degree of difficulty in reconciling the ambiguities in this passage and, as a result, in understanding exactly what the Regional Director meant by it. However, we do think that its tenor and possible intended meaning reflect a basic misunderstanding or misapplication of the "Congressional directive" in 1974. For this reason, we cannot conclude that the Board's determination to include LPNs in the Petoskey bargaining unit has a "reasonable basis in law," and, therefore, the Board's order will not be enforced.

As the Regional Director correctly noted, it is the intent of Congress in the health care field that the Board "distinguish true supervisory authority from the 'professional' judgment and discretion involved in patient care * * *." The distinction must be made, not because professional care is a matter of routine involving no independent judgment, but because the independent judgment which is necessarily involved in patient care, even if otherwise supervisory in character, is not always strictly "in the interest of the employer." The exercise of proper independent professional judgment in directing employees, therefore, should not *alone* align the professional with his employer as a supervisor.

Although the Regional Director correctly stated the basic principle, his decision does not reasonably indicate that he correctly applied it; his articulated reasons do not support the result reached. Thus, it is at least ambiguous for the Regional Director to speak of the " 'professional' judgment and discretion involved in patient care" and then find that the LPNs are not supervisors because their supervisory activities are "concerned with patient care * * * and not * * * the product of independent judgment." Either the LPNs are not supervisors because they do not exercise independent judgment in their assignment and direction of the aides and orderlies, or they are not supervisors because they exercise independent judgment professionally, but not in the interest of the employer.

We conclude from the tenor of the Regional Director's decision that the did not accept either of these rationales but, instead, may have reached his determination to include LPNs in the bargaining unit *simply because* their supervisory activities in assigning and directing subordinate employees were "in conjunction with their patient care responsibilities." The Regional Director failed to clearly articulate whether he had determined that LPN activities respecting patient care either did not involve independent judgment, or did involve independent professional judgment not in the interest of the employer, thereby leaving the impression that he considered the "conjunction with patient care" *alone sufficient* for nonsupervisory status.

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This characterization of the Regional Director's approach is also evidenced by other parts of his decision. As indicated in note 1, *supra*, the Union did not seek to represent any "professional employee" as defined in the NLRA. *See* 29 U.S.C. § 152(12). Accordingly, the general bargaining unit definition to which the parties stipulated, excluded professional employees. Although the parties did not stipulate to the supervisory status of RNs at Petoskey, the Regional Director excluded them from the unit as professional employees because that status "generally is accorded to RNs." Yet when the Regional Director discussed LPN authority to assign work, he spoke of the " 'professional' judgment and discretion involved in patient care *by RNs and LPNs.*" (It is also interesting to note that the 1974 legislative history regarding the supervisory status of health care "professionals" mentions RNs, but not LPNs, contrary to the Regional Director's statement.) Thus, it would appear that the Regional Director might have excepted LPNs from supervisory status, not because they exercise discretion *as professionals*, but because a sort of "professional" judgment and discretion is ordinarily involved in patient care. In other words, the Regional Director might have included LPNs in the unit *solely because of their patient care responsibilities, and not because any exercise of their discretion in caring for patients is not in the employer's interest.*

The position taken by the Board, in opposition to Beverly's contention that the unit determination in this case constitutes substantial departure from Board precedents, is also very significant in this regard. The Board argues in brief that the precedents upon which Beverly relies for the indicated proposition "have only limited precedential value" because they were decided prior to the 1974 NLRA Health Care amendments. This argument reflects a clearly erroneous belief that the 1974 amendments somehow altered the pertinent law, or changed the way in which the Board should approach the question of the supervisory status of health care professionals.

The fact is that although Congress was requested to effect change in the law in this area in 1974, it specifically declined to do so. See, *supra*, at 1098–1099. Moreover, Congress specifically approved of the Board's pre-1974 decisions and pre-1974 analytical method of dealing with the supervisory classification of health care professionals. Thus, rather than diminishing the persuasiveness of the pre-1974 health care cases upon which Beverly relies, Congress' action in 1974 enhances the "precedential value" of those decisions.[3]

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[3] We do not mean to suggest that a substantial similarity in circumstances between this case and any of the pre-1974 decisions upon which Beverly relies would be reason enough to conclude that the Board should have excluded the LPNs from the bargaining unit, herein, as it excluded other nurses in the pre-1974 cases. We are acutely aware that the question of supervisory status predominantely involves a factually intensive inquiry into the circumstances of each individual case, and that even a minor difference in the evidence (which would appear insignificant to a layman or to a court) might, in the Board's expert sense of things, properly be considered sufficient reason to reach a different outcome. For example, in *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969), the Board determined that the nurses' evaluations and training reports of subordinates were uniformly the sole determinant of subordinate retention and merit pay increases. In the present case, the evidence indicates (as the Re-

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The Board's erroneous belief that the law regarding the supervisory status of health care professionals changed in 1974, further strengthens our conclusion that the Regional Director may have accorded nonsupervisory status to the LPNs in this case *simply because* their activities in assigning subordinates relates to patient care. This standard does not correctly state Congress' intent as evidenced by the 1974 legislative history. On the contrary, it extends the exception for the "direction [of] employees in the exercise of professional judgment * * * incidental to the professional's treatment of patients, * * * *not* * * * *in the interest of the employer* [,]" to effectively encompass nearly every activity by a health care professional who has authority to direct employees and also has patients under his care.

Congress obviously did not intend to broadly accord nonsupervisory status in the manner suggested by the Regional Director. As we have indicated, the exercise of professional judgment in directing employees when treating patients is not always the exercise of authority strictly in the interest of the employer. But, on the other hand, the exercise of professional judgment in directing employees and the interest of the employer are not always mutually exclusive. Thus, in *Avon Convalescent Center, Inc.*, 200 N.L.R.B. 702 (1972), *enforced per curiam*, 490 F.2d 1384 (6th Cir. 1974), of which Congress implicitly approved in 1974, and upon which Beverly relies, herein, certain nursing home nurses were deemed to be supervisors because they assigned and responsibly directed other employees. In reaching this determination, the Board said:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section *must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.* Furthermore, power to enforce important personnel policies, rules, and regulations is certain to require the exercise of independent judgment. Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules, short of such authority, is compelling evidence that their direction and assignment of employees is substantial and meaningful.

Id. at 706 (emphasis added).

We think that the Regional Director's decision in the present case, regarding the non-supervisory status of LPNs at Petoskey, suggests a *sub silentio* departure from the analytical method employed by the Board, pre-1974, and, therefore, a substantial deviation from the "Congressional directive" in 1974. It is incumbent upon the Board to distinguish between professional direction of employees and direction in the interest of the employer. The confusing and "conclusory rationales," *NLRB v. Yeshiva University*, 444 U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1980), employed by the Regional Director in addressing that matter in this case, do not indicate that the distinction was made, but do indicate that the Regional Director simply decided that LPN activity "in conjunction with," "concerned with," or "pursuant to" patient care responsibilities *necessarily would not be supervisory.* This approach has no reasonable basis in the law.

Since we have determined that the Board's inclusion of LPNs in the Petoskey bargaining unit lacks an articulated, reasonable basis in the law, the Board's order that Beverly must bargain with that unit will not be enforced.

Further, although the exclusion of a number of votes equal to the seven LPNs at issue would not, mathematically, have altered the result of the representation elec-

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gional Director found) that the Director of Nurses only accepted the nurses' evaluations if they were not critical, and in the only case on record where a subordinate received a poor evaluation, the Director of Nurses sought out other information. This difference in the evidence is sufficient to reconcile the Board's determination in *Sherewood* that the nurses did *effectively* recommend personnel actions, with the determination that the LPNs do not *effectively* recommend such actions at Petoskey. Similarly, in *Rosewood, Inc.*, 185 N.L.R.B. 193 (1970), the Board concluded that LPN charge nurses who occupied positions in a managerial heirarchy similar to Petoskey, were supervisors because of the *effectiveness* of their authority to, *inter alia*, recommend wage increases, discipline, hiring and discharge. The Court assumes that the factual effectiveness of the authority in *Rosewood* had support in that record taken as a whole, just as we conclude that the *lack* of such *effective* authority has support, herein.

But again, our concern is not with the Board's assessment of the evidence in this case respecting these kinds of supervisory activity, or with the Board's ability to distinguish the facts in the pre-1974 cases. Our concern is with the Board's present understanding of the applicable law, and the lack of an articulated, reasonable basis under the law for reaching the conclusion that LPNs at Petoskey do not assign or direct work as supervisors.

tion upon which the bargaining order is based, there is a substantial possibility that the exclusion of LPNs from the bargaining unit might have produced different votes by other unit members and thereby altered the election's outcome. For this reason, we do not think it appropriate for us to enforce the order with any modification of the unit definition, even if we would definitely conclude that LPNs should not be included in the unit. We conclude that the bargaining order must be set aside and the case returned to the Board for further proceedings consistent with this opinion.

V

We find no error in fact or law in the Board's determination to include the supply clerk in a Petoskey bargaining unit which included LPNs. It is noted that, in 1974, Congress expressed its approval of the Board's "preventing proliferation of bargaining units in the health care industry," and, specifically, the Board's "trend toward broader units" in that field. S.Rep.No.766, 93d Cong., 2d Sess. ——, *reprinted in* [1974] U.S.Code Cong. & Ad.News 3946, 3950. Although the supply clerk at Petoskey might in the abstract, be considered more of a "clerical" employee [4] than a service or maintenance employee, the record is sufficient to establish a "community of interest" with other members of the unit (as the unit had otherwise been defined by the Regional Director) pursuant to this "Congressional directive."

Therefore, were it not for the fact that we question the lack of an articulated basis for including LPNs in the unit, we would defer to the Board's expert findings and conclusions in the matter of the supply clerk (which do have "warrant in the record and a reasonable basis in the law"). However, the Regional Director's decision is unclear as to whether the supply clerk should be included in the unit *solely* because of an alliance in interest with aides and orderlies in the unit,[5] or also because of the clerk's daily contacts with all nursing personnel at Petoskey [6] including the LPNs whose inclusion in the unit we question. In setting aside the order and returning the matter for further proceedings respecting the LPN's inclusion, we expect the Board to address this aspect of supply clerk's inclusion in the unit should the Board determine that LPNs are not to be included.

Enforcement of the June 4, 1979, order of the Board is denied. The order is set aside.

It is the order of this Court that the captioned cause be remanded to the Board with specific instructions that the Regional Director review the record of the proceedings leading to the September 20, 1978, Decision and Direction of Election in order to reconsider inclusion of the LPNs and the supply clerk in the bargaining unit, by making specific findings on the following questions:

1. Do LPN activities respecting patient care involve independent professional judgment? If not, LPNs are properly included within the bargaining unit.
2. If so, is that independent professional judgment exercised primarily in connection with patient care, not in the interest of his or her employer, *or* is it exercised in the interest of his or her employer?

If the second question is reached and answered that the independent professional judgment of a supervisory character is exercised primarily in connection with patient care, not in the interest of his or her employer, then, pursuant to the above opinion and the present state of the law, LPNs at Petoskey are properly included within the bargaining unit. On the contrary, should the second question be reached and answered that the exercise of the LPNs' independent professional judgment of a supervisory character is in the interest of his or her employer, and not merely in the interest of patient care, then, equally clearly, LPNs at Petoskey should not be included in the bargaining unit.

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[4] The general bargaining unit definition to which the parties stipulated excludes "office clerical employees."

[5] The supply clerk wears the same uniform and badge, and receives approximately the same wage and benefits as aides and orderlies.

[6] Beverly's two challenges to the Regional Director's factual findings regarding the supply clerk are both related to the question of the extent of the supply clerk's contacts with other unit members. Both are without merit.

First, Beverly contends that the Regional Director erred in concluding that during the 40% of the time the clerk is not in her office, she is "on the various wings" in contact with other unit members. Beverly says that the 40% of the clerk's time is actually divided between the central storeroom, social worker's office and administrative offices. Unfortunately, the Regional Director did not conclude that 40% of the clerk's time is spent on the wings, but only 25% to 30%. This finding is supported by the Administrator's testimony. The remaining 10% to 15% of the clerk's time may well be spent in the other work areas Beverly identifies.

Second, Beverly contends that the Regional Director erred in finding that the supply clerk has an "accounting function" in common with other unit employees. Beverly says the other unit employees have no such function. But, again, the Regional Director did not reach the conclusion Beverly ascribes to him. The Regional Director found that the supply clerk "must work directly with [other unit members] to maintain proper accounting for supplies used * * *." In other words, regardless of the other employees' functions, the clerk's accounting function necessitates her contacts with them. This finding is supported by the record.

Should the Board, upon reconsideration, determine that LPNs are not to be included in the bargaining unit, the Board is to state, upon review of the hearing transcript, whether the supply clerk is to be included in the bargaining unit because of an alliance and interest with aides and orderlies in the unit alone, *or* also because of the clerk's daily contact with all nursing personnel at Petoskey. If the supply clerk's inclusion into the bargaining unit is strictly because of an alliance and interest with clerks and orderlines in the unit, the Board's original decision should be affirmed. On the contrary, should the Regional Director conclude that the supply clerk's inclusion in the bargaining unit was also because of daily contact with all nursing personnel at Petoskey, including the LPNs which, upon reconsideration, are found not to belong in the bargaining unit, the supply clerk's inclusion in the bargaining unit must be reversed or, at least, reconsidered.

Excavation-Construction, Inc. v. NLRB

660 F.2d 1015 (4th Cir.), October 8, 1981—248 NLRB 649

On petition to review Board Order

Before BRYAN, Senior Circuit Judge, and WIDENER and MURNAGHAN, Circuit Judges

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WIDENER, Circuit Judge: The petitioner-employer, Excavation-Construction, Inc. (Company) seeks review of an order of the National Labor Relations Board (Board) finding that it violated §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by unilaterally implementing a change in the pay rate for Saturday work on its A-14 Rockville, Maryland project; that it violated §§ 8(a)(1) and (3) by discharging three employees engaged in a protected strike; that it violated §§ 8(a)(1) by interrogating Union Steward Gray about an upcoming union meeting; that it violated §§ 8(a)(1) and (5) by unilaterally increasing the pay rate from $8.30 per hour plus a benefits contribution of $.84 per hour to a straight wage of $9.14; and that the strike by Local 639 on August 14, 1978 was an unfair labor practice strike. The Board has applied for enforcement of its order under § 10(e) of the Act, 29 U.S.C. § 160(e). We deny enforcement.

The Company is engaged in general hauling and excavation work in the Washington, D.C. area. Teamsters Local 639 is the labor organization that has been recognized as the representative of its approximately 65 truck drivers.

In the spring of 1978, Local 639 began collective bargaining with a multi-employer bargaining association named Capital Area Trucking Association (Association) as well as with the Company on whose behalf the Association did not bargain. Prior to these negotiations, the Company was bound by a collective bargaining agreement between the Union and Construction Contractors Council. This prior contract contained provisions for time and a half pay for Saturday work without regard to other work done that week. In the negotiations with both the Association and the Company, the Saturday time and a half pay provision was an area of major dispute between the parties. The employers sought a make-up day provision, which is a provision allowing time and a half pay for Saturday except that in the event that inclement weather prevented normal work during the week, Saturday work would be paid at time and a half only for hours in excess of 40 during that week or 8 on the make-up day.

The negotiations between Local 639 and the Association concluded with a make-up day provision included. That provision was later rejected by the union members and the previous time and a half rate for Saturday was substituted.

In April 1978, Larry Campbell, the Company's General Manager, James I. Williams, Local 639 Vice President, and others met to begin negotiations on a new contract between the Union and the Company. As negotiations between Local 639 and the Association were ongoing at that time, the parties agreed to wait and see how those negotiations resulted. On May 19, negotiators for both sides met again, with the Union giving the Company a copy of the Association agreement, which at that point had not been ratified by the membership. That agreement contained a make-up day provision. Another meeting occurred on May 31, with the Company noting that it wanted a make-up day provision. Nothing definitive resulted, however, since the Association agreement had still not been ratified. A June 21 meeting resulted in nothing being decided. On June 23, the Association agreement was ratified absent the make-up day provision.

The Company claimed that it needed the make-up day provision because it had entered into a contract the previous May for the A-14 Metro project in Rockville, Maryland. That bid was made on the basis of a make-up day provision. Additionally, a supplemental collective bargaining agreement for other workers on that project contained language requiring time and a half

pay if any other employees received the same.

On July 6, 1978, the Company sent a telegram to the President of Local 639 which stated:

> SUBJECT: METRO JOB-A-14
> DUE TO COMPETITIVE FACTORS, AND FOR OTHER GOOD AND SUFFICIENT ECONOMIC REASONS, IT IS THE INTENTION OF EXCAVATION CONSTRUCTION, INC. COMMENCING SATURDAY JULY 15 TO PAY STRAIGHT TIME FOR ALL HOURS WORKED EXCEPT TO THE EXTENT THAT EMPLOYEES WORK MORE THAN 40 HOURS IN ANY ONE WORK WEEK OR MORE THAN 8 HOURS IN ANY WORK DAY, BUT NOT BOTH. THIS MEANS NO PREMIUM PAY, AS SUCH, EXCEPT AS STATED. SHOULD YOU HAVE ANY QUESTIONS PLEASE CALL ME.

On July 11 another meeting occurred. The Company pointed out its problem with A-14 and stated that it would accept the Association contract if it had a make-up day provision for the A-14 project. Local 639 President George indicated that he just could not go to his members with such a request since they knew that everyone else would be getting premium pay. The Company asked for a concession the Union might accept but none was offered. The Union wanted the Association contract with no make-up day provision on A-14. The meeting ended with Union President George stating "I'll take it back to my people but I can tell you right now, they are not going to buy it."

On July 13, George sent a letter to Campbell protesting the Company's actions and stating that the Union would meet regarding the action of the Company as to the Saturday pay provision for A-14 as of July 15, which the Union considered unlawful unilateral action on the part of the Company. George also advised that a vote would be taken regarding a strike if the proposed change with respect to Saturday pay on A-14 was implemented. On July 14, the Company sent a telegram in reply which included its last and final offer, which was the terms of the Association contract with the exception of a make-up day provision for A-14. The Union met on the night of the 14th. After the Company's telegram was read to the members, the membership voted to reject the Company's last and final offer. The vote was 26-5. The following day, Saturday, July 15, the Company implemented the wage change for job site A-14.

Weekend work for the Company was voluntary, and no pressure was placed on employees to work on weekends. On Friday of each week, a determination was made as to how many employees would be needed to work the following day. Employees then voluntarily signed up to work. Once an employee had signed up, however, he was subject to dismissal if he did not show up for work. Employees did not know until their arrival at work on Saturday morning where they would be working. That decision was made by management on Friday night. Employees were notified of their Saturday job assignments by trip tickets placed in their respective mail slots.

On Saturday, July 15, drivers Robinson, Suggs, and Wellons reported for work after volunteering the day before. All three were assigned to job site A-14. Robinson was the first to arrive for work that day. Upon finding out his job assignment, he told Walter Jones, the truck superintendent, that he would not work A-14 because he had worked less than 40 hours that work week and therefore was not assured of receiving time and a half.[1] Robinson asked to work at any other job, but Jones stated that no other jobs were available. Suggs and Wellons arrived shortly thereafter, and, like Robinson, refused to work job A–14. All three stated that they would work anywhere else but not A–14.

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[1] There is a conflict in the evidence as to whether the three workers had been told the day before that they would be paid time and a half. The Administrative Law Judge concluded that they had not been so told, and the Board accepted this finding.

The three men returned to work the following Monday. They were all asked why they had refused to work the previous Sat-

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urday. Wellons stated that on Friday night they were told by the Union not to work for straight time on Saturday. Each agreed, noting that they refused to work because they were not assured that they would get paid time and a half. All were then discharged for refusing to work on the A–14 job on the past Saturday.

Negotiations between the Company and Local 639 continued in August, with the Company still wanting a make-up day provision and the Union opposed. At an August 9 meeting the Company asked the Union if it wanted anything in return for a make-up day provision. The Union responded with a request for a $.50 per hour wage increase for all employees. These August talks additionally included a discussion of the three discharged employees, with the Company agreeing to reinstatement but no back pay. The Union also rejected a me-too offer.

On August 12, 1978, Campbell met with Union Steward Gray in Campbell's office. The two discussed the three discharged employees, with special attention paid to Suggs because Gray thought that he had gotten a bad deal from the firing. Campbell inquired as to whether a vote would be taken at the Union meeting scheduled for the next day. Gray stated that he did not know of any vote being taken at that meeting. Gray stated that he thought the meeting was going to deal with the three discharged employees and with a problem some of the employees were having regarding their pay. The meeting concluded after a discussion of the events leading up to the dismissal of the three drivers.

On August 13, 1978, the Company's employees belonging to Local 639 voted to strike. Among the reasons behind the strike which were discussed at that meeting were the failure of contract negotiations because of the Company's insistence on a make-up day provision and the dismissal of the three employees. The strike began the following day. On August 16, 1978, the Company advertised in Baltimore and Washington newspapers for replacements for the strikers. The Company advertised the pay at $9.14 per hour.[2]

On August 18, the Company and the Union met. The Company stated its intention to hire permanent replacements if the strike did not end. Campbell told striking workers the same thing on August 19. He spoke to the workers at the picket lines, inviting them to return to work and informing them that new workers would be hired if they did not return. He also told them that the health and pension benefits would not be paid but instead would be included in the pay checks. This $9.14 wage rate became effective on August 21. The Company had not paid premium pay for Saturday work on A–14 except for more than 40 hours per week or 8 hours per day beginning July 15th.

I Impasse

The Administrative Law Judge found that impasse had been reached before the Company changed the Saturday pay for A–14. Therefore, he concluded the change was not an unfair labor practice. The Board, however, disagreed, holding that no impasse existed when the Saturday wage rate was altered. Therefore, the Board found that the Company had committed an unfair labor practice in violation of § 8(a)(1) and (5).

We find that there is not substantial evidence to support the Board's decision. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The evidence clearly shows that the make-up pay provision was the sticking point and centerpiece of the Association negotiations as well as the negotiations at issue here. The parties mutually deferred negotiations on the issue until the Association agreement was worked out, thus hoping to take advantage of the negotiations advanced there. Such deferment does not indicate a lack of negotiations or refusal to negotiate but merely a desire to take advantage of multi-employer negotiations progressing contemporaneously. A defer-

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ment of negotiations by mutual agreement, as here, is no evidence of unwillingness to negotiate. And it is acknowledged by all that the Company offered to accept the Association agreement with the exception of the Saturday pay provision. In addition, the make-up day provision was specifically discussed at negotiation sessions between the Company and Local 639 after the Association agreement was ratified. There, Union President George said that his members would not accept such a provision. In reality, they did not.

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[2] Under the old contract between the Company and Local 639, the wage rate was $8.30 per hour plus $.84 per hour being paid for benefits. There is no dispute as to these facts.

At the time the Saturday overtime change was implemented, even if not when proposed, an impasse existed.[3] The Company had made its last and final offer which the Union had voted to reject. At that point, it cannot be said that there was a realistic possibility that negotiations would be fruitful. *Taft Broadcasting Co.,* 163 NLRB 475 (1967), pet. for review den. *sub nom. American Federation of Television and Radio Artists v. NLRB,* 395 F.2d 622 (D.C. 1968). We especially note that there is no allegation made by the Board that the Company did not bargain in good faith; it only alleges that the Company did not bargain to impasse. There is not substantial evidence in the record to support the Board's conclusion that the Company changed the Saturday wage rate before impasse was reached. The Union had considered and voted to reject the Company's last and final offer before the Saturday wage change was implemented by the Company. Thus, the parties were at an impasse with the Union's rejection of the offer.

II Discharge of Employees

The Board adopted the Administrative Law Judge's conclusion that the three employees were improperly discharged in violation of § 8(a)(1), 29 U.S.C. § 158(a)(1), because they were involved in protected concerted activity, and § 8(a)(3), 29 U.S.C. § 158(a)(3), because of their union membership or activities. He found the Company had violated both §§ 8(a)(1) and 8(a)(3). In reaching such a conclusion, the Administrative Law Judge rejected the Company's contention that the workers were involved in an intermittent, partial strike unprotected by the Act. The Administrative Law Judge found that the three workers were involved in a one-day strike, not in an intermittent one. It is clear that the three men refused to work and only refused to work on the A-14 job. The question is whether such action was concerted activity protected under the Act.

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right to engage in concerted activity. An employer violates § 8(a)(1) of the Act when he discharges employees engaged in concerted activities protected by § 7. Such activities are generally protected by the Act unless they are unlawful, violent, in breach of a contract, or otherwise indefensible. *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17, 82 S.Ct. 1099, 1104, 8 L.Ed.2d 298 (1962); *NLRB v. Waco Insultation,* 567 F.2d 596 (4th Cir. 1977). There is no question here but that the refusal to work of the three discharged drivers was concerted. The Union meeting of July 14th decided that question. The only question left then is whether their refusal to work is protected. If it is, the Company violated the Act by discharging these employees, and enforcement would be proper. Work stoppages in protest of working conditions are protected by the Act. *Washington Aluminum,* supra.

This protection, however, does not extend to partial, recurrent, or intermittent work stoppages. *G. C. Conn Ltd. v. NLRB,* 108 F.2d 390 (7th Cir. 1939). In *Conn,* employees refused to work overtime because of a dispute regarding the rate and hours for overtime pay. Without giving the employer prior notice, the employees left the work place at the end of the regular work day even though overtime work was scheduled for that evening. There was evidence they intended to do the same each day until their demands were met. The next day those employees returned to work. All of the employees who signed a statement that they would not work overtime according to company rules were discharged. The court of appeals refused to enforce the Board's order that the employees were engaged in protected concerted activity, noting that the employees had two choices available to them regarding their wage dispute. They could continue to work and negotiate further or they could strike. They could not, however, do both. By doing both they would be working "upon terms prescribed solely by [themselves]." *Conn* at 397. The Act does not protect such conduct by employees.

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[3] We need not consider whether an impasse existed prior to the 14th for it in fact existed at least with the Union's rejection of the Company's last and final offer at the Union meeting on July 14th.

This court followed *Conn* in *Home Beneficial Life Ins. Co. v. NLRB*, 159 F.2d 280 (4th Cir.), cert. den. 332 U.S. 758, 68 S.Ct. 58, 92 L.Ed. 344 (1947), a case indistinguishable on its essential facts from the case now before us. The employer in *Home Beneficial* had a rule that agents had to report to the office each morning before serving their respective routes. A group of agents advised the company that they would report on Wednesdays and Thursdays only, but not the other days. They were discharged when they did not report to the office in accordance with the company rule. We upheld the lawfulness of their discharge because they were seeking to set the terms of their own employment. In *NLRB v. Mt. Clemens Pottery Co.*, 147 F.2d 262 (6th Cir. 1945), the Sixth Circuit reached a like result for employees who refused to work overtime, as did the Eighth Circuit in *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946), for employees who refused to perform a part of their clerical duties.

The cases point to a distinction between single refusals to work over working conditions and recurrent refusals to perform a particular job. *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074 (5th Cir. 1979); *First National Bank of Omaha v. NLRB*, 413 F.2d 921 (8th Cir. 1969), the first being protected activity, the latter not being protected. Following this reasoning, the Administrative Law Judge stated that the men did not know at what rate they would be paid for working Saturday, July 15, and that they went to work that day to find out. If straight time had been paid, the men would refuse to work that day. In the future the men would simply not volunteer for weekend work, a permissible decision under company rules. Thus, he concluded the three employees were engaged in a one-day strike protected under the Act. The Administrative Law Judge noted that their return to work the next Monday showed that the strike was of limited duration. The holding of the Administrative Law Judge was upheld by the Board.

There is no basis in the record for such a conclusion. The union members, including the three affected employees, knew that A-14 would only pay straight time. Campbell met with the employees and told them of the proposed change on July 14. At the Union meeting on the night of the 14th, the Company's telegram was read in which it was stated, with unmistakable clarity,[3A] that straight time would be paid on the A-14 job, except for more than 40 hours that week or 8 hours that day. The members voted and specifically rejected those terms and agreed not to work weekends for straight time. As Union Steward Gray stated, "[w]e just made an agreement not to work on Saturdays and Sundays at straight time." Clearly, the employees knew what the Saturday wage rate would be for the A-14 job when they voted against accepting it. Additionally, we note the Administrative Law Judge, with the concurrence of the Board, rejected the three men's contention that they had been promised time and a half for working that particular Saturday.

Likewise, there is no substantial evidence in the record to support the conclusion that the men would simply not volunteer for weekend work from then on. Not only is there no evidence to that effect in the record, such a conclusion is inconsistent with the affected employees' own testimony. The men's only refusal was to work the A-14 job on weekends. They would work any other job. In fact, all three sought to work at another job site on the Saturday in question. The testimony is uncontradicted that the men would have worked overtime

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at any job site but A-14. There is nothing in the record from which it may be inferred that the refusal to work was confined to the particular Saturday in question. The vote at the union meeting the night before was not so limited. The men, then, were seeking to continue to work under terms prescribed by themselves alone, and were not engaged in a single, isolated, concerted protest against conditions of employment. Their activity is not protected by the Act.

III Interrogation of Gray

The conversation in question took place the day before the August 13 meeting at which the Union voted to strike. Campbell, of course, knew of the previous July meeting at which the Union voted to reject the make-up day provision concerning Saturday pay. It is obvious from the record also that everyone knew of the August 13 meeting. The entire

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[3A] The Company's July 6 telegram left no room for doubt.

conversation was tape recorded and transcribed, so we do not have to deal with problems of credibility as to what was said. The inquiry Campbell made of Gray concerning the August 13 meeting was this: "Do you know what the vote going to be tomorrow. I mean what's its going to be about?" Gray answered that he did not know of any vote tomorrow, that the meeting was going to be about the make-up day and apparently some complaints about some employees not getting paid due to sickness of one Jr., Jr. being a clerical or supervisory employee. The vast majority of the conversation concerned the three drivers who had been laid off and Gray's efforts especially to get the Company to put Suggs back to work, Gray being convinced that Suggs was operating under a misunderstanding in signing up for work on the Saturday in question, although the other two might not have been. There was no threat, expressed or implied, in the conversation, and even Gray in his testimony did not intimate such. Neither did the Board find any threat in the conversation. The only thing the Board takes exception to in the conversation is that Campbell wanted "to find out what the union was voting on," and that he gave no assurances to Gray against reprisals. An interrogation, not itself threatening, is not an unfair labor practice unless it meets certain fairly severe standards. *NLRB v. Dorn's Transportation*, 405 F.2d 706 (2d Cir. 1969). The proper inquiry in such a case, as held in *Dorn's Transportation*, is that set out in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). This circuit in *NLRB v. Consolidated D Elec. Co., etc.*, 469 F.2d 1016 (4th Cir. 1972), n. 9, p. 1020, has also adopted the *Bourne* standards as the "test to be applied to an interrogation in passing on whether it will support a finding of impropriety under the Act." The *Bourne*, p. 48, standards are:

(1) The background, i.e., is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e., how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g., was employee called from work to the boss' office? Was there an atmosphere of "unnatural formality"?

Analyzing those standards against the facts here, we see that the Board has found a mere inquiry, without assurance against reprisal, to be an unfair labor practice although unaccompanied by threats of reprisal or otherwise. This is not consistent with *Bourne* and *Consolidated D.*

The Company had no history of employer hostility to unions or discrimination. In addition, it was guilty of no unfair labor practices in the dispute at hand. Cf. *Winchester Spinning Corp. v. NLRB*, 402 F.2d 299 (4th Cir. 1968).

Campbell did not appear to be and was not in fact seeking information from Gray upon which to base taking action against individual employees.

While Campbell was the General Manager of the Company, Gray was a Steward of the Union. Nothing in the conversation indicates that Campbell tried to exert any pressure on Gray to take any particular action with respect to any union activity in the conversation. Absent some kind of otherwise illegal conduct, we are of opinion there is no reason a company official may

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not talk to a union official about a labor dispute.

The conversation apparently took place in Campbell's office, but there was no atmosphere of unnatural formality shown by the transcript of the conversation or any testimony with respect to the meeting. Indeed, the parties have seemed satisfied to let the transcript speak for itself.

To Campbell's question as to what was going on, Gray answered, apparently truthfully, that the meeting concerned the make-up day and the complaint of some of the employees about not receiving pay due to the sickness of Jr. This is verified by Gray's testimony in his brief and only mention of the reason for the August 13 union meeting.

Thus, the Board's holding that a mere interrogation with no intimation of threat or reprisal, unaccompanied though it may be with no assurances against reprisals, is an unfair labor practice, is in error for it does not meet the standard of *Bourne* which has been adopted in this circuit by *Consolidated D.*

IV Pay Increase

The Board, in rejecting the opinion of the Administrative Law Judge, found that the Company had violated § 8(a)(5) of the Act when it changed from paying $8.30 per hour plus $.84 per hour in pension and hospitalization benefits contributions to paying a straight $9.14 per hour to replacements and offering the same to non-striking drivers during the strike by Local 639. The Administrative Law Judge, noting that the unfair labor complaint was not because of the change of form of the payment of wages but alleged to be "a wage increase for employees in excess of any offer made to the Union during contract negotiations," found that there was no wage increase. Only a change in the form of payment had occurred. Accordingly, the Administrative Law Judge would have dismissed this part of the complaint.

The Board, however, concluded that such a change represented a wage increase unilaterally granted in violation of § 8(a)(5). Further, the Board concluded that the Company violated § 8(a)(1) of the Act by telling striking employees that they would be paid if they worked the $9.14 per hour with no hospitalization or pension benefits payments. The Board concluded that, since an offer did amount to a wage increase, the Company unlawfully offered increased wages to strikers if they would return to work.

Generally, it is an unfair labor practice for an employer to unilaterally make changes in the conditions and terms of employment subject to mandatory bargaining, including wages, either before or after the expiration of a collective bargaining agreement, at a time when the employer is under an obligation to bargain. *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962); *NLRB v. Cone Mills Corp.,* 373 F.2d 595 (4th Cir. 1967). While the Board is correct in noting that it may be held unlawful for an employer to unilaterally increase wages without first giving notice and conferring with the union on the matter, such wage increase did not occur here. The Board's complaint is that the Company unilaterally paid employees more than its best offer to the Union. There is no substantial evidence, based on the record as a whole, to support such a conclusion. The Company was paying the exact amount offered to the Union in negotiations. Finding no unlawful wage increase, we do not enforce the Board's order with respect to that matter.[4]

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V Nature of the August Strike

The Board concluded that the strike by Local 639 on August 14, 1978 was an unfair labor practice strike, thus making unlawful the permanent replacement of strikers. Because we have previously determined that the Company had committee no unfair labor practices, the strike was an economic one not entitling the strikers to reinstatement. *Radiator Specialty Co. v. NLRB,* 336 F.2d 495 (4th Cir. 1964); *NLRB v. United Brass Works, Inc.,* 287 F.2d 689 (4th Cir. 1961).

We are thus of opinion that the petition for review is well taken and the Board's request for enforcement of its order is not.

ENFORCEMENT DENIED.

Fun Striders, Inc. v. NLRB

658 F.2d 716 (9th Cir.), October 8, 1981—248 NLRB 182

On petition to review Board Order

Before HUG and FARRIS, Circuit Judges, and CLAIBORNE,* DISTRICT JUDGE

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FARRIS, Circuit Judge: Fun Striders, Inc., petitions for review of an order of the National Labor Relations Board finding that Fun Striders violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), by discharging and refusing to reinstate four employees who Fun Striders believed had distributed certain literature during an unannounced employee work stoppage. *See Fun Striders, Inc.,* 250 N.L.R.B. 520 (1980). Fun Striders contends that the NLRB erred (1) by finding the employees' distribution of communist-oriented literature to be protected activity and (2) by failing to apply a dual or mixed motive analysis to the discharges. The NLRB cross-applies for enforcement of its order. We set aside the order and refuse enforcement.

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[4] An alternate reason we give for our decision is that the general law is that an employer has a right to unilaterally change terms and conditions of employment after it has bargained to impasse with a union. The fact that the union has gone on strike merely adds emphasis to the rule. In this case the Company did not change even the form of wages until August 21, a week after the strike had commenced on August 14, and more than a month after the parties had bargained to impasse on July 14. In the same or similar factual situations, at least the following cases which we follow have authorized increases in wages following bargaining to impasse. *NLRB v. United Brass Works, Inc.,* 287 F.2d 689 (4th Cir. 1961); *NLRB v. Yama Workcraft, Inc.,* 580 F.2d 942 (9th Cir. 1978); *Gulf States Mfrs. Inc. v. NLRB,* 579 F.2d 1298 (5th Cir. 1978).

*Honorable Harry E. Claiborne, Chief United States District Judge for the District of Nevada, sitting by designation.

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I. THE DISPUTE

Fun Striders, Inc., is engaged in the manufacture of shoes and handbags. On August 24, 1978, in protest of the piece-rate set on a new shoe style, stitching department employees in one of its three plants stopped work. While the employees were on the picket line, members of the Progressive Labor Party appeared outside the plant selling their newspapers. The Party members offered to prepare and provide leaflets relating to the labor dispute. An employee, Carranza, accepted the offer, assisted in the preparation of a leaflet, and distributed it the next day. The leaflet urged employees to strike and to form a union. It also advocated "violent revolution," "destruction of all bosses," and "armed revolution of all the working class." Other leaflets of a similar nature were distributed by employees on the next two working days. At the conclusion of the protest, Atkins, the plant manager and an avowed anticommunist, refused to allow four employees (Carranza, Castro, Marin, and Ruiz) to return to work because he believed they were associated with the Party and had advocated the violent overthrow of the plant and its supervision.

On February 8, 1979, the Board's regional director issued a complaint alleging that the refusal to reinstate the four employees violated sections 8(a)(3) and (1) of the Labor Act, 29 U.S.C. §§ 158(a)(3), (1) (1976). The administrative law judge held that Fun Striders had violated section 8(a)(1). As to the section 8(a)(3) charge, the judge found that Fun Striders did not act out of anti-union animus. Because such animus is an element of section 8(a)(3) violations,[1] he made no finding regarding the alleged violation of section 8(a)(3). The Board affirmed and ordered remedies including reinstatement, back pay, and notice posting. *Fun Striders, Inc.*, 250 N.L.R.B. 520, 520 (1980).

II. SECTION 8(a)(1) VIOLATION

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1976), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by [section 7 of the Act, 29 U.S.C. § 157 (1976)]." Section 8(a)(1) was intended as a general definition of employer unfair labor practices. Violations of it may be either derivative, independent, or both.

A. *Derivative Violation*

A derivative violation is premised on a violation of sections 8(a)(2)–(5), 29 U.S.C. § 158(a)(2)–(5) (1976), which establish more specific categories of employer unfair labor practices. In general, a violation of one of these provisions will support a finding that section 8(a)(1) has been derivatively violated. *See NLRB v. Swedish Hospital Medical Center*, 619 F.2d 33, 35 (9th Cir. 1980) (dictum). Here, however, the Board failed to find a section 8(a)(3) violation. The Board's counsel is therefore precluded from justifying the section 8(a)(1) violation as a derivative violation.

B. *Independent Violation*

Section 8(a)(1) may also be violated by acts that do not violate the more specific provisions. Such a violation is established by showing:

(1) that employees are engaged in protected activities, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 308, 85 S.Ct. 955, 962, 13 L.Ed.2d 855 (1965);

(2) that the employer's conduct tends to "interfere with, restrain, or coerce employees" in those activities, *see Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977) (quoting section 8(a)(1)) (interrogation); and

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(3) that the employer's conduct is not justified by a legitimate and substantial business reason, *see Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 269, 85 S.Ct. 994, 999, 13 L.Ed.2d 827 (1965).

See generally 18B T. Kheel, *Labor Law* § 10.02[2] (1981).

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[1] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027 (1967). Although no proof of anti-union motive is required when the conduct is "inherently destructive" of employee rights, in such cases the employer may rebut the resulting presumption by proving that the challenged actions were motivated by legitimate business considerations. See *id.* Here, the administrative law judge's specific finding of a lack of anti-union animus resolved the motive issue in favor of the employer.

1. *Protected Activity.* The administrative law judge found that the distribution of the leaflets was protected activity. Fun Striders contends that the judge applied an incorrect legal standard in making this finding. It argues that the judge should have considered the political content of the leaflets. Distribution of literature that is purely political is an unprotected activity. *E. g., Firestone Steel Products Co.,* 244 N.L.R.B. No. 148, 102 L.R.R.M. 1172 (1979) (state political campaign literature); *Ford Motor Co.,* 221 N.L.R.B. 663, 666 (1975) (political campaign literature), *enforced mem.,* 546 F.2d 418 (3d Cir. 1976); *see also Ford Motor Co. (Rouge Complex),* 233 N.L.R.B. 698, 705 (1977) (NLRB conceded Revolutionary Communist Party literature unprotected). Where, however, leaflets contain non-political matter as well as political matter related to employee interests, distribution is protected. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 563–70, 98 S.Ct. 2505, 2511–14, 57 L.Ed.2d 428 (1978). The administrative law judge could properly conclude that distribution of the leaflets here was protected activity. *See also Veeder-Root Co.,* 237 N.L.R.B. 1175, 1176–77 (1978).

2. *Interference.* Fun Striders does not dispute that its refusal to reinstate the employees interfered with distribution of the leaflets.

3. *Business Justification.* Fun Striders contends, however, that its refusal to reinstate was justified. It argues that the violent, communist nature of the material in the leaflet provided a legitimate business reason for its actions. It also asserts that the Board erred in finding a violation where Fun Striders' motives were entirely legitimate. While admitting that the legitimacy of Fun Striders' motive precluded a section 8(a)(3) violation, the Board contends that motive is irrelevant to the section 8(a)(1) violation.

Although anti-union motive is required in section 8(a)(3) violations, it is not an essential element of section 8(a)(1) violations. *See Textile Workers Union v. Darlington Manufacturing Co.,* 380 U.S. 263, 269, 85 S.Ct. 994, 999, 13 L.Ed.2d 827 (1965). Nonetheless, motive is relevant.[2] In a section 8(a)(1) discharge case, if an employer demonstrates a legitimate, substantial business reason for the dismissal, "the burden shifts to the Board to establish that the primary motivation for the discharge was to penalize the employee for his [protected activity]." *NLRB v. William S. Carroll, Inc.,* 578 F.2d 1, 4 (1st Cir. 1978); *see Litton Dental Products v. NLRB,* 543 F.2d 1085, 1087–88 (4th Cir. 1976); *NLRB v. Elias Brothers Restaurants, Inc.,* 496 F.2d 1165, 1167 (6th Cir. 1974) (per curiam) ("motiv[ation] in part"); *NLRB v. Fairview Hospital,* 443 F.2d 1217, 1219 (7th Cir. 1971) (motive must be solely legitimate); *see also NLRB v. Alamo Express, Inc.,* 430 F.2d 1032, 1035–36 (5th Cir. 1970), *cert. denied,* 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1971); *NLRB v. Crosby Chemicals, Inc.,* 274 F.2d 72, 74 & n.5 (5th Cir. 1960).

The leaflets urged the employees to engage in a violent struggle against management. Fun Striders reasonably believed that this advocacy threatened to inject violent confrontation into the plant. It had a legitimate and substantial business reason to keep those it believed had distributed the offending leaflets out of the plant by refusing to reinstate them. Once Fun Striders made this showing, the Board had the burden of proving that Fun Striders' true motive was to interfere with protected activity. Its failure to carry this burden led to the administrative law judge's specific finding that Fun Striders had no anti-union animus.[3]

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Where, as here, the employer acts out of entirely legitimate motives, the business need to preserve peace precludes a finding that section 8(a)(1) has been violated by refusal to reinstate employees advocating violence. The result may differ in another case, where the employer's motives are mixed or in any event less clearly legitimate than here. The record before us, however, does not support the Board's determination that Fun Striders violated section 8(a)(1). Its order is set aside.

Enforcement denied.

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[2] Our previous cases do not clearly define the relevance of employer motive in a section 8(a)(1) proceeding. *See, e. g., Ad Art, Inc. v. NLRB,* 645 F.2d 669 (9th Cir. 1980) (assuming, without deciding, that anti-union animus is required to find section 8(a)(1) violation); *Stephens Institute v. NLRB,* 620 F.2d 720, 726 (9th Cir.) (upholding findings that sections 8(a)(1) and (3) had been violated, without separate analysis, in a single paragraph discussing dominant motive test), *cert. denied,* ——— U.S. ———, 101 S.Ct. 358, 66 L.Ed.2d 217 (1980).

[3] In addition to its business motivation—preservation of non-violent conditions in the plant—Fun Striders also had a political motive—anti-communism. We see no reason why an additional motive (other than interference with protected activities) should undercut a legitimate and substantial business justification.

NLRB v. Winburn Title Manufacturing Company

663 F.2d 44 (8th Cir.), October 15, 1981—250 NLRB 108

On petition to enforce Board Order

Before HENLEY and MCMILLIAN, Circuit Judges, and COLLINSON, Senior District Judge*

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HENLEY, Circuit Judge: This case is before the court on application of the National Labor Relations Board for enforcement of its order against Winburn Tile Manufacturing Company (the Company), based on a finding that the

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Company violated Section 8(a)(1) and (5) of the National Labor Relations Act of 1947 (the Act), as amended, 29 U.S.C. § 151 *et seq.*, by refusing to bargain with the Oil, Chemical and Atomic Workers International Union (the Union). The Company admits its refusal to bargain, but contends that the refusal does not constitute an unfair labor practice because the representation proceedings were improperly conducted.

A representation election was conducted by secret ballot on July 3, 1979 at the Company's Little Rock, Arkansas, location. The result was 61 votes for the Union and 57 against. One ballot was void and eight ballots were challenged, three by the Company and five by the Union, a sufficient number to affect the results of the election.

A Regional Director conducted an ex parte administrative investigation and at least some evidentiary material was submitted by both sides. On August 15, 1979 the Director issued a report recommending that the Company's three challenges be sustained. With respect to the Union's challenges, the Regional Director recommended that the objections to the ballots of Albert James and Harvey Hall be sustained based on a finding that James and Hall were supervisors. It was further recommended that two of the Union's other challenges be overruled, thus leaving the Union with a two-vote margin and rendering moot the Union's fifth challenge of Aubrey Bean's ballot. The Company filed exceptions to the Regional Director's report and requested a hearing on the eligibility of Bean, James and Hall.

On December 12, 1979 the Board adopted the Regional Director's findings and recommendations, and certified the Union. In denying the Company's request for a hearing, the Board stated that the Company had raised no material or substantial factual issues which would warrant reversal of the Regional Director's recommendations. The Company refused to bargain, and on February 5, 1980 a complaint was filed charging the Company with unfair labor practices in violation of Section 8 of the Act. The Company filed a timely answer challenging the representation proceeding and requesting a hearing. The Board held that the Company was not entitled, in the absence of newly discovered evidence, to raise issues which had been considered by the Regional Director in the Section 9 representation proceeding. Finding no indication of newly discovered evidence, the Board granted summary judgment and issued the order it now seeks to enforce. In resisting enforcement, the Company asserts that it is entitled to a hearing on its objections to the representation proceedings. We agree.

We do not dispute the Board's statement that an issue which has been fully litigated in a representation proceeding may not be relitigated in a subsequent unfair labor practice proceeding absent new evidence. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162, 61 S.Ct. 908, 917, 85 L.Ed. 1251 (1941). The Board's reliance on *Pittsburgh Plate Glass* in the present case, however, is misplaced. In *Pittsburgh Plate Glass*, there was a full evidentiary hearing in the representation proceeding. The Supreme Court emphasized the employer's opportunity to introduce evidence, call witnesses and cross-examine the other party's witnesses, and concluded that "a single trial of the issue was enough." *Id.* at 162, 61 S.Ct. 917.

In contrast to *Pittsburgh Plate Glass*, there was no evidentiary hearing in the present case, either during the representation proceeding or the unfair labor practice proceeding. The ex parte procedure used in this case "falls far short of any litigated proceeding standard." *NLRB v. Commercial Letter, Inc.*, 455 F.2d 109, 113 (8th Cir. 1972).[1] Furthermore, "[d]ue process demands that the right to a hearing on an unfair labor practice, granted by the National Labor Relations Act, not be circumvented by the ex parte investigatory proceedings established in the Board regu-

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*The Honorable William R. Collinson, United States Senior District Judge, Western District of Missouri, sitting by designation.

[1] The Board's order in *Commercial Letter* was subsequently enforced after a full evidentiary hearing on remand to the Board. *NLRB v. Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974).

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lations for the certification proceedings." *NLRB v. Commercial Letter, Inc.*, 455 F.2d at 114. We therefore find that *Pittsburgh Plate Glass* is not controlling in the present case. *See Linn Gear Co. v. NLRB*, 608 F.2d 791, 793 (9th Cir. 1979).

It does not necessarily follow, however, that summary judgment was improperly granted. The Company must still show that it was entitled to a hearing. The right to a hearing is established if "the requesting party [raises] substantial or material issues which, if proved, would warrant setting aside the election." *Beaird-Poulan Division, Emerson Elec. Co. v. NLRB*, 571 F.2d 432, 434 (8th Cir. 1978). The test for determining whether material factual issues exist has been set forth in *N.L.R.B. v. Griffith Oldsmobile, Inc.*, 455 F.2d 867 (8th Cir. 1972).

> It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing * * *. Mere disagreement with the Regional Director's reasoning and conclusions do[es] not raise 'substantial and material factual issues.' * * * To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director.

455 F.2d at 868–69, *quoting NLRB v. Tennessee Packers, Inc., Frosty Morn Division*, 379 F.2d 172, 178 (6th Cir.), *cert. denied*, 389 U.S. 958, 88 S.Ct. 338, 19 L.Ed.2d 364 (1967).

The Board asserts that the Company, in its exceptions to the Regional Director's report, failed to state specific controverted findings and offered no proof to support contrary findings, but merely questioned the Director's conclusions and inferences. Upon a careful reading of the record, we conclude that respondent has raised precisely the types of material issues warranting a hearing.

The Regional Director's report stated that James and Hall work in Winburn's vinyl division, which is housed in a separate building about one-fourth mile from the other buildings. The division employs twenty-seven people. The plant manager, Tyson Meneley, stated in his affidavit that because the plant is large, he relies on Hall and James to show new employees what to do and to perform certain other tasks.

As stated earlier, James' and Hall's ballots were challenged on the basis of their alleged status as supervisors. The Act defines supervisor as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). The Company asserts that Hall and James were "leadmen" rather than supervisors; that is, they only had authority over routine matters and were not authorized to exercise independent judgment. The Board, however, adopted the Regional Director's conclusion that Hall and James were supervisors within the meaning of the Act.

Critical to the Regional Director's conclusion that Hall and James were supervisors were a number of factual determinations concerning James' and Hall's authority to perform the functions of a supervisor as defined by the Act. For example, although not specifically stated, the Director apparently found that Hall and James effectively recommended pay increases for certain employees. However, the Company took exception to this finding and offered proof that all employees automatically received raises after a six-week probationary period regardless of any unsolicited recommendations by Hall and James, and that any other raises were made on the basis of the plant manager's independent judgment.

The Regional Director also apparently found that Hall and James could effectively recommend discipline of employees. In taking exception to this finding the Company offered proof that on two occasions Hall's

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recommendations of discipline were not followed. The Company further objects that it was not given an opportunity to respond to allegations involving

James' authority to discipline employees, and asserts that any disciplinary action was based on the independent judgment of Meneley, the plant manager.

In response to the Regional Director's finding that Hall and James could direct or assign the employees, the Company contends that any direction given was with respect to routine repetitive tasks and that no assignments were made without Meneley's authorization. The Company further asserts that Hall and James could not grant time off without Meneley's approval, nor were they authorized to initial time cards.

Several other specific findings by the Regional Director were controverted by the Company and several cases were cited which, if the Company's factual allegations are correct, would support a finding that Hall and James were not supervisors. *See, e. g., NLRB v. Security Guard,* 384 F.2d 143 (5th Cir. 1967); *Westlake United Corp.,* 236 N.L.R.B. No. 139, 98 L.R.R.M. 1376 (1978).

Although the Company disagrees with the Regional Director's conclusion that Hall and James are supervisors, it is not true, as the Board argues, that the Company's disagreements are limited to the Director's inferences and conclusions. The Company has specifically controverted the subsidiary factual determinations made by the Regional Director and has offered proof which, if true, would rebut the evidence presented by the Union. It is clear that the determination of James' and Hall's status required the Director to resolve these material factual disputes and credibility conflicts. "[T]his court has held that the company must be afforded the opportunity to produce evidence that might rebut testimony of union witnesses or at least subject those witnesses to the 'cleansing rigors of cross-examination.'" *Beaird-Poulan v. NLRB,* 571 F.2d at 434, *quoting NLRB v. Commercial Letter, supra.* In contrast to the present case, *see N.L.R.B. v. Griffith Oldsmobile, Inc., supra,* wherein the only evidence presented was by the Company, and the "sole question for the Director was, therefore, what inferences and conclusions could be drawn from their testimony." 455 F.2d at 869.

The Board's adoption of the Regional Director's findings and recommendations in the representation proceeding effectively foreclosed the Company's right to a hearing under Section 9. The only choice at that point was to refuse to bargain and raise the issues in defense of a Section 8 unfair labor practice proceeding. *See NLRB v. Skelly Oil Co.,* 473 F.2d 1079 (8th Cir. 1973). Upon a careful examination of the record, we find that the Company has raised material and substantial factual issues entitling it to a hearing.

We therefore deny enforcement of the Board's order and remand to the Board for an evidentiary hearing.

NLRB v. Amalgamated Clothing and Textile Workers Union, AFL-CIO, and its Local Union No. 1566

662 F.2d 1044 (4th Cir.), October 16, 1981—246 NLRB 747

On petition to enforce Board Order

Before Widener and Phillips, Circuit Judges, and Williams, District Judge*

1045

Per Curiam: The National Labor Relations Board petitions for enforcement of an order against the respondent International Union and its Local for a violation of § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A). We grant enforcement pursuant to § 10(e) of the Act, 29 U.S.C. § 160(e).

This case arises from the respondents' refusal to sign an agreement which would have allowed Belding Corticelli Fiberglass Fabrics Co. to rehire Mrs. Virginia Overstreet. Belding Corticelli had fired Mrs. Overstreet for violating company absentee regulations, and could not rehire her without the Unions' acquiescence. She earlier had resigned from the Unions, and this led the Administrative Law Judge to conclude that the Local's refusal to sign the agreement was improperly motivated and thus an unfair labor practice. The ALJ made his finding, however, against only the Local and not the International, after finding it significant that the allegations in the complaint listed the International and Local as "respondent" and not as "respondents."

In addition to objecting to the ALJ's order, the General Counsel petitioned the NLRB to reopen the record prior to deciding the case so as to allow introduction of the full collective bargaining agreement between the Unions and Belding Corticelli rather than only excerpts which had been introduced by agreement. The NLRB allowed the record to be reopened and subsequently concluded that both the International and Local were responsible for the violation. The International now asserts that the NLRB abused its discretion in reopening the record and that enforcement of the Board's order should be denied against the International. There is no claim that the finding of a § 8(b)(1)(A) violation against the Local is incorrect.

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*United States District Court for the Eastern District of Virginia, sitting by designation.

The NLRB's rules and regulations provide:

> Upon the filing of timely and proper exceptions, and any cross exceptions, or answering briefs, as provided in § 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may make other disposition of the case.

29 C.F.R. § 102.48(b) (1980).[1] Courts generally have shown the same deference to the NLRB as to a district court in its decisions with regard to whether to reopen the record in a particular case, and will not upset the decision of the Board in those matters absent an abuse of discretion. See e. g., *NLRB v. Jacob E. Decker & Sons, Inc.*, 569 F.2d 357, 363 (5th Cir. 1978); *NLRB v. Yale Manufacturing Co.*, 356 F.2d 69, 71 (1st Cir. 1966); *Metal Blast, Inc. v. NLRB*, 324 F.2d 602, 604 (6th Cir. 1963); cf. *NLRB v. Lloyd Wood Coal Co.*, 585 F.2d 752, 755 (5th Cir. 1978) (court ordered NLRB to reopen record because of abuse of discretion).

In the instant case, the Board reopened the record to allow introduction of the full collective bargaining agreement which was made between the employer and the "Textile Workers Union of America, AFL-CIO." The agreement was quite relevant to the underlying question because the Unions asserted that they would not allow Mrs. Overstreet to be rehired because that would violate the collective bargaining agreement. They offered no objection when parts of the collective bargaining agreement were introduced at the hearing, and, in fact, the excerpts were offered as a joint exhibit.[2]

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We note that the International was an active participant in all the proceedings below. An assistant general counsel of the International represented both the International and the Local before the NLRB, and a regional vice-president of the International represented the Local.[3] Thus, not only was the International a party to the proceeding and represented, the two International officials were fully capable of protecting any interests of the International during the proceedings. Furthermore, while the International objected to reopening of the record by the Board to allow introduction of the full collective bargaining agreement, it has made no effort to offer any evidence disputing the agency relationship between the International and the Local. In fact, the International, before this court, offers no argument that, with the collective bargaining agreement as evidence, the NLRB could not properly find such an agency relationship. In view of the facts we have stated, we are of opinion the NLRB did not abuse its discretion in reopening the record to allow introduction of the full collective bargaining agreement. There is thus no reason to overturn its finding that the International was a full party to this proceeding and jointly responsible with the Local.

Pursuant to § 10(e) of the National Labor Relations Act, we grant enforcement of the order below, *Amalgamated Clothing and Textile Workers Union, AFL-CIO and its Local Union No. 1566*, 246 NLRB No. 115 (1980).

ENFORCEMENT GRANTED.

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[1] In its brief, the International refers only to § 102.48(d)(1) which applies "after the Board decision or order." See also *id.* § 102.48(d)(2). In this case, reopening was sought before an order or decision by the Board which relies upon § 102.48(b).

[2] The general counsel has said the full collective bargaining agreement was not introduced at the hearing in an effort to save expense and time.

[3] According to the hearing transcript, the assistant general counsel of the International was at the hearing "appearing on behalf of ACTWU and its Local 1566." The regional vice-president was "appearing on behalf of ACTWU Local 1566."

Air Express International Corporation v. NLRB

659 F.2d 610 (5th Cir.), October 19, 1981; certiorari denied October 4, 1982—245 NLRB 478

On petition to set aside Board Order

Before GODBOLD, Chief Judge, MORGAN and

Henderson, Circuit Judges

612

Godbold, Chief Judge: Air Express International ("AEI") seeks to set aside the Board's order entered against it, and the Board seeks enforcement.

AEI is engaged in the business of air freight forwarding. Until February 9, 1978 its plant serving Atlanta's airport was located in East Point, Georgia. February 10, 1978 AEI acquired nationwide all of Trans-Air Freight System, Inc.'s ("Trans-Air") air freight forwarding business and moved its own Atlanta operation to Trans-Air's Atlanta facility located seven to 10 miles away in contiguous College Park, Georgia, consolidating the two Atlanta operations.

Just two months prior to this move Truckdrivers and Helpers Local Union No. 728 ("the union") was certified as the collective bargaining representative for the non-sales personnel at AEI's East Point facility.[1] Trans-Air's College Park facility was not unionized.

This controversy centers on AEI's decision to transfer only three of its East Point nonsales personnel to the new College Park facility, thereby discharging five members of the East Point bargaining unit, and AEI's refusal to recognize the union as the representative of the College Park employees. Also at issue is the discharge of a sixth East Point employee prior to the move, the alleged failure of AEI to bargain in good faith with the union over the effects of the move, and AEI's alleged acts of interrogation, threats of reprisal, promises of benefit, solicitation of employees not to engage in union activity or to give testimony to the Board, and creation of the impression of surveillance. An administrative law judge ("ALJ") found against AEI on virtually all charges and recommended that AEI be ordered to cease and desist from the various violations of §§ 8(a)(1), (3), and (5) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 158(a)(1), (3) and (5), that he had found, to offer reinstatement and back pay to the six discharged East Point employees, and to post the usual notice. The Board affirmed the ALJ's findings in all particulars except one,[2] adopted the recommended order (with minor variations), and rejected AEI's contention that it had been prejudiced by any bias of the ALJ.

I.

We focus first on the discharged employees. AEI contends that the five East Point employees who were not transferred to the new College Park facility were terminated[3] because it was decided as a business matter that the company needed to break up one of the employee groups and the employees of the less profitable operation should be let go with the hope that Trans-Air's more profitable customers would be retained.[4] Thus AEI argues that it had no illegal motive, or if there were such a motive that it would have made the same decision regardless. The Board found to the contrary. Its decision is based on substantial evidence. First, there is direct testimony by a former AEI sales employee that Frank O'Rorke, AEI's district manager stationed at East Point, told her over a series of conversations that the company was not going to allow the union in Atlanta, that it was going to get rid of the employees who voted for the union, and that "those guys * * * cut their throats" by bringing in the union. Second, circumstances speak as loudly as

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[1] The election was held July 28, 1977, with a 5-1 vote for the union. The Board certified the union on December 14, 1977. Guards, supervisors, and confidential and professional (i. e., sales) employees were excluded from the bargaining unit.

[2] The Board ruled that Trans-Air's station manager at College Park was not acting for AEI when he made threats of reprisal prior to consummation of AEI's acquisition of Trans-Air. We agree with this ruling. As the Board discerned, the ALJ's conclusion to the contrary was based solely on speculation.

[3] Some controversy surrounds whether John Moore, one of these five, was in fact terminated. Moore was offered a position at the new plant but only as a supervisor. Moore had previously turned down a supervisor's position at East Point because it lacked the security of tenure that his rank-and-file position possessed. He again refused a supervisor's position at College Park, and thus was terminated for a time, although he did recant and agree one month later to come back on as a supervisor. The fact that Moore was offered another position does not ameliorate AEI's discriminatory refusal to retain Moore at his current position because Moore considered the new position less desirable and because the Board found upon substantial evidence that AEI, in offering Moore only a supervisor's position, was motivated by a desire to lessen the number of rank-and-file union supporters at College Park.

[4] AEI's contention that it was motivated by the East Point employees' refusal 10 months earlier to comply with changes in their shifts patently lacks merit. Only one employee actually refused a shift change, and only one other was opposed to the changes. Moreover, at the time of opposition to the changes no employee was disciplined or reprimanded in any way except for the station manager who was fired for giving in to the one worker's protest.

these words. Of the three East Point employees retained after the move one was the station manager, one was a vocal anti-union advocate, and the third was the replacement for Nella Ree Dunn, the employee who had been discharged prior to the move. By contrast, the five employees not transferred included all of the acknowledged union organizers and supporters at the East Point facility. Elsewhere in the country when AEI consolidated its operations with Trans-Air's not a single AEI employee was discharged except for two part-time workers. We have no difficulty in holding that the Board correctly found that these terminations violated § 8(a)(3) of the Act and in enforcing the orders of reinstatement and back pay.

We also enforce the Board's decision as it relates to Nella Ree Dunn. Dunn was secretary to district manager Frank O'Rorke. She was fired July 11, 1977, two and one-half weeks before the election, because O'Rorke suspected her of being the source of leaks of salary information that were causing dissension among the employees. Later, O'Rorke asserted as additional grounds for Dunn's dismissal her incompetence and slow business. The Board found these reasons to be disingenuous. There was no direct evidence that Dunn was responsible for the leaks, they took place well before Dunn's discharge, and salary information was commonly known and was not as a general rule kept in confidence. The later asserted grounds were found to be pretextual. Thus, the Board concluded that the real reason for Dunn's discharge was that O'Rorke suspected her of supporting the union. The evidence is substantial.

In its reply brief AEI raises for the first time the argument that Dunn is not protected by the Act because she is a confidential secretary. Without deciding the validity of this legal contention,[5] we hold that the ALJ correctly found Dunn not to be a confidential secretary. O'Rorke testified that June 8, the day he received the union's election petition, all confidential duties that Dunn might have had were withdrawn from her. Thus, at the time of her discharge one month later Dunn's position was admittedly non-confidential.

II.

AEI hotly contests the order directing it to bargain with the union at its College Park facility. The Board based this order on two alternative grounds: first, that the certification obtained December 14, 1977 at the East Point facility covered the College Park employees once AEI transferred its operations there February 10, 1978; second, that a *Gissel*[6] order was warranted because of the severity of AEI's illegal opposition to the union.

A *Gissel* bargaining order is typically invoked when a union that has only informal evidence of majority status is refused recognition; the order issues because a formal election either fails or is likely to fail because of the company's commission of unfair labor practices. Bargaining orders are also appropriate where recognition is withdrawn from a union that has been formally certified as the representative of a bargaining unit. *See Peoples Gas System, Inc. v. NLRB,* 629 F.2d 35, 46–48 (D.C.Cir. 1980) (discussing the distinction). Certification carries with it an entitlement to one year's presumptive majority status, a presumption irrebuttable absent "unusual circumstances." *Brooks v. NLRB,* 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed. 125 (1954); *NLRB v. Auto Ventshade, Inc.,* 276 F.2d 303 (5th Cir. 1960). If an employer fails to honor properly a union's certification, then a non-*Gissel* bargaining order may issue to enforce the certification. *See e. g., NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272, 278–81, 92 S.Ct. 1571, 1577–79, 32 L.Ed.2d 61 (1972); *NLRB v. Louisiana Bunkers, Inc.,* 409 F.2d 1295 (5th Cir. 1969). If the East Point certification extends to the College Park facility, then this is a withdrawal of recognition (non-*Gissel*) case. If not, then College Park is uncertified and we have a refusal of recognition (*Gissel*) case.

A union certification applies to the intangible construct known in labor parlance as a "bargaining unit" (or simply "unit"). A unit enjoys the ephemeral attributes of not being rigidly defined by any fixed location, size, or composition of personnel. Thus, the relocation of a unit, an increase or decrease in the size of a unit, or a complete turnover within a unit alone does not require a finding that a once-certified unit has ceased to exist. *See Louisi-*

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[5] The U. S. Supreme Court has granted certiorari in a case that presents this issue. *Hendricks County Rural Electric Membership Corp. v. NLRB,* 627 F.2d 766, 771–76 (7th Cir. 1980), *cert. granted,* ——— U.S. ———, 101 S.Ct. 1479, 67 L.Ed.2d 612 (1981) (No. 80–1103).

[6] *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

ana Bunkers, Inc., 409 F.2d at 1298–99 (relocation); *NLRB v. King Radio Corp.*, 510 F.2d 1154, 1156–57 (10th Cir.), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975) (increase); *NLRB v. Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 8 (1st Cir. 1978) (decrease); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270, 273 (5th Cir. 1970), *cert. denied*, 423 U.S. 1016, 96 S.Ct. 449, 46 L.Ed.2d 387 (1975) (turnover). But as with other metaphysical categories, these mutations by degree, if severe enough, shade into mutations by kind, and may result in eradication of a unit. In such cases, where changes in the characteristics of a unit result in its being classified as either a different unit or a nonunit, "unusual circumstances" have occurred so that a company is justified in withdrawing recognition from a union during the first year of certification. *See Brooks v. NLRB*, 348 U.S. at 98–99, 75 S.Ct. at 178 (unusual circumstances include radical fluctuation of unit size in a short time). The courts give a wide degree of discretion to the Board in its determinations of the composition and definition of units. *E. g., Vicksburg Hospital, Inc. v. NLRB*, 653 F.2d 1070 at 1074–75 (5th Cir. 1981); *NLRB v. Foodway*, 496 F.2d 117, 119 (5th Cir. 1974) (arbitrary and capricious standard); *NLRB v. Baton Rouge Water Works*, 417 F.2d 1065 (5th Cir. 1969) (same).

With these principles in mind, we examine the facts to determine whether the College Park unit is a continuation of the East Point unit. AEI first contends that certification does not extend to College Park because a single-plant unit is no longer appropriate as a result of AEI's reorganization of its southeastern district. The Atlanta facility once comprised a single-plant district, but upon acquisition of Trans-Air AEI's southeastern district was restructured to include Atlanta and Charlotte. AEI contends that the Board may now only aggregate the employees at the Atlanta and Charlotte facilities into one unit rather than maintaining two separate units because labor management policy is formed only at this expanded district level. We do not agree. Restructuring AEI's regions is not the kind of change that amounts to an "unusual circumstance." To hold otherwise would allow any company to avoid a certification simply by shifting its management.

AEI next contends that as the result of the relocation of its East Point facility and its consolidation with the former Trans-Air facility, the College Park plant is a "new operation" and therefore not within the East Point certification. AEI argues that because 85% of its East Point business was international air freight whereas 85% of Trans-Air's business was domestic, upon merger of the two a new amalgam was formed. The company also points to the fact that the new facility is seven to 10 miles away on the opposite side of the airport and that its staff has doubled. Other facts support the Board's conclusion. AEI at its College Park facility continues to service only the Atlanta airport, it remains only in the air freight forwarding business, and but for its discriminatory termination of six employees a substantial percentage of its College Park employee complement would consist of former East Point workers.

The authorities cited by AEI are sufficiently distinguishable on their facts that the Board is not being arbitrary or illogical in declining to follow them here. In *General Electric Co.*, 170 NLRB 1272 (1968), the Board found that the consolidation of two plants created a new operation under facts similar to those here: the new plant was 10 miles away and the product lines of the two old plants were similar. The critical factor, though, and the one that the Board focused on, was that only half of the employees in question at the old plant that was unionized transferred to the new facility. Similarly, in *Electronic Products International Corp.*, 208 NLRB 350 (1974), the Board found that a relocated plant was a separate unit, but only two of the seven employees at the old plant accepted transfers, and they both quit within 30 days of the move. By contrast, here, as discussed below in this section of the opinion, it is presumed that all of the employees in the East Point bargaining unit would transfer.

Bearing in mind the deference we give to the Board in the question of the composition of a bargaining unit, we hold that the Board did not err in its unit determination in this matter. *NLRB v. Baton Rouge Water Works*, 417 F.2d 1065 (5th Cir. 1969) is analogous. There the Board held that a small rural water company acquired by Baton Rouge Water Works was an "accretion" to the Baton Rouge bargaining unit and thus was covered by union certification at Baton Rouge. We enforced the bargaining order even though the second facility was nine miles away, serviced rural customers rather than urban, had a separate day-to-day management, and was a separate legal entity. *See also NLRB v. Foodway,* 496 F.2d 117 (5th Cir. 1974) (acquiring company succeeds to duty to recognize existing union despite 24 distinguishing factors); *Vernon Calhoun Packing Co., Inc.,* 173 NLRB No. 112 (1968), *enforced without opinion,* 436 F.2d 588 (5th Cir. 1971) (second plant is an accretion).

So far we have pretermitted the issue of whether former East Point employees comprise a majority of the College Park bargaining unit. Employee composition at the new facility is usually the most critical factor in characterizing a relocated or merged unit. The Board found after lengthy analysis that the bargaining unit at College Park consisted of 10 employees, and that if AEI had not discriminatorily discharged six of its East Point employees, then seven[7] of these 10 would be former members of the East Point bargaining unit. AEI counters that no majority exists because three College Park employees found to be supervisors are actually rank-and-file and there is no evidence that the six employees not transferred would in fact have moved if given the opportunity.

The Board's initial characterization of three of Trans-Air's former employees as supervisors was based on substantial evidence. There is testimony that two of these three had authority to hire or fire employees and all three exercised independent judgment in directing other workers. Each was in charge of the facility during his or her shift. This satisfies the Act's definition of supervisor. *See NLRB v. Alamo Express, Inc.,* 430 F.2d 1032 (5th Cir. 1970), *cert. denied,* 400 U.S. 1021, 91 S.Ct. 584, 27 L.Ed.2d 633 (1971). The Board erred, however, in confining its inquiry to what the duties of these three were on the day of the move. Shortly after the move one of these three, Susan Doyle, was reclassified to "lead agent," allegedly because it was felt that there were too many supervisors.[8] In assessing the effects of a relocation or merger of a bargaining unit, a reasonable "shake down" period may be required in order for the new unit to stabilize. *Cf. NLRB v. Houston Distribution Services, Inc.,* 573 F.2d 260, 266 & n.7 (5th Cir. 1978), *cert. denied,* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 705 (1979) (accord where issue is successorship of acquiring company). The Board failed to allow for the possibility that Doyle's reclassification was part of such stabilization. If Doyle's status were critical to our decision, we should remand for further consideration. Our assessment of the composition of the bargaining unit does not change according to her status, however, and so we simply vacate the Board's decision as to Doyle and assume *arguendo* that she is not a supervisor.

We are left then with a bargaining unit of 11, composed of a majority of seven former East Point employees. AEI argues though that there is no evidence that the six discharged employees would have accepted a transfer to College Park if they had been given such an opportunity, citing *Fraser & Johnston Co. v. NLRB,* 469 F.2d 1259, 1264 (9th Cir. 1972) and *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684, 689 (2d Cir. 1967). In the circumstances of this case, however, the Board is not required to affirmatively demonstrate that each discharged employee would have transferred absent his or her illegal termination. The Board may rely on the presumption that discriminatorily discharged employees remain on with the company. *See NLRB v. Fabsteel Co.,* 587 F.2d 689, 695 (5th Cir.), *cert. denied,* 442 U.S. 943, 99 S.Ct. 2887, 61 L.Ed.2d 313 (1979); *NLRB v. Houston Distribution Services, Inc.,* 573 F.2d 260, 267 (5th Cir. 1978), *cert. denied,* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 705 (1979). The policy that gives rise to this presumption of continued employment is that a violator of the Act should not be allowed to benefit from its wrongdoing by placing the difficult burden on the Board of proving how individual employees might have acted under hypothetical circumstances. *NLRB v. A. W. Thompson, Inc.,* 449 F.2d 1333, 1337 (5th Cir. 1971), *cert. denied,* 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972).

The critical factor that distinguishes this case from those cited by AEI is that here the failure to transfer the employees in question was itself a violation of the Act. For example, in both *Cooper Thermometer v. NLRB,* 376 F.2d 684 (2d Cir. 1967) and *Fraser v. Johnston,* 469 F.2d 1259 (9th Cir. 1972), the courts refused bargaining orders because there had been no affirmative showing that a majority of employees at a relocated plant came from the old unionized plant, even though the relocation was accompanied by unfair labor practices. In both cases, however, the labor violations did not involve unlawful terminations but merely failure to bargain over the effects of the relocation. Without adopting the reasoning of these cases, we note that there is much less reason in such cases to presume that employees who did not transfer would have done so absent the particular violations.[9]

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[7] The seventh is Kathy Lee, the anti-union employee who was transferred.

[8] In addition to these three contested supervisors there were three other employees with the title of supervisor.

Relying on this presumption, we find there is substantial evidence to support the finding that the six discharged employees would have transferred to College Park absent their discharge, particularly since AEI has failed to develop any evidence to the contrary.[10] We hold, then, that the Board's determination of the size and composition of the College Park bargaining unit, although possibly flawed in one respect, is correct so far as is necessary for us to affirm the finding of continuation.

To summarize our reasoning with regard to the Board's bargaining order, in this case a certified bargaining unit has been merged *and* relocated and employees have been discriminatorily discharged in the process. Because the move was over a relatively short distance the Board could presume that the discharged employees would have transferred but for their termination, and that presumption has not been rebutted. We thus view the College Park bargaining unit as being composed of a majority of workers from the East Point plant, and this fact along with others adequately supports the Board's conclusion that College Park is a continuation of East Point.[11] Because the union has not enjoyed its full year of certification, we enforce the Board's bargaining order (as modified below). We need not address whether a *Gissel* order would be appropriate in this case.

III.

We come now to the findings of the Board that AEI was in violation of § 8(a)(5) for failing to bargain in good faith over the effects of the relocation.

The union and AEI met on three occasions to discuss the effects of the move. The Board found upon substantial evidence that at these meetings AEI improperly refused to supply the union a copy of its acquisition agreement with Trans-Air, that AEI's list of Trans-Air personnel given to the union was somewhat incomplete and inaccurate, and that AEI misrepresented its position by stating that it intended to terminate all East Point employees when in fact it intended to transfer Kathy Lee. We hold that these findings support the Board's order insofar as AEI is required to furnish to the union complete employee information and a copy of the acquisition agreement and is required to bargain in good faith in the future. The Board erred, however, in using the date of AEI's first failure to bargain in complete good faith (January 4, 1978) as the measure of the date to which its bargaining order was to be retroactive. The violations of § 8(a)(5) outlined above do not amount to a withdrawal of recognition. It was not until February 11, 1978, one day after the move, that AEI refused to recognize the union as the representative of its College Park plant. This date should measure the bargaining order because the union

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[9] We note also that the presumption might not arise where a plant is relocated to an entirely different metropolitan area. For example, in *Local 57, International Ladies' Garment Workers v. NLRB,* 374 F.2d 295 (D.C. Cir. 1967), *cert. denied,* 395 U.S. 980, 89 S.Ct. 2129, 23 L.Ed.2d 767 (1969), the court held that a bargaining order would not issue where a plant was moved to Miami from New York, but the court observed that this remedy has been used "where the move was of such a short distance that the Board could assume that, absent the unfair labor practices, workers would have followed the employer to the new site." *Id.* at 303.

[10] In a *Gissel* order case majority status is to be determined at the time the order issues. *NLRB v. American Cable Systems, Inc.,* 427 F.2d 446 (5th Cir.), *cert. denied,* 400 U.S. 957, 91 S.Ct. 356, 27 L.Ed.2d 266 (1970). In this non-*Gissel* case, however, the composition of the bargaining unit is to be determined at the time of the relocation (or after a reasonable shake down period). Otherwise, the rule would be contrary to principles of fair play, *see NLRB v. Auto Ventshade, Inc.,* 276 F.2d 303, 307 (5th Cir. 1960), and would create an undesirable incentive to delay through litigation. The difference exists between the two rules because in a *Gissel* case the issue is whether an extraordinary remedy is warranted while in this non-*Gissel* case the issue is simply whether the certification is to be given continued effect.

[11] We note that a majority of former workers at a new facility is not necessary to find a continuation of a bargaining unit after merger and relocation if other factors strongly support this conclusion, *see Westwood Import Co.,* 251 NLRB No. 162 (1980) (the Board's practice in relocation cases accompanied by unfair labor practices has been that if "a majority or *some significant portion* of the unit employees at the new location" would have been from the old location but for such practices, then a bargaining order has issued) (emphasis added), nor would a majority be sufficient if these other factors were lacking, for instance if the business of the new plant were entirely different from that of the former. In each situation the issue remains whether in the light of all the facts the bargaining unit remains the "same" or is now a "different" one. We note also that whereas in simple relocation cases the Board has treated the employee composition factor as the determinative one, *see Westwood,* where a relocation is coupled with a merger and thus somewhat altered operations and structure, as here, the inquiry is more complex.

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enjoyed effective recognition from December 14 when it was certified until February 11. We therefore vacate the Board's bargaining order and remand with directions to modify the order so as to allow the union to enjoy certified representative status only for the remainder of its certified year.[12]

IV.

We enforce the Board's order as relevant to the remainder of miscellaneous violations of the Act. Based on substantial evidence, the Board found that AEI discriminatorily threatened to withhold raises from some employees while granting and promising raises to others all in order to discourage union activity and weaken the pro-union majority, that AEI threatened employees with various other reprisals because of their support of the union, and that AEI created the impression of surveillance and otherwise interfered with the freedom of employee's union activities by interrogating employees about such activities, by warning of "harassment" from Board agents, and by soliciting employees not to testify before the Board.

Finally, we agree with the Board that there is not evidence of bias sufficient to reject the ALJ's findings.

ENFORCED in part, VACATED in part, and REMANDED in part with directions to modify.

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[12] Thereafter, of course, the certification will remain in effect but subject to rebuttal or good faith doubt.

NLRB v. Mar-Len Cabinets, Inc.

659 F.2d 995 (9th Cir.), October 19, 1981—234 NLRB 523

On petition to enforce Board Order

Before BROWNING, Chief Judge, ALARCON, Circuit Judge, and HAUK,* District Judge

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PER CURIAM: Prior to 1977, respondent Mar-Len Cabinets, Inc. was a non-party signatory to two master collective bargaining agreements between the United Brotherhood of Carpenters and Joiners of America and two employer associations, the first covering employees installing cabinets at various construction jobsites (the "outside agreement"), and the second covering employees manufacturing cabinets at respondent's shop (the "inside agreement").

When the master agreements expired, respondent sought to negotiate separate more favorable agreements with the union. The negotiations broke down. The union brought an unfair labor practice charge alleging respondent had violated § 8(a)(1) & (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (5), by instituting unilateral changes in the wages and working conditions of outside employees without first complying with the notice requirements of Section 8(d) of the Act, and by bargaining in bad faith with respect to a new inside agreement.

The National Labor Relations Board found in favor of the union, and now seeks enforcement of its order. We deny enforcement to the extent the order is based on a finding that respondent violated the notice provisions of the Act, but enforce it in other respects.

I. THE OUTSIDE AGREEMENT

The agreement between respondent and the union provided that a party desiring to change or cancel the agreement must give written notice to the other 60 days before the agreement expired. By letter dated March 4, 1977 Respondent informed the Union that it did not wish to continue to be bound by the master outside agreement, due to expire June 15, 1977. No notice was sent to state or Federal mediation services. No negotiations followed.

On March 22, 1977, the union notified the employer association parties to the master outside agreement that it wished to reopen the agreement. Copies of this notice were sent to state and Federal mediation serv-

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ices. A new master agreement was negotiated between the union and the employer associations. Respondent did not participate in these negotiations.

The union subsequently informed respondent that it considered respondent bound by the newly negotiated master agreement. The union took the position that respondent's March 4th notice was in-

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*Honorable A. Andrew Hauk, District Judge, United States District Court for the Central District of California, sitting by designation.

best copy available

effective because respondent had not notified the mediation services. Respondent told the union it did not consider itself bound by the new master agreement and sought to initiate negotiations for a separate agreement. The union refused to negotiate.

On August 8, 1977, respondent notified state and Federal mediation services that a labor dispute existed. On August 19, 1977, respondent unilaterally adopted its proposed contract changes, raising the wages of its outside employees and abolishing union security.

The Board found respondent had violated its duty to bargain collectively under Section 8(a)(5), 29 U.S.C. § 158(a)(5), by terminating the agreement without continuing its terms for 60 days after notifying the mediation services of the dispute, as required by Section 8(d), 29 U.S.C. § 158(d).[1]

Respondent challenges the Board's order on four grounds.

1. Respondent contends it was not required to wait 60 days after giving the 8(d)(3) notice before implementing its bargaining proposals because the waiting period is required only before a strike or lockout. Section 8(d)(4) provides that the party desiring to modify the contract continue "in full force and effect * * * all the terms and conditions of the existing contract * * *" until the waiting period has passed. 29 U.S.C. § 158(d)(4). This wording plainly prohibits a unilateral departure from the terms of the contract whether or not a strike or lockout follows, as the Senate Committee report on § 8(d) confirms: "Should the notice not be given on time * * * it becomes an unfair labor practice for an employer *to change any of the terms or conditions* specified in the contract for 60 days *or* to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period." S.Rep. No. 105, 80th Cong., 1st Sess. 24 (1947) (emphasis added), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, 407, 430 (1948).

2. Respondent asserts the union's absolute refusal to bargain on the outside agreement relieved respondent of any obligation to bargain collectively, including any duty to notify the mediation services.

Respondent relies upon the dictum in *Times Publishing Co.,* 72 NLRB 676, 683 (1947) that "a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested." The notice provision is not concerned with "good faith"; it is designed to give the mediation services time to intervene before disruptive economic action is taken by one of the parties. *Amax Coal Co. v. NLRB,* 614 F.2d 872, 889 (3d Cir. 1980). This purpose would be hindered, not served, if the duty to give notice disappeared when the non-initiating party refused to bargain. It is in just such a case that the need for mediation may be most pressing.

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3. Respondent contends that by rejecting its cancellation notice the union became the "initiating party," and thus bore the burden of giving notice. Section 8(d) provides that "no party to [a collective-bargaining] contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . (3) notifies the Federal Mediation and Conciliation Service * * *." 29 U.S.C. § 158(d) & (d)(3). This language places the burden of notifying the agencies on the first party seeking to terminate or modify the contractual arrangement. *United Furniture Workers of America v. NLRB,* 336 F.2d 738, 741 (D.C.Cir. 1964). The union's refusal to agree to the modification desired by respondent did not affect this obligation. Respondent's contention, like the argument rejected in *United Furniture Workers,* is to the:

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[1] Section 8(d) provides in relevant part:

[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territory agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

effect that the burden shifts in accordance with the twistings and turnings of the bargaining negotiations. Such a construction seems to us, however, to be fraught in the highest degree with the peril that the public interest in the emollient intervention of the mediation services will fall between the two stools of contending parties wholly intent upon the uncertain—and frequently fluctuating—fortunes of their negotiating positions. It is a peril which can be avoided by assigning a fixed and definite responsibility for notifying the public agencies. Congress has made that assignment and, not surprisingly, it is to the party who starts the process.

4. Finally, respondent argues it was relieved of its duty to notify the services because the union had already notified them. The Board's response is that the initiating party's duty to mail the required notices is absolute and can not be shifted.

The cases cited by the Board are not in point. They hold only that the initiating party must bear the adverse consequences if no notice is given, or the notice given is untimely. No court has held that the initiating party must send a second notice when the non-initiating party has already notified the mediation agencies.

Congress' principle concern in enacting Section 8(d) was to give the mediation services time to intervene in an effective manner. This goal would not be advanced by requiring the initiating party to give notice after the other party had done so.

The initiating party remains at risk, however, if the notice sent by the other party was ineffective to apprise the mediation services of the particular dispute. *Amax Coal Co. v. NLRB, supra,* 614 F.2d at 889. The Board did not reach this issue because it concluded that respondent's duty to notify could not be affected by any union notification. Therefore we will remand the case to the Board so it can rule on the effectiveness of the notification given to the mediation services by the union.

II. THE INSIDE AGREEMENT

A. *Withdrawal of Recognition.*

The Board found respondent violated Section 8(a)(5) and (1) by unlawfully withdrawing recognition from the union and thereafter refusing to bargain with the union.

The union enjoyed a rebuttable presumption of majority support, *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978), and respondent's withdrawal of recognition established a prima facie case of unlawful refusal to bargain. *NLRB v. Top Manufacturing Co.*, 594 F.2d 223, 224 (9th Cir. 1979). Respondent could rebut this presumption by showing either that the union had in fact lost its majority status or that its withdrawal of recognition was based upon a good faith doubt of the union's continued majority status. *Ibid.* The Board found respondent did not meet its burden.

Respondent points out that none of the employees joined in the picket line established by the union and that four of the six inside employees resigned from the union and returned to work. In addition, some employees expressed dissatisfaction with the union's failure to report bargaining developments and to respond to questions about the consequences of working behind the picket line. However, there was sufficient evidence supporting the Board's conclusions that the employees resigned from the union to avoid potential fines, not to oust the union as a bargaining representative, and that they crossed the picket line and returned to work as a means of preserving a continuity of income because of economic necessity, and not because they rejected union representation. *See NLRB v. Top Manufacturing Co.*, 594 F.2d 223, 224–25 (9th Cir. 1979). The board was also justified in concluding that the expressions of dissatisfaction, taken in context, did not indicate repudiation of the union but only displeasure with the union's handling of the bargaining negotiations. *Ibid.*

The Board also concluded respondent's doubt of the union's majority status was not asserted in good faith. "Reasonable doubt as to majority status must only be asserted in good faith and may not be raised in the context of an employer's activities aimed at causing disaffection from the Union." *Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721, 730 (9th Cir. 1980). The record supports the Board's finding that the resignations from the Union were a direct result of respondent's failure to fulfill its statutory obligation to bargain in good faith.

B. *Failure to Bargain in Good Faith.*

The Board found that "[r]espondent failed to bargain in good faith concerning the terms and conditions of employment for employees in the inside unit." This finding is supported by substantial evidence on the record considered as a whole.

Respondent claims it was willing to negotiate further over its proposals, but "the strike ended the bargaining." *See Neon Sign Corp. v. NLRB,* 602 F.2d 1203, 1205 (5th Cir. 1979). Respondent, however, took the initiative in cancelling the last bargaining session, claiming the union had lost its majority support. We agree with the Board that "if the negotiations became truncated in a manner depriving Respondent of a full opportunity to bargain over non-economic matters, the fault lies primarily with Respondent."

The Board based its finding of bad faith upon the conclusion that respondent made proposals "with the object in mind of forcing a breakdown in negotiations." Respondent proposed an extremely strong "management rights" package that would have required the union effectively to abrogate its representation of the employees. Respondent proposed to establish a no-strike/no-picket policy; to abolish union security, the right of union representatives to visit the plant, and super-seniority for shop stewards; to deny the employees' rights to arbitration of grievances and to respect picket lines; and to relieve respondent of its duties to notify the union of new hiring, to hire first through the union hiring hall, and to contribute to the union pension fund.

We should be cautious in inferring motivation from proposal content since " '[t]here are too many reasons why an employer who is willing to contract with a union might wish to * * * maintain an open shop' " *K-Mart Corp. v. NLRB,* 626 F.2d 704, 706 (9th Cir. 1980) (*quoting Cox, The Duty to Bargain in Good Faith,* 71 Harv.L.Rev. 1401, 1419 (1958)). Nevertheless, proposal content supports an inference of intent to frustrate agreement where, as here, the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.

Although the respondent proferred economic justifications in support of its "management rights" package, the Board found "the cost implications were so theoretical and marginal as to be pretextual." The economic justification offered in support of respondent's proposal to delete the union-security clause is illustrative. Respondent contended that the union was applying the clauses in an unlawful manner, and that retention of the clause could be expected to lead to litigation, and thus expense, for respondent. There was no convincing documentation showing that the union was applying the clause in an illegal manner. We have reviewed the record and agree with the Board that respondent was "grasping at straws" in speculating over the potential litigation cost of retaining the clause. These circumstances supported an inference of bad faith. "Patently improbable justifications for a bargaining position will support an inference that the position is not maintained in good faith. By the same token, 'adhering to an untenable legal position during the course of negotiations is inconsistent with the obligation to bargain in good faith.' " *Queen Mary Restaurants Corp. v. NLRB,* 560 F.2d 403, 409 (9th Cir. 1977) (quoting *Fraser & Johnston Co. v. NLRB,* 469 F.2d 1259, 1263 (9th Cir. 1972)).

The finding that the respondent did not bargain with the intent of reaching an agreement is also supported by events surrounding the withdrawal of recognition. When the union called a strike, respondent advised several employees they would have to resign from the union to return to work. Respondent typed a letter of resignation for one employee and furnished postage and mailed letters of resignation for two others. Contrary to respondent's contention, these events occurred prior to the last bargaining session at which respondent withdrew recognition.

Finally, the Board relied upon respondent's "declared objective of going 'nonunion.' " The Board found this "declaration" in a letter written by respondent to the union shortly before the master agreement expired. The letter stated, "we do not wish to continue in the union, however we are willing to sit at the bargaining table and bargain with you if you wish." Although the letter is ambiguous, we cannot say the Board's interpretation is improbable, especially in light of subsequent events. Accordingly, the Board properly considered the letter as evidence of bad faith.

ENFORCEMENT is GRANTED in part and DENIED in part, and the case REMANDED in part to the Board for further preceedings in accordance with this opinion.

The Edward J. DeBartolo Corporation v. NLRB

662 F.2d 264 (4th Cir.), October 20, 1981;
rehearing and rehearing en banc denied January 26,
1982; certiorari denied October 13, 1982—252
NLRB 702

On petition to review Board Order

Before BUTZNER and ERVIN, Circuit Judges, and BRITT,* District Judge

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ERVIN Circuit Judge: The Edward J. DeBartolo Corporation (DeBartolo) petitions this court to review and set aside an order of the National Labor Relations Board (the Board) dismissing a complaint alleging that the handbilling activity of the Florida Gulf Coast Building Trades Council, AFL-CIO (the Union) at one of DeBartolo's shopping malls violated federal labor laws. Upon review, we deny the petition.

I. *Background*

DeBartolo, an Ohio corporation doing business in several states,[1] owns and operates East Lake Square Mall in Tampa, Florida. The mall is fairly large, having over eighty tenants, and it is with one of its larger tenants—the H. J. Wilson Company, Inc. (Wilson's)—that this labor dispute had its origins.

DeBartolo entered into a land lease with Wilson's, whereby Wilson's agreed to build a department store in the mall. Wilson's in turn hired H. J. High Construction Company (High) to construct the store. After construction had commenced, the Union became embroiled in a primary labor dispute with High over the payment of allegedly substandard wages and the provision of inadequate benefits to its employees. In order to publicize its discontent with the situation, the Union handbilled at the entrances to the mall in late 1979 and early 1980, ceasing only after the issuance of an injunction by a Florida state court. The Union passed out the handbills in an orderly manner and did not picket.

The handbills, requesting a total consumer boycott of the mall, read:

> PLEASE *DON'T SHOP AT EAST LAKE SQUARE MALL* PLEASE
>
> The FLA. GULF COAST BUILDING TRADES COUNCIL, AFL-CIO is requesting that you do not shop at the stores in the East Lake Square Mall because of The Mall ownership's contribution to substandard wages.
>
> The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits. In the past, the Mall's owner, The Edward J. DeBartolo Corporation, has supported labor and our local economy by insuring that the Mall and its stores be built by contractors who pay fair wages and fringe benefits. Now, however, and for no apparent reason, the Mall owners have taken a giant step backwards by permitting our standards to be torn down. The payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community. Since low construction wages at this time of inflation means decreased purchasing power, do the owners of East Lake Mall intend to compensate for the decreased purchasing power of workers of the community by encouraging the stores in East Lake Mall to cut their prices and lower their profits?

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> CUT-RATE WAGES ARE NOT FAIR UNLESS MERCHANDISE PRICES ARE ALSO CUT-RATE.
>
> We ask for your support in our protest against substandard wages. Please do not patronize the stores in the East Lake Square Mall until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.
>
> IF YOU MUST ENTER THE MALL TO DO BUSINESS, please express to the store managers

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*The Honorable W. Earl Britt, United States District Judge for the Eastern District of North Carolina, sitting by designation.

[1] This court has jurisdiction pursuant to 29 U.S.C. § 160(f), as DeBartolo "transacts business" in Maryland by virtue of the operation of a mall and a shopping center there.

> your concern over substandard wages and your support of our efforts.
>
> We are appealing only to the public—the consumer. We are not seeking to induce any person to cease work or to refuse to make deliveries.

A few days after the Union commenced its handbilling, DeBartolo filed unfair labor practice charges. The Board's General Counsel then issued a complaint alleging that the handbilling urged a secondary boycott in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(b)(4)(ii)(B), which makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, when an object thereof is to force or require any person to cease doing business with any other person. The Union filed a timely response denying commission of an unfair labor practice, and upon joint motion of the parties, a hearing before an Administrative Law Judge was waived, with the Board making findings and conclusions upon a stipulated record.

The Board dismissed the complaint on the ground that the activity came within the ambit of the statute's "publicity proviso," which exempts from the statute's proscription

> publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution[.] 29 U.S.C. § 158(b)(4).

Observing that no allegations had been made that the handbilling had the unlawful effect of inducing any individual employed by anyone other than High to refuse to work and concluding that the record established that the handbills were truthful and that the statutory requirement of a "producer-distributor" relationship had been met, the Board determined that the handbilling was protected publicity. On appeal DeBartolo raises three arguments against the Board's conclusions, each of which will be considered in turn.[2]

II. *Truthfulness of the Handbills*

DeBartolo first argues that the publicity proviso cannot shield the handbilling because one of the prerequisites to its application is that the message conveyed be truthful. The message of the handbills was untruthful, DeBartolo asserts, in three instances: (1) it urged a consumer boycott of all the stores in the mall, including those that were totally neutral; (2) it gave the erroneous impression that High was a "producer" of the products of DeBartolo and the mall's tenants other than Wilson's; and (3) it failed to identify High, the primary employer, by name.

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These arguments were raised in briefs submitted to the Board, and the Board concluded that the first two contentions addressed legal issues unrelated to the truthfulness requirement and relevant instead to the proviso's "producer-distributor" requirement. We agree and hold our discussion of those issues in abeyance for Part III of the opinion.

The third contention the Board found relevant. It concluded, however, that the Union did not substantially depart from fact or intend to deceive by omitting High's name when it stated that it believed that Wilson's department store was being built by "contractors who pay substandard wages and fringe benefits." In so concluding, the Board relied upon the truthfulness test it had set forth in *Local 537, International Brotherhood of Teamsters (Lohman Sales Co.),* 132 N.L.R.B. 901, 906 (1961), in which it stated that the publicity proviso "does not require that a handbiller be an insurer that the content of the handbill is 100 per cent correct, and that where * * * there is no evidence of an intent to deceive and there has not been a substantial departure from fact, the requirements of the proviso are met."

The Board correctly applied the *Lohman Sales* standard to the facts of this case. Omission of

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[2] DeBartolo states in its brief that the Wilson's store has been completed and that High is no longer performing work at this location. We do not, however, consider the case moot. In labor cases, cessation of the challenged conduct does not assure that the underlying controversy will not be reopened or that the challenged conduct will not reoccur. *See NLRB v. Raytheon Co.,* 398 U.S. 25, 90 S.Ct. 1547, 26 L.Ed.2d 21 (1970); *Pet, Inc. v. NLRB,* 641 F.2d 545, 545 n.1 (8th Cir. 1981).

High's name in the handbill is, standing alone, not evidence of an intent on the Union's part to deceive the public about the labor dispute and does not, in any sense, depart from fact. Indeed, to hold otherwise would be tantamount to imposition of a per se requirement that the name or names of primary employer or employers appear in the handbills. This we will not do, in light of the Board's reluctance to make the statutory truthfulness requirement more stringent than its current expression in *Lohman Sales* and the dubious benefits to the public of such a rule. We therefore uphold the Board's conclusion that the handbill's message was a truthful one.[3]

III. *Producer-Distributor Relationship*

The second argument advanced by DeBartolo is that the publicity proviso did not protect the handbilling because the producer-distributor relationship required by the proviso did not exist between High and DeBartolo, and DeBartolo and the mall's tenants; it asserts that only the relationship between High and Wilson's can qualify as one between a producer and a distributor. We disagree and uphold the Board's conclusion that this relational requirement was fulfilled.

The proviso protects truthful publicity that advises the public "that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer." In considering the proviso's producer-distributor requirement in the context of this case, the Board first traced the mutually beneficial relationship between, and interdependence of, DeBartolo and the mall's tenants, as evidenced by the terms of their lease agreements. It found that each tenant agreed to use its premises in a way that would not injure the mall's reputation or interfere with other tenants' businesses; that each tenant had to pay its share of the operating, maintenance, and repair costs for the mall's common areas, with its share to be reduced every time a new tenant moved in; that a tenant's minimum rent would increase by ten per cent when new department stores of certain size opened at the mall; that each tenant was required to join the mall's merchants' association and to take part in joint advertising projects; that DeBartolo would share in the commercial success of the mall by collecting from ten-

ants percentage rents based on sales; and that DeBartolo had the right to exercise control over tenants' construction work, business hours, employees, signs, and equipment.

The terms of the lease agreements, in the Board's judgment, reflected "the symbiotic nature of the relationship between DeBartolo and its tenants." The symbiosis, in turn, supported the Board's conclusion that not only the High-Wilson's relationship but also the High-DeBartolo relationship and the relationship between High and the mall's tenants could be described as that of producer and distributor.

The Board concluded that High is a producer of the Wilson's store at the mall because, by its employees' labor, it adds value to the store. High is also a producer of the mall enterprise itself because, by helping to build the Wilson's store, it has applied capital, enterprise, and service to the mall enterprise and has thus added value to that enterprise. Both the Wilson's store and the mall enterprise itself, therefore, are products of High's labor.

Although the Board does not elaborate, its reasoning suggests that it considered DeBartolo and the mall's tenants to be distributors of both of High's products. DeBartolo and the tenants help "distribute" the new Wilson's store and its inventory by attracting shoppers, helping to maintain common areas, and participating in joint advertising. They help "distribute" the mall enterprise and the goods sold through that enterprise simply by conducting business.

In reviewing the Board's resolution of the producer-distributor issue, which presents mixed questions of law and fact, we are mindful of the limitations upon that review; we are to "accord great respect to the expertise of the Board when its conclusions [on a mixed question of fact and law] are rationally based on articulated facts and consistent with the Act." *NLRB v. Yeshiva University,* 444

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[3] Board Member Penello dissented from the Board's decision in this case because he found the stipulated record to be an insufficient basis upon which to decide the question of the handbill's truthfulness. He would have remanded the proceeding for a hearing on what he perceived to be factual questions surrounding the truthfulness issue.

We think that the Board majority acted properly in determining the issue. Application of the *Lohman Sales* test in this case required only legal determinations, i. e., whether omission of High's name from the handbill was evidence of intent to deceive, and whether the omission represented a substantial departure from fact. Remand was therefore not necessary.

U.S. 672, 691, 100 S.Ct. 856, 867, 63 L.Ed.2d 115 (1980). The Board's construction of a labor statute, if reasonably defensible, moreover, should not be rejected merely because the courts might prefer another view of the statute. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979), citing *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers,* 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978). Indeed, that construction is entitled to considerable deference. *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Iron Workers,* 434 U.S. at 350, 98 S.Ct. at 660. With these cautionary instructions in mind, we conclude that the Board's reasoned conclusions on the meaning and application of the producer-distributor language are rational and consistent with the proviso language. *See NLRB v. Yeshiva University,* 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980).

Board and judicial interpretation of the producer-distributor language, based in large part upon the legislative history of the proviso, clearly indicates that the language is not to be read literally but instead is to be broadly construed. In its leading decision *Lohman Sales,* the Board concluded that a wholesale distributor of cigarettes and other commodities—a middleman—was a producer of those goods within the meaning of the proviso because it added the value of its labor to these goods in the form of capital, enterprise, and service. In reaching that conclusion, the Board reviewed the legislative history of the proviso and decided that the words "product" and "produced" were not meant to be words of special limitation. Rather, it concluded that labor is the key characteristic of one who produces and, accordingly, that the Board need not attempt "to draw an uncertain line between those employers engaged essentially or only incidentally in the fabrication of products; between those employers who create a new product or embellish an old one; between products of the imagination and those that can be seen, touched, or smelled." 132 N.L.R.B. at 907. *See Local No. 662, Radio and Television Engineers (Middle South Broadcasting Co.),* 133 N.L.R.B. 1698 (1961) (radio station is producer of products it advertises).

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The Supreme Court approved the *Lohman Sales* decision and rationale in *NLRB v. Servette, Inc.,* 377 U.S. 46, 84 S.Ct. 1098, 12 L.Ed.2d 121 (1964). The *Servette* Court reviewed the legislative history of the proviso and the Board's *Lohman Sales* decision and concluded that Servette, as a wholesale distributor of specialty merchandise stocked by food chains, was a producer of that merchandise for purposes of application of the publicity proviso. In so holding, the Court noted that

> [t]he proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded * * *. It would fall far short of achieving this basic purpose if the proviso applied only in situations where the union's labor dispute is with the manufacturer or processor * * *. There is nothing in the legislative history which suggests that the protection of the proviso was intended to be any narrower in coverage than the prohibition to which it is an exception, and we see no basis for attributing such an incongruous purpose to Congress. *Id.* 377 U.S. at 55, 84 S.Ct. at 1104.[4]

Other courts have applied the *Servette* rationale to give the proviso a similarly expansive scope. *See, e.g., Great Western Broadcasting Corp. v. NLRB,* 356 F.2d 434 (9th Cir. 1966) (television station, by virtue of its advertisement of goods and services, was a producer of those goods and services, even though court found incongruous the idea of a service being a product which is distributed).

These decisions—handed down soon after the 1959 passage of the proviso—quite clearly show that the proviso's producer-distributor language was not to be given a narrow or literal construction, for such an interpretation would often defeat its clear purpose of protecting labor's ability to publicize by means other than picketing its grievances to consumers. Economic realities made a broad reading necessary; employees work not only to produce tangible products but also to provide services and to add value to goods not directly produced by them.

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[4] As the Court made clear in *Servette* and in the companion case *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits),* 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964), the publicity proviso resulted from a compromise between the House of Representatives and the Senate in amending section 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4), in 1959. The proviso was incorporated into the statute, even though it protected some coercive activity, because of the Senate's concern that the right of unions to exercise free speech and to appeal to the public be protected and that the revised section 8(b)(4) not offend the first amendment. When the Senate passed the compromise bill, Senator John Kennedy, who had presided over the conference committee, stated that the proviso preserved the right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.

> * * * We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop * * * and carry on all publicity short of having ambulatory picketing * * *. 105 Cong.Rec. 17898–99 (1959).

In no area has a generous interpretation of the language been more necessary than in the construction industry, as a construction company obviously does not produce tangible goods that are then literally distributed by a secondary employer. The Board has, accordingly, given liberal interpretation to the proviso in this context and has consistently held that construction contractors and subcontractors are producers within the meaning of the proviso and that their services are products, *see Plumbers and Pipefitters Local Union No. 142 (Shop-Rite Foods, Inc.),* 133 N.L.R.B. 307 (1961); *Local 712, IBEW (Golden Dawn Foods),* 134 N.L.R.B. 812 (1961), and that they are also producers of the "end product" to which their services contribute. *See Local 73, Electrical Workers Union (Northwestern Construction of Washington, Inc.),* 134 N.L.R.B. 498 (1961).[5]

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As labor cases involving shopping center construction arose, the Board continued to give broad definition to the producer-distributor language of the proviso. In *Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.),* 174 N.L.R.B. 362 (1969), the Board held that a union's handbilling of certain downtown stores was protected under the proviso. The handbills asked for a consumer boycott of those stores because the heating and air conditioning subcontractor at a suburban shopping center at which the stores had leased space was paying substandard wages. The Board's conclusion allowed the stores to be handbilled even though they themselves had not hired the subcontractor and had no relationship with it except to pay for its services as part of their monthly rent. In *Nashville Building & Construction Trades Council (Castner-Knott Dry Goods Store),* 188 N.L.R.B. 470 (1971), the Board reasoned in similar fashion. In that case, simultaneous picketing and handbilling at a downtown store urging a consumer boycott because of that store's contract with an out-of-state nonunion construction company to build a new store for it at a shopping mall was held to be illegal secondary activity. Handbills had been earlier distributed at that store and others which planned to locate at the mall, however, requesting that consumers boycott those stores because the mall's owner had hired nonunion contractors to construct the mall, and no argument was made that those handbills were outside the scope of the proviso. In these shopping center cases it can be inferred that the construction contractors and subcontractors were producers of a certain work product and that the shopping center's stores were distributors of that product and thus could be handbilled by unions urging a total boycott of their businesses.

In light of precedent, the Board's interpretation and application in this case of the publicity proviso is clearly consistent with the Act and is rational. High produces certain products, i. e., the Wilson's store and the mall enterprise, and those products are in turn distributed by DeBartolo and the mall tenants, all of whom had a financial interest in High's work but had no direct relationship with High. That DeBartolo and the mall tenants are not involved in the primary dispute between High and Wilson's does not alter the conclusion: it was clearly Congress's intent to allow coercive pressure of neutral employers in the forms of union handbilling of consumers and other pure publicity. *See NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760,* 377 U.S. at 69–70, 84 S.Ct. at 1069–70. Furthermore, that High had no contract with either DeBartolo or the mall tenants is not of major significance; the handbilling should be protected under the publicity proviso even when there is no direct connection between the primary employer and the handbilled employer. *See, e.g., Local Union No. 54, Sheet Metal Workers (Sakowitz, Inc.),* 174 N.L.R.B. 362 (1969). High thus does not have to be contractually related to DeBartolo and the mall's tenants for DeBartolo and the tenants to be able to respond to union handbilling and, in turn, to apply pressure on Wilson's and High. We therefore uphold the Board's conclusion that the proviso's requirement of a producer-distributor relationship was met in this case.[6]

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[5] In a different procedural setting, a district court has reasoned in like manner and refused to enjoin handbilling by a union at a retail store owned by persons who had a financial interest in a construction project at which employees allegedly worked under substandard conditions. *Squillacote v. Building and Construction Trades Council,* 266 F.Supp. 971 (E.D.Wis. 1967).

The Eighth Circuit in *Pet, Inc. v. NLRB*, 641 F.2d 545 (1981), has construed the producer-distributor requirement of the publicity proviso in a rather different fashion. In that case, the court reversed the Board's dismissal of Pet's complaint alleging that the United Steelworkers had engaged in an illegal secondary boycott. The union had struck one of the plants of Hussmann, a wholly owned subsidiary of Pet, and had also run advertisements in local newspapers and had handbilled in the St. Louis area urging the public to boycott Pet products and other Pet subsidiaries. The Board concluded that the union's handbilling and advertising activities were protected by the publicity proviso, because Hussmann, by its application of capital, enterprise, and service to Pet and to Pet's diversified enterprise, was a producer of all Pet enterprise products, in that the income it generated, goodwill it earned, and diversification it provided inured to the benefit of the entire enterprise. *United Steelworkers of America (Pet, Inc.)*, 244 N.L.R.B. No. 6 (1979). The Eighth Circuit majority, however, concluded that the proviso did not cover the union's publicity because Hussmann could not be a producer of the products of Pet and its subsidiaries: Hussmann did not, within the normal meaning of the word "produce," produce Pet's products by benefit of its profits; it had only a highly attenuated connection with Pet's products; and it did not work on any of the Pet products. 641 F.2d at 549. The dissent in *Pet*, however, concluded upon review of the proviso's legislative history and statutory purpose that the Board's broad interpretation of the producer language of the proviso was in harmony with the congressional purpose of protecting all pure publicity by a union. It therefore would have denied Pet's petition for review.

The Board in the case at hand relied in part upon its reasoning in *Pet* in concluding that the handbilling fell within the scope of the publicity proviso.[7] To the extent that the Board's reasoning in that decision supports the conclusions reached in our case, we respectfully differ with the reasoning and conclusions of the Eighth Circuit majority in *Pet* and find more persuasive the reasoning of the dissent.

Our considered judgment is that the Board in the case before us correctly concluded that the proviso applied to the handbilling at the mall and that High is a producer, and DeBartolo and the tenants, distributors, within the meaning of the proviso.

IV. *Location of the Handbilling*

DeBartolo finally argues that, even if the publicity proviso covers the language of the handbill, the activity of handbilling on the mall premises violated the Act. This issue of the location of the handbilling appears to have been raised for the first time on appeal; the Board's decision makes no mention of this argument in its summaries of the parties' contentions, and it does not in any manner address or determine the issue. We therefore decline to consider it, in light of the command of section 10(e) of the Act that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Finding no extraordinary circumstances to excuse DeBartolo, we cannot consider the argument. *See NLRB v. Kotarides Baking Co., Inc.*, 340 F.2d 587 (4th Cir. 1965); *NLRB v. Community Motor Bus Co.*, 335 F.2d 120 (4th Cir. 1964).

V.

Perceiving no merit in DeBartolo's contentions concerning the truthfulness of the handbills or the fulfillment of the publicity

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[6] The Board's appellate counsel, intervenor Florida Gulf Coast Building Trades Council, and amicus Building and Construction Trades Department also argue for affirmance of the Board's dismissal of the complaint on first amendment grounds, that is, that the dismissal successfully avoids a first amendment conflict, or, alternatively, that the first amendment protects the handbilling. The Board, however, found it unnecessary to reach or pass upon the first amendment question, and, because the issue has not been addressed by the Board, we decline to do so. We cannot substitute Board counsel's rationale for that of the Board, *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974), because substitution of counsel's rationale or the court's own discretion for that of the Board threatens the integrity of the administrative process and is incompatible with the orderly function of the process of judicial review. *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965). *See SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947).

[7] The Eighth Circuit had not denied enforcement of the Board's order in *Pet* at the time the Board decided this case.

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proviso's requirements of a producer-distributor relationship, we deny DeBartolo's petition to set aside the Board's order.

PETITION DENIED.

BRITT, District Judge, dissenting: This matter was presented to the National Labor Relations Board upon stipulated facts, including the following:

> At all times material herein, East Lake Square Mall, located in Tampa, Florida, has been an operating shopping center mall, owned and operated by DeBartolo through its subsidiary, Eastlake Square Associates. At no time germane to this Complaint has DeBartolo operated a retail store at East Lake Square Mall, nor does DeBartolo own any of the property on which the Belk's is located. East Lake Square Mall has approximately 85 tenants employers which, at all times material herein, have leased space in which to operate their respective stores from DeBartolo * * *. Wilson's is a tenant of DeBartolo while Belk's is not. DeBartolo has no control over the method or means by which any tenant or Belk's operates its business, except as provided in the applicable lease, property, or maintenance agreement. Neither does any tenant or Belk's have any control over the method or means by which DeBartolo or any other tenant or Belk's does business. Method or means as used herein and hereinafter includes, but is not limited to wages, hours, as well as working conditions and other matters dealing with labor relations * * *.
>
> DeBartolo, through its subsidiary, Eastlake Square Associates, has entered into a land lease with Wilson's, whereby Wilson's will build a department store that will connect to, and become part of the already operating East Lake Square Mall. Pursuant to the terms of the lease, Wilson's is totally responsible for the construction of its store and will own the structure * * *. Wilson's has contracted with High, a general contractor, to build its department store. High has employed its own employees, as well as contracted with various sub-contractors to build Wilson's Department Store. High is not a tenant of DeBartolo, does not engage in the operation of retail stores and does not have a contract to lease or purchase any property in or adjacent to the East Lake Square Mall * * *.
>
> * * * * *
>
> Neither DeBartolo, nor any tenant other than Wilson's, nor Belk's, has any contract or business relationship of any type with High. No tenant nor Belk's has any contract or business relationship with Wilson's.
>
> * * * * *
>
> The handbilling took place at all four entrances to the Mall which . . . are all located on the private property of DeBartolo but are utilized as means of ingress and egress to the retail stores located in the Mall.
>
> * * * * *
>
> If it were not for the fact that High was and is performing construction work on the Wilson's store, Respondent would have no dispute with DeBartolo, Belk's or any tenant in the Mall and would have no cause to handbill at East Lake Square Mall.
>
> At all times material herein Belk's has maintained and operated a retail establishment within Hillsborough County, Florida, which is more particularly located at East Lake Square Mall. That retail establishment is located on land which Belk's owns. That land is comprised of approximately 10.72 acres of property within a larger parcel of property otherwise known as East Lake Square Mall. The property owned by Belk's includes the land upon which the store structure stands and the adjacent sidewalks and parking area.
>
> The Wilson's and Belk's retail stores are competitor establishments. Belk's has no business relationship with Wilson's in any manner, and exercises no control over the construction of the Wilson's store to be located at East Lake Square Mall.
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> Belk's has no contract with nor does it do business in any manner with High.
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> The only business relationship between Belk's and DeBartolo is that Belk's pays DeBartolo for maintenance and security of common areas. Belk's does not in any way share or split its revenues from its East Lake Square Mall store with

DeBartolo. Belk's pays no money or thing of value to any tenant in the Mall and has no business relationship with any of them, except as provided in any provision of the aforesaid lease, property, or maintenance agreements.

Between the dates of January 8, 1980, and January 17, 1980, Respondent Union handbilled at the entrances to Belk's retail store with the identical handbill to that previously distributed at the mall entrances. The handbilling took place at the three entrances to the store itself, all of which took place upon Belk's property * * *.

Neither DeBartolo, Belk's nor any tenant has the ability to remove High as the general contractor on the construction project of the Wilson's store at East Lake Square Mall.

Under these facts the majority concludes that "High is a producer, and DeBartolo and the tenants, distributors" within the meaning of the publicity proviso of the statute under consideration. 29 U.S.C. § 158(b)(4). Being unable to agree, I respectfully dissent.

A key element of the proviso is that the publicity must relate to a "product" which has been "produced *by an employer with whom the labor organization has a primary dispute.*" *Id.* (emphasis added).

It is undisputed that as to Wilson the handbilling was proper. However, it requires a strained construction of the statute to say that the "mall enterprise itself" is the "product" of High's labor and that the mall owner and tenants distribute that enterprise "simply by conducting business." In my view no case has gone this far. The cases relied on by the majority are factually distinguishable. In one of these, *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 84 S.Ct. 1098, 12 L.Ed.2d 121 (1964), Respondent Servette was a wholesale distributor of certain items carried for sale by various retailers. The Union, involved in a dispute with Servette, distributed handbills at the retail stores asking patrons of the stores not to buy certain listed products distributed by Servette. The Supreme Court held that products "produced by an employer" included those distributed by a wholesaler such as Servette.

In *Pet, Inc. v. N.L.R.B.*, 641 F.2d 545 (8th Cir. 1981), the Eighth Circuit reversed a decision of the Board that one of Pet's wholly-owned subsidiaries (Hussmann) was a "producer" of Pet's products. I agree with the majority there, which said: "* * * we think it totally at odds with any normal interpretation of the word 'produce' to say that because Hussmann's profits inure to the benefit of Pet, Hussmann produces Pet's products. We find the connection between Pet's products and Hussmann to be highly attenuated." *Id.* at 549.

Whether the handbilling is an unfair labor practice under Section 8(b)(4)(ii)(B) of the Act or whether, as contended by Respondent, it is free speech protected by the first amendment, are matters not addressed by the Board. My vote is to reverse and remand to the Board for consideration of those important and dispositive issues.

East Bay Chevrolet d/b/a Time Chevrolet v. NLRB

East Bay Automotive Council v. NLRB

659 F.2d 1006 (9th Cir.), October 22, 1981—242 NLRB 625

On petitions to review Board Order

Before Anderson, Nelson, and Norris, Circuit Judges

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J. Blaine Anderson, Circuit Judge: East Bay Chevrolet, the Employer, seeks review of an order of the National Labor Relations Board (the Board) which requires that any agreement reached between the Employer and the East Bay Automobile Council (the Council) shall be retroactive to July 26, 1977. The Council, on the other hand, petitions for review of the Board's order denying it costs and attorney fees. The Board has applied for the enforcement of its orders.

I. *FACTS*

The Employer is an automobile dealer engaged in the selling and servicing of new and used cars. The Council is an amalgamation of four separate unions formed for the purpose of negotiating collective bargaining agreements with automobile dealerships. The four crafts that compose the Council are auto mechanics, painters, car jockeys, and new and used car sales people.

The Employer was a member of the East Bay Motor Car Dealers Association (the Association), a multi-employer group which represented its members in collective bargaining with unions. In 1972, the Association and the Council entered into a collec-

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tive bargaining agreement which, for the first time, covered the four crafts under one collective bargaining agreement. When that contract expired in 1974, another collective bargaining agreement was negotiated. That contract expired on May 31, 1977.

In April of 1977, after a change in ownership, the Employer notified the Council that it was withdrawing from the Association and would, henceforth, be conducting its collective bargaining on its own behalf. The Council acquiesced in this withdrawal and proceeded to negotiate with the Employer.

At their first negotiating session on July 5, 1977, the chairman of the Council requested that the Employer sign a prepared recognition agreement which stated that the Employer acknowledged the Council and its four constituent unions "as the sole and exclusive representative of its employees in a unit appropriate for the purposes of collective bargaining." (Excerpt of Record 23). After examining the document, the attorney for the Employer made several changes, including pluralizing the words "representative" and "unit." There was no discussion about the substantive effect of these changes. The recognition agreement as modified was signed and written proposals covering the four crafts were presented by the Council. No agreement was reached, but a second meeting was scheduled.

After the July 5, 1977 meeting, the attorney for the Employer filed a petition with the Board seeking an election to decertify the Automobile Salesmens' Union as the collective bargaining representative of the sales people. The basis for his actions was his receipt of a petition signed by all the sales people stating that they did not wish to be represented by the Automobile Salesmens' Union.

At the second bargaining session on July 7, 1977, the attorney for the Employer stated that the Employer could not bargain with the Council or with the Salesmens' Union because the petition had been filed with the Board and there was independent objective evidence that the Salesmens' Union did not represent the sales people. The Employer stated that it would continue to bargain as to the three other crafts. The Council and the representatives of the other Unions objected to this arrangement and the negotiations ended. Unfair labor practice charges were subsequently filed against the Employer.

In the meantime, the members of the Council struck the various automobile dealers in the Association as well as the Employer. On July 20, 1977, the Council ended its strike against the Association members when a new collective bargaining agreement was reached.

On July 26, 1977, the Employer and the Council agreed upon a "stop-gap" resolution to their dispute. The Employer entered into a collective bargaining agreement with the Council which was limited to the mechanics, painters, and car jockeys. In addition, a reservation agreement was executed. It provided that the collective bargaining agreement covering the three other crafts was without prejudice to the dispute concerning the representative status of the Salesmens' Union.

In the subsequent unfair labor practice proceedings, the Board ruled that the Employer had violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(a)(5) and (1), "by refusing to continue bargaining with the Council on a single-employer basis for a combined unit of its shop [auto mechanics, painters, and car jockeys] and sales employees. The Employer was ordered to immediately recognize and bargain with the Council in the four-craft unit. Further, the Board adopted the recommendation of the administrative law judge (the ALJ) and ordered that any contract reached between the Employer and the Council, "including monetary benefits to be derived therefrom, * * * be retroactive to July 26, 1977, the date the Respondent [the Employer] entered into the single three-craft contract and the reservation agreement." (Excerpt of Record 10). The Board also adopted the ALJ's recommendation and denied the Council's request for costs and attorney fees.

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II. *DISCUSSION*

A. *Retroactivity of the Agreement*

In its petition for review of the Board's decision, the Employer does not challenge the Board's unfair labor practice determinations, nor does it contest the propriety of the Board's order to recognize and bargain with the Council in the four-craft unit. The Employer's sole objection concerns the Board's order requiring any contract agreed upon by the parties to be retroactive to July 26, 1977. The Employer principally contends that the Board's order impermissibly establishes a substantive contract term and therefore should not be enforced. We believe the Employer's objection is well taken.

The obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978). This provision in our labor laws is based upon the basic principle "that the National Labor Relations Act is grounded on the premise of freedom of contract." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107, 90 S.Ct. 821, 825, 25 L.Ed.2d 146 (1970), *quoting United Steelworkers v. NLRB*, 389 F.2d 295, 300 (D.C. Cir. 1967).

> "While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (footnote omitted)

H. K. Porter, 397 U.S. at 108, 90 S.Ct. at 826. Therefore, the Board may not prescribe the substantive terms of a collective bargaining agreement, either directly or indirectly. *See H. K. Porter*, 397 U.S. at 106, 90 S.Ct. at 825; *NLRB v. Tomco*, 567 F.2d at 884.

In a case similar to the present, the Board recognized its limitations and refused a request that certain contract provisions be made retroactive. In *Trustees of Boston University*, 228 N.L.R.B. 1008 (1977), *enforced*, 575 F.2d 301 (1st Cir. 1978), *vacated on other grounds*, 445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980), the Trustees were found to have violated section 8(a)(5) of the Act by its refusal to bargain with the union. The union requested that the Board, in addition to the usual bargaining order, issue an order making all contract provisions involving salaries or fringe benefits retroactive because of the employer's frivolous objections and refusal to bargain. The Board declined to grant such extraordinary relief, stating that:

> "By its request for retroactivity of certain contract provisions, the Union in effect is asking the Board to establish the effective date of the contract with respect to these terms. Since the Board is without power to compel parties to agree to any such substantive provision of a collective bargaining agreement, we shall deny this request.[10]"
>
> "n. 10 *H. K. Porter v. NLRB*, 397 U.S. 99 [90 S.Ct. 821, 25 L.Ed.2d 146] (1970)."

Id. at 1010. Thus, in *Trustees*, the Board acknowledged that the effective date of a collective bargaining agreement is a substantive provision and that it could not compel parties to agree to such a provision.

Here, the Board has ignored its holding in *Trustees* and the principles set forth in cases such as *H. K. Porter* and *Tomco*. The Board has ordered the Employer to recognize and bargain with the Council in the four-craft unit and "if an understanding is reached, embody such agreement in a signed, written contract which shall be retroactive in all respects to July 26, 1977." This order does precisely what the Board acknowledged it had no authority to do—it prescribes a substantive provision, the effective date of the contract, in a collective bargaining agreement.

The General Counsel presents several arguments to justify the enforcement of the order. First, General Counsel argues that the Board's order does not establish a substantive provision of a contract. We summarily reject this contention as the Board itself in *Trustees* has ruled otherwise.

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General Counsel also argues that in previous cases, Board orders according retroactive effect to collective bargaining agreements have been upheld. While this court has enforced orders that have given retroactive effect to collective bargaining agreements, those cases are clearly distinguishable. There, collective bargaining agreements had already been negotiated and agreed upon. The issues in those cases were whether the employer was bound by the agreement or whether the employees were covered by the agreements. *See, e. g., NLRB v. Lantz*, 607 F.2d 290 (9th Cir. 1979); *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899 (9th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1598, 63 L.Ed.2d 785 (1980); *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306

(1979). After concluding that the employer was bound by contract or that the employees were covered by the contract, the Board ordered the employer to comply with the agreement. The retroactive order merely gave the employees the full benefit of the bargain that had already been agreed upon. The Board was not engaged in prescribing contract terms.

General Counsel further contends that even if the effective date of the contract is a substantive term, the principles of *H. K. Porter* are not violated. General Counsel argues that the Board may not impose terms which it believes the parties *should* have agreed to, but it may fashion a remedy based upon what the parties *would* have agreed upon but for the unfair labor practice. In essence, the General Counsel contends that we adopt the decision of the D.C. Circuit in *I.U.E. v. NLRB,* 426 F.2d 1243 (D.C.Cir.), *cert. denied,* 400 U.S. 950, 91 S.Ct. 239, 27 L.Ed.2d 256 (1970) (hereinafter referred to as *Tiidee Products*). In *Tiidee Products,* the employer's refusal to bargain was deemed to be a clear and flagrant violation of the Act. As a remedy, the Board had merely imposed a prospective bargaining order. The D.C. Circuit believed that a more meaningful remedy was warranted. The court ruled that a "make-whole remedy" could be imposed whereby the Board could award compensatory damages "based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act." *Id.* at 1253.

We have apparently never adopted or rejected the *Tiidee Products* decision; *see Culinary Alliance & Bartenders Union, Local 703 v. NLRB,* 488 F.2d 664, 666 (9th Cir. 1973), *cert. denied,* 417 U.S. 946, 94 S.Ct. 3071, 41 L.Ed.2d 666 (1974). We decline to do so now as there is no indication that the Board intended to base its order upon the *Tiidee Products* decision. As the Supreme Court stated in *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 443-444, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965):

> "When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' (footnote omitted) *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 197, 61 S.Ct. 845, 854, 85 L.Ed. 1271, 1284 * * * the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action * * *.' (citations omitted) For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.'" (citation omitted)

We have also considered the Board's decision in *Trading Port, Inc.,* 219 N.L.R.B. 298 (1975). In this case, the ALJ stated that his recommended order was not greatly different from a *Trading Port* retroactive bargaining order. In *Trading Port,* the union commenced a campaign to organize the employees of the employer. The union was able to get a majority of the employees to sign union authorization cards; however, due to the employer's unlawful conduct pri-

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or to the Board certification election, the union was defeated. The Board determined that the pervasiveness of the employer's unfair labor practices had made the holding of a fair election impossible and, therefore, a bargaining order was warranted. The employer was ordered to recognize and bargain with the union. However, instead of the typical prospective bargaining order which operated only from the date of the Board's decision, the Board granted a retroactive bargaining order. The order provided that the employer's obligation to bargain with the union "commence[s] as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in significant unfair labor practices to undermine the union's majority status." *Id.* at 301.

In fashioning the remedy, the Board was concerned that in some instances the prospective bargaining order "left unremedied an employer's unilateral changes in working conditions made after a union had established its majority status." *Id.* The retroactive bargaining order, it was hoped, would "'re-establish the conditions as they existed before the employer's unlawful campaign' and not place a union in a disadvantaged position." *Id.*

It is evident that the Trading Port bargaining order does not compel the parties to agree to any terms in the contract. It is only the obligation to bargain which is made retroactive. Thus *Trading Port* does not support the Board's order in this case.

We conclude that the Board's order establishing the effective date of the contract cannot be enforced as it compels the parties to agree to a substantive term of the contract. We, therefore, remand this portion of the Board's order to allow the Board to impose appropriate remedies.

B. *Costs and Attorney Fees*

The Council argues that the Board erred in not granting its request for litigation costs and attorney fees. We disagree. Congress has invested the Board with broad discretion in fashioning remedies to effectuate the policies of the Act in light of the circumstances of each case. *NLRB v. Food Store Employees Union, Local 347,* 417 U.S. 1, 8, 94 S.Ct. 2074, 2079, 40 L.Ed.2d 612 (1974); *Graphic Arts International Union, Local No. 280 v. NLRB,* 596 F.2d 904, 910 (9th Cir. 1979). The Board has adopted a policy of awarding litigation expenses only where the defenses asserted by the employer in refusing to bargain are totally without merit or frivolous. *Hecks, Inc.,* 215 N.L.R.B. 765 (1974). We are satisfied that the Board did not abuse its discretion in affirming the ALJ's determination that the Employer had not engaged in litigation totally without merit. A defense like the one involved in this case, which rests upon a credibility determination, is not frivolous. *Id.*

The Council contends that the issue should nevertheless be remanded to the Board because it failed to discuss the issue. However, the request for costs and attorney fees was only ancillary to the major questions presented. Omission of a discussion of ancillary issues does not warrant remand. *J. P. Stevens & Co., Inc. v. NLRB,* 612 F.2d 881, 883 (4th Cir.), *cert. denied,* ——— U.S. ———, 101 S.Ct. 315, 66 L.Ed.2d 145 (1980).

III. *Conclusion*

The Employer's petition for review is GRANTED. The Board's petition for enforcement of the remedial order is DENIED. The case is remanded to the Board for reconsideration of a remedial order in light of this opinion.

The Board's order denying costs and attorney's fees to the Council is AFFIRMED.

Griffith Company; J.W. Hicks Construction Co. and Security Paving Co., Inc. v. NLRB

NLRB v. International Union of Operating Engineers, Local Union 12

660 F.2d 406 (9th Cir.), October 26, 1981; certiorari denied June 7, 1982—243 NLRB 1121

On petition to review Board Order

Before CANBY and REINHARDT, Circuit Judges, and HILL,* District Judge.

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CANBY, Circuit Judge: This case returns for appellate review having been previously remanded to the Board for further consideration. 545 F.2d 1194 (9th Cir. 1976), *cert. denied,* 434 U.S. 854, 98 S.Ct. 171, 54 L.Ed.2d 125 (1977). The present petition raises several issues. The primary question presented is whether the construction industry's limited exemption from hot cargo agreements, § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), renders lawful a provision in a Master Labor Agreement which prohibits an employer from subcontracting work to any signatory subcontractor who is delinquent in required payments to a common employee fringe benefit trust. Secondary issues include: (1) whether these agreements can be enforced by economic coercion; (2) whether the union must reimburse the employers for any monies which were contributed pursuant to the contract provision; and (3) whether certain statements by the trust administrator and counsel for the fund to an employer constituted a threat by union agents to invoke the self-enforcement provision of the contract.

I

The relevant facts are recited in our previous decision 545 F.2d at 1195-96. They are summarized here for convenience. Griffith Company, J. W. Nicks Construction Company and Security Paving Company, Inc. (Griffith) are general contractors in Southern California. All are members of a construction industry trade association which negotiated a Master Labor Agreement (MLA) with Local 12 of the International Union of Operating Engineers. A large number of other contractors individually negotiated "short form" agreements with Local 12 which incorporated by reference most of the terms and conditions of the MLA.

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*The Honorable Irving L. Hill, United States District Judge, for the Central District of California, sitting by designation.

The agreement establishes four employee benefit trusts pursuant to § 302(c) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c)(5). Each trust is jointly administered by a Board of Trustees composed of members appointed in equal numbers by the employer groups and the union. The trust funds are managed by a hired administrator.

Contributions to each trust are pooled into one account. An employee's eligibility for benefits is not dependent on whether his employer has actually contributed to the trust. The employer's failure to contribute, however, decreases the total funds in the pool and thereby results in reduced benefits for all beneficiaries. As the size of the required trust payments has increased, so too has the number of employers who are delinquent in their payments. The union has employed various methods to combat the delinquency problem. The most recent **408** approach is manifest in paragraphs 15 [1] and 16 [2] of the MLA.

Firms which are delinquent in their contributions and are unable to reach a settlement with the trustees are placed on the fund's official delinquency list. Copies of this list are sent to the signatory contractors and the union. Paragraph 15 of the MLA provides that no employer shall contract any work to a delinquent subcontractor until the subcontractor has paid all delinquent amounts. Paragraph 16 provides that if an employer violates paragraph 15 by hiring a subcontractor then listed as delinquent, the employer is liable for all prior delinquency payments even if those payments were not incurred as a result of work done at the employer's worksite. If the subcontractor becomes delinquent after commencing work on the employer's project, the employer must terminate the subcontractor, and if the employer fails to do so, the employer becomes liable for all delinquencies incurred on the job by the subcontractor ten days after the subcontractor's name appears on the delinquency list. Paragraph 16 also permits the union to picket or strike to enforce these provisions.

In 1973, the trustees discovered that the Urban Pacific Construction Company, a firm which had signed a short form agreement with the union and was on the delinquency list, was doing work for Griffith. Griffith had notice of Urban Pacific's prior delinquencies at the time of contracting. The trust administrator, Mr. Majich, and his attorney informed the employer that if the delinquencies were not paid, the administrator would notify the union of its right to enforce paragraph 16 by economic action. Griffith refused to pay and the administrator notified the union.

Griffith then filed a complaint with the NLRB alleging that paragraphs 15 and 16 were an agreement to cease doing business with another employer in violation of § 8(e) [3] and that the statements by the trust officials were a threat to strike for secondary purposes in violation of § 8(b)(4)(ii)(B).[4]

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[1] Paragraph 15 provides in pertinent part:

The Trustees of the Trust Funds through their Administrator, shall furnish each Contractors Association and the Union, with a list of delinquent Contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquent list until such Contractor has paid all delinquent monies to the various Trust Funds * * *.

[2] Paragraph 16 provides:

In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to properly correct his delinquency.

(a) Where the Contractor fails or refuses to make payments required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor.

[3] § 8(e), 29 U.S.C. § 158(e) provides in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *.

[4] § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

Continued

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The Board held the agreement was a primary provision intended to preserve union standards or union employment and therefore rejected the complaint.

This court found the agreements were secondary and accordingly reversed. The court remanded the case to the Board with instructions that it determine whether the clause was rendered lawful by the construction industry's limited exemption from "hot cargo" agreements.[5] It further instructed the Board to consider whether, if the clauses were unlawful, the union was required to reimburse the employers for any monies which were contributed pursuant to the contract provisions and whether certain statements by the administrator and the trust counsel constituted a threat by union agents to invoke the self-enforcement provisions of the delinquency clause.

On remand, the Board held that the delinquency clause, with the exception of the self-help provision, was within the scope of the construction industry proviso and the payments made pursuant to that clause were therefore legal. The Board also concluded that the trust officials were not acting as agents of the union in making the questioned statements. We agree with the decision of the Board and enforce its order.

II

In *Pacific Northwest v. NLRB*, 654 F.2d 1301 (9th Cir. 1981) this court, sitting en banc, held that a Master Labor Agreement containing a union signatory clause requiring an employer to subcontract only to subcontractors who employed members of a particular union was within the scope of the construction industry proviso. The court focused on the unique nature of the construction industry, where short-term hiring and the extensive use of subcontractors make it difficult to define the primary bargaining unit and serve to create a community of interests among all workers at the jobsite. The court rejected the position advocated here by Griffith that the 8(e) proviso was intended solely to prevent jobsite friction between union and nonunion workers. Instead, it adopted the view that where a collective bargaining relationship exists, an agreement which serves the community of interests at the jobsite is permitted. At 1318–1322. See also, 105 Cong. Rec. 17900, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter Leg. Hist.] 1433, (Senator Kennedy).

We believe that paragraphs 15 and 16 of the MLA serve the community of interests at the jobsite and consequently fall within the proviso. Griffith would have us adopt the view that because the subject matter of the contract concerns delinquencies that may be unassociated with the general contractor's jobsite, the provisions are unrelated to the community of interests there. This argument takes entirely too restrictive a view of the construction industry proviso as interpreted by *Pacific Northwest.* When a general contractor engages a subcontractor who is delinquent in his trust fund payments, that subcontractor's employees may engage in a primary strike at the work site. Such a strike can cause exactly the type of dislocation at the jobsite that the construction industry proviso was intended to prevent. Moreover, because contributions to the pension system are pooled into one account, the delinquency of the subcontractor affects the welfare, through the pension benefits, of all employees at the jobsite. The provisions of the collective bargaining agreement under review here and their judicial enforcement

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are well calculated to serve the communal interests at the jobsite. We accordingly agree with the Board that these interests are protected by the construction industry proviso.

III

Paragraph 16 permits the unions to enforce the delinquency provisions by economic measures. The Board properly found that because the clauses were secondary they could not be enforced by self-help.

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* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

[5] See n.3, *supra.*

Although the 8(e) proviso exempts the construction industry from the prohibition against secondary boycott agreements, it does not exempt the industry from § 8(b)(4)(ii)(B), which forbids economic coercion to enforce such a boycott. The legislative history clearly indicates that agreements entered pursuant to § 8(e) were to be enforced judicially rather than by self-help.[*] Conference Committee Report H.R.Rep.No. 1147, 86th Cong., 1st Session 39, I Leg.Hist. 943; see also 105 Cong.Rec. 17,900, II Leg. Hist. 1433 (Senator Kennedy); 105 Cong. Rec. A8359, II Leg.Hist. 1830 (Senator Goldwater). This court has followed that view on numerous occasions. *See e. g. Pacific-Northwest,* at 1323–24; *Associated General Contractors, Inc. v. NLRB,* 514 F.2d 433, 438–39 (9th Cir. 1975); *Acco Construction Equipment, Inc. v. NLRB,* 511 F.2d 848 (9th Cir. 1975); *NLRB v. International Brotherhood of Electrical Workers,* 405 F.2d 159, 163–64 (9th Cir. 1968), *cert. denied,* 395 U.S. 921, 89 S.Ct. 1772, 23 L.Ed.2d 237 (1969). Accord: *Donald Schriver, Inc. v. NLRB,* 635 F.2d 859, 886 (D.C. Cir.1980), *cert. denied,* ——— U.S. ———, 101 S.Ct. 2058, 68 L.Ed.2d 357 (1981); *Bricklayer's Local No. 2 v. NLRB,* 562 F.2d 775, 787–88 (D.C.Cir.1977); *NLRB v. Muskegon Bricklayers Union,* 378 F.2d 859 (6th Cir. 1967).

Griffith argues, however, that because the self-help clause is invalid, the entire provision should be voided. We disagree. In *NLRB v. International Brotherhood of Electrical Workers,* 405 F.2d at 162, this court held that only that part of a contract that exceeds the limits of the construction industry proviso is negated. We implicitly reaffirmed this view in *Pacific-Northwest,* where we upheld a union signatory clause but invalidated provisions for its enforcement by self-help.

IV

The Board concluded that neither the administrator nor his counsel was an agent of the union. The Board accordingly dismissed the contractor's claim that the union through its agents violated § 8(b)(4)(ii) by threatening to invoke the self-enforcement provisions of the MLA. The Board's decision is supported by substantial evidence.

Each trust was established pursuant to § 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). That section requires the fund trustees to serve as independent fiduciaries and act solely in the interests of the beneficiaries. See *Toensing v. Brown,* 528 F.2d 69 (9 Cir. 1975). To ensure the independence of the trust, § 302(c)(5) requires that the employers and employees be equally represented in the trust administration. Courts and the Board have held that action by the trustees will be attributed to the union under the following fact situations:

(1) Where provisions of a collective bargaining agreement remove the discretion to administer the funds solely for the benefit of the employees. *Local 80, Sheet Metal Workers* (Turner-Brooks Inc.) 161 NLRB 229, 234 (1966); or

(2) Where the trustee's actions which are in question were directed by union officials. *Jacob Transfers Inc.,* 227 NLRB 1231, 1232 (1977); or

(3) Where the trustee's acts which are in question are undertaken in their capacities as union officials rather than as trustees. *NLRB v. Construction & General Laborers Union,* 577 F.2d 16, 20 (8th Cir. 1978), *cert. denied,* 439 U.S. 1070, 99 S.Ct. 839, 59 L.Ed.2d 35 (1979).

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The above list summarizes holdings thus far made and may not include all possible factual situations in which trustee action will be attributed to the union.

None of the three fact situations listed above is present in the instant case. There is nothing in the collective bargaining agreement which permits the trustees to act on behalf of the union. The trustees are required to administer the funds solely for the benefit of the employees and Paragraph 16 provides that the union alone has the right to strike in order to enforce the provision of the MLA. There is also no evidence that the communication of Mr. Majich (which the company characterizes as a threat of a strike) was directed by any union official. Moreover, Mr. Majich is an employee of the trust and is not a union official and he had no connection with the union.

There is nothing in the facts which would support a finding of agency. Contrary to the contractor's assertions, the administrator and his counsel cannot be viewed as union agents merely because they attempted to secure prompt payment of delinquencies. The officials, under a duty to maximize trust assets for the beneficiaries, sought to fulfill this obligation by means short of filing suit for breach of contract. Viewed in this light, the actions by the administrator and his counsel threatening to inform the union of its rights to strike were not done on behalf of the union but were undertaken to protect the interests of the beneficiaries.[7]

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[*] Indeed it appears that even Local 12 has conceded that the self-help provision is invalid.

Because the unions did not engage in the forbidden self-help to compel the contractors to comply with their contractual obligations, we conclude that the payments by the contractors to the pension funds were not exacted by unlawful means and therefore are not subject to reimbursement. *Cf. Graphic Arts International Union Local 280 v. NLRB,* 596 F.2d 904 (9th Cir. 1979); *Sheraton Kauai Corp. v. NLRB,* 429 F.2d 1352 (9th Cir. 1970)(reimbursement ordered where money received by illegal coercion).

V

This Court's en banc decision in *Pacific-Northwest* held that the scope of the 8(e) proviso extends to contractual provisions which further the common interest of workers at the jobsite. The delinquency clauses at issue clearly fit within the proviso as there interpreted. Further, there is substantial evidence to support the Board's determination that the trust administrator and his counsel were not agents of the union and that the union, therefore, did not threaten to invoke the self-enforcement provisions of the contract. However, the self-enforcement provisions are invalid under § 8(b)(4)(ii)(B).

Accordingly, we enforce the Board's order in its entirety.

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[7] J. J. Haggerty Inc., 139 NLRB 633, 651-653, 654-55 (1962), *enforced in relevant part sub nom. International Union of Operating Engineers v. NLRB,* 321 F.2d 130, 137 (2d Cir. 1963) and *Local 80 Sheet Metal Workers* (Turner-Brooks Inc.), 161 NLRB at 234, relied upon by the contractors are distinguishable. In both cases the trustees were not serving the interests of the trust beneficiaries but of the unions who appointed them.

NLRB v. Borg Warner Corporation; Baker Industries, Inc.; Wells Fargo Armored Service Corporation; Pony Express Courier Corporation

663 F.2d 666 (6th Cir.), October 28, 1981;
rehearing denied January 5, 1982; certiorari denied
June 7, 1982—245 NLRB 513

On petition to enforce Board Order

Before Keith and Martin, Circuit Judges, and Duncan,* District Judge

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Per Curiam: This case is before the court on application of the National Labor Relations Board for enforcement of the Board's order issued against Borg Warner Corporation and its subsidiaries Baker Industries, Wells Fargo Service Corporation, and Pony Express Courier Corporation on September 27, 1979 and reported at 245 N.L.R.B. No. 73.

The issues presented are: 1) whether the named corporations constitute a single employer for purposes of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) and whether Pony Express is the *alter ego* of Wells Fargo; 2) whether respondent violated section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union concerning the effects of its decision to transfer courier work from Wells Fargo to Pony Express; 3) whether respondent

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violated section 8(a)(3) and (1) of the Act by laying off five employees and constructively discharging another as a consequence of the transfer of courier work; and 4) whether respondent must recognize the Union as the bargaining agent for Pony Express.

With regard to the first issue, the Administrative Law Judge considered the following historical and technical interrelationship between Wells Fargo and Pony Express: Pony Express was incorporated in 1975 for the purpose of assuming much of Wells Fargo's courier service. That business involves the transfer of non-intrinsically valuable articles under low security circumstances. Wells Fargo remained a separate entity, offering primarily armored car services. However, both corporations are wholly owned subsidiaries of appellant Baker Industries which in turn is 97 percent owned by appellant Borg Warner. Furthermore, Pony Express and Wells Fargo share a number of top executive officers including the president, vice-president, secretary, and treasurer. Also, the vice-president for personnel, Mr. Hughes, renders labor advice for both corporations. Finally, the two corporations share common offices, post office boxes, and lockboxes. As an example of the close relationship between these two corporations, the Administrative Law Judge reviewed the details of the take-over by Pony Express of the Nashville and Knoxville courier operations. In this instance Wells Fargo vans were simply repainted and "sold" to Pony Express via a paper transaction. On these facts the Administrative Law Judge concluded respondents constituted a single employer and that Pony Express was the *alter ego* of Wells Fargo for purposes of the National Labor Relations Act.

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*Honorable Robert M. Duncan, United States District Judge for the Southern District of Ohio, sitting by designation.

The second issue, the section 8(a)(5) and (1) charge, arose out of Wells Fargo's tardy notice to the Union of its intention to transfer the Nashville and Knoxville courier operations. That decision was reached by the company in January of 1978, but Union officials were not notified until March 30, two days prior to the planned April 1 transfer. On March 31, the Union's counsel wrote the company suggesting certain measures which might be taken to minimize the adverse effects of the transfer on the Wells Fargo employees. The company's reply stated its mistaken belief that it had no obligation to bargain with the Union concerning the effects of the transfer decision. *See First National Maintenance Corp. v. N.L.R.B.*, ——— U.S. ———, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981). Thereafter the transfer was effected and although some additional discussions were had concerning the transfer effects, the Administrative Law Judge found that respondents by failing to give the Union timely notice, had made good faith bargaining impossible.

The consequences of the courier transfer complained of by the Union were the layoff of five employees and the constructive discharge of another. These dismissals occurred because Wells Fargo did not offer these employees jobs as part of the beginning of services at Pony Express. The underlying reason was illuminated by testimony of company officials which stressed the need to hold wages paid to Pony Express employees to levels below those then paid to Wells Fargo's unionized employees. This action, the Administrative Law Judge concluded, constituted illegal discrimination against union employees in violation of section 8(a)(3) and (1) of the Act. This finding was made in the absence of proof of antiunion motivation on the strength of the Supreme Court's decision in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967). There it was held that "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of antiunion motivation is needed * * *." Refusing to transfer Wells Fargo courier employees to Pony Express without prior negotiation was conduct which, in the opinion of the Administrative Law Judge, was inherently destructive of employee rights.

The fourth and final issue concerns the Administrative Law Judge's order requiring respondents to bargain with the Union as the representative of Pony Express' Nashville and Knoxville employees. This order stems from the finding that Pony Express is the *alter ego* of Wells

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Fargo. An employer's duty to bargain with an incumbent union devolves upon the nominally different entity which continues to operate the same business enterprise. *N.L.R.B. v. Triumph Curing Center*, 571 F.2d 462, 474 (9th Cir. 1978). Hence Pony Express is obliged to bargain with the union representing the Wells Fargo employees.

It is the opinion of this court that the Administrative Law Judge correctly decided all four issues. The motion of the Board to enforce is granted.

Pacemaker Yacht Company, a Division of Mission Marine, Inc. v. NLRB

663 F.2d 455 (3d Cir.), October 30, 1981—253 NLRB 828

On petition to review Board Order

Before SEITZ, Chief Judge, and ADAMS and GARTH, Circuit Judges

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SEITZ, Chief Judge. Pacemaker Yacht Company (the Company) petitions for review of a final order of the National Labor Relations Board (the Board) directing the Company to cease and desist from restraining or coercing employees in the exercise of rights protected by section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1976), and to reinstate employees who had been fired for striking. The Board has cross-applied for enforcement of its order. This court has jurisdiction under 29 U.S.C. § 160(e) & (f) (1976).

I.

In 1978, the Company and Teamsters Union 158 (the Union) were parties to a collective bargaining agreement covering employees at two plants in New Jersey. The agreement required the Company to contribute forty cents per hour worked by each employee to the Teamsters Health and Welfare Fund of Philadelphia and Vicinity—Local 158. The Fund retained an independent insurance carrier to underwrite employee health and welfare benefits. The Company was not involved in the administration of the Fund, and at all times fulfilled its obligation under the collective bargaining agreement.

In early 1978, the Fund failed to pay premiums to the insurance carrier, and consequently the underwriter refused to pay the claims of the employee beneficiaries. On June 20, 1978, most employees at both plants went on strike in protest of the Fund's delinquency. Throughout the day, Union officials advised striking employees that the work stoppage violated the collective bargaining agreement and urged them to return to work. The Company mailed a notice to all employees advising them that the strike violated Article X of the collective bargaining agreement, which prohibited "all strikes, picketing * * * or other interruption of the Company's operations," and stating that any employee who failed to report to the next shift would "be considered to have quit his job" and would be permanently replaced. One hundred and twenty-six employees who continued to strike after receiving this notice were discharged. The Union submitted a grievance on behalf of these employees, which proceeded to arbitration pursuant to the collective bargaining agreement. The arbitrator found that the strike violated Article X of

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the collective bargaining agreement but ruled that the discharge penalty was too severe, and ordered the Company to reinstate all strikers except those who instigated the strike. The Company complied with the award, and reinstated all but twenty employees who were identified as instigators in a subsequent grievance procedure.

The Union filed an unfair labor practice charge against the Company, alleging that the discharges restrained employees in their exercise of protected activity in violation of section 8(a)(1) of the Act. The administrative law judge dismissed the complaint, finding that the employees had waived their right to strike in Article X. The Board disagreed, and held that the no-strike clause in Article X did not waive employees' right to strike over the Fund's failure to pay insurance premiums. The Board examined the collective bargaining agreement and extrinsic evidence and concluded that "the union could not have made a clear and unmistakable waiver of the employees' right to strike to put pressure on the Fund since the parties never foresaw the possibility of such a situation." *Pacemaker Yacht Co.*, 253 N.L.R.B. No. 95, 1980–81 *Labor L.Rep. (CCH)* ¶ 17,733, at 28,579. Consequently, the Board found that the discharges violated section 8(a)(1) and ordered the Company to reinstate the employees with full seniority and backpay. The Company petitioned for review of that order and the Board cross-applied for enforcement.

II.

The Company urges that the Board's order should not be enforced for three reasons. First, the Company disputes the Board's finding that the no-strike clause in Article X of the collective bargaining agreement did not constitute a waiver of the right to strike over the Fund's failure to pay premiums to the insurance carrier. Second, it argues that the Board erred in failing to defer to the arbitrator's award in accordance with the standards established in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955). Finally, the Company contends that the strike was not protected activity under section 7 of the Act because the work stoppage involved a matter beyond its control. Because we find the waiver issue dispositive, it is unnecessary to address the Company's other arguments.

III.

Assuming, without deciding, that the strike at issue was protected activity under section 7 of the Act, we start with the proposition that generally employees may, through the collective bargaining process, waive the right to engage in this protected activity. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956). We have cautioned, however, that such a waiver must be "clear and unmistakable and that explicit language will not be read expansively." *Delaware Coca-Cola Bottling Co. v. General Teamsters Local 326*, 624 F.2d 1182, 1187–88 (3d Cir. 1980).

In *Delaware Coca-Cola,* we held that a single, broad, generally-worded no-strike clause does not constitute a clear and unmistakable waiver of the right of employees to engage in a sympathy strike. 624 F.2d at 1187. Our holding was squarely grounded upon the application of the principle of coterminous interpretation to a single express no-strike clause. Under this rule of contract interpretation, a no-strike clause is presumed to be no broader than the arbitration clause in a collective bargaining agreement. *See Gateway Coal Co.* v. United Mine Workers, 414 U.S. 368, 382, 94 S.Ct. 629, 639, 38 L.Ed.2d 583 (1974). Underlying this presumption is the theory that a no-strike clause is generally a quid pro quo for an arbitration clause. *See Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 455, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957). In *Delaware Coca-Cola,* we were unable to find any extrinsic evidence indicating that the parties had intended the no-strike clause to be broader than the arbitration clause and thus held that since the sympathy strike was not arbitrable, it was not barred by the no-strike clause.

The principle of coterminous interpretation, however, is not a rule of law, but

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merely a tool of contract interpretation, see *W-I Canteen Service Inc. v. NLRB,* 606 F.2d 738, 744 (7th Cir. 1979), which "must be applied to the facts of each case," *Delaware Coca-Cola,* 624 F.2d at 1187.

The collective bargaining agreement at issue contained two separate no-strike clauses.

ARTICLE IX

GRIEVANCE PROCEDURE

9.1 Should difference arise between the Company and its employees or between the Company and the Union as to the interpretation or application of the provisions of this Agreement, there shall be no suspension or stoppage of work and an earnest effort shall be made to settle such differences immediately or in the manner described below. [grievance procedures follow]

ARTICLE X

NO STRIKES OR LOCKOUT

10.1 So long as this Agreement is in effect, the Company agrees that there shall be no lockouts and the Union agrees that there will be no strikes, picketing, slow downs, deliberate curtailment of production, work stoppages of any kind or other interruption of the Company's operations. In the event one or more employees fail to abide by the provisions of this article, the Company retains full right to take any disciplinary action it deems necessary, including discharge.

10.2 In the event that there is any disagreement as to whether or not the employee has participated in such conduct, then this shall be deemed to be a grievance to be settled in accordance with Article IX.

The Board acknowledged that "the no-strike clause embodied in Article X is more comprehensive in scope than that in Article IX, and was not given as a quid pro quo for the grievance and arbitration procedure * * *." *Pacemaker Yacht Co.,* 1980–81 *Labor L.Rep. (CCH)* ¶17,733, at 23,580. Nonetheless, the Board concluded that the "absence of evidence that the parties either considered or discussed whether the no-strike clause would cover the situation which arose here indicates that no clear and unmistakable waiver of the right to strike over the Fund's inaction occurred." *Id.* Even apart from the general rule that courts "owe no particular deference to the Board" on matters of contract interpretation, *Dow Chemical Co. v. NLRB,* 636 F.2d 1352, 1358 (3d Cir. 1980), we believe that the Board erred as a matter of law in concluding that Article X did not bar the strike over the Fund's delinquency.

When limited by the principle of coterminous interpretation, a no-strike clause encompasses only arbitrable disputes. Therefore, a claim that the collective bargaining agreement waives the right to strike over a particular nonarbitrable dispute must be established clearly and unmistakably in order to rebut the presumption that the employees' waiver is no greater than the employer's obligation under the arbitration clause. When, however, a no-strike clause is not limited by the arbitration clause, the employer need not introduce evidence that the parties intended the no-strike clause to prohibit precisely the type of strike that actually occurred. All that is required is that a comprehensive waiver extending beyond the arbitration clause be "clear and unmistakable." *See W-I Canteen Service, Inc. v. NLRB,* 606 F.2d 738, 745 (7th Cir. 1979) (rejecting "a rigid requirement that a no-strike clause contain the specific term 'sympathy strike' " to waive employee's right to engage in sympathy strike, where no-strike clause expressly extended beyond arbitration clause).

An examination of the collective bargaining agreement, "read as a whole and in light of the law relating to it when made," *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 279, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956), establishes such a clear and unmistakable waiver. First, the language of Article X plainly prohibits all "strikes, picketing * * * or other interruption of the Company's operations." It is apparent that the

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no-strike pledge in Article X was given in exchange for the Company's no-lockout pledge. It is also clear that the parties intended Article IX to bar strikes over arbitrable disputes and Article X to bar strikes over all other disputes. There is no reason not to give this language its "ordinary and reasonable meaning." *Penn Packing Co. v. Amalgamated Meat Cutters, Local 195,* 497 F.2d 888, 891 (3d Cir. 1974). Indeed, a contrary interpretation would seem to render the no-strike clause in Article X a nullity. Since the no-strike clause in Article IX alone bars strikes over arbitrable disputes, Article X must be construed to bar nonarbitrable disputes—including the unforeseeable disputes. We reject the Board's interpretation in favor of the "settled rule of contract interpretation that contract language should not be interpreted to render the contract promise illusory or meaningless." *Retail Clerks Local 455 v. NLRB,* 510 F.2d 802, 806 N.15 (D.C. Cir. 1975).

Extrinsic evidence provides additional support for our interpretation of the no-strike clause. Recognizing the "danger inherent in utilizing [evidence about the conduct of the parties at the time of the strike] because it may not reflect the parties' intention at the time of the execution of the contract," *Delaware Coca-Cola,* 624 F.2d at 1189, we note that the Union officials consistently advised employees that their action violated the no-strike clause in the collective bargaining agreement. The Union also apparently conceded this point before the arbitrator. Unlike the ambiguous extrinsic evidence considered in *Delaware Coca-Cola,* 624 F.2d at 1189–90, the statements of Union officials here, who had signed the collective bargaining agreement, leave little doubt that they regarded the strike as a violation of the collective bargaining agreement.

Although the Union's statements must be considered in light of the fact that the strike resulted from employee dissatisfaction over the Union's administration of the Fund, we believe they are entitled to some probative value. *Cf. Iowa Beef Processors v. Amalgamated Meat Cutters,* 597 F.2d 1138, 1144 (8th Cir.), *cert. denied,* 444 U.S. 840, 100 S.Ct. 79, 62 L.Ed.2d 52 (1979) (finding statements by union officials that strike violated no-strike clause probative of contractual intent where agreement required union to declare all strikes unauthorized).

Finally, the state of the law at the time the agreement was executed supports the inference that by including two separate no-strike clauses the parties intended to bar strikes over both arbitrable and nonarbitrable disputes. At the time the contract was negotiated, the principle of coterminous interpretation had been adopted by the Board and by at least one court. *See Gary Hobart Water Corp. v. NLRB,* 210 N.L.R.B. 742 (1974), *enforced,* 511 F.2d 284, 288 (7th Cir.), *cert. denied,* 423 U.S. 925 (1975).[1] From this we infer that the inclusion of two no-strike clauses, one expressly tied to the arbitration clause and one prohibiting all strikes, was intended to waive the employees' right to strike over unforeseeable disputes, including the dispute over the Fund's failure to pay insurance premiums.

The Board apparently seeks to engraft a new limitation on the well-established ability of employees to waive their right to strike. Implicit in the Board's opinion is the notion that a general no-strike clause may never waive the right to strike over unspecified, nonarbitrable disputes. Although some may read our decision in *Delaware Coca-Cola* this broadly, *see* Note, *Express No-Strike Clause Agreements,* 67 *Va. L.Rev.* 729, 746 n.82 (1981), we decline to do so. The practical consequence of the Board's position is apparent here. Because a strike over the Fund's delinquency was unforeseeable at the time of the contract negotiations, under the Board's view, employees would have been incapable of waiving the right to strike over this dispute at all. We believe there is no basis for limiting employees' ability to waive the right to strike over nonarbitrable disputes simply because they were unforeseeable at the time the contract was negotiated. *Cf. United Steelworkers of America v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 578–80, 80 S.Ct. 1347, 1350–51, 4 L.Ed.2d 1409 (1960) (a collective bargaining agreement "is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.").

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[1] We do not view our decision today as inconsistent with subsequent Board decisions construing waiver provisions in collective bargaining agreements. In *International Union of Operating Engineers (Davis-McKee),* 238 N.L.R.B. 652 (1978), the Board held that a broad no-strike clause did not ban sympathy strikes. In that decision, however, the Board relied on the "presumption * * * that when the union gives up the right to strike in return for the employer's obligation to submit disputes to arbitration, it does so only with respect to those disputes which are arbitrable." *Id.* at 654. No such presumption is warranted here. This case resembles *American Cyanamid Co.,* 246 N.L.R.B. No. 17, 1979–80 *NLRB Dec. (CCH)* ¶ 16,354 in which the Board found that the existence of two separate no-strike clauses "suggests that * * * the broad, no-strike provisions in the 'Strikes and Lockouts' article were not the quid pro quo for [the Union's] agreement to arbitrate disputes, but were an independent undertaking by the Union in return for Respondent's no-lockout pledge." *Id.* at 30,600.

Freedom of contract is the "fundamental premise" on which the National Labor Relations Act is based. *H.K. Porter Co., v. NLRB,* 397 U.S. 99, 108, 90 S.Ct. 821, 826, 25 L.Ed.2d 146 (1970). Absent a contractual provision in irreconcilable conflict with federal labor policy, neither courts nor the Board may modify or nullify substantive contractual provisions. *See Armco Steel Corp. v. NLRB,* 344 F.2d 621, 624–25 (6th Cir. 1965).[2] The waiver of the right to strike over the dispute at issue here violates no principle of labor law and indeed may encourage industrial peace. *See Mastro Plastics Co. v. NLRB,* 350 U.S. 270, 280, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956) ("[w]aivers [of the right to strike] contribute to the normal flow of commerce and to the maintenance of regular production schedules."). Moreover, to require specific enumeration in a no-strike clause of all possible nonarbitrable disputes that might result in a work stoppage would place an unjustified obstacle on the ability of employers to bargain for an across-the-board no-strike clause and on the employees' ability to gain concessions in return for such a pledge. An employer who bargains for such a clause would never be certain that employees would not strike over some unforeseeable dispute, and employees, in turn, would have less to offer during contract negotiations. No federal labor policy supports such a restriction on party autonomy in the collective bargaining process.

We thus hold that the general no-strike clause in Article X of the collective bargaining agreement, not limited by the arbitration clause, constitutes a waiver of the employees' right to strike over the Fund's failure to pay insurance premiums.

IV.

The Company's petition for review will be granted and the Board's cross-application for enforcement will be denied.

GARTH, Circuit Judge, concurring.

I am in complete agreement with Chief Judge Seitz's analysis and his conclusion that the broadly worded no-strike clause in Article X of the collective bargaining agreement constituted a waiver of the employees' right to strike in the circumstances of this case. I would not rest our decision on the resolution of the waiver issue, however, but would meet head-on the question the majority finds unnecessary to address: whether, in the first place, the strike was protected activity under section 7 of the Act. In this regard, I would hold that the use of economic weapons, such as a strike, against an employer is not protected under section 7 when the object of the employees' grievance is a matter beyond the employer's control or the employer's power to influence.

I.

Pacemaker in this case found itself caught in the crossfire between its employees and their union. The company had fulfilled its contractual responsibility of making contributions to the union's health and welfare fund, but the Fund—over which Pacemaker had no control—had failed to pay premiums to the Fund's insurance carrier, Republic National Life Insurance Co. As a result, Republic refused to pay the medical and hospital claims of employee beneficiaries.

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[2] We are not confronted here with an asserted waiver of the right to strike over an employer's unfair labor practices. *Cf. Mastro Plastics Co. v. NLRB,* 350 U.S. 270, 76 S.Ct. 346, 100 L.Ed. 309 (1956) (finding strong policy against unfair labor practices and the right of employees to select their own bargaining representatives precludes implied waiver of right to strike over unfair labor practices). We also note that in this case the employer does not seek to enjoin a strike under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 184 (1976). See *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976).

The record discloses that the Fund, the Teamsters Health and Welfare Fund of Philadelphia and Vicinity—Local 158, was, practically speaking, twice removed from Pacemaker. Under its agreement with the union, Pacemaker, for each hour worked by each of its employees, paid forty cents to the Fund, which was an entity separate from the company and the union. It is conceded that Pacemaker at all times faithfully complied with this obligation. The Fund was responsible for selecting the insurance carrier and for paying the premiums for continued medical and hospital coverage of the employees. Thus, when the Fund failed to pay those premiums and Republic thereupon discontinued making benefits payments to the employees, Pacemaker was powerless to remedy the problem. The situation was well described by the union's lawyer, who told the Board's administrative law judge:

> The private insurance carrier stopped making payments to the employees, quite frankly, for failure on the part of the fund to make contributions to the private insurance carrier. Their position was that if we don't receive any money, we are not going to pay benefits.
>
> This caused a problem with the employees because the employees started getting contacts from various doctors and hospitals that the bills were not getting paid. The employees went to the union to try to resolve the problem. The union tried to make its best efforts to resolve the problem. Obviously, if the fund itself being a separate entity was not able to make the payments, then the union could not really do too much for the employees.

App. at 301a–302a. Clearly, if the union could not bring the situation under control, Pacemaker, which was still another step removed from the Fund, could not.

It was in this context that the employees became restive. As their dissatisfaction with the administration of the Fund grew, the company sought to have the union resolve the Fund's problems, but these endeavors were unsuccessful. When no signs of progress were forthcoming, Pacemaker's employees, in an attempt to put pressure on the union to remedy the Fund's delinquency, struck *Pacemaker* and demonstrated outside one of Pacemaker's plants as well as the union's headquarters. The strike—which, as we hold today, violated the no-strike clause of the collective bargaining agreement—forced the company temporarily to close both of its plants.

Thus, the record shows that the employees struck the company even though their grievance was not with Pacemaker, but was with the Fund. They inflicted a grave economic wound on their financially shaky employer (the company subsequently initiated Chapter XI bankruptcy proceedings) despite the fact that Pacemaker had no power to give them the relief they demanded and could not even influence the entity which did have that power.

II.

Section 7 of the Act provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." 29 U.S.C. § 157 (1976). However, employee activities aimed at improving terms and conditions of employment can lose their section 7 protection if carried out in a disruptive or otherwise inappropriate manner. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975) (separate bargaining by minority

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group of employees would undermine principle of collective bargaining); *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 477–78, 74 S.Ct. 172, 179, 98 L.Ed. 195 (1953) (disloyal employees distributed leaflets disparaging quality of employer's product; "the means used by the [employees] * * * have deprived [them] of the protection of [section 7]"); *Sullair P.T.O., Inc. v. NLRB*, 641 F.2d 500 (7th Cir. 1981) (employee's obscene language and disruptive behavior unprotected); *Texas Instruments, Inc. v. NLRB*, 637 F.2d 822 (1st Cir. 1981) (employees disseminated confidential wage information); *National Vendors v. NLRB*, 630 F.2d 1265, 1268 (8th Cir. 1980) (employees conducted disruptive meeting in company cafeteria); *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6, 9 (1st Cir. 1979) (employees struck over firing of high-ranking management official); *Texaco, Inc. v. NLRB*, 462 F.2d 812 (3d Cir.) (deliberately or maliciously false employee statements unprotected), *cert. denied,* 409 U.S. 1008, 93 S.Ct. 442, 34 L.Ed.2d 302 (1972). *See generally NLRB v. Pincus Bros., Inc.—Maxwell,* 620 F.2d 367, 375–77 (3d Cir. 1980) (employee circulated leaflet disparaging employer).

"[T]he general rule adopted by the courts has been to look at a variety of factors, including the reasonableness of the means of protest, in order to determine if the employees' activities were protected." *Abilities & Goodwill, supra,* 612 F.2d at 9. As the court stated in *Texas Instruments, supra,* 637 F.2d at 830, "Not all conduct that can, in some general sense, be characterized as an exercise of a right enumerated in section 7 is afforded the protection of the Act * * *. [R]ights under section 7 must in each instance be understood in relation to the concrete facts of a particular case" (citations omitted).

The argument for denying employee actions protected status is even stronger when the actions of employees unnecessarily and unfairly inflict economic harm on an employer who is neither responsible for the complained-of condition nor has any power to correct it. *See NLRB v. Bretz Fuel Co.,* 210 F.2d 392, 397 (4th Cir. 1954). As one commentator has written, "The argument that economic pressure should be unprotected [where the employer lacks interest or control] is * * * convincing." Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act,* 115 U.Pa.L.Rev. 1195, 1221 (1967).

This observation is directly applicable to this case. Here Pacemaker's employees used the company as a pawn in a crisis not of the company's making and beyond its power to resolve. The company had to endure total disruption of its production processes even though the dispute that triggered the strike was entirely between the employees and the Fund. *Cf. Harnischfeger Corp. v. NLRB,* 207 F.2d 575 (7th Cir. 1953). As Professor Getman has argued, "Where * * * the employer is not a party to the controversy * * * there is no reason why he should be forced to permit his business to be used as a battleground." Getman, *supra,* at 1221.

The teaching of *Eastex, Inc. v. NLRB,* 437 U.S. 556, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978), a case cited by both parties, is not to the contrary. In *Eastex,* the most recent Supreme Court expression concerning protected activity, the Court held that an employer could not prohibit the distribution, in nonworking areas of the employer's property during nonworking time, of a union newsletter that, in part, urged employees to lobby against incorporation of "right-to-work" provisions into the state constitution and criticized a presidential veto of an increase in the federal minimum wage. The employees in *Eastex* did not strike the company. Rather, they filed an unfair labor practice charge against Eastex seeking the right to distribute the newsletter.

Eastex argued that the distribution of the newsletter did not come within the "mutual aid or protection" language of section 7 because the newsletter did not relate to a specific dispute between the employees and their own employer over an issue which the employer had the right or power to affect. *Id.* at 563, 98 S.Ct. at 2511. The Court rejected the employer's argument,

finding "no warrant for [the company's] view that employees lose their protection under the 'mutual aid or protection' clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565, 98 S.Ct. at 2512. The Court observed that the subjects addressed in the newsletter could have a significant impact on the union's strength at the bargaining table and on the level of wages negotiated with the employer. *Id.* at 569, 98 S.Ct. at 2514.

It was in this special context, however, where half the newsletter's contents were clearly protected and where no strike occurred, that the Court rejected Eastex's "lack of control" argument. In doing so, the Court took pains to stress the limited nature of its holding. The Court observed, for example, that "the employer ha[d] not attempted to show that distribution [of the newsletter] would interfere with plant discipline or production." *Id.* at 572, 98 S.Ct. at 2515. More significantly, however, the Court acknowledged that "even when concerted activity comes within the scope of the 'mutual aid or protection' clause, the forms such activity permissibly may take may well depend on the object of the activity," and proceeded to quote from Professor Getman's article. *Id.* at 568 n.18, 98 S.Ct. at 2513 n.18. Thus, while *Eastex* bears upon the subject of protected activity and recognizes that protection may vary with the form and object of the activity, *Eastex* is not this case.

The form the employee activity took in this case makes the situation with which we are confronted totally different from the circumstances before the Court in *Eastex*. Although here, as in *Eastex*, the source of employee dissatisfaction lay in matters beyond the employer's control, unlike *Eastex*, the means used to express the employee grievances in the instant case had a substantially greater negative impact on the innocent employer. Moreover, while in *Eastex*, the employer could not show how it was prejudiced by the mere distribution of a protected newsletter in nonworking areas during nonworking time, the employer here was forced by the unwarranted actions of its employees to close both its plants, thereby shutting down production.

III.

I would thus hold that on the facts of this case, where the company concededly fulfilled all its responsibilities with respect to its collective bargaining agreement and the health and welfare fund, and the employees' grievance was solely with the Fund, the employees' strike against the company which employed them, did not constitute protected activity within the meaning of section 7 of the Act. This being the case, I would not reach the waiver issue discussed by the majority, with whose reasoning I, in any event, agree.

NLRB v. Sheet Metal Workers Union Local No. 3

662 F.2d 513 (8th Cir.), October 30, 1981—253 NLRB 330

On petition to enforce Board Order

Before Heaney and Stephenson, Circuit Judges, and Davies,* Senior District Judge.

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Per Curiam. This matter is before the Court pursuant to an application of the National Labor Relations Board for enforcement of its order against the Sheet Metal Workers Union Local No. 3. The Board found that the Union violated section 8(b)(7)(C) of the National Labor Relations Act by picketing McCarthy Heating & Air Conditioning Services, Inc., between February 25 and April 18, 1980. The Board determined that the Union picketed for more than thirty days without filing a representation petition and that its objective was to force the company to bargain with it or force the company's employees to choose it as their bargaining representative. The Board's decision and order is reported at 253 N.L.R.B. 53, 105 L.R.R.M. 1606 (1980).

In this case, there is absolutely no evidence that any agent of the Union specifically asked any McCarthy employee to become a representative of the Union or to execute an authorization card. Moreover, there is no evidence that the Union ever asked the employer for recognition as the representative of its employees. Finally, Liebsack, a Union agent who engaged in several conversations with McCarthy's employees, disclaimed any desire on the part of the Union to presently represent the employees.

The record does indicate, however, that Union agent Liebsack talked with the employees about their wages and benefits during the period of picketing and prepared a comparative analysis sheet designed to emphasize the disparities between union and nonunion wages. Additionally, Liebsack admitted that the Union may seek to represent McCarthy's employees in the future even though it has no present desire to do so.

The Board ordered the Union to cease and desist from its unfair labor practices in contravention of section 8(b)(7)(C) of the Act and to post an appropriate notice.

While this case presents a close question, we conclude that there is substantial evidence on the record as a whole from which the Board could reasonably have found that the Union conducted its picketing for a recognitional or organizational object in violation of section 8(b)(7)(C). The Board concedes, however, that the only evidence of the Union's unlawful objective is the comparison between union and nonunion wages and benefits made in Liebsack's conversations with McCarthy's employees and in the written comparative analysis sheet, and Liebsack's admission that the Union may attempt to organize the McCarthy employees in the future.

Area standards picketing, for the sole purpose of encouraging compliance with prevailing area wage and benefit standards, is nonrecognitional activity not proscribed by section 8(b)(7)(C). *N.L.R.B. v. International Brotherhood of Electrical Workers Local 265,* 604 F.2d 1091, 1097 (8th Cir. 1979). Here, the Board essentially conceded at oral argument that the Union was engaged in lawful area standards activity other than its oral and written comparisons of union and nonunion benefits and Liebsack's statement that it may seek to organize the McCarthy employees in the future.

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*The Honorable Ronald N. Davies, United States Senior District Judge, for the District of North Dakota, sitting by designation.

Therefore, we enforce the Board's order directing the Union to cease and desist those activities that violate section 8(b)(7)(C). We emphasize, however, that the Union is free to resume its nonrecognitional picketing of McCarthy as long as the picketing is not accompanied by conversations with employees regarding the benefits of unionization which are made with an unlawful recognitional and organizational objective.

National-Southwire Aluminum Company v. NLRB

662 F.2d 446 (6th Cir.), November 2, 1981—247 NLRB 1315

On petition to review Board Order

Before EDWARDS, Chief Judge, and MERRITT and BROWN, Circuit Judges

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This case is before the court on a petition to review and set aside or modify an order of the National Labor Relations Board and the cross-application of the Board for enforcement of its order. Reference is made to the decision and order by the Board, reported at 247 N.L.R.B. No. 175, for a recitation of the pertinent facts.

Upon consideration, the court concludes that the contested portions of the Board's order are overbroad. Those portions, as written, might be read as prohibiting management conduct that is not proscribed by the National Labor Relations Act.

The portion requiring petitioner to cease and desist from threatening terminations because of union stickers on plant equipment would have the effect of exempting union stickers from any future company neutral policy against placing any stickers on company property. The Act would not prohibit such a neutral policy, unless it were enforced in a discriminatory manner.

Similarly, the portion which prohibits assigning Martin Howard and Bruce Tongate to any duties other than the normal duties of employees in their classification would improperly prevent petitioner from making such assignments under any circumstances, not merely in retaliation for union activity. Moreover, this portion of the order is unnecessary, since an unchallenged provision of the order clearly requires petitioner to cease and desist from making undesirable assignments to employees because of their union activities. This portion of the Board's order requires petitioner to cease and desist from: "assigning employees to more menial or less desirable job tasks because of their union activities and sympathies."

Accordingly, it is ORDERED that:

(1) That portion of the order which requires petitioner to cease and desist from "Threatening terminations because of union stickers on plant mobile units and equipment," be changed to read, "Threatening terminations because of union stickers on plant mobile units or equipment, except in enforcement of a uniform policy applied to all stickers on such equipment."

(2) That portion of the Notice to Employees which reads, "WE WILL NOT threaten employees with discharge because of union stickers on plant equipment or mules," be changed to read, "WE WILL NOT threaten employees with discharge because of union stickers on plant equipment or mules, except in enforcement of a uniform policy applied to all stickers on such equipment."

(3) That portion of the order which requires petitioner to, "Give assurances to Martin Howard and Bruce Tongate that they will only be required to perform the normal and usual duties of employees in the metal workers classification" be deleted. That portion of the Notice to Employees which reads, "WE WILL give affirmative assurances to MARTIN HOWARD and BRUCE TONGATE that they will only be required to perform the normal and usual duties of employees in their classification, and that no less desirable job tasks such as cleaning the break-room will be assigned to them," be changed to read, "WE WILL NOT assign employees to more menial or less desirable job tasks because of their union activities or sympathies."

IT IS SO ORDERED.

Amsoil, Inc., a Delaware Corporation v. NLRB

525 F. Supp. 839 (D. Minn.), November 5, 1981

On motions for injunctive relief and for dismissal

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MacLaughlin, District Judge: This matter is before the Court on two motions. The defendants, National Labor Relations Board (Board) and its Regional Director Robert Wilson, have moved pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. The plaintiff, Amsoil, Inc., has moved for a preliminary injunction enjoining the defendants from proceeding with an unfair labor practice hearing scheduled for November 30, 1981, until after the defendants permit the plaintiff to take depositions in preparation for the hearing. For the reasons stated herein, the defendants' motion to dismiss will be granted.

FACTS

Amsoil is engaged in the manufacture and nonretail sale and distribution of synthetic lubricants and related automotive products. Its employees were not unionized in 1980. On January 21, 1981, the General Drivers, Warehousemen, Helpers and Inside Employees Union, Local No. 346 filed a charge against Amsoil with the Board, alleging that Amsoil had engaged in certain improper conduct. The union charged that Amsoil conducted surveillance of employees attending a union meeting and threatened employees with layoffs and loss of benefits if the employees chose to be represented by a union. The union also alleged that Amsoil improperly laid off a number of employees. The Board filed an unfair labor practice complaint against Amsoil on March 27, 1981. It also noticed a hearing for November 30, 1981. Amsoil filed an answer on April 2, 1981.

By letter dated May 28, 1981, Amsoil applied to the Board Regional Director to depose 17 individuals, including 16 employees or former employees. The application was made pursuant to section 102.30 of the Rules and Regulations, Series 8, of the Board, which provides:

> The regional director * * * shall upon receipt of the application [to take depositions], if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify * * *.

12 C.F.R. § 102.30(a) (1980). The Regional Director, by an order dated June 2, 1981, determined that Amsoil's reason for taking depositions was to seek pretrial discovery and did not constitute good cause. He denied the application to take depositions.

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Amsoil appealed the denial of the Regional Director to the Executive Secretary of the Board. The appeal was denied by the Board on June 29, 1981.

Amsoil filed its complaint in the federal district court on July 28, 1981. The complaint alleges that the Regional Director is under a statutory mandate of section 10(b) of the Labor Management Relations Act, 29 U.S.C. § 160(b), to permit discovery so far as practicable. It alleges that the denial of permission allowing Amsoil to engage in pretrial discovery in an unfair labor practice proceeding constitutes unreasonable, arbitrary and capricious conduct in violation of 29 U.S.C. § 160(b). Amsoil predicates jurisdiction of the federal district court on the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and 28 U.S.C. § 1345. It seeks an order compelling the Board to permit discovery and enjoining the Board from holding a hearing on the unfair labor practice complaint until 30 days after permitting discovery.

DISCUSSION

In general, judicial review of action taken by the Board is limited to the United States courts of appeals. 29 U.S.C. § 160(f); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48–49, 58 S.Ct. 459, 462–63, 82 L.Ed. 638 (1938). The United States Supreme Court, however, has carved out an exception to this rule. In *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958), the Supreme Court held that federal district courts have jurisdiction to enjoin actions of the Board in certain limited circumstances. In *Leedom v. Kyne*, the Board had established a bargaining unit consisting of both professional and nonprofessional employees without permitting the professional employees to vote on the matter as expressly required by section 9(b)(1) of the National Labor Relations Act. The Supreme Court held:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the act. Section 9(b)(1) is clear and mandatory * * *. Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

358 U.S. at 188–89, 79 S.Ct. at 183–84. A factor heavily relied upon by the Supreme Court was the unavailability of any adequate remedy for the professional employees if the federal district courts had no jurisdiction. Congress had granted the professional employees a right not to have to bargain with nonprofessional employees unless they consented to do so. The professional employees could not obtain review in a court of appeals of the Board's action. The Court held that where Congress grants a right "it must be held that [Congress] intended that right to be enforced * * *." 358 U.S. at 191, 79 S.Ct. at 185. In summary, *Leedom v. Kyne* established the proposition that district courts have jurisdiction apart from the review provisions of the National Labor Relations Act, to strike down orders of the Board which contravene an express statutory mandate.

The jurisdictional issue here is whether this case falls within the *Leedom v. Kyne* exception. The plaintiff contends that there is a clear statutory mandate requiring the Board to permit depositions in unfair labor practice hearings. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides for the filing of unfair labor practice proceedings by the Board. It also provides:

> Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

This provision has been interpreted in different ways in the courts of appeals. In *N.L.R.B. v. Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir.), *cert. denied*, 390 U.S. 955, 88 S.Ct. 1052, 19 L.Ed.2d 1150 (1967), the Fifth Circuit, on review of a final order

of the N.L.R.B., held that the Board's trial examiner erred in ruling that he had no discretion to permit depositions. The Fifth Circuit interpreted section 10(b) of the Act and Board Rule 102.30 as a grant of authority to trial examiners to permit the taking of depositions when practical and when good cause is shown. However, the Fifth Circuit declined to reverse the Board's decision in this case because it found "that the denial of the motion for leave to take depositions was a technical error which did not result in prejudice to the respondent's case." 383 F.2d at 277. *Accord, N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968); *N.L.R.B. v. Rex Disposables, Division of DHJ Industries, Inc.*, 494 F.2d 588 (5th Cir. 1974).

The Second Circuit, however, has rejected the Fifth Circuit's interpretation of section 10(b) of the Act. In *N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854 (2d Cir. 1970), *cert. denied*, 402 U.S. 915, 91 S.Ct. 1375, 28 L.Ed.2d 661 (1971), it interpreted section 10(b) as follows:

> Section 10(b) of the Act provides that Board proceedings, where "practicable," shall be conducted in accordance with the "rules of evidence" applicable in the federal district courts. On its face this amendment regulates the introduction of evidence at Board hearings, without imposing on the Board any particular pretrial procedures—such as discovery—which do not by any standard constitute rules of evidence. The legislative history of section 10(b) confirms this. Under the original Act, section 10(b) provided that "[i]n any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." This provision was heavily criticized on the ground that it allowed too much incompetent evidence to get into the record of Board hearings. It was solely to meet that criticism that section 10(b) was amended in 1947 * * *.

432 F.2d at 859. Under this interpretation, section 10(b) relates only to introduction of evidence at the

unfair labor act hearing, leaving the Board free to establish the prehearing procedures. The Board has done so in Board Rule 102.30.

The existence of these differing interpretations is probative evidence that the Court lacks subject matter jurisdiction. *Leedom v. Kyne* authorizes district courts to block Board actions that violate a clear statutory mandate. If courts of appeals cannot agree on the meaning of a statutory provision, then it certainly is not a clear mandate. It should be noted that what is at issue here is whether the Board's denial of depositions violates section 10(b), not its authority to enact Board Rule 102.30, nor its interpretation of that rule. Indeed, even the Fifth Circuit cases do not question the validity of Rule 102.30. In *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968), the court held that the Board's denial of depositions was not error because the respondent failed to present good cause for taking depositions. Good cause is required only by Rule 102.30, not by section 10(b).

When deciding whether jurisdiction exists in this case, the Court must determine for itself whether the relevant portion of section 10(b) establishes a clear statutory mandate that the Board must follow. On this point, the Court notes that the Court of Appeals for the Eighth Circuit has not had an opportunity to interpret this portion of section 10(b). In the absence of guidance from the Eighth Circuit, it is the judgment of this Court that the Second Circuit correctly interpreted section 10(b) in *N.L.R.B. v. Interboro Contractors, Inc.* The statute requires that unfair labor practice hearings shall be conducted "in accordance with the rules of evidence" that apply in district courts. The language deals only with the conduct of the hearing itself, not prehearing matters. Congress certainly could—and perhaps should—make all the rules of civil procedure applicable to Board unfair labor practice hearings, but under a straightforward reading of section 10(b), it has not done so. The Court believes that the Board should enact rules permitting greater use of discovery techniques. However, the Court concludes that the Board is not required by section 10(b), as it is currently written, to do so.

Moreover, the availability of judicial review of the Board's denial of depositions

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militates against finding that jurisdiction exists. Both the Second Circuit and the Fifth Circuit addressed the issue now before the Court on review of final orders of the Board. The plaintiff in this case should also be able to obtain review in the Court of Appeals for the Eighth Circuit of the denial of depositions in the event that the Board should rule against the plaintiff.

For the reasons stated herein, it is the conclusion of the Court that this lawsuit must be dismissed for lack of subject matter jurisdiction. Because of this disposition of the case, it is unnecessary to address the merits of the plaintiff's motion for a preliminary injunction.

IT IS HEREBY ORDERED that the defendants' motion to dismiss for lack of subject matter jurisdiction is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dow Chemical Company, Texas Division v. NLRB

660 F.2d 637 (5th Cir.), November 5, 1981—250 NLRB 748

On petition to review and cross application for enforcement of Board Order

Before MARKEY,** Chief Judge, and GEE and POLITZ, Circuit Judges

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MARKEY, Chief Judge: Dow Chemical Company, Texas Division (DOW) and certain employee-intervenors petition to review and set aside, and the National Labor Relations Board (board) cross-petitions to enforce, two orders of the board issued July 18, 1980. The orders originated in two cases—one involving Dow and Local Union 716 of the International Brotherhood of Electrical Workers, AFL-CIO-CLC (IBEW), the other involving Dow and Local No. 1848 of the International Brotherhood of Painters and Allied Trades, AFL-CIO (IBPAT). The board found Dow guilty in both cases of violating 29 U.S.C. § 158(a)(5) [8(a)(5)] and 29 U.S.C. § 158(a)(1) [8(a)(1)] of the National Labor Relations Act (Act). The petitions have been consolidated on this appeal. We deny enforcement.

**Of the U.S. Court of Customs and Patent Appeals, sitting by designation.

Background

Dow operates a large chemical manufacturing complex in Brazoria County, Texas, with 7200 employees, of which 2700 were represented by unions and 4500 were not. Represented employees were paid hourly and received benefits bargained for by their respective unions; unrepresented employees were salaried and received a standard set of benefits.

A. IBEW

Since 1944, Dow had collectively bargained with IBEW. The most recent collective bargaining agreement covered May 1975—May 1978. On or about March 14, 1978[1] certain members of IBEW filed a decertification petition. The board scheduled an election for April 14.

Between March 14–April 14, Dow conducted voluntary meetings at which management representatives informed IBEW members of the scheduled election, and answered their questions on differences between their existing wages and benefits and those of salaried, unrepresented employees. The managers presented slides illustrating the differences. In some respects salaries and benefits of unrepresented employees were superior to those of IBEW members. The managers repeatedly and specifically emphasized that they could not promise and were not promising that salaried pay and benefits would be available if the voters voted to decertify the Union.

During the election campaign, Dow sent three letters, over the signature of D.A. Rikard, Vice-President of Operations, to the home addresses of IBEW members.

Enclosed in the first letter, dated April 3 and addressed to "Dow Electricians and Families," were reproductions of slides presented at the previous week's meetings. The enclosures compared life insurance, medical coverage, and various types of leave afforded unrepresented and represented employees. The letter stated that the "benefits covered [in the enclosures] * * * are specifically outlined in the policies and booklets issued by the Company to all salaried employees." In closing, Rikard wrote, "As we explained in the meetings, the law prohibits us from promising these salaried benefits to our Dow Electricians if they choose to decertify. This information is being provided for you solely in response

to your questions to allow you to review the answers at your convenience."

The second letter, dated April 7, included reproductions of slides presented at the second set of meetings to illustrate pay and retirement policy differences. Rikard noted that although the retirement formula was "exactly the same for both hourly and salary" that "the higher the annual earnings, the higher the monthly retirement benefit." Rikard also commented on the availability of "excellent medical insurance for the families of salaried employees who die while employed at Dow." This letter closed with the same disclaimer paragraph pointing out Dow's legal disability against making any promises.

In the third letter, dated April 11, Rikard said it was "very significant" that employees from other groups who had voted to decertify had not chosen to revert to union status, illustrating that "these employees are being treated fairly and are well satisfied with their compensation and benefits." He concluded that "[a] 'no (X)' vote is a vote for a better way for yourself and your family."

Not surprisingly, there were numerous brief discussions about the election between supervisors and IBEW members during the campaign. Testimony regarding some of those discussions, and about some managers' statements at the meetings, figured prominently in the board's evaluation of Dow's pre-election conduct.

On April 14, the 115 IBEW members voted 63 to 52 against continued representation by the Union. On Monday, April 17, Dow placed the former IBEW members on salary and made available the fringe benefits established for salaried employees. In changing the electricians' classification, Dow was following precedent established in 1969 and 1972, when employees affiliated with the Teamsters' and the Carpenters' unions voted to decertify and were placed on salaried status immediately after the elections.

On April 21, IBEW filed objections to the election, and requested that it be set aside, alleging that Dow had "destroyed the conditions necessary for the conduct of a fair election" by informing the electricians that "decertification of the Union would result in an immediate and substantial wage increase, along with other improved benefits," in violation of § 8(a)(1)[2] of the Act.

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[1] Events described in the text occurred in 1978 unless otherwise indicated.

On May 18, some former IBEW members were granted increases of $140 to $150 per month, retroactive to the date of the election.[3] On May 22, the IBEW filed a charge with the board, alleging that Dow had "refused to bargain in good faith," and had "discriminated against its employees in terms and conditions of employment to discourage membership in a labor organization by granting increased wages and improved benefits."

On July 6, the board's Regional Director issued a complaint alleging that Dow had engaged in conduct violative of § 8(a)(1) and § 8(a)(5)[4] of the Act. The complaint and election objections were consolidated for hearing.

Administrative Proceedings re IBEW

The Administrative Law Judge (ALJ) who presided over a hearing on November 6–8 found that each of eight statements of Dow supervisors constituted a "promise of benefit" and thus an unlawful attempt to induce employees to vote against the Union in violation of § 8(a)(1). He considered three other statements or questions coercive inquiries violative of § 8(a)(1).

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The ALJ stated, "If I were to view the informational meetings with employees (including the slide presentations on wages and benefits) and [the three letters] which were mailed to employees detailing the same material—in isolation, there would be a strong argument that the Company was correctly detailing the existing facts to employees in order that they could make an informed decision in the election. * * * [However,] [b]ecause of comments made by supervisors * * * in which employees were told, *inter alia,* that they would receive better wages and fringe benefits, and would fare better as salaried employees, * * * and in light of a systematic campaign of interrogation of employees, I find that the dissemination of benefits via slides and individual mailings to employees to be part and parcel of the Company's effort to woo the employees from the Union and in this context, constitutes a promise of benefits and is violative of Section 8(a)(1) of the Act."

Regarding the transfer to salaried status immediately after the election, the ALJ stated, "Since such actions were taken both before and after timely objections to the election were made, the *Employer made such changes at its peril.* As I have found [Dow's] conduct in the period prior to the decertification election is violative of Section 8(a)(1), and * * * also constitutes objectionable conduct to the election, I find that the unilateral granting of the raises and change of employee status, done while the validity of the election was still in doubt, constitutes a violation of Section 8(a)(5) and (1) of the Act." [Emphasis added.]

Finding that "a fair election at this time would not be possible," the ALJ recommended that the election be set side and that Dow be ordered to bargain with the Union "for a reasonable period of time." He further recommended that the bargaining order should not be construed to require a recission of the benefits granted subsequent to the election.

The board affirmed the ALJ's rulings, findings and conclusions, and adopted his recommended order. The board added that if Dow had not engaged in pre-election unfair labor practices, it would nonetheless have still violated § 8(a)(5) and § 8(a)(1) by its post-election transfer to salaried status, citing *Presbyterian Hospital,* 241 NLRB 996 (1979).

B. IBPAT

IBPAT had been the collective bargaining representative for Dow's painters since 1944. The most recent collective bargaining agreement covered May 19, 1975—May 18, 1978. On March 16, members of IBPAT filed a decertification petition. On August 25, the board scheduled an election for September 22.

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[2] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1):

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [§ 7 of the Act]."

[3] Upon transfer to salaried status, each former IBEW member received a $50 increase. That increase and the $140–150 increases resulted from the transfer to salaried status. The transfer being determinative, no need was seen by the board, or is seen by us, for separate discussion of the increases.

[4] Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5):

"It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

During the month before the election, Dow conducted voluntary meetings with the painters as it had with the electricians. In response to painter's questions at the meetings, a Dow managerial representative compared the painters' current benefits to those available to salaried employees, using some of the slides presented at the earlier IBEW meetings. Disclaimers of making any promises were repeatedly made, as they had been at the IBEW meetings. On September 13 and 19, Dow's General Manager McClure sent letters to painters, one of which included, "I'm convinced that our people in the Texas Division don't need a union to assure them of good pay and benefits, as well as fair treatment. I hope you share this feeling and will cast a vote for yourself and your family by voting *NO* on election day."

The 44 eligible painters voted 29 to 15 to decertify. Following its customary practice, Dow transferred the painters to salaries status on the first working day after the election.

On September 28, IBPAT filed objections to the election, alleging that Dow had informed the painters that they would receive improved wages and benefits if they voted against the Union. On November 15, IBPAT filed a charge that Dow had refused to bargain. A complaint issued on December 1, charging that Dow violated § 8(a)(1) and § 8(a)(5) by offering its employees certain benefits prior to the election and by granting a post-election increase and salaried benefits without notice or consultation with the Union. The complaint and election objections were consolidated for hearing.

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Administrative Proceedings re IBPAT

The ALJ who conducted hearings on April 26 and 27, 1979, found that Dow had not promised benefits, saying, "[I]t had no need to do so, since the Company's practices were common knowledge. All the Company did was furnish specific details and comparisons so the voters were completely informed of what they would gain in material benefits by abandoning union representation, as surely the Union informed them of what they would gain by continued representation."

The ALJ recommended dismissal of the complaint in its entirety, concluding that because Dow had not interfered with its employees' free choice in the election, its post-election transfer to salaried status did not violate the Act. He recommended that IBPAT be officially decertified.

The board affirmed dismissal of the complaint with respect to Dow's pre-election conduct and decertified the union. It went on, however, to disagree with the ALJ's conclusion of law respecting Dow's post-election conduct, holding that, despite the validity of the election, Dow had violated § 8(a)(5) and § 8(a)(1) by unilaterally transferring the painters to salaried status before the results of the election were validated, again citing *Presbyterian Hospital, supra,*

Issues [5]

(1) Were pre-election statements and questions of Dow supervisors to IBEW members violative of § 8(a)(1), or were those statements protected speech under § 8(c) [6] of the Act?

(2) Were post-election transfers of former IBEW and IBPAT members to salaried status, before validation of election results, a violation of § 8(a)(5) and § 8(a)(1) of the Act?

OPINION

(1) *Dow's Pre-Election Statements.*

Under § 8(c) of the Act, an employer has the right to express "any views, argument, or opinion" so long as "such expression contains no threat of reprisal or force or promise of benefit." The board, in adopting the ALJ's determinations that eight statements of Dow's supervisors to IBEW members, made at the meetings and in separate conversations, were "promises of benefit," and three were "coercive inquiries," necessarily viewed all eleven pre-election statements as having overstepped the limits of § 8(c).

When the board's findings are reasonable and supported by substantial evidence, a court will affirm them, though the court might well have made contrary findings if sitting *de novo*. Reviewing courts are not, however, rubber stamps. Theirs is not only the right but the duty of overturning findings unreasonable and not supported by the evidence of record. "[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). Applying those standards, we conclude that the board's eleven statement-based findings of separate § 8(a)(1) violations are unsupported by substantial evidence. Nothing of record supports IBEW's charge that Dow's pre-election conduct "destroyed the conditions necessary for the conduct of a fair election."

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[5] In view of our disposition, it is unnecessary to discuss a third issue raised in the briefs, that is, whether the board's bargaining orders or rerun elections were the appropriate remedy.

[6] Section 8(c) of the Act, 29 U.S.C. § 158(c):

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

In reaching our conclusion, we deem it unnecessary to resolve any question of credibility or testimonial conflict. Though Dow strenuously argues that the statements allegedly made were not in fact made, we assume here that they were. The board cautions us with remainders of our inability to observe the demeanor of witnesses, and thus to judge credibility, an inability of which we are fully aware. The ALJ's reference to demeanor and credibility related, however, only to his finding that the eleven statements were made. We accept those findings, and review the statements in the light of the law.[7]

(A) *Promises of Benefit.*

In testing whether substantial evidence supports the board's findings that eight statements were promises, three facts in the record are of great probative force. First, it is undisputed that Dow's managers and supervisors repeatedly and specifically cautioned that they could not promise and were not promising anything if the election resulted in decertification. Second, as recognized by each ALJ in decisions adopted by the board, it was common knowledge at Dow, long before the decertification petitions were filed, that decertifying normally meant "going salaried." Third, no witness testified that *he* considered any of the eight statements to have constituted a promise. An absence of those three facts would not alone make the statements promises, for none was a promise *per se*. The presence of those facts, however, undermines the determination that the present statements can properly be interpreted as promises of benefit under the circumstances of record here.

In analyzing election campaign statements of employers for the presence of promises, no need exists for unearthing an express statement that particular benefits will be given in exchange for a vote to decertify. The Act is violated by statements from which promises may reasonably be inferred. *Chromalloy Mining and Minerals v. N.L.R.B.*, 620 F.2d 1120, 1124–25 (5th Cir. 1980). The inference, however, must be one reasonably makeable by the employee or employees to whom the statement is made. It is not sufficient that bits and pieces of statements may be later lifted out of context, that the facts and circumstances in which the statements were made and which were known to the employee or employees may be ignored, and that those bits and pieces may then be viewed in vacuo as either promises or non-promises. *See Federal-Mogul Corp. v. N.L.R.B.*, 566 F.2d 1245, 1254 (5th Cir. 1978), *cf. N.L.R.B. v. Kaiser Agricultural Chemicals*, 473 F.2d 374, 381 (5th Cir. 1973).

Also central to an analysis of employer statements is the principle that § 8(c) at an irreducible minimum protects the right of an employer to state its views, argument, or opinion, and to make truthful statements of existing facts. The First Amendment would permit no less. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). As the ALJ in the IBPAT proceeding stated: "Section 8(c) of the Act is completely devoid of meaning unless it permits an employer to clearly portray its practice with respect to its unrepresented employees so they could decide whether they wanted to secure unrepresented status." Indeed, the board has stated: "Section 8(c) grants to an employer the right, in a manner and setting free from coercion, to compare benefits presently in effect in his unorganized operation with those enjoyed by employees in a simi-

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[7] We do not, of course, consider testimony nowhere mentioned or referred to below, as a basis for a violation finding or otherwise, by the ALJ or the board. The board's brief quotes some of that testimony. Nor do we consider Dow's inappropriate allegations of bias on the part of the ALJ. In his decision the ALJ paraphrased the statements at issue. We treat and quote the statements themselves.

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lar operation which has union representation." *Walgreen Co.,* 203 NLRB 177 at 181 (1973). *Walgreen* was not mentioned by either ALJ or by the board.

The ALJ did not simply ignore the freedom of expression of views assured employers under the First Amendment and § 8(c). He said:

> Granted, there is often a fine line between the exercise of freedom of speech under Section 8(c) and violations of Section 8(a)(1) of the Act where statements and conduct involve threats or promise of benefit. With certain exceptions (e.g., medical benefits), I have found no explicit promises to raise wages a certain amount. However, numerous supervisors did more than supply information to employees, they systematically contacted electrician employees in the unit and, *inter alia,* urged them to decertify the Union stating that medical benefits were better, that they would be stupid not to decertify, that they would fare better on benefits as salaried employees, that the Company would pay them more but for the union, that the lowest paid carpenter (salaried-unrepresented) received more than the highest paid electrician, etc.
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> * * * * *
>
> I am aware of and have not disregarded Respondent's principal contention that Section 8(c) (and its related First Amendment claim) grants Respondent freedom to express its views, and particularly here, where all Respondent had to do was point out existing wages and benefit scales for salaried employees. In this case, the anamoly [sic] exists that wages and benefits for salaried employees were in fact better in some respects than wages and benefits being paid hourly represented electricians. In essence it can be argued that by telling the facts the Respondent was automatically engaging in a promise of benefits. I have attempted to reconcile the right of employees to be informed and the right of the employer to express his views under Section 8(c) with existing law that prohibits an employer from making threats or promises of benefits in violation of Section 8(a)(1) or constituting objectionable conduct prior to an election. I have concluded that on the basis of the record as a whole, Respondent did more than inform the employees of benefits currently enjoyed by salaried employees. It systematically interrogated employees as to their views on the decertification election and made the judgment that their wages and benefits would be better and attempted to "sell" that judgment to employees and thereby induce them to reject their existing union representation. It can be argued, of course, that if the Respondent is entitled to inform the employees of existing wage and benefit scales for salaried employees, why is it not entitled to use such factual material in campaigning to reject the Union? I have found that employees and supervisors alike were aware that decertification meant that employees would become salaries. In light of this, the Respondent went too far when it made the *judgment* that decertification meant better and increased wages and benefits *and told* the employees that. By so doing, the Respondent advanced into a forbidden area of promising employees benefits if they voted to reject the Union. [Emphasis in the original.][8]

As appears *infra,* the foregoing falters for lack of support in the record.

The board says in its brief that "an employer is entitled to present facts concerning the benefits or experience of its non-union employees," but that an employer "is not free to inform employees outright or by suggestion, that it will give them *more* if they vote to decertify the union." [Emphasis the board's.]

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Nowhere in the statements at issue, or in the circumstance in which they were made, can there be found a suggestion that IBEW members would get "more" than then-salaried employees were getting if they voted to decertify. There was no promise that they would get even the same, though, as the ALJ recognized, it was common knowledge that "going salaried" normally followed decertification. The board's brief undercuts the notion that promises were made. In arguing for the appropriateness of a bargaining order, the board recognizes that though the electricians knew that salaried status had followed past decertifications "they had no way of knowing just how much greater their own weekly earnings would be * * * if they voted to decertify the IBEW," and "the extent of the Company's post-election changes was unknown to the employer prior to the election."

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[8] The reference to Dow's having made a "judgment" is difficult to understand. If, as the ALJ recognized, everyone knew decertification meant "employees would become salaried," and if "wages and benefits for salaried employees were in fact better in some respects," it would seem that a judgment contrary to that attributed to Dow would be impossible. As appears in the text, what Dow actually told its employees did not constitute threats or promises.

There is no allegation that any statement of fact by Dow's supervisors was untruthful. Three statements were truthful answers to employee questions. One was a clarification of an employee's misstatement at a meeting. Three were statements of opinion. One was an expression of the speaker's desire. For a full month, the forthcoming election was necessarily a topic of many conversations. If the eight statements here involved must under the present circumstances be considered "promises" violative of the Act, virtually nothing would be left to employers in an election campaign but a sterile silence.

Moreover, nothing of record indicates that the employee-craftsmen here involved, electrician-members of IBEW, were so illiterate or unsophisticated as to have been misled or influenced to vote against their will by subtle nuances in the challenged statements, by drawing the inferences drawn by the ALJ, or otherwise. It would neither surprise nor coerce an IBEW member, for example, to hear that a Dow supervisor believed in or desired decertification of the Union. We do not deal here with the recognized imbalance of power between an employer and an individual employee in a bargaining context. We deal with an election, where the effective silencing of one source of information would be a clear disservice to employees faced with the need of making an informed choice.

Lengthy court opinions are anathema, yet explication of the evidentiary void surrounding the statement-based findings requires discussion of all eleven statements.

(a) *Statements of Superintendent Goff.*

Union steward Long testified that an unidentified electrician at a pre-election group meeting, "asked why we couldn't get them [salaried] benefits before," and that "Mr. Goff, I think, replied that the company had to deal with a third party. And if they didn't have to deal with this third party, they wouldn't have to process grievances, have arbitration and negotiation. They wouldn't need Labor Relations; they'd have more money to spend on the Dow employees." Interpreting Goff's response as "a clear indication that without the Union, employees would get more money," the board viewed it as a promise of benefit.

A truthful statement, in answer to a question on why money was not being spent on employees, that more money would be *available* to spend on employees if it were not being spent on labor relations, is not the same as a *promise* that that money would be spent on higher wages and benefits for employees. Economics, to say nothing of common sense, dictate that without the costs of running a Labor Relations department, and of negotiating and administering collective bargaining agreements, Dow would have more money to spend elsewhere. Whether that money should be spent on labor relations was not involved in the statement. That choice was yet to be made by the employees at the election. The statement that more money would be available is thus one of existing fact. In view of Dow's repeated disclaimers concerning promises, the truthful statement that Dow would "*have* more money to spend on the Dow employees" must be viewed as incorporating Dow's unquestioned unilateral right to choose, after decertification, whether to spend it on the employees or elsewhere. That the question dealt with salaried benefits known to be higher, that decertification had historically meant "going salaried," and that the question itself required reference to the union, are further circumstances undermining the board's interpretation of the statement as a promise. Accordingly, we find Goff's response protected under § 8(c).

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Long further testified that Goff answered a question about "how much money they was [sic] talking about" by stating that "he couldn't tell us anything about the amount of money, but the lowest paid carpenter made more than the highest paid electrician." The board says this "direct comparison between the wages of the nonrepresented carpenters and the represented electricians indicated to employees the benefits of nonrepresentation," and thus constituted a promise of benefit.

The board did not elucidate the basis for its apparent belief that employers may *not* in an election campaign truthfully indicate to employees the benefits of nonrepresentation. Nor did it explain the basis for its conversion of that indication into a promise. Nor did it explicate the obvious conflict with its statement in *Walgreen Co., supra.* Nor did it say why it thought employees involved as the electorate in an election campaign should *not* be told "the benefits of nonrepresentation," along with, as the board would presumably approve, the benefits of representation.

Unchallenged testimony established the truth of the response that "the lowest paid carpenter made more than the highest paid electrician." Hence Goff's statement in response to an employee's question was no more than a truthful comparison of benefits available to represented and unrepresented employees, a comparison recognized as legitimate campaign conduct protected under § 8(c). *See Central Hardware Co. v. N.L.R.B.,* 439 F.2d 1321, 1329 (8th Cir. 1971), *vacated on other grounds,* 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972); *J. S. Dillon & Sons Stores Co. v. N.L.R.B.,* 338 F.2d 395, 400 (10th Cir. 1964); *N.L.R.B. v. Laars Engineers, Inc.,* 332 F.2d 664, 667 (9th Cir.), *cert., denied,* 379 U.S. 930, 85 S.Ct. 325, 13 L.Ed.2d 342 (1964); and *Walgreen Co., supra.*

Moreover, Goff explained without contradiction that he told the employees that salaries were confidential, that he could not answer questions about salary directly, and that it was only the need to correct the implication that unrepresented carpenters were treated less favorably than electricians, and to set the record straight, that caused him to make the comparison. Goff's statement in context was not a promise to grant increases if employees voted to decertify.

Union steward Tomlin testified that Goff stated "that because we were represented by the Union, that Dow couldn't pay us sometime [sic] what they'd like to. And I asked him why. And Lee Wilkins answered and said it was because of the laws that they couldn't pay it." Electrician Salinas testified that Goff had "said something about that he would like to pay us more than what we were worth, but he couldn't pay it because we belonged to the I.B.E.W. And I think Mr. Tomlin asked him why. And then before Mr. Charlie Goff could answer, Lee Wilkins jumped up and told him that it was the law. * * *" The board viewed Goff's statements as promises.

Lee Wilkins, Manager of Labor Relations, testified, without contradiction, that Tomlin, the questioner, had *first* paid pay scales in the collective bargaining agreement were merely a minimum, not prohibiting Dow from paying more than the agreed rates. Consistent with the testimony of Tomlin and Salinas, Wilkins said he responded to Tomlin that, as he understood it, "any benefit offered any bargained for personnel with respect to increase of wages or benefits of any kind had to be offered to all. And [Dow] couldn't individually decide what a given electrician was worth."

Dow was foreclosed from paying individual employees without regard to the provisions of Article XXVIII of the labor contract governing wage adjustments within particular job classifications. The state-

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ments of Goff and Wilkins concerning an inability to unilaterally vary wages among individuals beyond the agreed scale was thus not a promise but a truthful statement of existing fact protected under § 8(c).

Electrician Allen testified that at a meeting someone had asked, "what was going to happen to Mr. T. A. Hutchins," an apprentice who had failed the journeyman test a few weeks before the election. According to Allen, Goff answered, "[I]f Mr. Hutchins was [sic] salaried that the company would have more leeway as to what to do with it; but under the existing labor contract, that he was washed out." That response to a question, citing a labor contract provision, was given a new connotation when the board found that "Goff was pointing out that management would be more lenient with apprentices if they were unrepresented and thereby violated Section 8(a)(1)."

Article 30, § 7 of the collective bargaining agreement between Dow and IBEW provides that, "an apprentice who fails the [journeyman] exam will be released from the program." Allen admitted that Goff had essentially said that if there were no labor contract in the picture, individual treatment could be given in such cases. Goff did not promise that Hutchins, or any other apprentice who failed a journeyman test, would be retained in the future if the electricians voted to decertify. "Leeway" is not here synonymous with "leniency." In context, therefore, Goff's remark was at most a truthful identification of a possible disadvantage of being governed by a labor contract. It was a truthful re-

sponse to a question, to which under the circumstances the only alternatives would be either an incomplete answer or a refusal to answer. As such, it constituted an accurate observation of fact within the bounds of legitimate electioneering protected under § 8(c).

(b) *Statements of Foreman Williamson.*

Electrician Allen testified that one day during the decertification campaign, he and Williamson "were just talking about general things; you know, talking a lot about it was such a pretty day, and I commented I'd sure like to go fishing. And he said, well, if we were to decertify, then I possibly could, you know." Allen also stated, however, that he had realized that half-days off were a salaried benefit. The board says Williamson's comment was "a holding out of a possible benefit."

Allen's testimony describes a conversation about "general things," "a pretty day," and his expressed desire to "go fishing." Williamson's response thus occurred in a casual conversation, the very type of "setting free from coercion" referred to by the board in *Walgreen Co., supra* at 181. Allen knew that one benefit available to unrepresented employees, but not negotiated for IBEW members, was the right to take half-day vacations. Williamson's remark referring to that known and factual *possibility,* in response to Allen's expression of a desire to go fishing on a pretty day, was not a promise of benefit but a statement protected under § 8(c).

(c) *Statements of Foreman McGee.*

Electrician Johnson testified that on the day before or the morning of the election, McGee came to his shop area and said "that he thought the electricians would be better off salaried, and that he figured that a guy would be dumb or stupid not to vote to decertify or to go salaried." Electrician LeBoeuf testified that McGee on the day before the election, told him that "he wished that we would decertify; that it would be to my—for my future and security that we do so." The board found these statements promises violative of § 8(a)(1).

There being no evidence that either Johnson or LeBoeuf viewed McGee's comments about what he "thought" and "figured" and "wished" as either coercive or promissory, those comments can only be considered the type of generalized statements of opinion permissible on both sides in an election campaign. **The record is devoid of substantial evidence to support a finding of a § 8(a)(1) violation in McGee's statements of his opinion.**

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(d) *Statements of Foreman Oswald.*

Electrician Rab testified that during the campaign Oswald told him that "he wished we would decertify, because if we did * * * they could do a lot more for us. They could perhaps, take us out for supper, or something to that effect, and reward us for doing a real good job." The ALJ stated that though "taking them 'to supper' seems almost innocuous, it does nevertheless, continue a trend of promising employees 'rewards' if they decertified the Union." The board found Oswald's comment violative of § 8(a)(1).

Testimony of a witness must be reviewed and evaluated in its entirety. Here, for example, the ALJ and the board quoted only partially from Rab's testimony, disregarding that part in which Rab testified that Oswald *also* said, in the *same* conversation, that "he wasn't promising anything." There is no inconsistency between the two segments of Oswald's statement described by Rab, and no reason to choose one and exclude the other. Indeed, the ALJ found it unnecessary to consider whether disclaimers of promises were said "tongue in cheek" because "employees and supervisors acknowledged that if the union were decertified, the employees involved would become salaried based on past practice and the fact that the Company had only two classes of employees, hourly represented and salaried unrepresented."

Testimony of a witness must also be evaluated in light of that of other witnesses which is consistent with the testimony under evaluation. Rab's testimony that Oswald denied any promise cannot be simply ignored, particularly in light of its total consistency with Oswald's unchallenged testimony that he had made it "very clear" to employees that he could not make any promises, and that in response to employee questions, he explained his views on how being treated individually could work to the employee's advantage. In the context of the freedom to state the truth and honest opinion in an election campaign, and in light of all consistent testimony, including the admitted disclaimer of any promises, Oswald's remark was not a promise but a protected statement under § 8(c).

(e) *Statements of Foreman St. Clair.*

Union steward Long testified that St. Clair told him during the campaign that "he believed we would be better off going salaried." Long further testified that St. Clair later called him into his office and told him "we would be better off decertified, and we'd have better benefits and make more money." Electrician Henderson testified that St. Clair told him that "he thought that the electricians would be better off financially and in benefits by going salaried—decertifying." The board considered St. Clair's comments promises.

Apart from the right of an employer in an election campaign to say it "believed" and "thought" employees would be "better off," the corollary of a union's right to say they would not be, the circumstances in which St. Clair's comments were made cannot be disregarded. Those circumstances cast a light quite different from that in which the board viewed those comments. Henderson admitted that he had known St. Clair for twenty-five years and considered him a friend. Their conversation occurred on a non-business related drive together on a Sunday afternoon. Long also knew St. Clair, who was not his supervisor, for a long time and had talked with him in his office several times before, "usually about fishing." St. Clair candidly testified that he told Long "friend to friend" that it was his "honest, personal opinion" that the electricians would be better off if the Union were decertified.

That neither Long nor Henderson testified that *they* interpreted St. Clair's statements of his thoughts and beliefs as promises of better benefits and wages in exchange for decertification, is consistent with St. Clair's unchallenged denial of ever promising anything to Long or Henderson.

Nothing in the law prohibits an employer's representatives in an election campaign for stating, in a setting free from coercion, their opinion or belief that voters

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would be better off if they voted to decertify, any more than it prohibits union representatives from stating a contrary opinion. That is what an election campaign is all about. The statements of St. Clair to personal friends in private conversations were noncoercive expressions of personal opinion protected under § 8(c).

(B) *Coercive Questions.*

The ALJ labeled three occasions, when Dow supervisors asked certain employees about the election, "a systematic campaign of interrogation." The board says the three occasions involved coercive inquiries or unlawful interrogation in violation of § 8(a)(1). Quite apart from whether three instances of inquiry during a month-long campaign for the allegiance of 115 voters may be considered a "systematic" anything, the inquiries themselves cannot on this record be considered coercive. No witness testified that *he* considered any of the three questions coercive, and nothing in the circumstances of record warranted the ALJ, the board, or would warrant us, in doing so.

In *N.L.R.B. v. McGahey,* 233 F.2d 406 (5th Cir. 1956), this court described casual and moderate inquiries, even as to union preference, absent evidence indicating that the employee has reason to consider the inquiries a threat of reprisals, as not constituting an unfair labor practice in violation of § 8(a)(1). In *McGahey,* threats to close the plant and comparable menacing predictions were forecasts of reprisals. No such threats appear in the present record.

In *Federal Mogul Corp. v. N.L.R.B., supra,* this court supplied extensive guidance and precedent in setting forth what it designated the *Bourne* Rule. *Bourne v. N.L.R.B.,* 332 F.2d 47 (2d Cir. 1964); *see also N.L.R.B. v. Camco, Inc.,* 340 F.2d 803, 804 (5th Cir.), *cert. denied,* 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1965). Under that rule, all of the circumstances must be considered in light of certain listed factors. This court there described the ALJ's election not to apply the *Bourne* Rule as improper.

In *Paceco v. N.L.R.B.,* 601 F.2d 180, 182–183 (5th Cir. 1979), this court said: "While it is correct as a general proposition that '[o]nly when the interrogation tends to restrain, coerce, or interfere with employees in the exercise of their rights under the Act is such interrogation proscribed by Section 8(a)(1),' *NLRB v. Sunnyland Packing Co.,* 5 Cir. 1966, 369 F.2d 787, 793 * * * [citations omitted], we find the mere recital of that general standard without more too cryptic to permit us to determine whether there is substantial evidence to support the board's conclusions." In *Paceco,* this court again detailed the factors[9] to be considered in determining whether a line of questioning has the effect of interfering with employee's rights under § 7 of the Act,[10] vacated the board's order, and remanded for reconsideration in light of those factors.

Here, the board's brief contains *ad hoc* assertions of counsel touching at most four of the eight factors listed in *Paceco.* Neither the ALJ nor the board articulated a relationship of *Paceco* factors to the challenged inquiries. In the interest of judicial economy, and in view of the nature and circumstances of the three inquiries involved, we decline what would be merely a *pro forma* remand to the board for applica-

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tion of *Paceco* factors. That action would serve only to further delay for the parties a final resolution of a dispute now more than three years old.

When the inquiries here involved are examined in light of over thirty-four years of Dow—IBEW collective bargaining, on this record hardly a history of hostility on either side, in light of all the evidence, in light of the factors listed in *Paceco,* and in light of this court's prior holdings, the inquiries are seen to be non-violative of § 8(a)(1).

(a) *Question of Superintendant Goff.*

Salinas testified that Goff asked "what I thought about the decertification, and I told him that either way it would affect my family." The board found Goff's inquiry "coercive and violative of Section 8(a)(1)."

Goff asked Salinas a single question on what he thought about the election. That question did not concern Salinas' voting intention. Goff pressed no further after Salinas' noncommittal response. Goff is not even alleged to have asked Salinas how he intended to vote or for his attitude toward the Union. There is not the slightest evidence indicating that Salinas had reason to consider the question as forecasting a reprisal. We find nothing in the record to support the finding that Goff's question was coercive or that it constituted a § 8(a)(1) violation.

(b) *Question of Foreman Hargrove.*

Electrician Hernandez testified that Hargrove asked him and another electrician (Gary) "how we was [sic] voting." Hernandez testified that he remained silent but that Gary answered "yes," meaning, says Hernandez, that Gary would be voting for the Union, and that Hargrove then "started talking about our benefits would be better * * * both as far as insurance goes and * * * we would have a better opportunity going salaried." The board said Hargrove "engaged in unlawful interrogation and promises of benefits, both of which constitute separate violations of Section 8(a)(1)."

Hernandez was the only employee to claim that a supervisor had asked how any employee intended to vote.[11] Yet Hernandez *also* testified that Hargrove's question was posed "in a joking manner." Again, in analyzing a question to detect the presence of coercion, the context, manner, and circumstances in which the question occurred cannot simply be ignored. That neither Hernandez nor Gary said they felt coerced, and that the question was admittedly put and received in a humorous tone, indicate its noncoercive nature. The record lacks substantial evidence to support a finding that Hargrove's question constituted coercive or unlawful interrogation.

When asked whether Hargrove had ever made any promises to him of increased benefits, Hernandez answered "No." He acquiesced in a characterization of the conversation with Hargrove as essentially a discussion of benefits available under salaried status, that is, a comparison fully within the bounds of § 8(c). No support can be found in the record for the board's finding that Hargrove's statements constituted promises in violation of § 8(a)(1).

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[9] History of employer's conduct toward employees; nature of information sought; position of questioner in company's hierarchy; place and method of interrogation; truthfulness; whether employer had a valid purpose for information on union strength; whether that purpose was communicated to employees interrogated; and whether company personnel gave employees any assurances that they would not be subject to reprisals. *Paceco v. N.L.R.B., supra* at 183.

[10] Section 7 of the Act, 29 U.S.C. § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

[11] Hargrove denied asking about intention, and testified that he only asked "their feelings on the election, and how did they think the election would go." Gary, described by Hernandez as the only one who answered, did not testify. His testimony might have been helpful in resolving the testimonial conflict. As indicated in the text, we do not attempt here to resolve the conflict, nor do we consider allegations of hearsay, but accept the truth of Hernandez' testimony. We do, however, evaluate Hernandez' testimony in its entirety.

(c) *Question of Manager Walker.*

Electrician Elliott testified that Walker "wanted to know what my feelings was [sic] about the voting and the election," that he answered that he would not be where he is today but for the Union, and that Walker said "if we went salaried, that it would be beneficial—could be beneficial to me, on account of my age and length of service." The board says that "by interrogating Elliott and indicating it would be beneficial to him if he voted to decertify, [Dow] engaged in conduct violative of Section 8(a)(1)."

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Elliott did not say Walker asked his voting intention, a fact consistent with Walker's uncontradicted testimony that he did not ask Elliott how he intended to vote. Elliott did not testify that he felt coerced and the question is not *in haec verba* coercive. Insubstantial evidence appears in the record to support a finding, even by inference, that Walker's question was anything other than the type of casual or moderate inquiry described as non-violative of § 8(a)(1) by this court in *McGahey, supra.*

Elliott did not testify that Walker made any promises, or that he viewed anything Walker said as a promise, a fact consistent with Walker's uncontradicted testimony that he had told employees "[o]n many, many occasions" that he could not make any promises. To state the view that decertification could be beneficial is permissible campaign rhetoric, as is a union representative's statement that decertification would not be beneficial.

The board said Walker's statement was a promise, but merely labeling a statement a promise does not make it so. A finding that a statement not *in haec verba* a promise must nonetheless be so interpreted requires some evidence in the record to support that interpretation. Nothing of record supports an inference that Walker's statement that going salaried "could be beneficial" was a promise. In the present record, no evidentiary basis exists for the board's finding that Walker's statement was a promise violative of § 8(a)(1).

(C) *Comparisons Made in Meetings and Letters.*

Each of the board's eleven findings based on pre-election statements to IBEW members being without support in the record, there remains in the pre-election picture only the comparisons made at the group meetings and in the three Rikard letters to IBEW members. The ALJ, as above indicated, viewed that evidence as presenting "a strong argument that the Company was correctly detailing the existing facts to employees in order that they could make an informed decision in the election." The ALJ in the IBPAT proceeding found that comparisons substantially identical to those made to IBEW members "did not interfere with employee free choice in the election," and the board adopted that finding in that proceeding. The substantially identical exhortations to vote "No" in the Rikard and McClure letters were apparently considered, as they are here, as permissible electioneering rhetoric.

The record establishes that the comparisons made here are precisely the type described by the board in *Walgreen Co., supra,* as within the right granted an employer in § 8(c). The ALJ and the board effectively found the comparisons themselves in the IBEW proceeding free from coercion. Looking to the entire course of Dow's conduct, as it should, and noting the pre-election statements discussed above, the board found the comparisions at meetings and letters tainted as part of a campaign to "woo" the IBEW members from their union. The difficulty in that approach is that every election campaign is a wooing process, engaged in by the employer and union. If Dow, in all its challenged pre-election conduct, sought to woo its employees from the Union, that intent is of no moment in itself, an employer's "wooing," absent threats or promises, being specifically sanctioned by § 8(c) of the Act. *N.L.R.B. v. Gissel Packing Co., supra; N.L.R.B. v. Sidran,* 181 F.2d 671, 674–75 (5th Cir. 1950); *N.L.R.B. v. Laars Engineers, Inc.,* 332 F.2d 664, 665–67 (9th Cir.), *cert. denied,* 379 U.S. 930, 85 S.Ct. 325, 13 L.Ed.2d 342 (1964); *N.L.R.B. v. Enid Co-op Creamery Assoc.,* 169 F.2d 986 (10th Cir. 1948). Here, as above indicated, the view that eleven statements constituted "promises" and "unlawful interrogation" sufficient to have tainted the comparisons made at meetings and in letters is without support in the record.[12]

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The board adopted one ALJ's finding that comparisions to IBEW members constituted violations. It also adopted another ALJ's finding that virtually identical comparisons to IBPAT members did not. The board distinguishes the former on the basis of statements found to be violations, a distinction that disappears, as above indicated, when those statements are viewed in light of the evidence and the law.

It has been recognized that a course or pattern of anti-union activity, or anti-union animus or hostility, may create an atmosphere in which otherwise seemingly innocuous statements may impede employees' free choice. *N.L.R.B. v. Kaiser Agricultural Chemicals, supra,* at 381. There is here, however, no finding and no evidence whatever of any such course or pattern, and no basis in law for distinguishing the comparisons made to IBEW members from those made to IBPAT members.

The board's findings that Dow violated § 8(a)(1) in its pre-election conduct in the IBEW election being without support in the record, enforcement of that portion of the board's order based on those findings must be denied, and its order setting aside the election must be vacated.

(2) *Post-Election Conduct of Dow.*

In the IBEW and IBPAT proceedings, the board found Dow's unilateral post-election transfer of employees to salaried status an unfair labor practice in two respects: first, as a § 8(a)(5) violation of its duty to bargain, and, second, as a § 8(a)(1) violation of its duty to refrain from interfering with the employees' § 7 rights in a possible rerun election. The board relied on its holding in *Presbyterian Hospital, supra,* that when a union loses a decertification election an employer may not withhold dues under a preexisting bargaining agreement provision for dues checkoff, decline to transfer them to the union, and save them until the board resolves the union's election objections. The board there expressed the view that a union that has lost a decertification election remains the employees' bargaining representative until all union objections are resolved and the final election results have been validated by the board, and that a refusal to bargain during that interim period thus violates § 8(a)(5). The board's treatment of Dow's post-election conduct creates a case of first impression in this court.

The board's application of *Presbyterian Hospital* as a basis for holding Dow's post-election changes a violation of a duty to bargain under § 8(a)(5) conflicts with the rule applied in both proceedings by the ALJs here. Each held that Dow was free to place the employees on salaried status and grant raises, but that it did so *at its peril* while the union's election objections were pending. Sustaining the objections in the IBEW proceedings, that ALJ found Dow's post-election conduct a violation of § 8(a)(5) and § 8(a)(1). Rejecting the objections in the IBPAT proceeding, the other ALJ found Dow's same post-election conduct not a violation and dismissed the § 8(a)(5) and § 8(a)(1) allegations.

Before us, the parties describe the rule applied by the ALJs as having its origin in *Mike O'Connor Chevrolet-Buick-GMC Co.,* 209 NLRB 701 (1974), *enforcement denied on other grounds,* 512 F.2d 684 (8th Cir. 1975), and refer to that rule as "the *Mike O'Connor* rule." The rule, however, has a

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long pedigree reflected in decisions rendered by this court before and after *Mike O'Connor.*[13]

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[12] The board's brief makes much of Manager Kessler's testimony in the IBPAT proceeding as proof that the elections were conducted differently. The partially quoted testimony, however, related only to the events at meetings. Further, the board lacks candor in mischaracterizing Kessler's testimony. When asked whether at any meeting he told the painters that if they voted to decertify "they would be transferred to salary status and receive the salaried schedule benefits," Kessler answered: "Absolutely not. With my prior experience in the electrician's campaign, I know what is and is not proper under the rules covered by the National Labor Relations Board, and we absolutely went out of our way to make sure we did not make any promises." The board's brief disingenuously recasts that testimony: "Kessler further testified that as a result of the Company's 'prior experience in the electricians' campaign' it had learned what was and was not 'proper under the rules covered by the National Labor Relations Act, and * * * absolutely went out of [its] way to make sure * * * [not to] make any promises." Neither the ALJs nor the board made any reference to Kessler's testimony, perhaps because Kessler did *not* say "as a *result* of the Company's" prior experience, or that "it had *learned*" what "*was* and *was not*" proper.

[13] *See Anchortank, Inc. v. N.L.R.B.,* 618 F.2d 1153, 1156–57 (5th Cir. 1980); *N.L.R.B. v. Allis-Chalmers Corp.,* 601 F.2d 870, 874 (5th Cir. 1979); *N.L.R.B. v. W. R. Grace & Co., Construction Prod. Div.,* 571 F.2d 279, 282 (5th Cir. 1978); *General Electric Co., Battery Prod., Capacitor Dep't,* 400 F.2d 713, 717–18 (5th Cir. 1968), *cert. denied,* 394 U.S. 904, 89 S.Ct. 1012, 22 L.Ed.2d 216 (1969); and *N.L.R.B. v. Laney & Duke Storage Warehouse Co.,* 369 F.2d 859, 869 (5th Cir. 1966). *See also Cone Brothers Contracting Co. v. N.L.R.B.,* 235 F.2d 37, 42–43 (5th Cir. 1956), *cert. denied,* 352 U.S. 916, 77 S.Ct. 214, 1 L.Ed.2d 122 (1956); and *N.L.R.B.* v. *Houston Chronicle Publishing Co.,* 300 F.2d 273 (5th Cir. 1962).

Under what we will also call the *Mike O'Connor* rule, an employer may make unilateral changes following a union victory in an initial representation election and before the employer's election objections are resolved, but does so *at its peril.* If the employer's objections are sustained, no duty to bargain with the union existed and a failure to bargain charge under § 8(a)(5) will be dismissed. *See N.L.R.B. v. Houston Chronicle Publishing Company,* 300 F.2d 273 (5th Cir. 1962). If the employer's objections are rejected, its duty to bargain relates back to the date of the election, and the employer's unilateral actions while objections were pending are automatic violations of § 8(a)(5). *See Anchortank, Inc. v. N.L.R.B.,* 618 F.2d 1153 (5th Cir. 1980).

Though *Mike O'Connor* involved an initial representation election won by the union, and the present case involves a decertification election lost by the union, we see no basis in law or justice for distinguishing between types of election or for distinguishing on a basis of which side won or lost. Moreover, we view the Act as requiring that its labor peace goals, as well as protection of workers' freedom to choose, be achieved by an even-handed application of the same rules of the game to all elections and to both sides.

As above indicated, the board rejected the ALJs' effective application of the *Mike O'Connor* rule, by holding that Dow's obligation to bargain continues after a union has lost a decertification election and until election objections are reviewed by the board, regardless of whether the election is ultimately held lawful. The impracticality of that approach in the present context is illustrated by the board's order to bargain in the IBPAT proceeding. The board decertified IBPAT and, on the same day, ordered Dow to cease and desist from "[u]nilaterally changing the terms and conditions of employment of unit employees * * * prior to the final resolution concerning any question concerning the continuing representation of [IBPAT] * * * or any incumbent union." General Counsel's admission at oral argument that the board provided a highly technical remedy does not go far enough. The "remedy" was constructed of smoke.

There was no instant of time afforded by the board's order in which Dow would be able to bargain with a union that was not *board-decertified.* Ironically, the board noted that "Nothing herein is to be construed, however, as requiring [Dow] to rescind any of the wage increases or other benefits, the granting of which we have found to be unlawful." The order to bargain may at best be described as a general admonition, possibly applicable sometime in an unknowable future.

Beyond its impracticality, a broad application of *Presbyterian Hospital* to decertification elections lost by a union would deprive former union members of the right to express their choice in the election from the date of the election to the date on which the board completed its review of the election, and would do so whether the election was fair or unfair. In the present case, *Presbyterian Hospital* would have so deprived IBPAT members from September 22, 1978 until July 18, 1980—that is, for almost twenty-two months. Under *Mike O'Connor,* the choice expressed by union members is immediately honored. If the election is found to have been fair, that choice remains undisturbed. Only if the election is found to have been unfair is that choice overturned.

In *Presbyterian Hospital,* the board articulated policy and practical considerations it viewed as undergirding the concept that the result of a decertification election must be in limbo until the board resolved objections: "The well-established rule concerning election results is that they are not effective until certification [i. e. validation by the board] * * *. If the status of the parties were to change immediately upon the tally of ballots, the possibility of sustained objections and rerun elections might lead to a number of changes in the collective bargaining relationship before a representative is finally certified * * *. The general rule * * * lends certainty and stability to the process since the parties may safely maintain the status quo until the representation question is conclusively resolved by the Board." *Presbyterian Hospital, supra* at 998, quoting *Trico Products Corp.,* 238 NLRB 1306 at 1307 (1978).

Though the foregoing articulation has the sound of superficial plausibility, it collapses when confronted with the *Mike O'Connor* rule. The latter rule, which the board chose not to mention in its Decision and Order, is not only more fair and practical, but meets the desiderata articulated by the board in *Presbyterian Hospital. Mike O'Connor's* requirement that an employer whose election objections are overruled must bargain retroactively about all post-election changes, thus restoring the duty-to-bargain *status quo* as of the date of the election, is fully applicable to the present circumstances. It is clear that a long-established union should not be destroyed immediately upon its loss of a decertification election, but *Mike O'Connor* causes no such result. The union continues to exist and, if its election objections are sustained, the employer must bargain retroactively with it. Further, the employees may elect at an appropriate time to return to the union. If, on the other hand, a union's objections are rejected and it has thus lost a fair election, no reason appears for requiring an employer to bargain with it, or for holding employees bound to it, throughout the pendency of its objections.

Moreover, the board is inaccurate in stating that the view broadly expressed in *Presbyterian Hospital* is "well-established," insofar as its application to an employer's general duty to bargain with a union that has lost a decertification election is concerned.[14] Before us, the board cites three cases: *Andor Company, Inc.,* 119 NLRB 925 (1957); *N.L.R.B. v. Albert Van Luit & Co.,* 597 F.2d 681 (9th Cir. 1979); and *Trico Products Corp., supra. Andor* did not involve an election, but dealt only with an employee petition for a deauthorization election to rescind a union security clause. The board said that *if* the employees voted to deauthorize it would be effective on board validation. *Luit* involved only the question of whether employee revocations of dues checkoff authorizations were valid during pendency of union objections to a deauthorization election. In *Andor* and *Luit,* the union necessarily continued as the recognized representative of the employees, the involved deauthorization elections relating only to continuance of specific provisions in bargaining agreements. In *Trico,* the election was between competing unions, the incumbent union lost, and the sole charge related to the employer's withholding and transfer of dues to the incumbent union. None of the cases cited by the board involved a charge of failure to bargain under § 8(a)(5) based on an employer's change to salaried status of employees who had voted to decertify their union.

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Enforcement of union dues checkoff and security clauses basically concern the relationship of employees to their union, with the employer only peripherally involved. The *Presbyterian Hospital* view may serve the purpose of maintaining financial integrity of a union which has merely lost a security clause deauthorization election, as in *Andor* and *Luit.* It may serve a similar purpose with respect to payment of dues checkoff money to a union that has lost an election to another union, as in *Trico.* We make no evaluation of the merits of *Presbyterian Hospital* as it may apply to the facts in those cases. It is sufficient here to indicate that it was in appropriately applied to the duty to bargain on change to salaried status amid the distinct facts in the present case.[15]

Before us, the board argues that if the *Mike O'Connor* rule were to apply to the outcome of a decertification election lost by a union, a victorious employer could profit by its own unfair labor practices—that is, an employer might thereby unfairly regain for a time its freedom to make unilateral changes if the union's election objections were ultimately sustained. In so arguing, the board disregards not only the employee's right to prompt recognition of their choice, but the effect of *Mike O'Connor's* requirement that an employer's freedom to make changes be rendered *conditional* while election objections are pending. Similarly, the board disregards the "heads I win, tails you lose" aspect of its insistence that the no-duty-to-bargain *status quo* must be changed immediately when a union wins a representation election, as required by *Mike O'Connor,* and that the duty-to-bargain *status quo* must not be changed when a union loses a decertification election. Nor does the board appear to recognize that a victorious union could profit by its own unfair labor practices when, as it should be, *Mike O'Connor* is applied to the outcome of a decertification election won by the union—that is, that a union might have unfairly impinged for a time upon an employer's autonomy to make unilateral changes (and on employees' freedom of choice) if the employer's election objections are ultimately sustained. Rules should not be designed on an assumption that either employers or unions are or are not likely to employ them unfairly. Nor, as above indicated, should the rule applied be dependent on which side wins. The board enjoys a "wide discretion over representation matters," *Brooks v. N.L.R.B.*, 348 U.S. 96, 103, 75 S.Ct. 176, 181, 99 L.Ed. 125 (1954), yet that discretion cannot reasonably encompass application of one rule governing creation of an obligation to bargain and application of a different rule governing dissolution of an obligation to bargain.

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[14] *Presbyterian Hospital* was decided by the board during the year after the events involved herein. In *Sec v. Chenery Corp.,* 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947) the court stated, "Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." Because *Presbyterian Hospital* is clearly out of line with the statutory design expressed in § 7 and § 159(a), its retroactive application by the board to the instant cases was the type of retroactivity condemned by law.

[15] No issue respecting dues checkoff or union security clauses is presented in the present appeals. We need not hold in this case, therefore, that the *Mike O'Connor* rule, enabling unilateral employer changes *at peril* and providing for retroactive bargaining, would accommodate the balance of interests raised by those issues.

In its insistence that an employer's duty to bargain arises, and a new relationship is established, as soon as a union wins an election, but not the converse, the board confuses employees' freedom of choice with a policy favoring unions. Indeed, the board's brief describes *Mike O'Connor* as an "exception" adopted "to protect a union's status as the majority representative," and describes the issue here as "the continued status of the union," emphasizing the value in preserving stability in "established relationships." The recognized goals of a union-favoring policy have long been recognized. The board, and we, however, must be governed by the law. Section 7 of the Act provides that "[e]mployees shall [not only] have the right to self-organization, to form, join or assist labor organizations" but "shall also have the right to refrain from any and all such activities." *Presbyterian Hospital*, when employed to enforce continued bargaining with a union that has lost a fair decertification election, as the board did here in the IBPAT proceeding, results in a form of compulsory unionism in disregard of the employees' untainted and uninfluenced vote to become non-union, and a consequent denial of the employees' statutory right of free choice under § 7 of the Act.

Employment of *Presbyterian Hospital* to enforce a duty to bargain under the present circumstances is further inconsistent with the long-standing rule that an employer is under no obligation to bargain with a union if it has reasonable and good faith grounds for doubting the union's continued majority status.[16] *See N.L.R.B. v. Gissel Packing Co., supra* 395 U.S. at 597 n. 11, 89 S.Ct. at 1931 n. 11; *N.L.R.B. v. Leatherwood Drilling Co.*, 513 F.2d 270 (5th Cir.), *cert. denied*, 423 U.S. 1016, 96 S.Ct. 449, 46 L.Ed.2d 387 (1975); and *N.L.R.B. v. A. W. Thompson, Inc.*, 449 F.2d 1333 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972). An employer having such a reasonable and good faith basis to doubt the union's continued majority status is not simply permitted but may be required by the Act to refrain from further bargaining with the union. *See ILGWU v. N.L.R.B.*, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961). A contrary view would nullify the employees' freedom of choice recognized in § 7 of the Act.

Section 8(a)(5) provides that a violation occurs only when an employer refuses to bargain with "the representative of his employees." That obligation is expressly "subject to the provisions of section 159(a) of this title." Section 159(a),[17] in turn, provides that employee representatives must be selected "by the majority of the employees." Here, the board insists that an employer must bargain with a union that has lost an election (with IBEW even if the board had not found the election unfair;

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[16] The board contends that though Dow raised the issue of its good faith doubt in its brief to the board, it did not press it sufficiently to put the board on notice, and that Dow may not argue the matter before us. In answers to the complaints, Dow stated that since the filing date of the decertification petitions it "has had a good faith doubt of the Union's continued status as a representative of an uncoerced majority of the employees." There was, of course, no reason or basis for pressing before the board the matter of doubt as it related to Dow's post-election activities. Both ALJs considered those activities permissible, the ALJ in the IBEW proceeding finding that those activities constituted only a retroactive violation in view of what he considered pre-election violations. It was the board's election to inject its own view of Dow's post-election activities, finding them *per se* violations, that raises the issue of whether Dow had a good faith doubt justifying a refusal to bargain *after* the unions lost the elections.

[17] Section 159(a), 29 U.S.C. § 159(a)

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment."

with IBPAT even though the board did find the election fair and decertified the union). It is difficult to perceive, however, of a more firm and logical basis for a reasonable and good faith doubt of a union's majority status than the fact of its having lost a fair decertification election.

For all of the foregoing reasons, we reverse the board's findings of § 8(a)(5) post-election violations in both cases.

Respecting the finding of a § 8(a)(1) violation, this court long ago refused to extend to the post-election period the pre-election prohibition of that section against the employer's granting benefits. *N.L.R.B. v. Ambox, Incorporated,* 357 F.2d 138, 141 (5th Cir. 1966); *General Electric Co. v. N.L.R.B.,* 400 F.2d 713, 717 (5th Cir. 1968), *cert. denied,* 394 U.S. 904, 89 S.Ct. 1012, 22 L.Ed.2d 216 (1969). Accordingly, we reverse the findings of § 8(a)(1) violations based on post-election transfers to salaried status in both cases.

CONCLUSION

We deny enforcement of the board's orders in both cases, vacate the order setting

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aside the election in the IBEW proceeding, and remand the latter proceeding to the board for further action consistent with this opinion.

Red Ball Motor Freight, Inc. v. NLRB

660 F.2d 626 (5th Cir.), November 5, 1981;
rehearing denied December 1, 1981; certiorari
denied May 24, 1982—253 NLRB 871

On petition to set aside Board Order

Before Ainsworth, Ingraham and Tate, Circuit Judges

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Per Curiam: The employer ("Red Ball") petitions to set aside a remedial back pay and reinstatement order entered by the National Labor Relations Board against it, and the Board cross-petitions for enforcement of the order.

Red Ball had discharged its employee, Linda Surley, at the close of a work day, allegedly because she had been dilatory in commencing work at her desk at 8:00 A.M. that morning. On a complaint to such effect by the Board's regional director, the Administrative Law Judge (the ALJ) had held, after hearing, that the discharge was based on Surley's protected concerted activities in protesting and objecting to certain employment practices by Red Ball that were unfavorable to its clerical employees. On analysis of the record evidence, the ALJ concluded that Red Ball "seized upon" the failure of Surley (an employee of 9½ years tenure) "to commence work promptly at 8 A.M. as a pretext to make its true motivation, i.e., to rid itself of an employee who had demonstrated a growing propensity to engage in protected concerted activities."

The Board affirmed the rulings, findings, and conclusions of the ALJ. Red Ball Motor Freight, Inc. and Linda Surley, 253 NLRB No. 111 (1980). It agreed that the activities in which Surley had been engaged were protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, as "concerted activities for the purpose of collective bargaining or other mutual aid or protection" with respect to the terms and conditions of employees. It upheld the unfair labor practice under Section 8(a)(1), 29 U.S.C. § 158(a)(1), as found by the ALJ, in that Red Ball had interfered with or coerced the employee in her exercise of her protected concerted activities conduct. In doing so, however, the Board analyzed the issue in the light of its own recent decision in *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB No. 150 (1980). By that test, when the General Counsel had made a prima facie showing that Surley's participation in concerted activities protected under Section 7 of the Act was the motivating factor in Red Ball's decision to discharge her, the burden shifted to the company to establish that the discharge would have taken place in the absence of the protected conduct; Red Ball having failed to rebut the prima facie showing, the Board concluded that Red Ball had failed to show that, absent Surley's protected activities, her discharge would nevertheless have occurred.

Red Ball challenges the Board's *Wright Line* shift of the burden of proof, in mixed-cause discharges (i.e., at least partially based on protected conduct and also allegedly based on good cause), as improperly requiring an employer to prove its innocence and as in derogation of the right of management to discharge employees for cause, see, e.g., Section 10(c) of the National Labor Relations Act.

Another panel of this court, however, recently indicated no disapproval of the Board's use of the *Wright Line* test in determining whether, after a prima facie case of discharge for

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protected activities has been established, the "good" cause assigned was indeed the real reason rather than pretext for the discharge. *N.L.R.B. v. Charles H. McCauley Associates,* 657 F.2d 685 (5th Cir. 1981). Moreover, substantial evidence in the present record as a whole, as the Board's decision states, "amply supports the Administrative Law Judge's findings that Surley's growing propensity to engage in protected concerted activities caught the attention of Respondent's management, which was then motivated to engage in special surveillance of her work performance and to seize upon her first alleged transgression as a pretext to terminate her."

Accordingly, the petition for review of the order of the Board will be DENIED. The Board's cross-petition for enforcement of its order will be GRANTED.

ORDER ENFORCED.

Lippincott Industries, Inc. v. NLRB

661 F.2d 112 (9th Cir.), November 9, 1981—251 NLRB 262

On petition to review Board Order

Before WRIGHT and ANDERSON, Circuit Judges, and THOMPSON,* District Judge

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J. BLAINE ANDERSON, Circuit Judge: Lippincott Industries, Inc. (Lippincott) petitions for review of a decision of the National Labor Relations Board (Board), 251 NLRB No. 34 (1980). The Board cross-applies for enforcement of its order.

The Administrative Law Judge (ALJ) concluded that Lippincott violated Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(1), by unlawfully interrogating three employees during the

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union organizational campaign. The ALJ further held that Lippincott violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3), by discharging one of those employees three hours before the representation election because of her known pro-union sentiment, and because her discharge would have a chilling effect on the other employees who would be voting in the election. The Board affirmed the ALJ's findings and conclusions. We enforce the Board's order.

EMPLOYEE INTERROGATIONS

Interrogation of employees is an unfair labor practice when, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their protected rights. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1080 (9th Cir. 1977). The Board's determination on this issue must be upheld if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *NLRB v. International Medication Systems, Ltd.*, 640 F.2d 1110, 1112 (9th Cir. 1981).

The evidence of record sufficiently supports the Board's ruling that employee Peterson was subjected to interrogation(s) having a reasonable tendency to restrain or interfere with the exercise of protected rights, and Lippincott does not seriously contend otherwise. Rather, Lippincott challenges the ALJ's crediting of Peterson's testimony over the testimony of two of its supervisors. We may not reject the ALJ's credibility determinations unless a clear preponderance of the evidence shows they are incorrect. *NLRB v. Carilli,* 648 F.2d 1206, 1211 (9th Cir. 1981); *NLRB v. Inland Empire Meat Co.*, 611 F.2d 1235, 1238 (9th Cir. 1980). The record in this case does not.

The unlawful interrogation of Peterson justifies the Board's order to cease and desist from such conduct. Accordingly, it is unnecessary for us to address the interrogations of former employees Carter and Hartman.

EMPLOYEE DISCHARGE

The Board concluded, in agreement with the ALJ, that Peterson was discharged because of her known pro-union sentiment and because her discharge would have a chilling effect on the other employees who would be voting in the representation election a few hours later. The Board found that the legitimate business reasons advanced by Lippincott were contrived to provide an excuse for the discharge.

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*The Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

The remedial order respecting this violation must be enforced if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the record viewed as a whole. *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir. 1981). Lippincott challenges the order on both counts.

We have carefully studied the parties' contentions regarding the applicable legal standard for determining whether a discharge is violative of the Act. The Board has characterized this as a "pretext" case. Lippincott describes it as a "mixed motive" case. We think that in terms of the proper legal standard to be applied, the difference between these two types of cases is of little importance.

Undoubtedly, the language in some of the cases has suggested a distinction. *Compare, e.g., Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1083 (9th Cir. 1977) ("* * * the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity; a business reason cannot be used as a pretext for a discriminatory firing.") with *Western Exterminator Co. v. NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977) ("* * * where a discharge is motivated by both a legitimate business consideration and protected union activity, 'the test is whether the business reason or the protected union activity is the moving cause behind the discharge.' "). The perceived distinction, however, is more semantical than substantive. In either instance, the employer has asserted justifiable, legitimate business reasons for the discharge. The difference is **115** that in a pretext case the employer's reasons are discredited or otherwise rejected, leaving only the impermissible reason, while in a mixed motive case the relative causative force of the employer's reasons is compared against the impermissible reason to determine whether the latter is the moving cause behind the discharge. Therefore, the primary distinction between the two cases rests upon the differing weight that is attributed to the employer's explanation when examining the motivations behind a discharge. Of course, this determination is made *after* the evidence is presented.

The artificial distinction existing between these two classes of cases was eroded in *Ad Art, Inc. v. NLRB*, 645 F.2d 669, 678 (9th Cir. 1980), where this court stated that, "[w]hen a discharge is *conceivably motivated* both by legitimate business considerations and protected union activity, the test is whether the business reason or the protected union activity is the moving cause behind the discharge." (emphasis added). Many of our more recent decisions have stated the test without reference to the employer's asserted legitimate reasons. *See, e.g., NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1366–67 (9th Cir. 1981); *NLRB v. Adams Delivery Service, Inc.*, 623 F.2d 96, 99 (9th Cir. 1980); *Stephenson v. NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980). Thus, the test is properly focused on the employer's impermissible motivation to determine whether anti-union animus was the moving cause, or but for cause, behind the decision to discharge an employee. The test so structured gives full recognition to the well accepted maxim that "[a]n employer may discharge an employee for good cause, bad cause, or no cause at all, without violating § 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act." *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980).

We note in passing that the Board's decision in *Wright Line, Inc.*, 251 NLRB No. 150, 105 LRRM 1169 (1980), while changing the procedural requirements, nonetheless applies a test designed to identify whether protected union activity was the moving cause behind the discharge. The rule announced in *Wright Line* has recently been accepted by this court. *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). The *Wright Line* decision was rendered after the Board's decision in the instant case and will not be applied here. We mention it only to illustrate the consistent development of this area of law.

We must now determine whether the Board properly applied the law as described above. Lippincott directs us to the ALJ's decision wherein he sets forth the guiding rule as follows: "* * * a discharge *motivated in part* by an employee's exercise of section 7 rights is a violation even though another valid cause may also be present." (emphasis added). We agree with Lippincott that this statement of the test is incorrect. *Stephenson v. NLRB,* 614 F.2d 1210, 1213 (9th Cir. 1980). However, it is the Board's, not the ALJ's, application of the law that we review.

Nevertheless, Lippincott contends that the Board applied the "in part" test described by the ALJ. It relies on footnote 4 of the Board's decision wherein it is stated that member Penello found it unnecessary to rely on the "in part" test referred to by the ALJ. Lippincott argues that by logical implication, the other two members did rely on the improper test. We disagree. The Board did not explicitly state a test, and whatever contrary inference can be drawn from footnote 4 is dispelled by the unequivocal express language in the body of the decision. The Board concluded that Peterson was discharged *because* of her involvement with the union and *because* of the chilling effect that discharge would have on other employees. Lippincott's explanation was found "implausible" and its reasons "contrived." These expressions comport with the proper standard discussed above. We are convinced that the Board properly applied the law.

The only remaining question is whether the Board's findings are supported by substantial evidence on the record viewed as a whole. The Board may rely on circumstantial as well as direct evidence in determining an employer's motivation, *NLRB v. Inland Empire Meat Co.,* 611 F.2d 1235, 1238 (9th Cir. 1979), and we must be mindful that the determination of motive is particularly within the purview of the NLRB. *Pay'n Save Corp. v. NLRB,* 641 F.2d 697, 702 (9th Cir. 1981).

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We have reviewed the entire record and find that a very close question is presented. Perhaps we would have reached a different conclusion had the evidence been presented to us *de novo,* but we are without power to substitute our view for the Board's choice between conflicting views. *Ad Art, Inc. v. NLRB,* 645 F.2d 669, 679 (9th Cir. 1980). The Board's inferences and findings are reasonable and supported by substantial evidence.

Lippincott's petition for review is denied. We enforce the Board's order.

NLRB v. Forest City Enterprises, Inc.

663 F.2d 34 (6th Cir.), November 10, 1981—248 NLRB 17

On petition to enforce Board Order

Before Keith and Merritt, Circuit Judges, and Aldrich, District Judge*

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In this case the NLRB seeks enforcement of its cease and desist order against respondent Forest City Enterprises' (the "Company") refusal to bargain with the certified union in violation of § 8(a)(5) and (1) of the National Labor Relations Act. The Company justifies its refusal to bargain on the grounds (1) that the Board's certification of a single store bargaining unit was inappropriate, and (2) that the representation election was invalid because certain actions of the NLRB agent conducting the election destroyed the integrity and neutrality of the Board's procedures. We find that the Board did not abuse its discretion in certifying a single store as a bargaining unit, and that the NLRB misconduct alleged by the company was not so substantial as to have affected the outcome of the representation election. We therefore affirm the order of the NLRB.

In August, 1978 the union filed a representation petition seeking to represent the Company's employees at one of the Company's two retail stores in Akron, Ohio. The Company unsuccessfully contested the designation of the single store (the "Rolling Acres" store) as an appropriate bargaining unit claiming that the bargaining unit must include employees from both the Company's Akron area stores.

The union won a representation election (36 to 22) on December 1, 1978; however, the Company filed objections to the election claiming that the Board agent who conducted the election was unfairly prejudiced in favor of the union. The Regional Director conducted an investigation but refused the Company's request for a hearing and overruled the Company's objections finding that they did not raise substantial and material issues of fact or law. The union was certified as the exclusive collective bargaining representative. The Company's request for review of the Regional Director's decision was denied by the Board on April 5, 1979.

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*The Honorable Ann Aldrich, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Unfair labor practice proceedings were initiated by the newly certified union after the Company refused to bargain with it. The Board granted summary judgment against the Company, finding a violation of Section 8(a)(5) and (1), and ordered the Company to bargain with the union. 248 N.L.R.B. No. 5 (March 3, 1980). The Board now petitions this Court for enforcement of its order.

I.

The Company first argues that it should not be required to bargain with the union because the designation of a single store bargaining unit in this case was inappropriate. To justify its refusal, the Company must establish that the Board abused its discretion in designating the bargaining unit, *Meijer, Inc. v. NLRB*, 564 F.2d 737, 743 (6th Cir. 1977); and where the Board designates a single store bargaining unit, the Company has the additional burden of rebutting a presumption in favor of the designation, *Haag Drug Co.*, 169 NLRB 899, 876 (1968). The Company has failed to overcome its burdens in this case.

Although Forest City Enterprises operates a multistate retail store chain with two stores in the Akron market area, the manager of the Rolling Acres store has significant control over the day to day operations and his decisions are rarely challenged by the central management. Moreover, there is little employee interchange between stores, and the attempts to organize a union and to initiate bargaining have occurred solely at the single store level. These factors support the view that the individual unit is able to deal with day to day issues of the bargaining relationship, *Meijer, Inc. v. NLRB*, 564 F.2d at 740. In light of the absence of broader union activity within the Company, the selection of a single store bargaining unit advances the policy of assuring employees the "fullest freedom" in exercising their rights under the NLRA. 29 U.S.C. § 159(b) (1976); *Meijer, Inc.*, 564 F.2d at 742–43; *Michigan Hospital Service Corp. v. NLRB*, 472 F.2d 293, 296 (6th Cir. 1972).

There is thus ample basis for a finding that the designation of the single store bargaining unit was appropriate here.

II.

Disposition of the claim that the alleged irregularities in the representation election constitute a sufficient justification for the Company's refusal to bargain turns on the determination whether the objections raised, viewed in the light most favorable to the Company, merited a full hearing before the NLRB, or whether the objections were so insubstantial as to have neither impaired the neutrality of the election nor significantly affected the outcome.

The Company made 10 specific charges of election irregularities, which taken together amount to a claim that the Board agent was biased in favor of the union and that her bias was apparent to many employees destroying the "laboratory conditions" under which elections should be conducted.

We agree with the Board's determination that a sufficient number of employees was not affected to have changed the outcome of the election. See *NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975). We also find that the irregularities were not so extreme as to destroy confidence in the Board's election process. Cf. *Provincial House, Inc. v. NLRB*, 568 F.2d 8 (6th Cir. 1977) (Board agent fraternizing with union members).

Because we find that the objections, when interpreted in a manner most favorable to the Company's case fail to present any "substantial and material issues of fact," we agree that the Company was not entitled to a hearing in this case. The Regional Director conducted an *ex parte* investigation of the objections and found them insufficient to overturn the election. The Company then filed exceptions to the Regional Director's report which the Board found did not raise substantial issues warranting review. This Court has previously upheld such a procedure on similarly narrow grounds. *Reichart Furniture Co. v. NLRB*, 649 F.2d 397 (6th Cir. 1981).

Nonetheless, we must again emphasize that where a hearing is not granted and the determination whether objections to elections are substantial depends entirely on an *ex parte* report prepared by the Regional Director, that report must be included in the record submitted to the Board and the Court of Appeals. This Court has repeatedly suggested that due process demands and that the NLRB regulations apparently require such a record where substantial questions regarding the fairness of union elections are raised. *See Reichart Furniture Co. v. NLRB,* 649 F.2d 397, 398–99 (Merritt, J., concurring); *NLRB v. North Electric Co., Plant No. 10,* 644 F.2d 580 (6th Cir. 1981); *NLRB v. Curtis Noll Corp.,* 634 F.2d 1027 (6th Cir. 1980); *Prestolite Wire Division v. NLRB,* 592 F.2d 302 (6th Cir. 1979).

We find that the NLRB has not erred in issuing the order requiring the Company to bargain with the certified union. The order is hereby enforced.

NLRB v. St. Louis Christian Home

663 F.2d 60 (8th Cir.), November 11, 1981; rehearing and rehearing en banc denied December 10, 1981—251 NLRB 1477

On petition to enforce Board Order

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Bright, Circuit Judge: The National Labor Relations Board (NLRB) petitions this court under section 10(e) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(e) (1976), for enforcement of an order directing St. Louis Christian Home (the Home) to bargain collectively with the Nursing and Convalescent Division, Local 50, Service Employees International Union, AFL–CIO, CLC (the Union), as bargaining agent for the Home's childcare workers, a maintenance employee, and a storeroom clerk. This case presents the question of whether the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), exempting lay teachers in church-operated schools from NLRB jurisdiction, covers lay employees in church-operated institutions other than schools. We conclude that the employees of the respondent Home do not fall within the *Catholic Bishop* exemption. Accordingly, we grant enforcement of the NLRB's order.

I. *Background.*

The St. Louis Christian Home is an emergency residential treatment center for battered, abused, and neglected children between the ages of five and seventeen. It is organized as a nonprofit Missouri corporation and is an agency of the National Benevolent Association, the social service arm of the Christian Church Disciples of Christ (Christian Church). The Home was originally established in 1905 as an orphanage exclusively serving members of the Christian Church, but later changed its orientation. From the early 1960's through the early 1970's, the Home treated emotionally disturbed children from throughout Missouri, and in the early 1970's, the Home embarked on its current enterprise of treating battered, abused, and neglected children from the St. Louis area.[1]

The Home has facilities to accommodate thirty-two children and has completed construction of a cottage that will increase its capacity to forty-eight children. The Missouri Division of Family Services refers children to the Home, which accepts them as space becomes available. Children stay for an average of six weeks, during which time they remain wards of the state while a state social worker attempts to find permanent placement for them. The Home assists the state in placing the children, and provides the children with extensive therapy through social workers. Most of the children attend public school while staying at the Home, but those few (no more than six) unable to do so because of physical or mental problems attend classes in the Home.

Federal, state, and local governments provide the largest source of funds for the Home. Its funding pattern breaks down as follows:

Government: 55%
Christian Church: 19%
Investment income: 13%
Gifts: 6%
Bequests: 5%
Gifts in kind: 2%

The Missouri Division of Family Services does not license church-affiliated care institutions such as the Home, but such a care institution must fulfill the same requirements necessary for licensing of comparable nonreligious institutions in order to receive state funds for its services to abused children. For example, the Home must supply the state with copies of its constitution and bylaws, budget intake procedures, and personnel policies, as well as a list of its employees, their salaries, and records of their physical examinations. To comply with another state requirement, the Home must provide each child an opportunity for religious expression according to the religious preference of the child's family. The Home must obtain parental consent before a child attends a religious service of any church, including the Christian Church, if the practice of the church varies from the religious preference of the child or the child's family.

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[1] The Home also operates a limited adoption service, placing about six babies a year with Christian Church families. None of the employees in the bargaining unit engage in this activity, however.

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The Union petitioned for certification as bargaining agent for the Home's childcare workers, maintenance man, and storeroom clerk on December 4, 1979. All of the employees in the bargaining unit are lay workers. State regulations prescribe minimum qualifications for childcare workers: they must be over 21 years of age, have graduated from high school, pass yearly physical examinations, and be able to prepare meals and administer prescribed medication. Religious affiliation is not a factor in selection of these employees, and the record does not show how many, if any, belong to the Christian Church.[2]

Following a representation hearing on January 7, 1980, the Regional Director of the NLRB certified the unit as appropriate for collective bargaining on January 18, 1980. The Union won the election held February 15, 1980, and on February 26, 1980, the Regional Director certified the Union as bargaining representative for the designated employees. The Home refused to bargain, contesting the NLRB's asserted jurisdiction as a violation of the first amendment and the standards set out in *NLRB v. Catholic Bishop of Chicago, supra.* The Union filed an unfair labor practices charge, and on August 27, 1980, the NLRB found the Home in violation of sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§ 158(a)(1), (5) (1976), and ordered the Home to bargain with the Union. The case has come before this court on an application for enforcement and cross-petition for review of the NLRB order.

II. *Discussion.*

A. *Interstate Commerce.*

The Home initially contends that it is not an employer engaged in commerce within the meaning of sections 2(6) and (7) of the Act, 29 U.S.C. §§ 152(6), (7) (1976),[3] and as a result, its activities are outside the ambit of the NLRB's jurisdiction as defined in 29 U.S.C. § 160(a).[4] Congress intended to grant the NLRB, under the commerce clause, the broadest possible jurisdiction permitted by the Constitution. *See NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963); *NLRB v. Alexander,* 595 F.2d 454, 456 n.3 (8th Cir.), *cert. denied,* 444 U.S. 899, 100 S.Ct. 209, 62 L.Ed.2d 135 (1979); *NLRB v. Erlich's 814, Inc.,* 577 F.2d 68, 70–71 (8th Cir. 1978). The NLRB sets discretionary jurisdictional standards expressed as a minimum level of gross annual revenues, and Congress explicitly approved this policy in the Landrum-Griffin Act of 1959, 29 U.S.C. § 164(c)(1) (1976). The NLRB has set the jurisdictional standard for "day care centers, institutions involving specialized care and custody of children" at $250,000 in gross annual revenues. *See The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home,* 224 NLRB 1344, 1345 n.6 (1976); *Salt and Pepper Nursery School and Kindergarten No. 2,* 222 NLRB 1295 (1976); *cf. NLRB v. Kent County Association for Retarded Citizens,* 590 F.2d 19 (1st Cir. 1978) (approving extensions of *St. Aloysius Home* standard to other nonprofit charita-

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ble institutions). Accordingly, because the Home's gross revenues in 1979 approximated $600,000, the

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[2] Eloise Moreland, the Executive Director of the Home, is the only employee known to be a Christian Church member. Although not a member of the clergy, Moreland has some of the privileges the Christian Church accords its ministers, such as a minister's discount card.

[3] The relevant portions of section 152 follow:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. [29 U.S.C. §§ 152(6), (7) (1976).]

[4] Subsection (a) provides in part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. [29 U.S.C. § 160(a) (1976).]

NLRB exercised jurisdiction over the Home. Thus, the Home falls within the above jurisdictional standard.

The Home contends that because its children all come from Missouri and it purchases supplies solely from Missouri suppliers, it does not affect interstate commerce regardless of the size of its annual income. In addition to applying the $250,000 jurisdictional standard, the Board based its assertion of jurisdiction on findings that in 1979 the Home paid in excess of $16,000 for telephone and electricity to companies engaged in interstate commerce. This amount of interstate purchases supports NLRB jurisdiction over the Home. In other cases involving lesser sums, courts have approved the Board's exercise of jurisdiction, in light of the broad grant of power to the NLRB. *See, e. g., NLRB v. Maxwell,* 637 F.2d 698 (9th Cir. 1981) ($6,000 sufficient); *Von Solbrig Hospital, Inc. v. NLRB,* 465 F.2d 173 (7th Cir. 1972) ($4,925 sufficient); *NLRB v. Inglewood Park Cemetery Association,* 355 F.2d 448 (9th Cir.), *cert. denied,* 384 U.S. 951, 86 S.Ct. 1572, 16 L.Ed.2d 548 (1966) ($3,000 sufficient); *NLRB v. Aurora City Lines, Inc.,* 299 F.2d 229 (7th Cir. 1962) ($2,000 sufficient). Accordingly, we hold the Board properly exercised jurisdiction in these proceedings.

The Home also contends that the Board's jurisdiction does not extend to non-profit institutions which do not affect commerce. The argument relies on the dissent of NLRB Member Penello in *Lighthouse for the Blind of Houston,* 248 NLRB 1366 (1980), which the Fifth Circuit adopted in denying enforcement of the NLRB bargaining order in *NLRB v. Lighthouse for the Blind of Houston,* 653 F.2d 206 (5th Cir. 1981). In that case, the court found the relationship between employer and employee to be rehabilitative rather than commercial in nature, and thus not suitable for collective bargaining. In contrast, the Home has a commercial, not rehabilitative, relationship with its employees in the bargaining unit. The record here supports the Board's determination that the operations of the Home (a nonprofit corporation) affect commerce. *See generally NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. at 511–18, 99 S.Ct. at 1324–27 (Brennan, J., dissenting) (discussing legislative history); *NLRB v. Kent County Association for Retarded Citizens, supra,* 590 F.2d at 20–23.

B. *First Amendment.*

The Home argues that the NLRB's assertion of jurisdiction over it will lead to violation of both the establishment and free exercise clauses of the first amendment. Under the framework of analysis formulated by the Supreme Court in *NLRB v. Catholic Bishop of Chicago, supra,* this court must initially consider "whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions." 440 U.S. at 501, 99 S.Ct. at 1319. The *Catholic Bishop* Court determined that the exercise of NLRB jurisdiction over the relationship between the church and its teachers in church-operated schools raised serious first amendment questions, and refused to rule on the constitutionality of the questioned NLRB jurisdiction without a showing of the "affirmative intention of the Congress clearly expressed" to confer such jurisdiction. Because this case does not raise the serious constitutional questions discussed in *Catholic Bishop,* this court need not inquire whether Congress clearly expressed its intention to confer jurisdiction.

According to the Home, the constitutional problems arose in *Catholic Bishop* because the Catholic Church operated the schools in question. This interpretation of *Catholic Bishop* underlies the Home's contention that NLRB jurisdiction does not extend to any institution established by a church for religious reasons because a situation might arise where the NLRB would need to inquire into the legitimacy of those reasons.

Church operation, although important, constituted but one of many features which, considered together, presented potential first amendment problems in *Catholic Bishop.* Not only did the Catholic Church operate the schools, it actively propagated religious faith in the classrooms. The teachers in the bargaining unit, even though members of the laity, participated in that religious mission. The Supreme Court quoted extensively from *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), to illustrate that its concern stemmed from the religious nature of the schools' relationships with their teachers.

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"Religious authority necessarily pervades the school system." * * *

> We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education.

* * * * *

"[P]arochial schools involve substantial religious activity and purpose.

> "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." (Footnote omitted.)

* * * * *

"[T]he *raison d'etre* of parochial schools is the propagation of religious faith." [*NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. at 501, 503, 99 S.Ct. at 1319, 1320 (quoting *Lemon v. Kurtzman, supra,* 403 U.S. at 617, 616, 628, 91 S.Ct. at 2113, 2118).]

The Court emphasized the possible religious function of a teacher employed by a school engaged in a pervasively religious enterprise.[5]

The religious character of the enterprise in *Catholic Bishop* existed at all three levels: the church, the church-operated institution, and the institution's employees. The Supreme Court concluded that the involvement of the NLRB in mediating between two of those levels would pose a significant danger of impermissible entanglement between church and state.

By contrast, the Home, though sponsored by the Christian Church, does not devote itself to the propagation of religion. The Christian Church may perceive its religious mission to include caring for unfortunate children, but the actual business of the Home and of its employees does not involve a religious enterprise comparable to a church-operated school. The Home operates in the same way as a secular childcare institution.

The evidence produced at the representation proceeding clearly demonstrates that the Home differs from a Catholic school and resembles a nonreligious institution. The Home receives funds primarily from government sources. It operates on a non-sectarian basis, hiring employees without regard to religion and taking in children solely from state agency referrals. The children remain wards of the state, and unlike the schools in *Catholic Bishop* where Catholic religious training was mandatory, the state requires the Home to obtain parental consent before resident children attend Christian Church services.

Because both the Home and its employees perform essentially secular functions, the involvement of the NLRB in mediating collective bargaining between the two does not raise the serious constitutional questions discussed in *Catholic Bishop,*[6] although some issue implicating the religion clauses could conceivably arise during collective bargaining. The Home suggests, for example, that in bargaining over wages, the Home might have to disclose the source and destination of contributions to the Christian Church, or that if the Christian Church decides to relocate or close the Home, the NLRB could question its decision. However, "[t]he possibility of impairment [of sectarian objectives] must be more substantial than one based on dark speculation and forboding fancy." *St. Elizabeth Community Hospital v. NLRB,* 626 F.2d 123, 129 (9th Cir. 1980) (Sneed, J., dissenting) (remand for further factfinding in light of *Catholic Bishop*). The Home has not demonstrated that such impairment will likely occur. The Home's activities relate only tangentially to the religious mission of the Christian Church, and inquiry into the operation of the Home should not intrude on any activity substantially religious in character. The Home operates in the same way as a secular childcare institution and voluntarily accepts state regulation which treats it in the same way. Thus, under the circumstnaces of this case, the NLRB properly treated the Home in the same manner as a secular institution.

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[5] The Second Circuit reached the same conclusion about the *Catholic Bishop* opinion in *NLRB v. Bishop Ford Central Catholic High School,* 623 F.2d 818, 822 (2d Cir. 1980), *cert. denied,* —— U.S. ——, 101 S.Ct. 1698, 68 L.Ed.2d 196 (1981) (holding *Catholic Bishop* applicable to Catholic school controlled by law trustees):

> The entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith. * * * It is the commitment of the faculty to religious values * * * and the obligation to propagate those values which provides the risk of entanglement.

[6] The Home works directly with the State of Missouri in accepting state referrals and in finding placements for the children, and it depends heavily on state funding. If the Home were not secular in nature, this collaboration could lead to constitutional problems under *Lemon v. Kurtzman, supra,* but because the Home is not permeated by religion, it can work closely with the state without violating the establishment clause.

III. *Conclusion.*

The NLRB's assertion of jurisdiction over the Home does not raise the serious constitutional questions contemplated in *Catholic Bishop.* We affirm the NLRB's finding that the Home is subject to the Act because its operations affect interstate commerce. Accordingly, we enforce in full the NLRB's order requiring the Home to bargain collectively with the Union.

Bill Johnson's Restaurants, Inc. v. NLRB

660 F.2d 1335 (9th Cir.), November 12, 1981; certiorari granted October 18, 1982—249 NLRB 155

On petition to review Board Order

Before GOODWIN and CANBY, Circuit Judges, and BYRNE,* District Judge

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CANBY, Circuit Judge: On April 30, 1980, the National Labor Relations Board affirmed a ruling by an administrative law judge that appellant Bill Johnson's Restaurants had committed unfair labor practices by discharging four waitresses, interrogating other employees, and by filing and prosecuting a state court lawsuit against picketers who were protesting unfair labor practices. The Board ordered the restaurant to reinstate the four waitresses, to give them back pay, and to withdraw the lawsuit from state court. The restaurant seeks review of the Board's order under section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f). The Board cross-petitions for enforcement. We enforce the order of the Board.

FACTS

The following facts were found by the administrative law judge and affirmed by the Board. In February 1972, Ruth Helton began working at Bill Johnson's Big Apple East, one of four restaurants owned and operated by Bill Johnson's Restaurants, Inc., in the Phoenix, Arizona, metropolitan area. The corporation is owned by the Johnson family. By summer 1978, Helton was one of the two most senior waitresses at the restaurant; since 1977 she had received an hourly bonus, and she served on the breakfast shift, which because of the hours and tips was the most desirable shift at the restaurant.

On July 25, 1978, Vice President Johnny Johnson called a meeting of employees to announce a new policy of strict enforcement of company rules. Among other things, Johnson told the waitresses that they must call in on days off, and that they could not chew gum while working or use the business phone for personal calls. Johnson ended by stating that any waitress who broke company rules would be fired. The next day, a waitress on the breakfast shift who had not attended the meeting asked her supervisor, Suzie Gay, what had happened. Gay answered, "Nothing pertaining to the breakfast girls." The breakfast waitresses, as the most senior employees, had traditionally been excepted from some company rules. For example, they were not required to call in on days off, and they had been allowed to use the business phone for personal calls.

In the days after the speech, the waitresses discussed it extensively. Several waitresses agreed with Helton's suggestion that they needed a union to represent them. Discussions of unionization were held in the waitresses' lounge, at a nearby hotel, at a party where Supervisor Gay was present for at least part of the discussion, and in the restaurant during a coffee break while Gay was nearby.

On August 8, Helton worked her regular shift and went home. That afternoon, Gay called her and told her that she was fired. Helton asked why, and Gay answered that Johnny Johnson had not liked a question she had asked at the July 25 meeting. (Helton had asked only whether waitresses could sell customers a single pancake or had to sell orders of two.) Gay said also that Johnson did not like Helton's attitude.

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Helton asked for a written explanation, but Gay said that the restaurant was not required to give her one. On August 9, Helton filed a charge with the NLRB.

The day after Helton's discharge, Dirkson, a hostess, told Gay that all the waitresses thought Helton had been treated unfairly. Gay said that she didn't like firing Helton, but that "Ruth had been antagonizing the girls on the floor" and that she couldn't "run a shift with that type of friction." She then asked whether Dirkson knew "if Ruth had any contact with any of the girls." A few days later, after learning that Helton had filed a charge with the NLRB, Gay asked Dirkson if any other waitresses had been talking about the union.

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*Honorable William M. Byrne, United States District Judge for the Central District of California, sitting by designation.

On September 18, waitresses Nichols, Scott, and Michaud walked out of the restaurant without explanation. On the way out, they turned their checkpads in to the cashier. The cashier reported their leaving to Manager Lois Williams. That afternoon, the waitresses returned to fill out their tip reports. Williams told them that they could pick up their checks the next day. When Manager Sherry Sturgeon asked the waitresses why they had walked out, they responded that they thought Helton was fired unjustly, and complained about the treatment they had received since the July 25 meeting. Sturgeon told the waitresses that they could forget what Johnny Johnson had said at the meeting because she was back in charge after her vacation. During the conversation, Scott stated that she was tired of waitressing. Nichols complained that her daily commute was too long. At no time did the waitresses say that they had quit their jobs, but Sturgeon told them to pick up their checks the following day.

On September 20, the Board issued a complaint against the restaurant, and the three waitresses joined Helton and a few others to picket the restaurant. Their picket signs said that the restaurant had been accused of unfair labor practices and asked the public to boycott the restaurant. The picketers walked along the sidewalk in front of the restaurant. Although they crossed two driveways which led to the restaurant parking lot, they did not block public access to the lots. At no time were there more than seven adults and two children picketing. That day, Sturgeon confronted the picketers and took down their names. She said, "You might think you're funny, but I intend to have the last laugh. I will get even with you for what you're doing." She told Helton that "I'll get even with you if it's the last thing I do." That afternoon, Gene Johnson telephoned waitress Cheryl Nichols and asked to talk with her husband. Johnson asked Carl Nichols why they had been picketing the restaurant. Carl said that they were protesting Helton's discharge. Then Johnson said that she would hate to see the Nichols lose their new home, and also that she would hate to see them "get hurt by all this."

On September 21 and 22, the picketing continued. On September 22, the picketers distributed a leaflet to the public. The leaflet stated:

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT * * * FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by [Ruth] Helton, a former employee who was fired August 8 after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> - Eight hour shifts with no specified breaks.
> - No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.
> - Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
>
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>
> - Inconsistent management practices.
> - Unwarranted sexual advances.
> - A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.
>
> EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, the restaurant filed a civil complaint in state court. The complaint alleged that the picketers had engaged in mass picketing, blocked public access to the restaurant, and created a threat to public safety. The complaint also alleged that the picketers had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the NLRB." The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the picketers from trespassing, mass picketing, violence, interfering with the restaurant's business operations, and publishing false and misleading statements about the restaurant and its management. That same day, the court issued a temporary restraining order granting most of the relief requested, and setting an October 5 hearing to consider the request for a preliminary injunction.

On September 26, the picketing continued, and Helton hired an attorney to represent her. On October 2, the restaurant's attorney deposed Helton, asking numerous questions about the nature and extent of Helton's union activities, the identities of other employees involved in union activities, and the extent of management's knowledge of these activities. On November 16, the state court denied the restaurant's request for a preliminary injunction. The suit for a permanent injunction and damages is still pending.

HELTON'S DISCHARGE

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(3), 29 U.S.C. § 158(a)(1) and (a)(3), by discharging Helton for engaging in union activity. The Board ordered reinstatement and back pay. Under section 8(a)(3), the test is whether the union activity was the moving cause behind the employee's discharge. *L'Eggs Products, Inc. v. NLRB,* 619 F.2d 1337, 1341–42 (9th Cir. 1980). The determination of motive is particularly within the Board's area of expertise. *Pay'n Save Corp. v. NLRB,* 641 F.2d 697, 702 (9th Cir. 1981); *NLRB v. Fort Vancouver Plywood Co.,* 604 F.2d 596, 600 (9th Cir. 1979), *cert. denied,* 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980). An employer may not use a business reason as a pretext for a discharge which is motivated by anti-union animus. *L'Eggs Products, Inc. v. NLRB,* 619 F.2d at 1341. The Board need not credit an employer's self-serving statement that an employee was discharged for cause. *NLRB v. Fort Vancouver Plywood Co.,* 604 F.2d at 600. If the Board's findings and inferences are reasonable and supported by substantial evidence, they must be affirmed. *Pay'n Save Corp. v. NLRB,* 641 F.2d at 702; *NLRB v. Silver Spur Casino,* 623 F.2d 571, 585 (9th Cir. 1980), *cert. denied,* — U.S. —, 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981).

In this case, the restaurant argues that it fired Helton for rules violations. The Board found that this reason was a pretext, and concluded that Helton was fired for engaging in union activity. This finding is supported by substantial evidence. Helton was a senior waitress, one of two waitresses who received a bonus. She had not previously been reprimanded for rules violations. Gay specifically told another breakfast waitress after the July 25 meeting that the rules did not apply to the breakfast shift, and none of the breakfast waitresses was required to call in on days off until Helton was fired. Other waitresses who broke the rules were reprimanded, not fired. The timing of Helton's discharge, the restaurant's leniency in enforcing rules violations of other waitresses, and the absence of reprimands on Helton's record all support the conclusion that she was fired for union activity. *See NLRB v. Warren L. Rose Castings, Inc.,* 587 F.2d 1005, 1008 (9th Cir. 1978).

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The restaurant argues, however, that the evidence does not show that the restaurant management knew about Helton's union activities, and that without such knowledge, there can be no section 8(a)(3) violation. We conclude that there is substantial evidence to support the finding that the restaurant management knew about Helton's union activities. An employer's knowledge of union activity may be inferred from circumstantial evidence. *Famet, Inc. v. NLRB,* 490 F.2d 293, 295–96 (9th Cir. 1973). Because of the small number of employees who worked in the restaurant (40 waitresses total) and the close-knit, family management team, it is reasonable to infer that the management knew of Helton's efforts to organize a union. *Id.* After the July 25 meeting, the waitresses often discussed unionization in the restaurant. Their efforts at secrecy were minimal. At the August 3 party, Helton and another waitress discussed unionization in the presence of supervisor Gay. Later, after Helton was fired, Gay told Dirkson that Helton had been fired for creating friction among the waitresses, and asked whether Helton had contacted any other waitresses. The Board's conclusion that Helton was fired for union activity was a reasonable one, and supported by substantial evidence. We enforce the order of the Board on this issue.

DISCHARGE OF THE STRIKERS

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(3) by discharging three waitresses who struck in support of Helton. The restaurant argues that the waitresses did not strike, but quit their jobs. The Board found otherwise, and we conclude that its finding is supported by substantial evidence. The waitresses told manager Sturgeon that they had walked out of the restaurant because they objected to Helton's discharge and to management's treatment of the waitresses after the July 25 meeting. Sturgeon then told them to pick up their checks the next day. It was reasonable for the Board to conclude from this conversation that the waitresses were fired for protesting working conditions. The failure of employees to present more specific demands to management at the time of their walkout does not prevent it from being a strike, within the scope of Section 7, 29 U.S.C. § 157. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14–15, 82 S.Ct. 1099, 1102–03, 8 L.Ed.2d 298 (1962); *Electromec Design & Development Co. v. NLRB*, 409 F.2d 631, 634 (9th Cir. 1969). It is true that during the conversation with Sturgeon, Scott said that she was tired of waitressing, and Nichols complained that her daily commute was too far. It is also true that the leaflets distributed by the picketers stated that the waitresses had quit their jobs in support of Helton. While different inferences may be drawn from the facts, however, the inferences drawn by the Board were reasonable and supported by substantial evidence. Once it was determined that the waitresses were fired for striking in support of Helton, they were entitled to reinstatement and back pay. *NLRB v. International Van Lines*, 409 U.S. 48, 50–51, 93 S.Ct. 74, 76, 34 L.Ed.2d 201 (1972). We therefore enforce the order of the Board on this issue.

THREATS AND INTERROGATION

The Board found that the restaurant had violated section 8(a)(1) by threatening and interrogating employees. An employer's interrogation of an employee violates section 8(a)(1) if, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employee in the exercise of his or her protected § 7 rights. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 725 (9th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1080 (9th Cir. 1977). The test is whether the interrogation tends to be coercive, not whether the employee was in fact coerced. *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d at 725; *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1364 (9th Cir. 1981). The Board found four instances of threats or interrogation which violated section 8(a)(1). These findings are supported by substantial evidence.

On the first day of picketing, manager Sturgeon threatened to get even with the picketers. That afternoon, president Gene Johnson told a picketer that she would hate to see him get hurt by all this. Both conversations involved threats which violated section 8(a)(1). On two occasions, supervisor Gay questioned Dirkson about union activities. On August 10, Gay told Dirkson that she had to fire Helton because Helton had been antagonizing the waitresses. Gay then asked whether any other waitresses had been contacted by Helton. A few days later, Gay again asked Dirkson whether any other waitresses had been talking about the union. Taken together, these two conversations clearly implied that a waitress involved in unionization would be fired. Therefore, these interrogations violated section 8(a)(1).

THE STATE COURT SUIT

The Board found that the restaurant had violated sections 8(a)(1) and 8(a)(4) by filing and prosecuting the state court civil suit against the picketers. It is clear that "the mere filing of a lawsuit can restrain the exercise of [section 7] rights." *United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980, 983 (9th Cir. 1979). Before condemning a lawsuit as an unfair labor practice, however, the Board must be careful to make an accommodation between the rights of all persons to seek resolution of their legal claims in court and the rights of employees under the NLRA. *Clyde Taylor*, 127 N.L.R.B. 103, 109 (1960). The Board has adopted the rule that it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective. *See United Credit Bureau of America, Inc. v. NLRB*, 643 F.2d 1017, 1023 (4th Cir. 1981); *Power Systems, Inc. v. NLRB*, 601 F.2d 936, 939 (7th Cir. 1979). Thus an employer who brings a good faith action against employees for mass picketing, and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits. *Cf. Associated General Contractors v. NLRB,* 637 F.2d 556, 560–62 (8th Cir. 1980).

In this case, the restaurant's civil lawsuit had a lawful objective on its face; *i.e.,* the complaint sought relief for alleged wrongs that the state court could remedy. The Board found, however, that the restaurant lacked a reasonable basis in fact for the lawsuit, and concluded that the lawsuit was filed in bad faith to retaliate against the picketers. The Board found violations of both section 8(a)(1) and section 8(a)(4). Other courts have stated that the employer's anti-union motive is a key element of such violations. *See Associated General Contractors v. NLRB,* 637 F.2d at 561; *United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d at 1024.[1] We conclude that there is substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity.

The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated. The state court did issue a temporary restraining order to limit the number of picketers and the man-

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ner of picketing. At no time, however, did the picketers number more than seven adults and two children who demonstrated peacefully on the sidewalk outside the restaurant. The mass picketing alleged in the complaint never materialized, and the preliminary injunction was later denied.

The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with "actual malice," as defined in *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–80, 84 S.Ct. 710, 725–26, 11 L.Ed.2d 686 (1964). *See Linn v. Plant Guard Workers,* 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582 (1966). The statements contained in the leaflets were somewhat ambiguous; it was not made clear whether all the picketers' listed complaints (which the administrative law judge found to be factually true) had been made the subject of charges by the NLRB. The restaurant may therefore have believed that the leaflets falsely characterized the NLRB proceedings. But the very ambiguity of the leaflets in that regard tends to negate actual malice. In fact, the restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements. Instead, the restaurant argues that its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction. More than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis. *See United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d at 1024–25.

The lack of a reasonable basis in fact for the lawsuit is some evidence that it was filed for an improper purpose. The Board's finding of an improper motive is supported by more than this reasonable inference, however. On the first day of picketing, manager Sturgeon confronted the picketers, and wrote down their names. She told them that she would "get even with you for what you're doing." She told Helton that she would "get even with you if it's the last thing I do." That afternoon, president Gene Johnson told a picketer that she would hate to see him "get hurt by all this." Five days later, the restaurant filed the lawsuit in state court. The restaurant almost immediately deposed Helton, and questioned her in depth about the identities of other pro-union employees. The deposition was conducted without the assurances against reprisal usually expected to accompany employer interrogation of employees.[2]

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[1] We question whether motive should necessarily play a part in determining whether an employer violates section 8(a)(1) by filing a lawsuit, without a reasonable basis in fact, against an employee. On its face, section 8(a)(1) does not require a showing of motive: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7.]" In contrast, section 8(a)(4) requires a showing that the employer's conduct was provoked by the employee's filing of charges with the Board. Motive is therefore a necessary element of a section 8(a)(4) violation. Because we uphold the Board's finding of improper motive, we need not reach the question whether section 8(a)(1) may be violated in the absence of such motivation. *See Ad Art, Inc. v. NLRB,* 645 F.2d 669, 678 n.10 (9th Cir. 1981).

[2] The Board found that the restaurant violated section 8(a)(1) by conducting this deposition. The deposition almost certainly had a chilling effect on Helton and the other picketers. It also tended to interfere with the Board's administration of federal labor policy by allowing the restaurant to circumvent the restrictive discovery rules which apply to unfair labor practice hearings. *See NLRB v. Maxwell,* 637 F.2d 698, 702–03 (9th

Continued

These circumstances, in the context of other unfair labor practices which the Board found, clearly permit a finding that the lawsuit was prompted by an improper motive. The immediate effect of this lawsuit upon Helton was to penalize her for filing an unfair labor practice charge with the Board. That motive and effect clearly produce a violation of section 8(a)(4). In addition, the lawsuit carried an implicit message to the other picketers: namely, that any persons who file charges against the restaurant or picket the restaurant will find themselves in court.[3] The violation of section 8(a)(1) is also clear. We conclude that substantial evidence supports the Board's finding that the lawsuit filed by the restaurant against Helton and the other picketers violated **1344** sections 8(a)(1) and 8(a)(4). *See United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d at 1025.

Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice. The federal antiinjunction statute, 28 U.S.C. § 2283, does not prevent the Board from curbing state court action that interferes with the Board's exercise of its own jurisdiction. *Capital Service, Inc. v. NLRB,* 347 U.S. 501, 504–06, 74 S.Ct. 699, 701–03, 98 L.Ed. 887 (1954); *see also NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144–48, 92 S. Ct. 373, 377–79, 30 L.Ed.2d 328 (1971). Indeed, the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit.

It is true that the regulatory scheme established by the National Labor Relations Act does not of itself preempt state court jurisdiction over actions for libel arising in a labor context. *Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The Supreme Court has recognized the potential of such state suits for interference with federally protected rights, however, and has consequently ruled that all state libel actions are preempted unless they are based upon defamatory statements published with knowledge of their falsity or with reckless disregard of truth or falsity. *Id.* at 65. This carefully drawn boundary between legitimate state and federal interests would be hopelessly obscured if a libel action was automatically sustainable so long as the plaintiff carefully drafted its complaint to allege malice. The proper test of the legitimacy of the state action is whether the plaintiff has evidence to support its allegations of malice. *See United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d at 2024–25.

The state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations. The same determination, however, is one which the Board must make to decide whether filing the libel suit was an unfair labor practice. Since the Board has actually decided the issue, and the subject is central to the enforcement of federal labor policy, the Board's decision would appear to preempt further action by the state court. *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 209–10, 98 S.Ct. 1745, 1763–64, 56 L.Ed.2d 209 (1978) (Blackmun, J., concurring); *see San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244–245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). Whether or not the state court's jurisdiction is technically preempted, however, the Board has the power to enjoin a state court lawsuit when the impropriety of that lawsuit is properly addressed and adjudicated by the Board.

We recognize that this case involves a delicate balance between federal and state interests as well as between individual rights of organization and litigation. The Board has demonstrated its sensitivity to these issues by its sparing enforcement of limitations on the right to bring suit in state court. *See United Credit Bureau of America, Inc. v. NLRB,* 643 F.2d at 1022–23. In the present case the employer did not offer factual substantiation of its allegations of malice, and substantial evidence supported the Board's finding that the action was brought for retaliation and intimidation of employees in their organizational rights. In these circumstances, pursuit of the state action threatened the proper enforcement of the federal act and the Board was justified in putting a stop to it.

Cir. 1981). Because we agree that filing and conducting the libel suit was an unfair labor practice, however, we do not consider whether the deposition alone violated section 8(a)(1).

[3] The chilling effect of a state lawsuit upon activity protected by the Act is multiplied when the state action, as here, seeks large damages. Employees whose picketing is the subject of a state suit for injunction may default and simply comply with the terms of the state injunction. They can hardly afford to fail to defend a claim for $500,000 damages. *See Linn v. Plant Guard Workers,* 383 U.S. 53, 64, 86 S.Ct. 657, 663, 15 L.Ed.2d 582 (1966).

The Order of the Board is enforced in its entirety.

Metropolitan Edison Company v. NLRB

663 F.2d 478 (3d Cir.), November 13, 1981;
rehearing denied January 5, 1982; certiorari
granted June 14, 1982—252 NLRB 1030

On petition to review Board Order

Before SEITZ, Chief Judge, and VAN DUSEN and HIGGINBOTHAM, Circuit Judges

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SEITZ, Chief Judge: Metropolitan Edison Company (the Company) petitions for review of an order of the National Labor Relations Board (the Board) finding that the Company violated section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by disciplining two officers of intervenor Local Union 563 (the Local) more severely than rank-and-file members for participating in an illegal work stoppage. The Board cross-petitions for enforcement of its order. This court has jurisdiction under section 10(e) and (f) of the Act, as amended. 29 U.S.C. § 160(e) & (f) (1976).

I.

The Company, a public utility that provides electrical power to customers in Southeastern Pennsylvania, started construction of a two-unit nuclear generating station at Three Mile Island (TMI) in 1968. The construction was still underway in 1977. At that time, over half of the Company's employees were represented by five local unions of the International Brotherhood of Electrical Workers (the Union) under a collective bargaining agreement that took effect on May 1, 1976. Article XI of the agreement provided:

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> The Brotherhood and its members agree that * * * there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public.

Under prior collective bargaining agreements containing the same provision, members of the Union had violated the no-strike provision four times. On each occasion the Company disciplined the Union officers more severely than its members. The Company justified the disparity in discipline on the ground that union officers, unlike the members, have an affirmative duty to try to end an illegal strike. Twice the Union grieved to arbitration the issue of whether the Company could impose the extra discipline, and twice the Union lost.

The events that gave rise to this dispute occurred on August 30, 1977. Members of the Operating Engineers' Union picketed the north entrance to TMI. Members of the Local, including its president Lang and vice-president Light, refused to cross that picket line. The administrative law judge succinctly described the events on that morning:

> Both [Lang and Light] spent the morning of August 30, 1977, seeking to secure removal of the picket line so that their members, who had earlier indicated an unwillingness to cross any picket line, would go to work. Thus, Lang had come to [TMI] early on the morning of August 30, pursuant to a phone call from [the Company's personnel administrator], in which [he] advised [Lang] that there was a picket line which the [Local's] members were refusing to cross and requested him to see what could be done. In the course of their conversations that morning, [the administrator] reiterated to Lang a position taken by the Company a number of times previously that the union officers had a particular obligation to cross the picket line so that other employees would follow. When Lang arrived at the gate he spoke to the Operating Engineers' picket captain, learned the reason for the picket line, and was told that the line would not be removed unless removal was ordered by his business agent. Lang called the business agent. Subsequently, Lang went to the union hall, * * * and directed Gene Light to go the Operating Engineers to see whether he could negotiate with them to get them off the bridge. When he returned to the picket line, Lang was again told [by two Company officers] that he had a particular obligation as a union official to cross the picket line. Lang told [one of them] that it was the consensus of the members that they were not going to cross until the picket line came down and he told [the

> other] that he felt it was better if he stayed out because then he could at least negotiate with the pickets. Gene Light had substantially similar conversations with both [officers].
>
> In the course of discussing what it would take to have the picket line removed, the Operating Engineers' steward told Lang that they would remove the picket line if the contractors ceased using the north bridge.

After Lang related this conversation to the Company's coordinator of services, the Company set up a reserved gate for the contractors' employees at the south bridge, the picket line came down, and the Local's members went to work.

Of the 135 rank-and-file members who refused to cross the picket line, 121 received five-day suspensions, and fourteen who had participated in previous illegal stoppages received ten-day suspensions. Lang and Light each received a twenty-five-day suspension. The Company stated in the written records of its disciplinary action that the harsher discipline for each was justified because in addition to violating the no-strike clause, each had

> [failed] as an elected official of [the Local] to demonstrate to the Company, in an objective manner, [his] affirmative duty as an elected officer to:
>
> (a) Make every effort to uphold the sanctity of the Agreement and its established grievance procedures.
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>
> (b) Make every bona fide effort to prevent the unlawful work stoppage.
>
> (c) Make every effort, including returning to work [himself], to end the unlawful work stoppage.

The Local filed an unfair labor practice charge, and the General Counsel issued a complaint against the Company. The administrative law judge found that the Company's actions violated section 8(a)(1) and (3) of the Act, and the Board adopted his rulings, findings, and conclusions, although modifying the terms of his cease and desist order. *Metropolitan Edison Co.*, 252 N.L.R.B. 1030 (1980).

II.

An employer may impose greater discipline on union officials if the collective bargaining agreement enumerates specific affirmative steps a union official is to take in the event of an illegal work stoppage and the official has failed to perform those actions. In *Gould Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979), *cert. denied sub nom. Moran v. Gould Corp.*, 449 U.S. 890, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980), this court held that an employer did not commit an unfair labor practice when it singled out from among fifty participants in an illegal work stoppage a union steward for discharge. The collective bargaining agreement contained a no-strike clause, and also required union officials to take affirmative steps to end illegal work stoppages:

> In the event of an illegal [work stoppage], the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following: Within not more than twenty-four (24) hours after the occurrence of any such unauthorized action, the Union, its officers and representatives shall publicly disavow same by posting a notice on the bulletin boards throughout the plant. The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wildcat picket line. The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action. The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

612 F.2d at 730 n.3. The court held that the employer's discharge of the steward did not discriminate against the exercise of protected section 7 concerted activities because the company disciplined the steward not because of his status as a union officer but because of his failure to fulfill the responsibilities imposed on him by the collective bargaining agreement. The court further held that the discharge of the steward for violation of that contractual duty was not inherently destructive of employee rights and thus an unfair labor practice under the doctrine of *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967), because (1) there is no right to strike illegally or to violate contractually imposed duties, and (2) anyone dissuaded from seeking union office by such a rule should be dissuaded if he or she intended to engage in illegal strikes or to violate contractual obligations. *Id.* at 730–33.

If the collective bargaining agreement requires in general terms that union officials take affirmative steps to end an illegal work stoppage, a union official does not breach that duty simply because he does not take the exact affirmative steps the employer ordered him to take. Only if his actions in complying with that duty are not in good faith does he become subject to greater discipline. In *C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), an employer discharged only one out of twenty-five employees who participated in an illegal work stoppage—the shop steward. There was a no-strike provision in the collective bargaining agreement. The court held that the only basis for finding a greater obligation on the steward than on the other employees was a provision that, "The steward's duties shall consist of seeing that all terms and conditions of the Agreement are being complied with * * *." *Id.* at 181. The steward, both before and during the **482** work stoppage, attempted to dissuade the employees from striking, but would not cross the picket line as the employer wanted him to do. The court held that the employer had committed an unfair labor practice in more harshly disciplining the steward, because "[i]n the absence of a clear contractual provision requiring [the steward] to cross the picket line, his efforts were sufficient, if not the most effective possible, to satisfy his obligation to see that the no strike clause was complied with." *Id.* at 183.

If the collective bargaining agreement does not specify that union officials have some responsibility to try to end an illegal work stoppage, then the company may not impose any greater discipline on union officials than on other participants in the strike. In *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981), an employer had punished a union steward who took part in an illegal work stoppage more severely than other participants. The collective bargaining agreement contained a general no-strike clause. However, the *Hammermill* agreement contained no provision that placed any greater responsibilities on union officials than on the rank-and-file members, and the arbitrator in a grievance proceeding on the same matter had held that the contract placed no increased responsibilities on union officials. In those circumstances, the two members of the panel who reached the issue held that the company had committed an unfair labor practice in singling out the steward for harsher punishment. *Id.* at 163 (opinion of Rosenn, J.); *id.* at 166–67 (opinion of Higginbotham, J.).[1]

The rules developed from the *Gould, Heist,* and *Hammermill* cases are consonant with sound labor policy. The rules recognize the principle that although statutory rights may be waived, courts will generally not find a waiver unless it is clear and unmistakable. *See Texaco, Inc. v. NLRB,* 462 F.2d 812, 815 (3d Cir.), *cert. denied,* 409 U.S. 1008, 93 S.Ct. 442, 34 L.Ed.2d 302 (1972). The rules recognize that, since the holding of union office is the essence of protected union activities, *see General Motors Corp.,* 218 N.L.R.B. 472, 477 (1975), *enforced mem.,* 535 F.2d 1246 (3d Cir. 1976), discriminatory punishment solely on the basis of holding union office is a section 8(a)(3) unfair labor practice.[2] *Hammermill,* 658 F.2d at 163; *id.* at 166–67. Although it is true that we need not hesitate to adopt a rule that allows union officials to be punished discriminatorily if such a ruling would deter prospective union officials from seeking union office because they intend after assuming office to participate in illegal work stoppages and to repudiate voluntarily assumed contractual obligations, *see Gould,* 612 F.2d at 733, this case illustrates the limits of that rationale. Allowing the discriminatory punishment that the Company imposed on Lang and Light might deter others from seeking union office because of the fear that, if an illegal strike were to occur, they would be put into an untenable position: either obey the company and lose their authority,[3] or follow their own judgment and risk harsher punishment. It is because of this dilemma that we will not interpret a collective bargaining agreement to impose additional responsibilities on union officials absent clear language showing that the union agreed to it. *Compare Heist,* 657 F.2d at 182–83 (similar analysis where agreement did not specify the responsibilities it imposed on union official).

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[1] To the extent that *Indiana & Michigan Electric Co. v. NLRB,* 599 F.2d 227 (7th Cir. 1979) is inconsistent with *Gould, Heist,* and *Hammermill,* we decline to follow it. *See Hammermill,* 658 F.2d at 163–65 (opinion of Rosenn, J.) (distinguishing *Indiana*); *id.* at 167 (opinion of Higginbotham, J.) (rejecting *Indiana*). We also note that the Court of Appeals for the Seventh Circuit appears to have limited the scope of the *Indiana & Michigan* decision. *See Heist,* 657 F.2d at 182–83.

[2] If union officials take a leadership role in support of an illegal work stoppage, then they may be more severely disciplined for that reason. *See J. P. Wetherby Construction Co.,* 182 N.L.R.B. 690 (1970).

[3] This possibility was demonstrated on August 4, 1977. That morning, members of the Local had refused to cross the picket line established by the Pipefitters' Union at the north entrance to TMI. After this incident the Company advised Lang and Light that they had a legal obligation to cross the picket line and to urge their membership to do the same. At a meeting after work on August 4, Lang told the members of their obligations, but the membership shouted down his urgings that they cross picket lines.

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Because the agreement here, like that in *Hammermill,* did not expressly impose a duty on the Union officials to attempt to halt an illegal work stoppage, the Company committed an unfair labor practice when it disciplined Lang and Light more harshly than the other participants in work stoppage of August 30.

III.

The Company argues that, notwithstanding the absence of any explicit contractual language placing greater responsibilities on the Union officials, two earlier arbitrations had interpreted identical language in previous collective bargaining agreements between the Company and the Union to require Union officials to take affirmative steps to end an illegal work stoppage. Because the relevant language was not changed in any of the renewals since the time of those decisions, the Company argues that we are bound by the arbitral awards construing the collective bargaining agreement to place greater responsibilities on union officials.

There are two arbitration awards on which the Company relies: the Howard arbitration in 1975 and the Seidenberg arbitration in 1973. Both arbitrations arose out of illegal work stoppages in which the Company had disciplined union officials more severely than rank-and-file members. Both times the issue before the arbitrator was whether the company had had just cause for the discipline. In neither hearing did the Union raise the issue whether the collective bargaining agreement placed greater responsibilities on the Union officials. The only discussion of the origin of the greater responsibilities occurred in the Howard arbitration. The arbitrator stated:

> It is well-established that Union officials have an *affirmative duty* to protect the authority of the Union leadership from illegitimate action on the part of employees, and to uphold the sanctity of the Agreement and its established grievance procedures. Failure to exercise this responsibility subjects them to more serious penalties. * * * Indeed, the mere *participation* by Union leaders in an illegal work stoppage is sufficient to justify a differential penalty * * *.

(emphasis in the original).

The narrow issue before us is whether we are bound by the previous arbitral interpretations. We hold that we are not.[4]

Normally an arbitrator need not follow previous arbitrations construing the same agreement. *See New Orleans Steamship Association v. General Longshore Workers,* 626 F.2d 455, 468 (5th Cir. 1980), *cert. granted sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association,* —— U.S. ——, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981); *Riverboat Casino, Inc. v. Local Joint Executive Board,* 578 F.2d 250, 251 (9th Cir. 1978) (to require adherence to previous arbitration would reduce flexibility of the arbitral process). It follows that when this court is called upon to construe a collective bargaining agreement, it need not follow a previous arbitral interpretation. To bind this court to a contractual interpretation made in a previous arbitral award would not be consistent with what the parties bargained for: arbitration as a dispute resolution process for specific grievances. *See NLRB v. Pincus Brothers, Inc.-Maxwell,* 620 F.2d 367, 374 (3d Cir. 1980).

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An exception to the general rule may be found if the collective bargaining agreement so provides. *Riverboat Casino,* 578 F.2d at 251. However, that exception is not applicable here, because the agreement between the Company and the Union does not provide that one arbitration is to be bound by an earlier decision, unless the earlier decision was made under the same collective bargaining agreement. Article IX, § 9.2, 4th ("A decision [by an arbitrator] shall be binding * * * for the term of this Agreement."). The two arbitrations upon which the Company relies were made under previous agreements. Additionally, the agreement provides that "all Customs and Practices" between the Company and the Union are to be listed in the agreement. The agreement lists no practice of being bound to arbitrations under previous agreements.

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[4] The administrative law judge held that he was not bound to the previous interpretations because, if they had been made today, the Board "would *likely* find those awards repugnant to the purposes and policies of the Act," 252 N.L.R.B. at 1035 (emphasis added), under the analysis of *Spielberg Manufacturing Co.,* 112 N.L.R.B. 1080 (1955). Because we reach the same result on other grounds, we do not decide whether the conclusory *Spielberg* analysis was correct.

IV.

The Company further argues that its harsher discipline of Lang and Light was justified because Lang and Light were leaders of the strike. *See J.P. Wetherby Construction Co.,* 182 N.L.R.B. 690 (1970). The Board rejected this argument, finding that Lang and Light were not active leaders of the strike. Our review persuades us that the Board's finding is supported by substantial evidence on the record considered as a whole. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487–88, 71 S.Ct. 456, 464–65, 95 L.Ed. 456 (1951).

V.

The Company's petition for review will be denied, and the Board's order will be enforced.

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VAN DUSEN, Senior Circuit Judge, dissenting: I respectfully dissent from the majority opinion because my analysis indicates that it is contrary to *Gould, Inc. v. N.L.R.B.,* 612 F.2d 728 (3d Cir.), *cert. denied sub nom. Moran v. Gould Corp.,* 449 U.S. 890, 101 S.Ct. 247, 66 L.Ed.2d 115 (1980),[1] which is this court's most pertinent decision on the facts presented by this record, and hence in violation of Chapter VIII, paragraph C (p. 25), of the Internal Operating Procedures

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(IOP) of this court.[2] I would vacate the Board's order and remand the case to the Board for reconsideration and application of the principles of *Gould, supra,* to the factual situation presented by this record.

In addition to the language quoted from the decision of the ALJ on page 480 of the majority opinion, that decision contains this wording at p. 1034 of 252 N.L.R.B.:

> "Respondent contends that Lang and Light were given the greater discipline not because they held union office but rather:
>
> > * * * it was awarded because of things they did or did not do; statements they made or did not make; and, the misuse of the union office they held.
>
> "Respondent points out that, while violations of the no-strike agreement were not frequent at its plants, the August 30 incident was not the first. On prior occasions in 1970, 1972, 1973, and 1974, members of various IBEW locals engaged in work stoppages in violation of the contract. In each of those incidents the participating employees were disciplined and the union officers or stewards involved were given greater discipline for failure to make bona fide efforts to get the employees back to work. Indeed, in the 1973 work stoppage, which occurred at T.M.I., Lang and Light, as union officers, received the greater

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[1] Note 3 of the dissenting opinion of Member Penello makes clear that the Board, in promulgating its September 1980 decision, see *Metropolitan Edison Company, et al.,* 252 N.L.R.B. 1030, 1031 (1980), was referring to the December 1979 opinion of this court in *Gould,* as opposed to the opinion in that case as it was amended in March 1980, since *Gould, supra,* was cited at 252 N.L.R.B. 1031 *and* 103 LRRM 2207 as 612 F.2d 728 (3d Cir. 1979), rather than as a 1980 decision. On March 13, 1980, the court added this wording to the *Gould* opinion in place of the last two sentences on page 12 of the 1979 slip opinion:

"We reaffirm this court's previous statement of the proper precept to be applied where there is a mixed motivation attending employer's action: 'Although there might exist a justifiable cause for discharge of an employee, there is a violation of the Act if the real motive for the discharge is found to be the employer's dislike of union activity or affiliation. * * * Such real motive will be found where union activity by the employee is recognized as a substantial or motivating cause of his discharge.' *N.L.R.B. v. Gentithes,* 463 F.2d 557, 560 (3d Cir. 1972) (per Chief Judge Seitz). It is also controlling case law of this court that where there is substantial evidence that the employee's discharge was motivated by the employee's protected activity, there is a violation of the Act notwithstanding the concurrent existence of an otherwise valid reason. *N.L.R.B. v. Princeton Inn Co.,* 424 F.2d 264, 265 (3d Cir. 1970). From our review of the entire record we conclude that there is no substantial evidence to support a finding that Moran's discharge was because he had filed charges with the EEOC, OSHA, and the Board. Accordingly the Board's holding of a § 8(a)(4) violation must be vacated."

612 F.2d at 734. The report in 103 LRRM 2207 does not contain this new language, but it contains the previous language from the 1979 slip opinion. See 103 LRRM at 2211 (last two sentences).

More importantly, the majority of the Board cited and relied on *Precision Castings Company,* 233 N.L.R.B. 35 (1977), a decision which this court implicitly rejected in *Gould* when it adopted the reasoning of *Ind. & Mich. Elec. Co. v. N.L.R.B.,* 599 F.2d 227 (7th Cir. 1979), in the passage quoted on pp. 486 & 487 of this dissent. 612 F.2d at 732–33. The Board's brief in this appeal admits that it refused to follow our decision in *Gould* and instead applied its own case law. Respondent's brief at pp. 32–35.

[2] Paragraph C of Chapter VIII of the IOP reads as follows:

"It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court."

discipline. In 1972 and 1974, when the Union took to arbitration the question of the greater discipline assigned to the union officers, the Company's discipline was upheld. In both arbitration decisions, the arbitrators held that union officials had an affirmative duty, by virtue of their office, to honor and protect the collective-bargaining agreement, and that failure to exercise that responsibility subjected them to more severe penalties. Respondent also pointed out that both Lang and Light had been told repeatedly, both prior to the August 30 incident and while it was occurring that Respondent expected them to set an example for the other employees by crossing the picket line and that it would discipline them if they failed to do so. Further, Respondent argued, by attempting to secure the removal of the picket line as a means of getting the employees back to work, rather than leading the employees across the picket line or ordering those employees to cross, Lang and Light 'became the active leaders of the strike.' This, Respondent stated, was a factor considered significant in determining the degree of their discipline.

"Respondent also adduced evidence that a work stoppage similar to that of August 30 had taken place on August 4. At that time, various participating employees, not including Lang and Light, were disciplined. Lang and Light were both told, quite emphatically, that the Employer considered it their obligation to cross a picket line and set a proper example for their members. At a union meeting following this work stoppage, Lang told his membership of their legal obligations. The membership vociferously rejected his urgings that they cross such picket lines.

"Finally, Respondent points to an incident involving David Lang which it contends provides separate justification for the greater discipline accorded him. Early on the morning of August 30, after Lang had been summoned to the line by Hahn, an employee drove up, observed the pickets, and asked what he should do. According to Hahn, Hahn said 'come to work,' but *Lang told the employee, 'go to the union hall.'* According to Lang, when the employee (identified by Lang as Tom Lynch) asked what he should do, *Lang told him 'you know what you are supposed to do.' The employee never left his vehicle but drove off in the direction of*

the union hall. Lang saw Lynch later at the union hall."

(Emphasis supplied; footnotes omitted.)

The majority has chosen to follow language in two separate opinions of two individual judges on the panel in *Hammermill Paper Co. v. N.L.R.B.*, 658 F.2d 155 (3d Cir. 1981), a case where each of the two members of the panel concurring in the judgment of the court stated his own views separately, rather than the very clear and strong language used by a unanimous panel of this court in *Gould, supra,* the facts of which are closer to those in this case than are the facts of *Hammermill.* In *Gould,* this court used the following language at pp. 732–33:

> "We first consider the law applicable to the § 8(a)(1) and (3) violations and begin by noting our prior holding that 'strikes carried out in violation of a no-strike provision in a collective bargaining agreement are not protected by the Act, and therefore the discharge of employees who engage in such strikes is not an unfair labor practice.' *Food Fair Stores, Inc. v. NLRB,* 491 F.2d 388, 395 (3d Cir. 1974). Also relevant are Board rulings that an employer need not fire all illegal strikers, but may 'pick and choose' which participants will be discharged as long as the basis for so doing is not union related. *Precision Castings, supra; Chrysler Corp.,* 232 NLRB 466, 474 (1977); *McLean Trucking Co.,* 175 NLRB 440, 450-51 (1969). See also *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939). And we note, finally, the holding of the Supreme Court in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967), that if the discriminatory discipline complained of is so inherently destructive of employee rights there is no need to establish any specific anti-union motivation in order to sustain a § 8(a)(3) violation.
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> "* * * when the Board followed *Precision Castings* with a similar ruling in *Ind. & Mich. Elec. Co.,* 237 NLRB No. 35 (1978), that ruling was reversed on appeal, *Ind. & Mich. Elec. Co. v. N.L.R.B.,* 599 F.2d 227 (7th Cir. 1979). The Board had ruled that the greater responsibility which accompanies the holding of union office was insufficient reason for imposing more severe

discipline on officers than rank-and-file strikers. In reversing, the court reasoned:

> Employees have no right to participate in an illegal strike. Accordingly, if an employee right is threatened here, it must be one relating to union office. The Board has said and we recognize that union office 'embodies the essence of protected concerted activities.' See *General Motors Corp.*, 218 N.L.R.B. 472, 477 (1975), *enforced*, 535 F.2d 1246 (3d Cir. 1976). Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding office would no doubt have an inherently adverse effect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.
>
> In arguing that status as a union official may not be the sole criterion for differentiating among employees in meting out discipline, the Board somewhat misstates the issue. The more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file. 599 F.2d 230.
>
> * * * * *
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> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike (footnote omitted) did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into
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> account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights. 599 F.2d 232.

"We concur in that reasoning and believe that it applies as well to the instant case and supports our conclusion that the Board's finding of a § 8(a)(1) and (3) violation must be vacated. More specifically, we cannot agree with the Board's deduction that since Moran was a steward and was discharged it follows logically that he 'was singled out for discipline *solely because* he was the steward.' On the contrary, it is clear that he was disciplined because he participated in an illegal strike and failed to perform his contractual obligation to take positive steps to halt that work stoppage. True, this duty devolved upon him because he fell within the *class* of persons upon whom the collective bargaining agreement imposed that duty, to wit, officers of the union, but the agreement could just as well have imposed this duty on individuals by name regardless of their office, and the result would be the same. In other words, it was a breach of a duty *imposed* by his office and not his office *as such* which formed the basis for his discharge. Viewed in this light, Moran's discharge was permissible and did not constitute an unfair labor practice. Indeed, if we were to hold otherwise, the union officer who participated in an illegal work stoppage would be placed in a more advantageous position than the rank-and-file members, and this would be neither fair, logical nor just.

"The General Counsel's argument that since the company lacked the right under the contract to discharge Moran for violating Article XVI § 3 his discharge was unlawful is unpersuasive. It is true that § 3 contains no provision for the discipline of those who violate it, however, § 2 does give the company the right to discharge those who participate in illegal work stoppages. Section 3 of Article XVI was relied upon merely as a basis for singling out Moran from among the strikers subject to discharge. This was lawful.

"* * * As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, an obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of 'union' activity."

(Emphasis in original.)

Also, in *Hammermill, supra,* Judge Rosenn, writing the OPINION OF THE COURT, pointed out that

> "* * * the result we reach is not at all inconsistent with *Gould* and *Indiana.* Nor do we see any need to reconsider our decision in *Gould.* * * * [W]e caution the Board that insofar as *Gould* holds that an employer may use discipline as a means of enforcing the individual duties of union officials, we continued to adhere to that precedent."

It is noted that *Indiana,* cited above, is referred to in that portion of the *Gould* opinion quoted above.

There is no showing that the company ever approved, condoned, or ratified the personal decision of the two union officials to negotiate with the pickets, thereby prolonging the work stoppage, instead of leading their fellow union members across the picket line to work for this electric utility supplying power to the Harrisburg area of southeastern Pennsylvania.[3]

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I believe the terms of VIII-C quoted above in note 2 require that this case, at the least, be remanded to the Board, which may decide to have it reconsidered by the ALJ, who heard the witnesses, in light of *Gould,* as amended, and *Hammermill,* neither of which decision in its final form was considered by the ALJ (see note 1 above).

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[3] I note that this court had pointed out in *Eazor Exp., Inc. v. International Bro. of Team., Etc.,* 520 F.2d 951, 964 n.6 (3d Cir. 1975), *cert. denied,* 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976), *overruled on other grounds sub nom. Carbon Fuel Co. v. Mine Workers,* 444 U.S. 212, 100 S.Ct. 410, 62 L.Ed.2d 394 (1979):

> "That * * * discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania in April 1968 where the strike was ended when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line."

Aaron Brothers Company, a Division of Chromalloy American Corp. v. NLRB

661 F.2d 750 (9th Cir.), November 16, 1981—245 NLRB 29

On petition to review Board Order

Before TANG and NORRIS, Circuit Judges and WHELAN*, District Judge

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TANG, Circuit Judge: Aaron Brothers Company seeks review of a National Labor Relations Board decision and the Board seeks to enforce its order. Two issues are raised: (1) whether Aaron Brothers violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5) (1976), when it instituted a wage increase without first consulting or bargaining with the union representing the company's employees; and (2) whether Aaron Brothers violated sections 8(a)(1) and (5) by refusing to entertain wage proposals beyond the amount granted by the company's unilateral wage increase.

I

FACTS

Aaron Brothers is engaged in retail art sales. As part of its business, the company operates a warehouse in California. In 1975, the Teamsters Automotive Workers Union, Local No. 495 (the Union), was certified as the bargaining representative for the warehouse employees. To challenge the certification's validity, Aaron Brothers refused to bargain with the union; the National Labor Relations Board (the Board) ordered Aaron Brothers to bargain, and this court enforced the order. *See Aaron Brothers Corp.,* 223 N.L.R.B. 1179 (1976), *enf'd,* 563 F.2d 409 (9th Cir. 1977).

Aaron Brothers and the Union met to negotiate a contract on March 30, 1978. Negotiations were conducted by the company representative, John Fretwell, and Un-

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ion representative John Krasnick.[1] Krasnick and Fretwell held four bargaining sessions between the first meeting and June 15, 1978. They discussed various contract items, including wages, during the meetings, but they reached tentative agreement only with respect to a union security clause. At the completion of the June 15 session, the parties scheduled their next session for September 15, 1978. The session was later postponed to November 9, 1978.

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*Honorable Francis C. Whelan, United States District Judge for the Central District of California, sitting by designation.

[1] On the strength of the ALJ's credibility assessment, we credit Krasnick's version of the facts in the few instances of conflicting testimony. The ALJ stated at page 2[illegible]:

> This discrepancy is resolved in Krasnick's favor because his overall demeanor was more convincing then Fretwell's; his testimony on this point and generally carried greater substantive plausibility than Fretwell's in instances of conflict; and, as is about to be developed, Fretwell testified on one occasion with such palpable falseness as to cast serious doubt on his credibility in any case of conflict.

On September 22, 1978, Aaron Brothers sent a notice to all of its employees, including those in the bargaining unit, that it was instituting a 19 cents an hour wage increase, effective October 5, 1978. Aaron Brothers considered notifying the Union, but decided against such action. The increase went into effect as scheduled.

The Union first learned of the increase at the November 9 bargaining session. Fretwell apologized for not notifying Krasnick earlier. Krasnick stated that the wage increase was an unfair labor practice and Fretwell agreed that it would be so interpreted. Krasnick then suggested that they use the wage increase as a base for further negotiations. Fretwell replied that he had no authority to grant anything further. Krasnick then stated that there was no sense in negotiating further and indicated that he was going to file an unfair labor practice charge. Fretwell agreed with Krasnick's assessment, and the session adjourned.

The Union filed an unfair labor practice charge on November 28, 1978. A hearing was held on April 17, 1979 before an Administrative Law Judge (ALJ). The ALJ found that Aaron Brothers had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA) by instituting the October 5 wage increase and refusing on November 9 to negotiate further on wages. The ALJ entered an order requiring, *inter alia*, Aaron Brothers to refrain from unilaterally implementing wage increases and to cease refusing to negotiate wage changes beyond the increase granted on October 5, 1978. The National Labor Relations Board (the Board) adopted the ALJ decision without modification.

Aaron Brothers now petitions the Court of Appeals for review of the Board decision and the Board cross-applies to enforce the order.

II

Wage Increase

It is settled that an employer violates sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. §§ 158(a)(1) & (5) (1976),[2] if he or she institutes a wage change without first consulting and bargaining with the union representing the employees. *NLRB v. Katz*, 369 U.S. 736, 745–47, 82 S.Ct. 1107, 1112–14, 8 L.Ed.2d 230 (1962). Aaron Brothers concedes that it implemented the October 5 wage increase without first alerting or consulting the Union. It argues, however, that the wage increase did not violate sections 8(a)(1) and 8(a)(5) because the increase was part of a continuing company policy annually to adjust wages and was therefore not a change in working conditions subject to the *Katz* rule.

The Board and the ALJ did not rule on whether the wage increase was instituted

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pursuant to a longstanding company policy. The ALJ concluded that even if it was, Aaron Brothers was required to notify the Union of the impending increase, citing the Board's decision in *Allis-Chalmers Corp.*, 237 N.L.R.B. 290, 291 (1978), *enf'd on other grounds*, 601 F.2d 870, 875 (5th Cir. 1979) (wage increases not automatic), *enf'mt stayed pending review*, 608 F.2d 1018 (5th Cir. 1979) (sole issue whether union properly certified). The Board affirmed this position without comment.

The Board's position is contrary to this circuit's established rule. Wage changes that merely reflect continuations of past company policy are not considered changes in existing work conditions, and thus fall outside the *Katz* rule. *See Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *NLRB v. Nello Pistoresi & Son, Inc. (S & D Trucking Co., Inc.)*, 500 F.2d 399, 400 (9th Cir. 1974). Moreover, no other circuit has accepted the Board's position. *See, e.g., NLRB v. Phil-Modes, Inc.*, 406 F.2d 556, 557 n.3 (5th Cir. 1969) (Board position "simply begs the question of whether there was a change in wages").

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[2] Section 8(a)(1) and (5) of the NLRA provide:

(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(1) and (5) (1976).

The Board suggests on appeal that an enforcement order can be granted on the alternative ground that this wage increase does not fit within the "longstanding practice" exception to *Katz.* The burden of proving that a wage increase falls within the longstanding practice exception is upon the employer. *See NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875 (5th Cir. 1979), *modified,* 608 F.2d 1018 (5th Cir. 1979) (sole issue whether union properly certified). While the Board's argument may have merit, it is not clear upon this record whether Aaron Brothers has met its burden.

In determining whether a benefit change fits within the *Katz* exception, the Supreme Court has counseled lower courts to examine the degree to which an employer has discretion to award a benefit or determine its size. *See Katz,* 369 U.S. at 746–47, 82 S.Ct. at 1113–14. The greater the discretion, the Court has reasoned, the greater the danger unilateral action will destablize industrial relations by undermining a union's institutional credibility.

In applying this standard, we have focused principally upon how long an employer's practice has been in effect. By itself this standard does not give a clear indication whether here the wage increase was a change in working conditions or whether it was merely a continuation of established company policy. The policy was four years old. This time period falls between the periods we have deemed insufficient to qualify as a longstanding practice and periods we have declared sufficient. *Compare Queen Mary Restaurants Corp.*, 560 F.2d at 408 (wage increase to employees not part of a longstanding practice when wages increased only once under policy) *and Nello Pistoresi & Son, Inc.*, 500 F.2d at 400 (when Christmas bonus paid for only two years and followed no formula, discontinuance of bonus not unilateral change in terms of employment) *with NLRB v. Progress Bulletin Publishing Co.*, 443 F.2d 1369 (9th Cir. 1971) (when Christmas bonus paid regularly for 20 of previous 21 years and amount varied with seniority of employees, discontinuance of bonus was unilateral change in working conditions).

We also have indicated that a court should consider whether the benefit change was fixed by an established formula containing variables beyond the employer's immediate influence. *Nello Pistoresi & Son, Inc.*, 500 F.2d at 401 (holding that Christmas bonus was not established policy partly because employer used no formula to compute bonus; distinguishing earlier case partly on ground that bonus program there was tied to employees' seniority). Three circuits follow this approach and inquire whether benefit changes result from fixed guidelines or formulae based on sales, employee tenure, or other factors beyond an employer's immediate control.[3]

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Aaron Brothers urges the adoption of the Second Circuit rule that unilateral wage increases of any amount are permissible under section 8(a)(5) so long as the employer has had a history periodically of increasing employee benefits. *See NLRB v. Hendel Manufacturing Co., Inc.*, 523 F.2d 133, 135 (2d Cir. 1975); *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 199–200 (2d Cir. 1969), *modified in part on other grounds,* 426 F.2d 791 (2d Cir. 1970). We reject this approach. So long as an employer has made wage changes on a regular basis, the Second Circuit rule appears to give an employer unfettered discretion to implement a wage change of any amount without first consulting or bargaining with the union representing the employees. This standard allows an employer routinely to circumvent the collective bargaining process, a result the *Katz* Court sought to avoid by creating a *per se* rule.[4]

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[3] *See Allis-Chalmers Corp.*, 601 F.2d at 875–76 (wage increase did not result from "purely automatic" policy and was not pursuant to "definite guidelines"); *NLRB v. John Zink Co.*, 551 F.2d 799, 801–02 (10th Cir. 1977) (where company action was not "automatic" and involved some degree of managerial discretion, 82 job classification changes and merit increases were unilateral changes in terms of employment); *N.L.R.B. v. J. P. Stevens & Co.*, 538 F.2d 1152, 1163 (5th Cir. 1976) (where employer had no tangible guidelines to determine which employees should receive merit increase, when they should receive it, or the size of the increase, grant of merit increase to 20 of 50 employees in bargaining unit a unilateral change in terms of employment); *N.L.R.B. v. Ralph Printing & Lithographing Co.*, 433 F.2d 1058, 1062–63 (8th Cir. 1970) (consultation with union not required where wage increase granted pursuant to well-established policy raising wages to maintain wage differential between skilled and unskilled workers in response to increases in minimum wage or when character of an employee's job changes, but a company policy does not qualify under exception where wage increase based on a subjective evaluation of an employee's performance), *cert. denied,* 401 U.S. 925, 91 S.Ct. 883, 27 L.Ed.2d 829 (1971); *Phil-Modes, Inc.*, 406 F.2d at 557 (shifting employee's pay from piecework basis to hourly basis not a unilateral change where the shift had occurred every year the employer had been in operation and where the beginning and end of the period were triggered each year by consumer demand, a factor beyond the employer's control); *N.L.R.B. v. Southern Coach & Body Co.*, 336 F.2d 214, 217–18 (5th Cir. 1964) (wage increase not an unilateral change where increase resulted from longstanding policy granting automatic increases according to job tenure and difficulty of job).

[4] Aaron Brothers also argues that a failure to implement the October 5 wage increase would have been an unfair labor practice, placing it in the

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Nothing in this record suggests that Aaron Brothers relies upon pre-established guidelines or formulae in deciding whether to grant a wage increase or in determining its size. Moreover, the marked fluctuation in the size of the raises from year to year, summarized in Table #1, suggests that the wage decision was the product of an *ad hoc* decisionmaking process rather than a continuation of an established company policy.

Table #1 Wage Increases Granted by Aaron Brothers to Hourly-Paid Employees by Date Increase Became Effective and by Amount of Increase.

Effective Date	Amount of Increase
July 18, 1975	20 cents per hour
August 3, 1976	13 cents per hour
June 9, 1977	16 cents per hour
October 5, 1978	19 cents per hour

Source: Decision of Administrative Law Judge.

Nonetheless, on the record before us we are unable to determine whether the wage increase violated section 8(a)(5). We therefore remand the issue to the Board to determine whether the increase resulted from nondiscretionary standards and guidelines.

III

Refusal to Bargain

The ALJ and the Board found that Aaron Brothers committed a separate violation of section 8(a)(5) by refusing, in bad faith, to bargain about wages after November 9, 1978. This court must accept the Board's finding of bad faith if it is supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951). When reviewing a charge of bad faith, a court must examine the entire conduct of both sides during negotiations. *NLRB v. Insurance Agents International Union,* 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960); *NLRB v. American National Insurance Co.,* 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952).

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An employer fails to manifest good faith in bargaining sessions if he does not " 'participate actively in the deliberations so as to indicate a present intention to find a basis for agreement' " and does not make " 'sincere effort * * * to reach a common ground.' " *NLRB v. Yutana Barge Lines, Inc.,* 315 F.2d 524, 530 (9th Cir. 1963) (quoting *NLRB v. Montgomery Ward & Co.,* 133 F.2d 676, 686 (9th Cir. 1943)). Both parties are required "to afford the other [party] a fair opportunity to exchange and discuss proposals and counter-proposals." *Id.*

The charge of bad faith made here is based principally upon the conduct of Aaron Brothers representative, John Fretwell, at the November 9 negotiating session with Union negotiator John Krasnick. After describing what had transpired at the five previous bargaining sessions, the ALJ found:

> By notice dated September 22, 1978, Respondent notified its employees companywide, including those in the bargaining unit, that they would be receiving an hourly wage increase of 19 cents, effective October 5. The Union first learned of the increase during the November 9 bargaining meeting, when Fretwell gave Krasnick a copy of the employee notice. Fretwell told Krasnick that he had asked that the increase be withheld from the unit employees, and was "embarassed" that it had not; and voiced agreement with Krasnick's accusation that the inclusion of the unit employees in the raise was an unfair labor practice. With that, Krasnick proposed that the new wage levels be used as a base for the continued negotiation of the wage issue. Fretwell declined, explaining that he was without authority to offer anything additional. Krasnick countered that he would have to file an unfair labor practice in that event, and Fretwell said he would not blame Krasnick if he did.

The ALJ concluded from these facts that Aaron Brothers' refusal to continue negotiating on wages resulted from the company's bad faith. Aaron Brothers does not dispute any of the findings made above, but contends that they do not demonstrate bad faith. It argues first that these findings show that the Union was the party responsible for breaking off negotiations. The record does not support this contention. The ALJ found that the union rep-

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untenable position of committing an unfair labor practice whether or not it implemented the increase. This concern is unfounded. Aaron Brothers could have avoided all risk by notifying and consulting with the Union as to the course it should follow. *See N.L.R.B. v. United Aircraft Corp.*, 490 F.2d 1105, 1111 (2d Cir. 1973); *General Motors Acceptance Corp. v. N.L.R.B.*, 476 F.2d 850, 854 (1st Cir. 1973).

resentative offered to continue wage negotiations using the October 5 wage increase as a base. The more plausible reading of Fretwell's response is that Aaron Brothers was not interested in negotiating the wage issue further.

Aaron Brothers argues alternatively that it was justified in breaking off wage bargaining on November 9 because the parties had reached an impasse on the wage issue. Although it is clear that "the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession," *American National Insurance Co.*, 343 U.S. at 404, 72 S.Ct. at 829, the record does not support a conclusion that the prospects for further compromise were nil; the parties had completed only five bargaining sessions prior to the November meeting and neither party had yet presented a "final" wage offer.

Aaron Brothers also argues that it bargained in good faith prior to November 9. The record indicates that the company actively engaged in bargaining during the negotiating sessions held prior to November 9. The record, however, also contains evidence casting doubt on the company's interest in reaching an agreement. Aaron Brothers' two month delay in informing the Union of its decision to implement the October 5 pay increase suggests that the company was prepared to circumvent the collective bargaining process by presenting the Union with a *fait accompli. Cf. Alfred M. Lewis, Inc. v. N.L.R.B.*, 587 F.2d 403, 409 (9th Cir. 1978) (bargaining in good faith requires not only notice to Union of pending unilateral change in working conditions, but also the opportunity to bargain.) Moreover, hearing testimony indicates that Aar-

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on Brothers made a conscious decision not to inform the Union of the pending increase on the ground that the employer doubted whether the Union retained majority support. *Cf. Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 730 (9th Cir. 1980) (an employer who believes that a Union has lost majority support may petition the NLRB for decertification but may not in the interim refuse to bargain or otherwise engage in unfair labor practices).[5]

The Board's finding of bad faith in Aaron Brothers' November 9 refusal to bargain about wages is supported by substantial evidence. We therefore affirm that portion of the Board's decision, and enforce the portion of the Board's order pertaining to the refusal to bargain.

ENFORCED in part; REMANDED in part.

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[5] Aaron Brothers also argues that events that occurred after November 9 do not support a finding that the company violated the NLRA. The NLRB, however, did not rely on events after November 9 in reaching its findings, nor did it cite the company for additional unfair labor practices that may have occurred after November 9. The ALJ accepted testimony concerning the events that occurred after November 9, but did so only for the purpose of determining whether the Union waived its bargaining rights after November 9.

Construction Erectors, Inc. v. NLRB

661 F.2d 801 (9th Cir.), November 16, 1981—252 NLRB 319

On petition to review Board Order

Before DUNIWAY and SNEED, Circuit Judges, and TASHIMA,* District Judge

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TASHIMA, District Judge: Construction Erectors, Inc. (the "Company") petitions for review of a decision of the National Labor Relations Board (the "Board"). The Board has cross-petitioned for enforcement of its order. The Administrative Law Judge's ("ALJ") Findings of Fact and Conclusions and the Board's Decision and Order are reported at 252 NLRB No. 85 (1980).[1]

On December 10, 1977, the Company entered into a collective bargaining agreement with Local 625 of the International Association of Bridge, Structural, and Ornamental Ironworkers, AFL-CIO (the "Union"). The Company repudiated the agreement on February 28, 1979, asserting, *inter alia*, that it no longer employed any Union members. An unfair labor practice charge was filed by the Union on March 13, 1979.

PROCEEDINGS BEFORE THE BOARD

The ALJ found that the Company had committed an unfair labor practice by repudiating its contract with the Union and held that, at the time of the 1977 agreement

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*Honorable A. Wallace Tashima, United States District Judge, Central District of California, sitting by designation.

[1] The facts are fully detailed in the ALJ's decision. The facts necessary to explain our decision are set forth in Part II of the "Discussion," which follows.

between the Company and the Union, *i. e.*, on December 10, 1977, the Company's employees were a stable unit and the Union had the support of a majority of that unit. As a result, he concluded that the agreement was governed by § 9(a) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 159(a), rather than § 8(f), 29 U.S.C. § 158(f), that the Union was entitled to be recognized as the exclusive representative of all ironworkers employed by the Company for the remainder of the term of the agreement and that the Company was, therefore, not free to unilaterally terminate the contract and withdraw recognition from the Union. The ALJ recommended that the Board issue a cease and desist order, award backpay to all employees in the bargaining unit who had lost wages since the time the Company repudiated the contract and require the Company to make up any payments it owed to the Union trust fund pursuant to that contract.

The Board affirmed the ALJ's findings and conclusions, and adopted his recommended order.

ISSUE

Was the Board's finding, that there was a permanent and stable workforce at the time the Company and the Union signed the 1977 agreement, supported by substantial evidence.

DISCUSSION

I. *Standard of Review and Applicable Law.*

On review of an order of the Board, this Court's inquiry is limited to whether the Board's factual findings are supported by substantial evidence on the record as a whole, and whether the Board's application of those findings is rational and consistent with the Act. An order meeting this test is entitled to enforcement. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978); *Precision Striping v. NLRB*, 642 F.2d 1144, 1146 (9th Cir. 1981).

Generally, it is an unfair labor practice for an employer and union to sign a collective bargaining agreement recognizing a minority union as an exclusive bargaining representative. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961). However, § 8(f) of the Act creates an exception to this rule, allowing a construction industry employer to execute a "pre-hire agreement" with a Union that has not yet attained majority status. This exception recognizes the unique nature of the construction industry. Employees in that industry tend to move frequently from job to job, making it impossible for the NLRB to conduct an election at each site. The use of pre-hire agreements also facilitates bidding, by allowing a contractor to compute his labor costs before submitting his bid for a particular job. *NLRB v. Local Union No. 103, Int'l Assn. of Bridge, Structural & Ornamental Iron Workers, AFL-CIO*, 434 U.S. 335, 348, 98 S.Ct. 651, 659, 54 L.Ed.2d 586 (1978) *("Higdon")*.

A pre-hire agreement under § 8(f) does not entitle a union to full rights until it can show that it has attained majority support in the relevant bargaining unit. An employer is free to repudiate a § 8(f) agreement and call for a bargaining representative election at any time. *Higdon, supra*, at 345, 98 S.Ct. at 657. Once a union achieves majority status, however, "the pre-hire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the unit", *id.* at 350, 98 S.Ct. at 660, and the employer becomes obliged to recognize the union as bargaining representative for the duration of the contract. *Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 838–39 (9th Cir. 1978).

One method employed by the Board in deciding whether construction industry bargaining agreements are voidable § 8(f) contracts or binding § 9(a) contracts is to determine whether the agreement in question covers a permanent and stable unit of employees. *See, e. g., Precision Striping, Inc.*, 245 NLRB No. 34, 102 LRRM 1264

(1979), *enf. denied*, 642 F.2d 1144 (9th Cir. 1981); *Land Equipment, Inc.*, 248 NLRB 685 n.2 (1980), *enf'd* 649 F.2d 867 (9th Cir. 1981) (memorandum); *Hageman Underground Construction*, 253 NLRB No. 7, 1980–81 CCH NLRB ¶ 17,486 (1980). If the union represents a majority of employees in a stable unit when the contract is executed, the contract is treated as a binding § 9(a) agreement from the date of its execution. If the union does not represent a majority at the time of contract execution, but later achieves a majority in a stable unit, the Board deems the contract to be initially a § 8(f) agreement that is later converted to a § 9(a) agreement. In either situation, once the contract becomes a § 9(a) agreement, it is binding for the term of the agreement under the "contract bar" principle.[2] On the other hand, when a construction industry employer has no stable complement and hires its employees on a project-by-project basis with little employee carryover from site to site,

> "majority status among employees at a given jobsite is not presumed to carry over automatically to future sites and 'the union must demonstrate its majority status at each new jobsite in order to invoke the provisions of Section 8(a)(5) of the Act.' "

Hageman Underground Construction, supra, at n.7, *citing Dee Cee Floor Covering, Inc.*, 232 NLRB 421 (1977), 1977–78 CCH NLRB ¶ 18,658.

II. *Application of the Legal Standard to this Case.*

As we have stated, the Board found that on December 10, 1977, the Company had established a permanent complement of at least six ironworkers which it maintained until the outbreak of a strike in late November, 1978. However, only six of the Company's 13 employees, on December 10, 1977, the date of the agreement between the Union and the Company, had been working there more than three weeks prior to that date. Two of these six were not Union members and were not primarily employed as ironworkers. Only one of these six was employed by the Company during 1978. Of the entire complement of 13 employed on December 10, 1977, only two were still employed at the end of January, 1978. There also was evidence before the Board that 62 employees were referred from the Union hiring hall during 1978. Therefore, we conclude that there was not substantial evidence to support the Board's finding that there was a permanent and stable work force at the time of the agreement between the Union and the Company.

The facts of this case, thus, clearly distinguish it from the cases relied on by the Board. For example, in *Precision Striping, supra,* the employer was found to have employed the same five persons from September, 1977 until the contract was repudiated in March, 1978. 245 NLRB No. 34 at n.10. Similarly, in *Hageman Underground Construction, supra,* three identifiable backhoe operators were transferred by the company from project to project. These three were held to constitute a stable unit because the company operated only four backhoes in all. 253 NLRB No. 7, 1980–81 CCH NLRB at 28,246–47.

The Board made no finding as to whether or not the Company's force of ironworkers had become a permanent and stable unit at any time after January, 1978. The Board now contends that at the time of the strike in November, 1978, there were six workers who constituted the entire ironworker complement and that they had worked for the Company on a relatively continuous basis throughout 1978.[3] The Board, however, did not rely upon this evidence to find that the workforce of ironworkers became permanent and stable during the latter part of 1978. Thus, the facts relied on in the Board's brief cannot be relied upon by us to support the Board's order. As the Court stated in *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444, 85 S.Ct. 1061, 1064, 13 L.Ed.2d 951 (1965):

> "[T]he integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action * * *' *Burlington Truck Lines v. United States, supra,* [371 U.S. 156] at 168 [83 S.Ct. 239 at 245, 9 L.Ed.2d 207]; see *Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 [67 S.Ct. 1575, 1577, 91 L.Ed. 1995]. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review."

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[2] Under the "contract bar" rule, the Board will ordinarily not entertain a challenge to an incumbent union's majority status during the term of an agreement of three years duration or less. *Pioneer Inn Associates, supra,* 578 F.2d at 838; *General Cable Corp.*, 139 NLRB 1123, 1124 (1962); *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955).

[3] The Board's brief names these six ironworkers and states that two worked for the Company from January through November, three worked from April through November and one worked from May through November.

Because of his conclusion as to the stability of the Company's workforce on the date the 1977 agreement was executed and his application of the "contract bar" rule, the ALJ did not reach the question of whether the Union had majority support at any other time prior to the repudiation of the agreement. The Company claims that it employed no Union members at the time it repudiated the agreement. If this is true, the Company cannot be found to have committed an unfair labor practice, unless the Board finds that at some time prior to the repudiation of the 1977 agreement, the workforce in the bargaining unit had become permanent and stable and the Union obtained majority support within the unit at that time. Otherwise, the Union must demonstrate its majority at each new jobsite in order to invoke the provisions of § 8(a)(5) of the Act. *Dee Cee Floor Covering, supra,* 1977–78 CCH NLRB at 31,024.

CONCLUSION

The Company's petition for review is granted and the Board's order is vacated. The Board's cross-petition for enforcement of its order is denied. We remand to the Board for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

R.W. Harmon & Sons, Inc. v. NLRB

664 F.2d 248 (10th Cir.), November 16, 1981—246 NLRB 454

On petition to review Board Order

Before BARRETT and LOGAN, Circuit Judges, and O'CONNOR, District Judge*

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LOGAN, Circuit Judge: R. W. Harmon & Sons, Inc. (Harmon or petitioner) seeks review of two orders of the National Labor Relations Board (Board) asserting jurisdiction over petitioner's activities. Harmon is a corporation engaged in providing school bus and other charter bus transportation services in nine states. It presently provides school bus services to approximately seventy-three public school districts. The challenged Board orders

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arose out of petitioner's refusals to bargain with Service Employees Union Local 513 (union), which represents school bus drivers in Wichita, Kansas and O'Fallon, Missouri.[1]

Harmon contests the Board's jurisdictional authority on two grounds. It argues, first, Harmon's activities are essentially local in character and do not affect interstate commerce; and, second, each school board so fully controls employment conditions and restricts Harmon's ability to engage in meaningful collective bargaining with its bus drivers, that Harmon shares the school board's governmental exemption from Board jurisdiction, as provided in section 2(2) of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(2). Petitioner also argues that the Board abused its discretion when it abandoned its former test for asserting jurisdiction over school bus operators.

The two cases consolidated here involve Harmon's contracts to provide school bus transportation in the Sedgwick County school district in Wichita, Kansas and the Fort Zumwalt school district in O'Fallon, Missouri. In both contracts the school districts require that drivers possess valid chauffeur's licenses and meet state qualifications for school bus drivers. The school districts have authority to reject applicants for bus driver positions, and the contracts allow the school districts to recommend that Harmon dismiss, discipline, or transfer drivers to other routes. Additionally, the school boards establish the bus routes and route schedules. Harmon hires and trains the drivers, determines their wage rates and benefits, and regularly monitors and supervises their performance.

In 1978 the union filed representation petitions with the Board's Regional Director, seeking certification as the collective bargaining representative of Harmon's bus drivers in both school districts. Following the representation hearings, the Regional Director ordered elections, rejecting Harmon's contentions that its operations were purely local in character or were so controlled by the school districts that the Board could not assert jurisdiction over it. The union won the elections and was then certified as the drivers' exclusive bargaining representative.

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*Honorable Earl E. O'Connor of the United States District Court for the District of Kansas, sitting by designation.

[1] To obtain judicial review of a Board decision in either a representation proceeding or an election, an employer must refuse to bargain with the employee representative, which will result in an unfair labor practice charge against the employer. *Magnesium Casting Co. v. NLRB,* 401 U.S. 137, 139, 91 S.Ct. 599, 600, 27 L.Ed.2d 735 (1971).

When Harmon refused to bargain, the union filed unfair labor practice charges. In its defense Harmon again asserted that the Board lacked jurisdiction. In both cases the Board granted summary judgment against Harmon because it found the company raised no issues it had not or could not have litigated in prior representation proceedings. It also found that by refusing to bargain, Harmon violated sections 8(a)(1) and (5) of the NLRA, 29 U.S.C. § 158(a)(1) and (5). This appeal followed.

We first consider the jurisdictional issues. Harmon argues that because its business is essentially local in character its labor activities do not affect interstate commerce. Congress vested the Board with the "fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S.Ct. 312, 313, 9 L.Ed.2d 279 (1963) (emphasis in original). Cases determining the Board's jurisdiction have focused upon the employer's activities. The Board may regulate any business if it is engaged in interstate commerce; or even if it is essentially local in nature, if its activities affect interstate commerce. *E. g., Community Currency Exchange, Inc. v. NLRB,* 471 F.2d 39, 41 (7th Cir. 1972); *cf. NLRB v. Merrill,* 388 F.2d 514, 518 (10th Cir. 1968) (Board may consider all of the employer's business operations). Contrary to Harmon's assertions that its activities are essentially local and do not affect interstate commerce, Harmon admits that it has annual revenues of more than $16,000,000 from extensive operations in nine states, and that for use in its business activities in Kansas and Missouri, it annually purchases

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thousands of dollars of goods originating outside those states. These factors clearly bring Harmon within the Board's statutory jurisdiction.

Petitioner next argues that the Board should decline to exercise jurisdiction because of the extent to which the school districts, which are exempt under NLRA section 2(2), control the conditions of employment. The Board may exercise its jurisdiction only over statutory employers, employees, and labor organizations. Section 2(2) exempts from the definition of "employer" any "state or political subdivision thereof." 29 U.S.C. §152(2). Courts have interpreted section 2(2) to prohibit the Board from asserting jurisdiction over private employers that perform services for exempt governmental entities if the employer does not "retain sufficient control over the employment relationship to engage in meaningful collective bargaining." *Board of Trustees of Memorial Hospital v. NLRB,* 624 F.2d 177, 185 (10th Cir. 1980); *NLRB v. Pope Maintenance Corp.,* 573 F.2d 898, 902 (5th Cir. 1978).

Whether an employer retains sufficient control over the employment relationship is a question of fact. We must accept the Board's resolution of the question "unless unsupported by substantial evidence on the record considered as a whole, or unless arbitrary or capricious." *Id.* at 903; *accord, NLRB v. St. Louis Comprehensive Neighborhood Health Center,* 633 F.2d 1268, 1272 (8th Cir. 1980). The record supports the Board's conclusion that petitioner retains substantial control over most employment conditions. Harmon controls the basic bargaining subjects: wages, seniority, grievance procedures, vacation, insurance, and retirement plans.[2]

Harmon contends that the school districts' authority to reject job applicants and to recommend dismissal of a driver effectively eliminates Harmon's ability to engage in meaningful collective bargaining. We disagree. Courts view the absolute power to hire and fire workers as a relevant but not essential indication of an employer-employee relationship, *e. g., NLRB v. E. C. Atkins & Co.,* 331 U.S. 398, 413, 67 S.Ct. 1265, 1273, 91 L.Ed. 1563 (1947), and have affirmed the Board's jurisdictional authority over an employer that has yielded some control over hiring and discharge to a governmental entity. *Zapex Corp. v. NLRB,* 621 F.2d 328, 333 (9th Cir. 1980); *Herbert Harvey, Inc. v. NLRB,* 424 F.2d 770, 778-79 (D.C. Cir. 1969). Even if the school districts vigorously exercise their authority to reject applicants or recommend dismissal of drivers, Harmon still would control and could bargain over most employment conditions. Moreover, the school districts only infrequently have exercised their authority to reject applicants or recommend dismissal. Harmon officials testified that between them the two school districts had rejected only two applicants Harmon had approved and had recommended dismissal on just four occasions, and that in all but one instance Harmon transferred rather than dismissed the drivers.

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[2] Although Harmon presently does not provide vacation time, insurance, or retirement plans, it admits it has the authority to grant these benefits.

Harmon also emphasizes that it cannot bargain about bus routes, time schedules, and days of operation because the school districts specify those terms. The jurisdictional test, however, does not require an employer to control all terms and conditions of employment, but only enough control to bargain effectively. Since Harmon controls wages and benefits—the bread and butter issues of collective bargaining—it can engage in meaningful bargaining.

Finally, Harmon argues that the Board abused its discretion when it abandoned its earlier "intimate connection" test. Prior to *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the Board utilized a two-pronged test to determine whether to assert jurisdiction over enterprises performing services for governmental entities. First, the Board would determine whether the private employer retained sufficient control over employment conditions to bargain effectively with a union. Second, even if the employer could bargain effectively, the

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Board would not exercise its jurisdiction if it found that the private employer served a function that was "intimately connected" with the governmental entity. The Board had considered school bus transportation a function "intimately connected" with the school districts and declined jurisdiction over companies providing school bus transportation. *E. g., Roesch Lines, Inc.*, 224 NLRB 203 (1976). In *National Transportation Service*, however, the Board abandoned the test's second prong and for the first time asserted jurisdiction over a bus transportation company.

Harmon makes various arguments that the Board abused its discretion in abandoning the "intimate connection" prong of the test, including that it should have followed the rulemaking procedures of the Administrative Procedure Act. *See* 5 U.S.C. § 553. We need not address Harmon's claims because it did not raise them until the unfair labor practice proceedings. A party cannot raise an issue in an unfair labor practice proceeding or on appeal that could have been, but was not, raised in the representation hearing.[3] *St. Anthony Hospital Systems v. NLRB*, 655 F.2d 1028, 1030 (10th Cir. 1981); 29 C.F.R. § 102.67(f) (1981).[4] While there is an exception to this rule if the party can demonstrate compelling circumstances, *NLRB v. Austin Development Center, Inc.*, 606 F.2d 785, 788 (7th Cir. 1979), Harmon has not suggested any compelling circumstances, and we decline to address the merits of this issue.

The Board's order is therefore enforced.

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[3] Although the Fort Zumwalt representation hearing took place before the Board decided *National Transportation Service*, the Wichita hearing occurred after that decision. At the Wichita hearing Harmon referred to *National Transportation Service*, but did not argue that the Board's decision in that case was an abuse of discretion.

[4] 29 C.F.R. § 102.67(f) (1981) provides, in pertinent part:

"Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding."

Prudential Insurance Company of America v. NLRB

661 F.2d 398 (5th Cir.), November 16, 1981—251 NLRB 1591

On petition to review Board Order

Before TUTTLE, RONEY and ANDERSON, Circuit Judges

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RONEY, Circuit Judge: This petition involves an employee's right to have a union representative present at an investigatory interview that the employee reasonably believes would result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). The Prudential Insurance Company of America petitions this Court to set aside an order of the National Labor Relations Board requiring it to cease and desist from violating that *Weingarten* right. Finding that the Union waived the *Weingarten* right in its collective bargaining agreement with Prudential, we deny enforcement of the Board's order.

Neal Bowser was a district agent with Prudential. One of his responsibilities was to keep accurate premium payment records in an Agency Record Book (ARB) so the company could determine which policies were active and which had lapsed. Because of discrepancies in some of Bowser's records, his district manager conducted an audit of

Bowser's ARB and found a number of policies whose current status could not be determined. A meeting with Bowser, his immediate supervisor, and the manager was set up for 11:15 a. m. on May 11, 1979. Bowser asked a union representative to attend the meeting, and the manager approved the request. Without advance notice, however, the meeting was moved up to 10:00 a. m. and started without the union representative. After five minutes of questioning about his ARB, Bowser asked for and was denied union representation. He continued the meeting under protest. Later, a union grievance committee member was denied permission to join the meeting as Bowser's representative. The manager subsequently recommended that Bowser be discharged.

The Union filed an unfair labor practice charge. The Administrative Law Judge found that although the interview was investigatory in nature, Bowser had no right to union representation because the information sought by Prudential was necessary for the conduct of its business and could only be obtained from Bowser. The Board, however, reversed the ALJ and found an unfair labor practice.

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The first question in a case like this is whether Bowser's meeting with his supervisor and manager was an interview covered by *Weingarten*. For the purpose of this decision, we assume that the *Weingarten* criteria were met: it was an investigatory interview in which Bowser was questioned about his ARB, records, and policies; he reasonably feared disciplinary action; and he asked for union representation. We assume Bowser had a right to have a union representative present during the interview unless it was waived.

Although Prudential argues that *Weingarten* should not apply to the insurance industry due to its special nature, no authority is cited for this proposition, the argument relies in part upon some of the arguments disregarded by the Supreme Court in *Weingarten*, and there is no base upon which this Court could build an exception to *Weingarten* for the insurance industry.

The question then is whether the bargaining agreement with the Union waives such right. By the express language in the agreement, it would seem to do just that. The agreement provides:

> The Union further agrees that neither the Union nor its members shall interfere with the right of the Employer: * * *
>
> To interview any Agent with respect to any phase of his work without the grievance committee being present.

Confronted with this language, the Board held that the clause did not effectively waive the *Weingarten* right because it was originally adopted before such right was recognized and it referred to "grievance committee" rather than "union representative."

Since the *Weingarten* right to representation at an interview with the employer "plainly effectuates the most fundamental purposes of the Act," *Weingarten*, 420 U.S. at 261, 95 S.Ct. at 966, an initial question is whether it can be waived by a union contract. The *Weingarten* decision provides no clear indication whether a contractual waiver of this important right is permissible. 420 U.S. at 275 n.8 (Powell, J., dissenting). The Board has not yet ruled on the question of waiver, but the Board's General Counsel has issued a formal opinion holding that a waiver would be valid. *Southern California Edison Co.*, Case 31–CA–7526, 7 Advise Mem.Rptr. ¶ 17, 102 (Division of Advice, July 12, 1978).

Other congressionally given fundamental rights, such as the right to strike, may be bargained away contractually by the union. *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956). *See also NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832 (1953). Since the right to representation only inheres upon the employee's request, it is clear that the employee's silence can be an effective waiver of the right. Since the individual can waive his *Weingarten* right and the Supreme Court has recognized the right of a contractual waiver for other such fundamental rights, it would appear that a contractual waiver of the *Weingarten* right is possible.

Identifying the *Weingarten* right as an individual right does not mean that it cannot be contractually waived by the union. A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and accepts advantages it believes are in the best interest of the employees it represents. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337–38, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953). This flexibility includes the right of the union to waive some employee rights, even the employee's individual statutory rights. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 455, 77 S.Ct. 912, 917, 1 L.Ed.2d 972 (1957); *NLRB v. Mid-States Metal Products, Inc.,* 403 F.2d 702, 704–05 (5th Cir. 1968). Courts which have invalidated a clear contractual waiver of an

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employee's individual statutory right have done so only when the waived right affects the employee's right to exercise his basic choice of bargaining representative. *See NLRB v. Magnavox Co. of Tennessee,* 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974). *Compare NLRB v. Mid-States Metal Products, Inc.,* 403 F.2d 702 (5th Cir. 1968) *with Mason & Hanger-Silas Mason Co. v. NLRB,* 405 F.2d 1 (5th Cir. 1968). The union should therefore be able to waive the employee's *Weingarten* right for other concessions during negotiations.

Such a contractual waiver, however, must be "clear and unmistakable." *NLRB v. Item Co.,* 220 F.2d 956, 958–59 (5th Cir.), *cert. denied,* 350 U.S. 836, 76 S.Ct. 73, 100 L.Ed. 746 (1955). The Board argues that the no-union-representation-at-interviews clause of the collective bargaining agreement is not a clear and unmistakable waiver because it was agreed to initially long before *Weingarten* was decided, because it contains a reference to "the grievance committee" being present rather than a "union representative," and because neither side focused on the *Weingarten* right in the negotiations. To understand what the parties intended by the contract clause it is necessary to review the history of negotiations affecting this clause.

Following an incident involving alleged harassment of an employee during an investigatory interview, the clause was put in Prudential's agreement with the Union in 1956. *Weingarten* was decided in 1975. There have been three agreements negotiated since *Weingarten,* and the record has numerous references to that decision. Prior to 1975, the Union negotiated for representation during all interviews. It has since negotiated for representation during all "abusive" interviews. The Union asserted a right, similar to *Weingarten,* to union representation at the request of the employee when the employee determined the interview was "abusive." The union representative, like the representative in *Weingarten,* would not actively participate in the interview. While the Union never stated it was expressly waiving the *Weingarten* right, the record of the negotiations indicate the Union was aware of *Weingarten* and that its attempt to have union representation at abusive meeting compassed the *Weingarten*-type of interview.

Throughout the negotiations, Prudential maintained the stand that union representation in any employee interview was an interference with its business. Although the Union indicated that Prudential's position was contrary to the law, Prudential made clear that it considered the clause a waiver of the *Weingarten* right. Given Prudential's position and the Union's acquiescence, it is unmistakable that the Union waived the *Weingarten* right. Indeed, it is not clear what the clause waived if it did not waive the Union's *Weingarten* right. *Cf. Retail Clerks International Association Local No. 455, AFL-CIO v. NLRB,* 510 F.2d 802, 805 (D.C.Cir.1975) (contract provision should be interpreted to give it meaning). As for the reference to the "grievance committee" rather than to a "union representative," Prudential's practices recognize the grievance committee as essentially the same as the union representative in each district office.

We hold that the Union agreement waived the *Weingarten* right which was the basis of the unfair labor charge. We therefore deny enforcement of the Board's order.

ENFORCEMENT DENIED.

General Thermo, Inc. v. NLRB

664 F.2d 195 (8th Cir.), November 20, 1981—250 NLRB 1260

On petition to set aside Board Order

Before HEANEY and HENLEY, Circuit Judges, and NICHOL,* Senior District Judge

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HENLEY, Circuit Judge: General Thermo, Inc. petitions this court to set aside an order of the National Labor Relations Board finding that it engaged in unfair labor practices when its assistant plant manager, Ronald Bohn, asked questions about support for a union and indicated his opposition to it, and when Bohn fired an employee, Richard McMahon. The NLRB cross-petitions for enforcement of its order. This court has jurisdiction pursuant to 29 U.S.C. § 160(e) and (f), the alleged unfair labor practices having taken place in Maquoketa, Iowa, within this circuit.

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*The Honorable Fred J. Nichol, Senior District Judge, District of South Dakota, sitting by designation.

The Company makes radiators and industrial heat transfer units, and employs about 125 people. McMahon was employed as a radiator assembler from January 20, 1977 until his discharge on September 26, 1978.

1. Bohn's questions and statements about the Union.

On August 21, 1978 McMahon and two other employees, Melva Polkinghorn and Clayton Shady, discussed various problems at the plant—safety hazards, disparate wages for women, material shortages, and equipment problems. Polkinghorn suggested that they needed a union, and McMahon and Shady agreed with her. Polkinghorn stated that she knew of some people to contact about forming a union.

Shortly thereafter McMahon made efforts to contact them. He sent his wife to Dubuque, Iowa to discuss union organizing with a UAW representative. McMahon then arranged for an organizational meeting to take place at his house on September 20. The meeting was rescheduled for October 5 (several days after McMahon's discharge) because of a conflict in the UAW representative's schedule. At this meeting only seven or eight authorization cards were collected, and no further meetings have been held.

By the time of the Company picnic on September 9, management was aware that some employee support for a union existed. At the picnic Ronald Bohn, who had only begun working at the Company at the beginning of September, introduced himself to employees and conversed with them. He was asked about his past employment, and he responded that he had worked at Young Radiator (a competitor of General Thermo). In the course of the conversation he mentioned a nine and one-half month strike which had occurred at Young Radiator, and stated that both the company and the employees lost during the strike.

One of the groups Bohn approached included Victor DuBois and Clarence Polkinghorn. After introducing himself, Bohn asked whether they had any complaints about the Company. DuBois replied that some newer employees earned more money than long time employees. Bohn promised to look into it, and then inquired what the people in the group thought of the union. He also indicated that he knew that McMahon and Shady were involved, and had heard that a woman was involved but did not know who she was. Clarence Polkinghorn knew that the woman was his former wife, Melva, and went to get her.

Melva shortly joined the group. Bohn expressed the opinion that employees did not need a union, and that problems could be worked out. He referred to the strike at Young, where, he asserted, the union did not back up employees. According to Melva Polkinghorn and DuBois, Bohn also said that big shots in a union could be fired.

Later in the afternoon McMahon joined a group which included Bohn, Charles Gilmore, the Polkinghorns, and an employee named Huey. When Huey complained that employees with less seniority than his were earning more than he and that certain work conditions were not right, Bohn responded that he was there to straighten things out. McMahon, who had been drinking, interjected that the only way to straighten things out was to get a union. Bohn asked if he was the one who was starting a union, and McMahon admitted that he was. The talk became loud and heated, with McMahon and Bohn swearing. According to McMahon, Charles Gilmore (a lead man)[1] declared that McMahon and Shady were nothing but troublemakers, and McMahon had only two weeks left.

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A few months after the picnic, Bohn gave Melva Polkinghorn a raise, and told her to quit badmouthing the Company. The raise was not part of a plant-wide increase.

The ALJ found that questions at the picnic amounted to unlawful interrogation, and gave the employees the impression that their union activities were under surveillance. He further found that the "threat" to Melva Polkinghorn, to quit bad-mouthing the Company, could only refer to her union activities. Such an admonition, he concluded, interfered with Polkinghorn's protected rights under the Act. The Board adopted both findings of unlawful conduct, and ordered the Company to post an appropriate notice.

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[1] The ALJ found that Charles Gilmore was not a supervisor, and thus his conduct could not be attributed to the Company. Charles Gilmore's status is not an issue on appeal.

Five circumstances deserve consideration in unlawful interrogation cases:

> a history of employer hostility and discrimination, the nature of the information sought (*e. g.*, was the interrogator seeking information from which he could take action against individual employees), the identity of the questioner (*i. e.*, what was his position in the company), the place and method of interrogation, and the truthfulness of the reply (*e. g.*, did the interrogation inspire fear leading to evasive answers).

NLRB v. Ritchie Mfg. Co., 354 F.2d 90, 99 (8th Cir. 1965).

Applying these factors to the instant case, we think that no violation of the Act occurred at the picnic. The questioning about the union was isolated and casual, and took place in a recreational atmosphere. No one gave evasive answers, and this indicates lack of fear among the employees. Finally, other than the discharge of McMahon (discussed *infra*), there was no evidence of Company action against individual employees.

We find the evidence insufficient to support the conclusion that the Act was violated when Bohn told Polkinghorn to quit "bad-mouthing" the Company. This comment occurred three months after the only organizational meeting. Unlike the Board, we are not willing to assume that the comment referred to union activity.

2. The discharge of McMahon.

The Company maintains that McMahon was a problem employee, and the record supports this contention. At various times he failed to maintain a satisfactory level of production, and his attendance intermittently was poor. His foreman, Tom Gilmore, often had difficulty getting him to wear safety glasses, and when he persuaded McMahon to put them on there was no assurance that they would stay on. In mid-May, 1978 Gilmore discussed McMahon's work problems with the plant manager, Miller, but at that time Gilmore did not recommend discharge. In July Gilmore recommended discharge, but Miller disagreed, stating that they should make every effort to salvage McMahon as an employee.[2]

On the morning of September 26, 1978 an employee named Bickford heard McMahon say that he was going to kick the shit out of Rick Starr (another employee). Bickford repeated what he had heard to Charles Gilmore, who reported the matter to Bohn.

Bohn warned Starr to stay away from McMahon, and then called McMahon to his office. He also had Tom Gilmore come. According to Bohn and Gilmore, they wanted to ask about the reported threat to Starr, and they had not made any decision to discharge or even discipline McMahon. However, in light of the fact that Gilmore may have been building a case against McMahon, the possibility of adverse action unquestionably existed.

According to Bohn and Gilmore, the first thing Bohn said was that he had heard that McMahon threatened Starr. McMahon vehemently denied this charge, and used considerable profanity. According to Gilmore, Bohn cursed back at him. McMahon asked to face his accusers, and Bohn refused. Finally, Bohn fired McMahon.

In contrast, McMahon testified that the first thing Bohn said to him in the interview was that he (Bohn) had said at the picnic that he would get rid of all troublemakers, and that four or five people would quit if he did not fire McMahon (thus indicating that Bohn had already made the decision to fire McMahon). Bohn then referred to the reported threat to Starr. McMahon then appealed to Gilmore and also asked that plant manager Miller be brought in to corroborate McMahon's assertion that he did not talk about people behind their backs, and that he was the sort of person who would confront someone face-to-face if he had something to say. McMahon denied cursing, but the ALJ discredited him on this point.

The ALJ found that the Company had ample ground to discharge McMahon, and that, therefore, the discharge did not violate the Act, even if McMahon's discharge was motivated in part by his union activities. He found that McMahon's poor work habits, low production, and refusal to wear safety glasses were legitimate reasons for the discharge. He found that it was unnecessary to decide whether Bohn had decided to fire McMahon before the interview.

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[2] McMahon, who is illiterate, has a wife and four children to support.

The Board reversed the ALJ on the issue of the legality of the discharge. It found that the complaints of McMahon's poor work habits, low production, and refusal to wear safety glasses were too remote in time[3] to be the real reasons for his discharge. It further found that McMahon's loud and profane behavior at the meeting could not be a justification for the discharge, because this behavior was typical of him and cursing was common at the plant.

The existence of a good reason for discharge does not negate a violation of the Act if the discharge is actually for union activity, *NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 233 (8th Cir. 1966). On the present state of the record, we are unable to determine what the actual reason for McMahon's discharge was. We think the Board erred in part in overturning the finding of the ALJ that poor performance and refusal to wear safety glasses were not part of the reason for McMahon's discharge. Complaints on these matters and Gilmore's recommendation of termination to plant manager Miller both occurred before McMahon was involved in organizing efforts. However, these faults of McMahon do not of themselves explain why the discharge occurred when it actually did and, indeed, the faults may not have been the precipitating cause of the discharge.

The timing of the discharge was suspicious, coming only a short time after the Company learned of McMahon's union activity. However, McMahon's profanity at the meeting, coupled with his previous shortcomings, could well explain the timing of his discharge. According to Bohn and Gilmore's version of the meeting, McMahon's behavior was very insubordinate and insulting.[4] We cannot agree with the Board that because the Company tolerated foul language from McMahon and others before that his profanity at the meeting

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was a pretext for discharge. Cursing at one's peers in a work situation differs from arguing profanely with one's supervisor in a meeting called to investigate reports of a threat.

The ALJ and the Board did not specifically determine whether Bohn made the decision to fire McMahon before the meeting or during the meeting. Rather, the Board noted that Bohn chose to confront McMahon only with the single issue of alleged threats and discharged him at the point when Bohn decided McMahon's loud and abusive protestations had become excessive. It then noted that other reasons mentioned in the post-discharge memorandum were not communicated to McMahon at the time of discharge, and from these facts drew the inference that the reasons were constructed as an afterthought to conceal an unlawful motive for the discharge.

This reasoning, however, in a way begs the question. It assumes without finding an answer to the question what happened at the meeting. If McMahon became so loud, profane and abusive at the meeting that discussion with him was impossible, then failure to mention all of the reasons for discharge would hardly support the inference that the reasons were pretextual and the discharge unlawful.

Resolution of the basic question requires in large measure a credibility determination: whether, as McMahon testified, Bohn's first words at the meeting indicated an intention to fire McMahon, or whether, as Bohn and Gilmore testified, no decision on disciplinary action had been made at the time the meeting started. Credibility questions initially are for the ALJ, not this court, and in present circumstances we cannot say that the Board's decision is supported by substantial evidence or by adequate reasoning. Accordingly, the Board is at liberty to conduct further proceedings looking toward a determination of what actually happened at the meeting of September 26, 1978 and the inferences to be drawn from the facts.

Enforcement is denied. The portion of the Board's decision relating to McMahon's discharge is remanded for such further proceedings as may be appropriate.

Pioneer Finishing Corporation v. NLRB

667 F.2d 199 (1st Cir.), November 23, 1981;
certiorari denied April 18, 1983—247 NLRB 1299

On petition to review Board Order

Before COFFIN, Chief Judge, ALDRICH and

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[3] There were three written warnings on safety glasses, dated April 12, May 24, and July 12, 1978. There was a written warning dated August 9, 1978 concerning slow work.

[4] Insubordination is an adequate reason for discharge. *NLRB v. Red Top, Inc.*, 455 F.2d 721, 728 (8th Cir. 1972).

BREYER, Circuit Judges

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COFFIN, Chief Judge: Pioneer Finishing Corporation seeks review of an order issued by the National Labor Relations Board requiring it to reinstate three employees in the same or similar jobs from which they had been discharged, and the Board seeks enforcement of its order. After reviewing questions of law, and after finding that there is substantial evidence on the record to support the Board's conclusion that the discharge of two employees violated § 8(a)(1) of the National Labor Relations Act and the discharge of one violated §§ 8(a)(1) and 8(a)(3), we hold that the Board's order should be enforced.

Pioneer Finishing operates a factory in Fall River, Massachusetts, in which approximately 140 employees dye and finish textile products. The employees, unionized for a number of years, had negotiated a new collective bargaining agreement late in 1977. Although the wage provisions went into effect immediately, other provisions were deferred until the Company prepared a final copy of the agreement for signing.

Among the topics of negotiation was the question whether formation of a health and safety committee should be required by the agreement. Believing that the negotiators had agreed upon formation of such a committee, Union Shop Chairman Kenneth Pacheco was distressed to find that the final draft prepared by the Company in the spring of 1978 omitted reference to the committee. The Company took the position that the committee was to be implemented on a trial basis but not included in the contract. It is not clear whether, at that point, the contract had been signed or whether further negotiation was possible. Believing the issue still to be negotiable, Pacheco got the Union to schedule a meeting of employees to discuss the omission of the clause from the contract. He helped prepare a leaflet discussing working conditions at the plant and the status of the

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health and safety clause, and recommending that employees act by taking note of safety issues and by attending the Union meeting. He signed the leaflet as Shop Chairman and distributed the leaflet on the Company premises during his off-hours on May 2.

The leaflet stated in part that:

> "Pioneer Finishing is a dangerous place to work * * *. In 1977 alone, there were 28 serious accidents resulting in 2,248 hours of lost time and wages! Which of us will be victims of these crippling accidents in 1978? How many of us risk accidents daily because of holes in the floor, falling lights, defective trucks and machinery, etc.? Only an effective Health & Safety Committee can ensure a safer future for us all * * *.
>
> "The company wants the Health & Safety clause stricken from the contract * * *. The reason the company wants this is clear. After all, an effective Health & Safety Committee forcing the company to fix the hazards affecting you and I is bound to cost them money * * *."

On May 5, three days after Pacheco distributed the leaflet, he was suspended by Thomas Melucci, President of the Company. In a letter to the Union explaining the reasons for the discharge, Melucci assumed that the contract was in effect. He wrote that Pacheco had violated the contract because he did not have permission to distribute the leaflet and should instead have posted it on the bulletin board provided under the contract for official notices.[1] Melucci also stated that the leaflet disrupted the "harmonious relationship" between the Company and the Union guaranteed by the agreement because it contained false and inflammatory statements. Specifically the Company claimed that not all 28 accidents were either "serious" or "crippling", that there were no grounds for stating that the Company was not respecting the agreement reached during negotiation and that it was reneging because it did not wish to spend the money that would be required. Approximately a week later, Pacheco was discharged. [Matter not pertinent to printed opinion deleted.]

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[1] The two relevant clauses in the collective bargaining agreement state that:

"*Bulletin Boards:* The Employer agrees to provide space on its bulletin board for the posting of official notices relating to Union meetings and other Union affairs."

"*Access to Premises:* A representative or representatives of the Union shall have access to the plants of the Employer for the purpose of adjusting grievances, negotiating the settlement of disputes, investigating working conditions and generally for the purpose of carrying into effect the provisions and aims of this agreement. He shall make an appointment in advance of such visits. In any event, the representative of the Union shall on arrival at the plant clear through the regular channels of the Employer for receiving visitors and may be accompanied by a representative of the Employer on any visit into the plant."

The issue of Pacheco's discharge was submitted to a single arbitrator by agreement of Pacheco, the Union, and the Company. After a hearing, the arbitrator concluded that the Company was justified in discharging Pacheco. In reaching this conclusion, he found that Pacheco had entered the Company's premises and circulated the leaflets without permission in violation of the contract, that Pacheco's activity was not protected by virtue of his status as Shop Chairman, that the content of the leaflet grossly exaggerated safety conditions at the plant, and that it violated the contract by destroying the "harmonious relationship" between the Union and the Company. Pacheco protested this decision by filing a charge against the Company, claiming that his discharge violated §§8(a)(1) and 8(a)(3) of the Act. The administrative law judge (ALJ), after determining that he did not need to defer to the arbitrator's decision, found that the Company was not justified in discharging Pacheco because his activities were protected by the Act. The Board upheld that conclusion. [Matter not pertinent to printed opinion deleted.]

Deference to the Arbitrator

Although the Board is not required by statute to defer to the decision reached by an arbitrator, it has established a policy of

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deference to encourage the voluntary settlement of labor disputes. *Spielberg Manufacturing Company,* 112 N.L.R.B. 1080, 1082 (1955). Recognizing, however, that it also has the statutory responsibility to remedy unfair labor practices, it has defined criteria to determine when deference is appropriate: the arbitration proceedings must appear to have been fair and regular, all parties must have agreed to be bound, and the decision cannot be clearly repugnant to the purposes and policies of the Act. *Id.* In addition, the arbitrator must have considered the unfair labor practice issue. *Suburban Motor Freight, Inc.,* 247 N.L.R.B. No. 2 (Jan. 8, 1980); *Raytheon Company,* 140 N.L.R.B. 883, 884 (1963), *enf. denied on other grounds,* 326 F.2d 471 (1st Cir. 1964).

In choosing not to defer, the ALJ wrote that

> "The [arbitrator's] decision does refer to the concept of 'protected activity', but the arbitrator defines that term in a sense totally at odds with the statute, and his statement of the issue presented indicates that he felt confined solely to the contractual questions: "The issue before me was *not* whether certain employees thought unsafe conditions existed, but whether Pacheco exceeded the Contract in doing what he did' [emphasis in original] * * * . The arbitrator nowhere conveys an awareness of the statutory principles implicated by [the issue of Pacheco's right to engage in concerted activity], and his decision, in my view, abridges those principles."

Although not expressly so stating, the ALJ was in effect concluding that deference was not appropriate because the arbitrator had not considered the statutory issues and because the result was not consistent with the Act.

In reviewing the correctness of this conclusion, we look to whether the ALJ abused his discretion in deciding that the factors calling for deference were not present. *Liquor Salesmen's Union Local 2 v. NLRB,* 664 F.2d 318 at 326 & n.3 (2d Cir. 1981); *Ad Art, Inc. v. NLRB,* 645 F.2d 669, 674 (9th Cir. 1981); *NLRB v. Pincus Bros., Inc.,—Maxwell,* 620 F.2d 367, 372 (3d Cir. 1980). We find that there was no abuse of discretion primarily because the arbitrator did not adequately address the statutory issue.

The arbitrator's opinion clearly evidences that he was solely concerned with whether Pacheco had violated the contract by distributing the leaflets. Although he initially stated that the question was whether Pacheco was engaged in "protected activity", to determine if the activity was protected, he looked to whether the activity violated the contract. He found as violations Pacheco's unauthorized entry into the premises and the distribution of untruths that attempted to destroy the "harmonious relationship" protected by the contract.

There are occasions when consideration of the contractual issues may determine the statutory issues, and therefore allows the Board to find that the arbitrator necessarily and clearly, though not explicitly, considered the statutory issue. This occurs when the statutory and contractual issues are congruent because they rest upon the same factual determinations. *See, e.g., Liquor Salesmen's Union Local 2 v. NLRB, supra,* at 325; *Ad Art, Inc.*

v. NLRB, supra, 645 F.2d at 677; *Bloom v. NLRB,* 603 F.2d 1015, 1021 (D.C.Cir. 1979); *Bay Shipbuilding Corp.,* 251 N.L.R.B. No. 114 (Aug. 27, 1980).

In the case at bar, the finding that the contract was violated, even if taken as correct, does not of necessity determine that Pacheco had no protection under the statute. To so determine, the arbitrator would have had to consider the separate, statutory issues: whether the content of the leaflet was protected under the statute and whether the contract waived statutory rights to enter and to distribute the leaflet. These issues require individualized analysis and hence prevent deference where, as here, there is no indication that this analysis has been performed.

It is not enough that the parties raised the statutory issues before the arbitrator and that one might decide that he considered those issues by virtue of the fact that he chose instead to rest his decision on contractual grounds. Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute. *See Stephenson v. NLRB,* 550 F.2d 535, 540 (9th Cir. 1977). Moreover, it is quite clear that the arbitrator's decision did not reflect, directly or indirectly, consideration of any factors germane to the statutory issue. Although deference may advance the policies of the statute by encouraging voluntary settlement, in this instance the Board did not abuse its discretion by deciding not to defer to the arbitrator's award.

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Because we find that one of the deferral criteria was not met, we do not need also to review the ALJ's conclusion that the result was contrary to the purpose and policies of the Act. *Compare NLRB v. Max Factor and Co.,* 640 F.2d 197, 203 n.6 (9th Cir. 1980). Such a judgment, however, is implicit in our discussion below on the question whether substantial evidence supports the Board's finding that Pacheco's activities were protected under the Act.

Pacheco's Discharge

Having correctly decided that deference was not appropriate, the Board concluded that Pacheco's activities were protected under the statute and therefore could not be used as reason for his suspension and subsequent discharge. In so finding, the Board had to determine that the substance of the leaflet warranted protection under the Act, and that Pacheco had a protected right to be on the premises and to distribute leaflets. We review these findings to the extent of considering whether the Board applied the law properly and whether substantial evidence on the record as a whole supports its findings.

Examining first whether the message conveyed by Pacheco's activities was protected, we find ample evidence to support the Board. The leaflet dealt directly with an important condition of employment, the health and safety measures to be taken to protect employees. This is a topic of discussion falling clearly within the core of concerns protected by the Act. The action urged by the leaflet—inclusion of a health and safety clause in the contract—does not affect the status of this protection. Although the Company reasons that this call to reopen negotiations after a contract had been signed violated the contract and the Act by disrupting harmonious relations, substantial evidence exists to support the Board's finding that there was reason to question whether the contract had been signed by all parties at the time of Pacheco's activities. As a result, there may have been no contract to violate, and the courses of action suggested in the leaflet would not have eroded the respect for a finalized collective bargaining agreement required by the Act.

Lastly, the particular wording of the leaflet does not remove Pacheco's activities from the sphere of protection afforded by the statute. Although the language in the leaflet may have been inflammatory, the Act protects expression that may not be totally accurate. Inaccurate or misleading statements lose their protection only if they are "deliberately or maliciously false". *El Mundo Broadcasting Corp.,* 108 N.L.R.B. 1270, 1278–79 (1954). The Supreme Court has recognized that "rhetorical hyperbole" is common in labor disputes and must be protected, *Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 286, 94 S.Ct. 2770, 2782, 41 L.Ed.2d 745 (1974), and that the "vigorous exercise of [section 7 rights] must not be stifled by the threat of liability for the overenthusiastic use of rhetoric". *Id.* at 277, 94 S.Ct. at 2778.

While the portrayal of the 28 injuries as serious or crippling was not accurate, we agree with the Board's assessment that the leaflet's characterization of the injuries was "rhetorical hyperbole" not to be construed as fact by fellow employees. There is no evidence that any misstatements of fact were made maliciously or without some foundation in fact. *See El Mundo Broadcasting Corp., supra,* 108 N.L.R.B. at 1280. We also agree with the Board that the assertion that the company wished to save money is an argument typical to labor disputes, to be interpreted in such a light. Lastly, the Board had reason to conclude that Pacheco was not intentionally maligning the Company when he wrote that he did not think that it would live up to the agreement to include the health and safety clause in the contract. Pacheco genuinely believed that the Company had agreed to the clause during negotiations and that its failure to include the clause was the result of bad faith, not the Company's good faith understanding that the clause was not to be included.

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There remains the question whether the manner in which Pacheco distributed the leaflets removed him from the protection of the Act. He entered the premises during his off-hours and distributed the leaflets to the employees while they were working.

The Board is correct first in concluding that the contract, if in effect, did not waive the statutory right of employees to distribute Union materials. It limited the right of access of Union officials to the premises to the performance of specific duties, which did not include the distribution of literature. It also established the bulletin board as the place in which official notices should be posted. These specific restrictions cannot be interpreted, however, as a waiver of the right of employees to circulate leaflets that deal with the conditions of their employment. *See Ford Motor Co.,* 221 N.L.R.B. 663, 665 (1975) (contractual waiver of employees' rights to distribute union literature would be invalid).

Pacheco was in the unusual situation of being both an employee and, as Union Shop Chairman, a Union official. Although we have in the past recognized that a contract may validly restrict the rights that a union official would otherwise enjoy as an employee, *NLRB v. Wilson Freight Co.,* 604 F.2d 712, 726–27 (1st Cir. 1979), *cert. denied,* 445 U.S. 962, 100 S.Ct. 1650, 64 L.Ed.2d 238 (1980), Pacheco's activities here have not been specifically proscribed by the contract. When a union official is also an employee, it cannot be assumed that he had waived rights he would have as an employee unless he has done so explicitly or unless his activities are destructive to the collective bargaining process to which he is specifically committed as a union official. *Compare id.*

The fact that Pacheco was off-duty at the time that he entered the premises does not render his activity unprotected. Whether off-duty access is protected under the Act depends upon the balance between the employees' § 7 rights and the employer's private property rights. *GTE Lenkurt,* 204 N.L.R.B. 921 (1973). Although the Act cannot require access when a company has asserted its property rights by issuing a no-access rule, the balance shifts when the company has not taken a strong stand. In this instance, the Company has no rule preventing access but instead has in fact allowed non-working employees to enter the premises to distribute materials to working employees. Under these circumstances, we uphold the Board's finding that Pacheco's off-duty status did not remove his activity from the protection of the Act.

Finally, the fact that the leaflets were distributed to employees who were working does not justify Pacheco's discharge. Where distribution during working time is not specifically prohibited, distribution is protected as long as it does not interfere with production. *Daylin, Inc.,* 198 N.L.R.B. 281 (1972), *enf'd,* 496 F.2d 484 (6th Cir. 1974). There is no evidence that production was substantially impaired in this instance. We conclude, therefore, that the Board applied the law properly and that there is substantial evidence on the record to support the Board's conclusion that Pacheco was discharged for the performance of protected activities in violation of the Act.

[Remainder of opinion not published]

The Board's order shall be enforced.

Justak Brothers and Company, Inc. v. NLRB

664 F.2d 1074 (7th Cir.), November 25, 1981—253 NLRB 1054

On petition to review Board Order

Before SWYGERT, Senior Circuit Judge, and SPRECHER and BAUER, Circuit Judges

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SWYGERT, Senior Circuit Judge: Justak Brothers and Company, Inc. (hereinafter "the Company") has petitioned this court for review of an order of the National Labor Relations Board (hereinafter "the Board") pursuant to section 10(f) of the National Labor Relations Act, *as amended,* 29 U.S.C. §§ 151 *et seq.* (hereinafter "the Act"), 29 U.S.C. § 160(f). The Board has cross-applied for enforcement of its order pursuant to section 10(e) of the Act. Laborers Local Union 41, Laborers International Union of North America (hereinafter "the Union") intervened in this proceeding.

The Company supplies casual labor and vacuum truck waste removal services to industrial plants. Its work force consists of office employees, mechanics and mechanics' helpers, truck drivers, and laborers. In June 1979 the Union began an organizing campaign among the Company's laborers and truck drivers. On July 2 the Union filed a petition with the Board seeking an election at the Company. On July 12 the Company received the Union's request for bargaining. On July 23 the Union filed an unfair labor practice charge against the Company.

On September 28 the Board issued a complaint alleging that the Company (1) violated section 8(a)(1) by threatening and interrogating employees, promising and granting benefits to employees, and creating an impression of surveillance; (2) violated sections 8(a)(3) and (1) by discharging three employees; and (3) violated sections 8(a)(5) and (1) by refusing to bargain with the Union. After a hearing in December the Administrative Law Judge issued a decision on June 30, 1980 that sustained the allegations. On January 7, 1981 the Board affirmed the Administrative Law Judge's findings and conclusions. It adopted the recommended order that included the issuance of a *Gissel*-type bargaining order. The Company then filed this petition for review.

We review three issues. First, whether there is substantial evidence on the record as a whole to support the Board's finding that the Company violated section 8(a)(1) of the Act by restraining *the* coercing employees in the exercise of their section 7 rights. Second, whether there is substantial evidence on the record as a whole to support the Board's finding that the Company violated sections 8(a)(3) and (1) of the Act by discharging three employees because of their union activities. Third, whether the Board abused its discretion in finding a bargaining order necessary to remedy the Company's violations of sections 8(a)(5) and (1) of the Act of refusing to recognize and bargain with the Union.

I. The Independent Section 8(a)(1) Violations

The Company does not challenge the independent section 8(a)(1) violations. The provisions of the Board's order relating to these violations, therefore, are enforced. A

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discussion of these unfair labor practices is necessary, however, because their scope and nature are important factors in determining whether the Board properly issued a bargaining order. (*See* section III *infra.*)

In June 1979 the Union began an organizing campaign among the Company's laborers and truck drivers. On June 26 the Union held an organizational meeting where many of the Company's employees presented signed authorization cards to the Union representatives.

The Company's section 8(a)(1) violations began the next day. All of the Company's management, from owner Gary Justak to lower level supervisors,[1] committed these unfair labor practices. The violations fall into six categories: (1) threatening employees with discharge or layoff; (2) threatening employees with investigations and deportations by Immigration and Naturalization Service authorities; (3) creating the impression of surveillance of union activities; (4) interrogating employees about union activities; (5) promising better wages and medical coverage to thwart union organization; and (6) actually granting wage increases to thwart union organization.

II. Sections 8(a)(3) and 8(a)(1) Violations

A. Applicable Law

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against an employee "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." An employer violates section 8(a)(3) when it discharges an employee because of his union activities.

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[1] For a discussion of the supervisory status of the Company's "leadmen," *see* section III, *infra.*

The critical issue in a section 8(a)(3) claim is whether the employer's actions were motivated by anti-union considerations. *NLRB v. Gogin,* 575 F.2d 596, 601 (7th Cir. 1978); *Jay's Foods, Inc. v. NLRB,* 573 F.2d 438, 443 (7th Cir. 1978), *cert. denied,* 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978). Because motive is rarely open to direct proof, it is "to be determined by the Board from consideration of all the evidence and in making its determination the Board is free to rely on circumstantial, as well as direct evidence." *NLRB v. Gogin,* 575 F.2d at 601.

This court recently approved the Board's refinement of the analysis used to determine the causal relationship between the employee's protected activities and the employer's action. *Peavey Co. v. NLRB,* 648 F.2d 460 (7th Cir. 1981). Under this analysis:

> The General Counsel must first make a *prima facie* showing that the employee's protected conduct was a motivating factor in the employer's decision to discharge the employee. Once this is established, the burden shifts to the employer to demonstrate that he would have discharged the employee even in the absence of the protected conduct.

Peavey Co. v. NLRB, 648 F.2d at 461 (7th Cir. 1981). *See Statler Industries, Inc. v. NLRB,* 644 F.2d 902, 905 (1st Cir. 1981). If a causal relationship between the discharge and the protected activity is shown then the employer is liable unless he sustains his burden of proof. Furthermore, an employer's explanation need not be accepted if there is a reasonable basis for believing it "furnished the excuse rather than the reason for [an employer's] retaliatory action." *NLRB v. Thor Power Tool Co.,* 351 F.2d 584, 587 (7th Cir. 1965).

As noted, Company officials made numerous unlawful threats of discharge, layoff, plant shutdown, and deportation as soon as they became aware of the Union's organizational campaign. (*See* section I *supra.*) This court has held repeatedly that the employer's conduct and anti-union animus are significant factors in determining motive. *NLRB v. Gogin,* 575 F.2d 596, 601–02; *NLRB v. Tom Wood Pontiac, Inc.,* 447 F.2d 383, 386 (7th Cir. 1971); *NLRB v. Bedford Nugent Corp.,* 379 F.2d 528, 529 (7th Cir. 1967).

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Finally, this court "may not displace the Board's choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). *See W. W. Grainger, Inc. v. NLRB,* 582 F.2d 1118, 1120–21 (7th Cir. 1978). We will not pass on the credibility of witnesses, reweigh the evidence, or reject reasonable Board inferences simply because other inferences might also be reasonably drawn. *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 405, 82 S.Ct. 853, 854, 7 L.Ed.2d 829 (1962).

B. Illegal Discharges

On the morning of June 28, three truck drivers—Thomas Waugaman, David Clousing, and Eric Myers—signed union authorization cards. Waugaman and Clousing also solicited cards from other drivers.

1. Waugaman's discharge

The Company threatened to discharge Thomas Waugaman. Justak (the owner) told him, "You may get a union in here but you will not be here." Kritch told Clousing that Waugaman "was on his way out." On June 29, the day before Waugaman's alleged misconduct that was the ostensible basis for his discharge, Kritch told Waugaman that he would try to "get him" for work related infractions.

On June 30, the Company asserts that Waugaman failed to respond when paged. The credited testimony shows, however, that: (1) Waugaman was called in and worked most of Saturday; (2) he was told he could leave by the job site supervisor; (3) the supervisor said that he would telephone the Company and have Waugaman paged if he was needed further; and (4) Waugaman was not paged that day to return to the job site.

The Company relies on discredited testimony without showing exceptional circumstances that warrant overturning the Administrative Law Judge's credibility resolutions. *See NLRB v. Pitts-*

burgh S. S. Co., 337 U.S. 656, 659–60, 69 S.Ct. 1283, 1285–86, 93 L.Ed. 1602 (1949); *Electri-Flex Co. v. NLRB,* 570 F.2d 1327, 1331–32 (7th Cir. 1978), *cert. denied,* 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 256. For example, the Company claims that Waugaman lied to the job site supervisor on June 30 by telling him that his shift had ended. The Company however, never called the supervisor as a witness to rebut Waugaman's uncontradicted testimony that the supervisor told Waugaman he could leave. *Cf. International Union, UAW v. NLRB,* 459 F.2d 1329, 1336–39 (D.C.Cir. 1972).

The Board's finding that Waugaman was discharged for anti-union reasons had substantial support in the record.

2. Clousing's discharge

Clousing too was threatened. He was warned of a plant shutdown, told he was being fired for soliciting cards, and rehired on the condition he destroy the cards that he had in his possession.

On June 28, the day Clousing was observed soliciting authorization cards, the Company inserted a warning in his personnel file for taking an overly-long lunch break. The credited testimony, however, shows that Clousing did not take a one-hour lunch break, was never told of the purported infraction and was never shown the warning. On July 2 the Company issued another warning to Clousing for arriving late for work. The credited evidence shows, however, that Clousing actually arrived at work early that day when he drove Myers to work. Moreover, as with the June 28 warning, Clousing was never told of the infraction or shown the warning.

Three weeks later the Company discharged Clousing. The Company asserts that Clousing quit voluntarily. The credited evidence shows, however, that Clousing was actually discharged because of his pro-Union activities.

We repeat that a reviewing court generally will not overturn the Administrative Law Judge's credibility resolutions. *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 405, 82 S.Ct. 853, 854, 7 L.Ed.2d 829 (1962). The Administrative Law Judge based credibility findings on the demeanor of the witnesses and on the inconsistencies in the testimony of Kritch and Justak. Kritch gave three different versions of Clousing's discharge, while Justak gave yet another. Clousing, on the other hand, testified consistently about the events surrounding his discharge. Furthermore, as noted, the two warnings in Clousing's file are suspicious. We see no basis for overturning the Administrative Law Judge's credibility resolutions or the inferences drawn therefrom.

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The Company asserts further that it would have justifiably discharged Clousing because he falsely told the Company that he missed work on July 24 because he had to take a sick child to the doctor. This contention lacks merit. The Company has contended all along that Clousing was not discharged. It was only after the Company's evidence was discredited that it argued that it would have discharged Clousing for lying. The evidence shows overwhelmingly that the Company suspected that Clousing was at the union hall on the day in question and that this suspicion was the actual reason for his discharge. In these circumstances Clousing's misconduct is no defense for the Company.

3. Myers' discharge

The Company discharged a third truck driver, Eric Myers, who had signed an authorization card on June 28.

The Company asserts that it discharged Myers for failing to answer a second beeper while enroute to the Company and for taking too long to report to the yard after the first page. The credited evidence shows, however, that Myers was not paged a second time. Moreover, Myers told Justak when he responded to the first page that it would take him a while to come in, and Justak replied, "That's OK * * * . Make it as soon as you can." Once again, we are presented with no basis for overturning the Administrative Law Judge's credibility resolutions.

Moreover, even if Myers' testimony is not believed, there is no credible evidence showing that his conduct was treated uniformly by the Company as a dischargeable offense. The record does not support the Company's contention that it had a consistently-applied policy of automatic termination for beeper violations. Moreover, witnesses did not testify that truck drivers were told to answer a page within a specific time or that they were told to stay within a specific distance from the Company.

The Board's order relating to all section 8(a)(3) violations is enforced.

III. Sections 8(a)(5) and (1) Violations

A. The Appropriate Unit

The Company contends that the Board erred in including certain employees in the unit and in excluding others. Congress has delegated the primary responsibility for determining the appropriateness of a collective bargaining unit to the Board. *NLRB v. Gogin,* 575 F.2d 596, 603 (7th Cir. 1978); *State Farm Mutual Automobile Ins. Co. v. NLRB,* 411 F.2d 356, 358 (7th Cir.), *cert. denied,* 396 U.S. 832, 90 S.Ct. 87, 24 L.Ed.2d 83 (1969). Its determination will not be overturned unless it is arbitrary and unreasonable. *South Prairie Construction Co. v. Local No. 627, Int'l Union,* 425 U.S. 800, 805, 96 S.Ct. 1842, 1844, 48 L.Ed.2d 382 (1976); *NLRB v. Gogin,* 575 F.2d at 603.

1. The J. B. Sanitation Employees

The Board found that there was no "community of interest" requiring the inclusion of the J. B. employees in the unit. The Board noted that the J. B. employees had separate supervisors, performed different tasks, and drove different trucks than the Company's drivers. Moreover, there were no transfer or exchange of duties, no common supervisors, and no similarity in pay structure. These findings justify the Board's exclusion of the J. B. employees from the bargaining unit. *NLRB v. Gogin,* 575 F.2d at 603 nn. 13 and 14.

2. Part-time Employees

The Board excluded Ruth Hicks, James Lampa, Timothy King, and Joseph

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Nowak from the unit because of the irregular nature of their part-time employment. Part-time employees may be included in a bargaining unit with full-time employees if the part-time employees work regularly. *NLRB v. Economy Food Center, Inc.,* 333 F.2d 468, 471 (7th Cir. 1964). The Board found, however, that these four individuals were employed only on a sporadic and intermittent basis. The exclusion of these employees from the bargaining unit is justified.

3. Francisco Arredondo, Silverio Gonzalez, Jesus Sanchez, and Sergio Herrada

The Company challenges the inclusion of these four employees in the unit because their personnel files reveal that they left the Company to return to Mexico. As the Board noted, however, all these employees were working for the Company on the July 12 demand date, had been working for at least four months previously, and continued to work for at least a month afterwards. There was no evidence showing that these employees were hired to work only until a definite termination date. The Board's inclusion of Arredondo, Gonzalez, Sanchez, and Herrada in the bargaining unit is justified.

4. Supervisory status

One of the Board's special functions is to determine whether a person is an "employee" or a "supervisor" within the meaning of the Act. This court has noted that the Board is entitled to a "large measure of informed discretion" in carrying out this task. *Dynamic Machine Co. v. NLRB,* 552 F.2d 1195, 1201 (7th Cir.), *cert. denied,* 434 U.S. 827, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977).

The Board excluded Parks, Vrabel, Godines, and Simko from the bargaining unit because they were supervisors. Their employment contracts designated the four as foremen; they wore hats distinguishing them from laborers; and their pay scale was more than twice that of the laborers. Their job functions were supervisory—they assigned work, directed employees to their jobs, checked employees' performances, sent employees home, and transferred employees between jobs. These findings justify the Board's designation of these men as supervisors. *NLRB v. Adam & Eve Cosmetics, Inc.,* 567 F.2d 723, 727–29 (7th Cir. 1977); *Dynamic Machine Co. v. NLRB,* 552 F.2d at 1200–01.

The Board included Enrique Miranda and Pedro Moreno in the bargaining unit because they were not supervisors. The two men were paid less than the leadmen, were designated laborers in their employment records, and did a laborer's work. These findings justify the inclusion of Miranda and Moreno in the bargaining unit.

The Board's determinations on the scope of the bargaining unit are upheld.

B. The Union's Majority

Seventy-nine employees were in the bargaining unit on July 12 when the Company received the Union's request for bargaining. The Union had received authorization cards from 42 of these employees. The Company challenges the validity of several of the cards.

The Company challenges Thomas Waugaman's card because of the alleged misinformation given him by Union representatives as to the purpose of the cards. Where the terms on the card are unambiguous, however, it must be counted unless a union adherent deliberately and clearly cancels its meaning. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 at 606, 89 S.Ct. 1918, 1936, 23 L.Ed.2d 547; *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 507 (7th Cir. 1980). The terms of the card here are clear, and there is no evidence of a deliberate cancellation.

The Company challenges Ancelmo Acosta's card because there is no evidence that anyone explained its meaning to him. The record shows he signed the card and turned it in at the June 26 organizational meeting. At this meeting the Union had employees interpreting in Spanish the remarks of the Union representatives. This challenge, therefore, lacks merit.

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The Company also challenges Carillo's, Gonzalez's, and Samarron's cards because of their alleged inability to understand English. There was no evidence in the record, however, indicating that these employees spoke only Spanish.

The Company challenges the cards of Altamirano, Moreno, and Martinez because the Company payroll records show that they began work on June 26 at 8:00 A.M., worked 11½ hours, and so could not have attended the organizational meeting. Substantial evidence in the record, however, showed that the Union meeting lasted as long as three hours (beginning at 5 or 5:30 p.m.) and that the card signing occurred at the end of the meeting. These cards were properly counted. *NLRB v. Philamon Labs, Inc.*, 298 F.2d 176, 180 (2d Cir.), *cert. denied*, 370 U.S. 919, 82 S.Ct. 1555, 8 L.Ed.2d 498 (1962).

Finally, the Company challenges the card of Felix Campos because his pretrial affidavit was admitted to authenticate his card. Campos's affidavit states that he attended the June 26 meeting and he authorized another employee to sign his name to his authorization card. The Company challenges the admissibility of this affidavit under Rule 804 of the Federal Rules of Evidence.

The Administrative Law Judge gave reasons justifying the affidavit's admission. Campos was unavailable because he could not be found. His affidavit had probative value because it explained the difference between the signatures on the authorization card and his W-4 form. The affidavit was given under oath—a person who willfully lies is subject to criminal penalties. The affidavit, therefore, had "equivalent guarantees of trustworthiness." *See Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 963-64 (3d Cir. 1978); *United States v. Lyon*, 567 F.2d 777, 784 (8th Cir.), *cert. denied*, 435 U.S. 918, 98 S.Ct. 1476, 55 L.Ed.2d 510 (1977). Finally, there was adequate notice because as soon as the General Counsel learned that Campos was unavailable, he informed the Company that he would introduce the affidavit. *United States v. Bailey*, 581 F.2d 341, 348 (3d Cir. 1978).

C. Bargaining order

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the Supreme Court upheld the Board's authority to issue bargaining orders on the basis of authorization cards whenever the employer has committed unfair labor practices that had "the tendency to undermine majority strength and impede the election process." 395 U.S. at 614, 89 S.Ct. at 1940. The determination of the appropriateness of a bargaining order is, like all remedies, entrusted to the sound discretion of the Board.

This court has required the Board to give reasons that justify its use of the bargaining order remedy. *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973). The purpose of this requirement is to permit the court to perform its task of judicial review. *Id.* at 1119; *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 509 (7th Cir. 1980). The requirement, therefore, must be understood in light of this purpose.[2] It is meant neither to burden the Board nor to curtail the issuance of bargaining orders. *Hedstrom v. NLRB,* 629 F.2d 305, 309 (3d Cir. 1980), *cert. denied,* ——— U.S. ———, 101 S.Ct. 1699, 68 L.Ed.2d 196 (1981). Elaborate explanations are not essential; indeed, scientific accuracy in estimating the impact of unfair labor practices is impossible. Rather, we only require that the Board delineate the factors that it considers in its estimation, and describe how these factors have been weighed. *See* 484 F.2d at 1118, n.16. In this case the Board identified and discussed the unfair labor practices it relied upon, noted their tendency to undermine the Union's majority—especially in regards to their lingering effects—and evaluated the adequacy of traditional remedies. Nothing more is necessary.

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[2] For example, even if the Board fails to justify its issuance of a bargaining order, as long as the record is clear this court may review it and affirm or deny the issuance of the order. *Walgreen Co. v. NLRB*, 509 F.2d 1014, 1018 (7th Cir. 1975); *C&W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 625-26 (7th Cir. 1978).

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Once the Board has spelled out the basis for its issuance of a bargaining order, this court's review is limited to whether the Board abused its discretion. The Board noted that from the very start of the Union's organizing campaign, the Company engaged in a systematic campaign of unfair labor practices designed to destroy the Union's support. (*See* sections I and II, *supra.*) These unfair labor practices were committed by almost all the Company's supervisors, including its highest corporate official. Moreover, the Company has made no effort to neutralize the effect of its threats of layoff, discharge, shutdown, and deportation. Common sense recognizes the dramatic and long term effects of such threats. *NLRB v. Gissel Packing Co.,* 395 U.S. at 587–89, 615, 619–20, 89 S.Ct. at 1926–27, 1940, 1942–43; *NLRB v. Jamaica Towing Co., Inc.,* 632 F.2d 208, 212–13 (2d Cir. 1980); *Bandag v. NLRB,* 583 F.2d 765, 772 (5th Cir. 1978).

The Board considered and rejected traditional remedies. The probable impact of unfair labor practices is increased when a small bargaining unit is involved. *NLRB v. Bighorn Beverage,* 614 F.2d 1238, 1243 (9th Cir. 1980); *NLRB v. Eagle Material Handling, Inc.,* 558 F.2d 160, 168 (3d Cir. 1977). The Company's violations are not minor. It engaged in surveillance of Union activities, discharged pro-Union employees, threatened layoffs and immigration investigation, and both promised and granted benefits to thwart unionization. Threats were not only made but executed. ("Actions speak louder than words," as the administrative law judge noted.) Under such circumstances, and after a careful review of the record, we fully agree with the Board that a bargaining order is an appropriate remedy.

The Company maintains that its employee turnover shows the inappropriateness of the bargaining order. It is well settled, however, that the Board may issue a bargaining order even if the Union represents only a minority when the order is entered. *Gissel,* 395 U.S. at 610, 89 S.Ct. at 1938. If we were to accept the Company's contention, an employer could engage in a scheme of unfair labor practices and yet escape a bargaining order by delaying and waiting for employee turnover. *NLRB v. L. B. Foster Co.,* 418 F.2d 1, 5 (9th Cir. 1969), *cert. denied,* 397 U.S. 990, 90 S.Ct. 1124, 25 L.Ed.2d 398 (1970); *Chromalloy Mining and Minerals v. NLRB,* 620 F.2d 1120, 1132–33 (5th Cir. 1980). We cannot allow this perversion of the Act's purpose. It is important to recall, as the Supreme Court has noted, that the issuance of a bargaining order in the *Gissel*-type circumstances promotes employee free choice because the Union must have obtained a majority of cards to obtain the bargaining order. *Gissel,* 395 U.S. at 614, 89 S.Ct. at 1940. To allow employee turnover to defeat the issuance of a bargaining order, therefore, would undermine employee free choice. Employee turnover should not be a controlling factor.

IV

The order of the National Labor Relations Board is enforced.

NLRB v. Atlantic International Corporation and its wholly owned subsidiaries, Atlantic Manufacturing Corporation and Atalantic Marketing Corporation

664 F.2d 1231 (4th Cir.), November 30, 1981—246 NLRB 291

On petition to enforce Board Order

Before WIDENER, HALL and SPROUSE, Circuit Judges

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WIDENER, Circuit Judge: The National Labor Relations Board (the Board) seeks enforcement of a remedial order entered by it against Atlantic International Corporation and its wholly owned subsidiaries, Atlantic Manufacturing Corporation and Atlantic Marketing Corporation (the Company). The Company objects to this order on the grounds that the Board lacks the authority to impose a make-whole remedy, and, in the alternative, that the remedy is inappropriate in this case. We enforce the order as a proper exercise of the Board's discretionary remedial authority.

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On July 30, 1976, the Board conducted a representation election in a unit of 455 of the Company's employees. Following certain challenges and objections by the Company, the Board certified the Carpenters' District Council of Baltimore and Vicinity and its Affiliates, Cabinet Makers' Local No. 974, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union), as the bargaining representative for that unit.

Subsequent to certification, the Union filed an unfair labor practice complaint alleging the Company's refusal to bargain. The Board found that the Company had violated sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., § 158(a)(1, 5), and entered a bargaining order which was enforced by this court on December 26, 1979. 236 N.L.R.B. 903, *enf'd sub nom. NLRB v. Atlantic International Corporation, et al.*, 612 F.2d 1308 (4th Cir. 1979) (unpublished).

During the pendency of that action in the latter half of 1977, the Company experienced serious financial problems. In addition to a restriction of its cash flow, the Company was notified that the premium for the health insurance coverage that it provided its employees would rise by approximately 48%. At that time, the Company unilaterally changed certain terms and conditions of employment. It required employees to contribute to the maintenance of the health insurance plan which previously had been provided free of charge. Furthermore, the Company lowered its pay scale for a period of approximately two weeks, conditioned reemployment of laid-off workers upon acceptance of that pay scale, and suspended its practice of giving its employees hams and turkeys for Thanksgiving and Christmas. A ruling concerning hams and turkeys is not at issue here. The Union filed unfair labor practice complaints as to these changes, again claiming that the Company had refused to bargain in violation of sections 8(a)(5) and (1) of the Act.

The Board affirmed the administrative law judge's finding that the Company violated these sections by "unilaterally discontinuing full payment of employee health insurance premiums, . . . temporarily reducing wages, and conditioning reemployment of laid-off employees upon acceptance of the reduced wage rate." Contrary to the administrative law judge's decision, however, the Board ordered restitution of losses suffered by qualified employees as a result of the discontinuance of the fully paid health plan.

The finding of the Board that the Company violated sections 8(a)(5) and (1) of the Act is not the subject of review by the Company.

In arriving at a remedy, the administrative law judge applied his interpretation of the N.L.R.B. case of *Wonder State Mfg. Co.*, 147 N.L.R.B. 179 (1964), *enforcement denied on other grounds*, 344 F.2d 210 (8th Cir. 1965). He construed *Wonder State* as requiring that he determine what the result of bargaining would have been had the parties bargained in good faith and that he enforce the hypothetical result accordingly. The administrative law judge applied this principle to the Company's discontinuance of its contributions to the health plan and concluded as a fact that negotiations would not have altered the Company's decision. In contrast, applying the same principle, the administrative law judge found that, had the Company bargained in good faith as required, it would not have reduced wages.

The Board, in its opinion and order, found that the administrative law judge had misapplied *Wonder State* to the health insurance premiums. It found that the premiums were an ongoing, fixed benefit, administered on a regular basis and, as a term or condition of employment, not subject to unilateral change. The Board thus attempted to divorce itself from the administrative law judge's findings with respect to health insurance premiums, whatever the validity of its reason.

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In adopting the administrative law judge's rulings, findings and conclusions with respect to the unilateral wage reduction, the Board erroneously adopted his construction of *Wonder State*. If the

Board's discussion of the insurance premiums can be read as holding that the administrative law judge should have treated the health benefits as equivalent to wages and therefore should have applied the same test, it is also in error. The notion that the Board may require a party to comply with what it speculates the outcome of negotiations would have been had good-faith bargaining taken place clearly contravenes the holding of *H. K. Porter Co., Inc. v. NLRB,* 397 U.S. 99, 90 S.Ct. 821, 25 L.Ed.2d 126 (1970). *Porter* forbids the Board from requiring a company and a union to bargain to a foreordained result. The principle applied here by the administrative law judge and the Board goes even a step beyond *Porter* in requiring the parties to act as though they had bargained to a conclusion when no such bargaining in fact had taken place.

The administrative law judge, however, also found a unilateral reduction in wages and health benefits without bargaining during the time the Company should have been bargaining with the Union was an unfair labor practice, and this finding was adopted by the Board.

When we strike out, as we do, from the findings of the administrative law judge and the Board all reference to what the parties would have arrived at had they bargained, we still find a unilateral reduction in wages and health benefits during the time when the Company should have been bargaining. This is not dependent upon the other subsidiary finding of what conclusion the parties would have arrived at had they bargained.

A unilateral reduction in wages and benefits during the time the Company should have been bargaining is within the proscription in this circuit of *Overnight Transportation Company v. NLRB,* 372 F.2d 765 (1967). Restitution of losses with reference to pre-existing wages and benefits is a restoration of the *status quo ante, Overnight,* p. 770, and we thus think the Board's order should be enforced, although we have stricken out one of the subsidiary findings. *Communist Party v. Control Board,* 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961), especially pp. 66–67, 81 S.Ct. pp. 1394–95.

We also think the order of the Board is within its broad discretion even considering the financial condition of the Company.

ENFORCEMENT GRANTED.

K. K. HALL, Circuit Judge, concurring: Although I concur in the majority's result, I think the opinion incorrectly criticizes the Board's decision. Contrary to the impression given by the majority, the Board did not adopt the ALJ's application of *Wonder State v. NLRB,* 147 N.L.R.B. 179 (1969). Therefore, I would affirm the decision of the Board, without extraneous reference to the *Wonder State* problem.

In *Wonder State,* the Board upheld an employer's decision to unilaterally eliminate Christmas bonuses. In that case, management's decision in September to withhold bonuses turned out to have been justified because, by Christmas time, the business outlook was dismal. Nevertheless, the essence of the Board's decision was merely a recognition that management should have discretion whether or not to give Christmas bonuses.

The ALJ's opinion in this case does contain some faulty legal analysis. He mistakenly interpreted *Wonder State* as requiring him to decide whether bargaining would have made any difference in the employer's decisions to decrease benefits and reduce wages. Pursuing this analysis, the ALJ found that Atlantic's business was so bad that it could not afford to pay the additional insurance premiums regardless of whether negotiations had been held. Accordingly, the ALJ ruled that Atlantic did not have to reimburse its employees for their contribution to the insurance program. However, the ALJ concluded that business was not bad enough to justify the reduction in wages, and added that "if the Respondent had engaged in good faith bargaining on these matters, it would not have taken these benefits away from the employees." Therefore, he required the employer to reimburse the employees for lost wages.

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On review, the Board reversed the ALJ's decision on the issue of insurance premiums, but affirmed the decision on wages. In reviewing the insurance issue, the Board specifically rejected *Wonder State* as authority, noting that Christmas bonuses are variable depending on economic conditions, while insurance premiums are an ongoing, fixed benefit. However, in reviewing the wages issue, the Board did not analyze the ALJ's opinion, but rather summarily affirmed the award.

The majority reads the Board's summary affirmance on the wages issue as an adoption *sub silentio* of the ALJ's analysis of *Wonder State.* It puzzles me how the majority can reach this conclusion when the Board had explicitly stated that *Wonder State* would not apply to the analogous issue of insurance premiums. Certainly wages—like insurance premiums—fall within the "fixed benefit" category. More likely, the Board recognized that the ALJ had reached the right result on the wages issue (albeit for the wrong reason) and saw no reason to repeat its earlier rejection of the ALJ's interpretation of *Wonder State*. Reading the Board's opinion as a whole, it is clear that the Board considered insurance premiums *and* wages to be fixed benefits which do not fall within the ambit of *Wonder State*.

It seems that the majority would have no complaint with the Board's decision if the Board had emphasized that it disagreed with the ALJ's analysis of *Wonder State* on the wages issue as well as on the insurance issue. However, since the Board never adopted *Wonder State* at all, I see no reason why it should be required to chastise the ALJ for his incorrect interpretation of the case. Therefore, I would enforce the Board's decision without any caveats.

Montgomery Ward & Co., Inc. v. NLRB

664 F.2d 1095 (8th Cir.), November 30, 1981—254 NLRB 826

On petition to enforce Board Order

Before BRIGHT and ROSS, Circuit Judges, and LARSON, District Judge*

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PER CURIAM: The National Labor Relations Board (Board) has applied to this court for enforcement of its order holding that Montgomery Ward & Co., Inc. (Wards) violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). Wards discharged Michael Poupard and Richard Lafferty (employees) after they admitted that they had stolen goods from Wards. The Board found that Wards violated section 8(a)(1) by requiring the employees to attend investigative interviews without the presence of their union steward after they had requested his presence and when the employees reasonably believed that disciplinary action could result from such an interview. Although the issue is close we find that there is substantial evidence in the record as a whole of section 8(a)(1) violations but disagree with the "make whole" relief ordered by the Board.

During the course of a security investigation, Wards discovered that Poupard and Lafferty had been stealing merchandise from their respective departments. When the security investigator contacted the employees for an interview regarding these thefts, each employee requested union representation. Upon such request, the employees were informed that the security interviews would not be conducted if a union representative was called and the entire matter would be turned over to management and the police. The employees each signed an interview consent form, proceeded with the interview, and then signed a statement admitting they had stolen merchandise from Wards. Both employees offered to make restitution. Wards terminated the employees after reviewing the results of the security investigation. The evidence is clear that the firings were a direct result of the admitted thefts and not the result of the employees' insistence on the presence of a union steward.

The ALJ determined that Wards had violated section 8(a)(1) by failing to permit the requested union assistance at the investigative interviews and recommended that the Board order reinstatement and back pay for Lafferty. He also recommended a cease and desist order along with the posting of the usual notice. The Board agreed with the ALJ but added the requirements that Wards expunge any record of the discharge from Lafferty's personnel file and ordered back pay for Poupard.[1]

We find substantial evidence in the record as a whole to support the Board's determination that both employees requested and were denied union representation at investigative interviews which the employ-

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ees reasonably believed would result in disciplinary action. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975).

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*The Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

[1] Poupard admitted to the ALJ that he had stolen from this employer. Lafferty recanted his confession and the ALJ refused to let Wards prove that Lafferty made partial restitution. In addition the counsel for the General Counsel acknowledged that there was no allegation that the discharge was not for just cause.

However, the determination that the proper remedy should be back pay and reinstatement is clearly prohibited by the language of the National Labor Relations Act. *NLRB v. Potter Electric Signal Co.*, 600 F.2d 120 (8th Cir. 1979) is dispositive of the remedy issue. In *Potter*, we held that where it is clear that employees were discharged for good cause and not for requesting union assistance at an investigatory interview, section 10(c) of the Act, 29 U.S.C. § 160(c), precludes an order of back pay and reinstatement under such circumstances.

In this case, like *Potter*, the employees effected their own discharge by stealing and the section 8(a)(1) violation was simply incidental to the investigation which preceded the firing. Thus, the Board lacks the power to order reinstatement or back pay for employees discharged for theft of company property, because to do so would violate section 10(c) as interpreted in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964); *NLRB v. Potter Electric Signal Co., supra*, 600 F.2d at 124.

Enforcement is granted as to the finding of the Board that there were section 8(a)(1) violations. Enforcement is denied as to the determinations concerning back pay and reinstatement. The notice shall be modified by striking the last paragraph thereof.

Pioneer Natural Gas Company v. NLRB

662 F.2d 408 (5th Cir.), November 30, 1981—253 NLRB 17

On petition to review Board Order

Before THORNBERRY, REAVLEY and POLITZ, Circuit Judges

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REAVLEY, Circuit Judge: An administrative law judge determined that the Pioneer Natural Gas Company had violated § 8(a)(1) and § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) by interrogating and discriminating against certain employees. The National Labor Relations Board summarily affirmed the ALJ's "rulings, findings, and conclusions" and adopted his order with a slight modification.[1] Pioneer petitions for review, and the Board cross-petitions for enforcement of its order. We grant Pioneer's petition and deny enforcement.

I. Background

In March 1978, a union began a campaign to organize Pioneer's employees at Pioneer's several places of business. The campaign ended on October 13, 1978. There is no evidence in the record that Pioneer actively opposed this or any other union. The union simply failed to gain sufficient support from the employees. As the ALJ found, Pioneer demonstrated "little or no" anti-union animus.

The violations found in this case all occurred in one department on one floor in one of Pioneer's many facilities. This "gas

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measurement" department had 17 non-supervisory employees; all but one were female. Five women worked under the supervision of James Blatzheim, the chief clerk of gas measurement; the others worked under the supervision of James Goldston, the computer supervisor. Both Blatzheim and Goldston reported to supervisor Bob Brotherton; Brotherton reported to Guy Bufkin, the Assistant Director of the Department; and Bufkin reported to Bob Spikes, the Director. With a single exception, all of the events involved three of the five employees who worked for Blatzheim—Ninnevah Kay Younger, Biolanda Benitez, and Deborah Gallegos (the "reprimandees").

The ALJ found, and the record makes clear, that, prior to June 1978, there was constant bickering between the three reprimandees and some of the women who worked for Goldston. On June 6, the three were called individually into Blatzheim's office and were reprimanded for criticizing, badgering, deliberately antagonizing, and threatening violence against Goldston's employees, and for making deliberate mistakes on the job and bragging that supervisors couldn't tell them what to do. That all of these charges had some basis in fact is established by the three reprimandees' own testimony at the hearing.[2] The ALJ found, however,

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[1] The ALJ neglected to incorporate one of the violations he found into his remedial order; the Board corrected this omission.

[2] Benitez admitted that the three of them criticized the work of Goldston's employees "several times a month." Both Benitez and Younger ad-

Continued

that the reprimands were issued because two of the three had attended a union meeting on May 25, and because all three had thereafter distributed union cards and advocated the union.

The ALJ also found that two statements Blatzheim made to Younger on June 6, and two questions Goldston asked Benitez and another employee in late May and early June, were instances of "restraint and coercion" prohibited by § 8(a)(1).

Finally, the ALJ found that the discharge of Gallegos in June 1979, over eight months after the union campaign had ended, was in retaliation for her attempt to engage in "concerted activity" protected by § 7 of the Act, 29 U.S.C. § 157.

As we have said, all of the ALJ's determinations were affirmed by the Board.

II. *Review of the Merits*

We are, of course, bound by the Board's findings of fact if they are supported by substantial evidence in the record "considered as a whole." 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). If the Board applies an erroneous legal rule in concluding that the facts establish a violation of the Act, however, we are not bound by the Board's conclusion that the Act has been violated. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 182, 92 S.Ct. 383, 399, 30 L.Ed.2d 341 (1971) ("the legal standard to be applied is ultimately for the courts to decide and enforce"). Instead, we apply the Board's factual findings to the correct legal standard. If the Board has not made a necessary finding, we may nevertheless sustain its conclusion if the record clearly supports the omitted finding. If the record is unclear, we may remand to the agency for further proceedings. If the record clearly provides no support for the necessary finding, however, we may deny enforcement without resort to remand. *See Delco-Remy Div., Gen. Motors Corp. v. NLRB,* 596 F.2d 1295, 1309–10 (5th Cir. 1979).

With these principles in mind, we review the Board's determinations on each of the alleged violations.

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A. *The Reprimands*

The ALJ concluded that the decision to reprimand Younger, Benitez and Gallegos was discrimination that violated § 8(a)(3) and § 8(a)(1) of the Act.[3] In order to prove that Pioneer discriminated against its employees, "the Board must show that the particular supervisory responsible for the [action] knew about [the employees'] union activities," *Delchamps, Inc. v. NLRB,* 585 F.2d 91, 94 (5th Cir. 1978), and that the employees' union activities were a "motivating factor" in the employer's action, *Delco-Remy,* 596 F.2d at 1305; *NLRB v. Whitfield Pickle Co.,* 374 F.2d 576, 582 (5th Cir. 1967) (anti-union animus must be a "but for" cause). In establishing the knowledge element, the Board may not simply "impute" the knowledge of a lower-level supervisor to the decision-making supervisor, *Delchamps,* 585 F.2d at 94; the Board may, however, "rel[y] on circumstantial evidence to infer that the knowledge of one supervisor has been communicated" to the other, *id.* at 95 (citing *Texas Aluminum Co. v. NLRB,* 435 F.2d 917, 919 (5th Cir. 1970)).

The ALJ found that Blatzheim learned on May 24 that Younger planned to attend a union meeting on May 25, and that he learned on May 26 that Younger was distributing union cards.[4] The ALJ also found that Goldston learned on May 25 that Benitez planned to attend the meeting. In addition, the ALJ noted that Blatzheim and Goldston

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mitted to criticizing Goldston and his predecessor. Younger admitted that, during the four or five months previous to May 18, 1978, Blatzheim had told her on "several occasions" that Goldston's employees were complaining about the three of them.

Benitez admitted to an incident in which she caused a confrontation by talking behind another employee's back, and another in which she caused a disturbance by verbally abusing Velma Hall, one of Goldston's employees. Both Younger and Benitez admitted to calling the supervisors "asses."

Younger also acknowledged an incident, occurring shortly before the time when Pioneer claims it decided to give the reprimands, in which Gallegos threatened to hit one of Goldston's employees with a bottle. Benitez admitted that, in another incident occurring around the same time, she "could have" stated that she would not do work assigned to her.

[3] Section 8(a) of the NLRA provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

29 U.S.C. § 158(a)(1), (3).

[4] Blatzheim admitted that he knew Younger had attended the meeting—she had volunteered the information on May 24—but he denied knowing that she was distributing union cards.

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worked in the vicinity of the three reprimandees.[5] From these facts, the ALJ found "that Respondent, through its supervisors Blatzheim and Goldston, was aware of [the three employees' union] activities during late May, 1978."

The undisputed evidence shows, and the ALJ found, that neither Blatzheim nor Goldston made the decision to reprimand the three employees. That decision was made by Assistant Director Bufkin and Director Spikes. Neither the ALJ nor the Board found that Bufkin or Spikes was aware of the reprimandees' union activities, or that Blatzheim or Goldston communicated his knowledge to Bufkin or Spikes.[6] Thus, it is clear that the ALJ performed the "mechanical imputation" of knowledge rejected in *Delchamps,* 585 F.2d at 95.

The Board argues that, despite its failure to follow *Delchamps,* the circumstances surrounding the reprimand support the inference that Spikes and Bufkin knew of the reprimandees' union activities. We think that there is no support in the record for this inference.

The reprimandees' own testimony establishes that the reprimandees themselves were not aware of the union campaign before May 18, 1978. Pioneer claimed at the hearing that the decision to reprimand was made in April. Pioneer's supervisors testified that the continuing complaints from Goldston's employees about the reprimandees were brought to Bufkin's attention sometime in April. Bufkin testified that he and Spikes decided to reprimand the three, and had Goldston's employees reduce their complaints to writing. Even if the ALJ disbelieved this testimony, the General Counsel was presented with two such written complaints at trial, and stipulated on the record that the written complaints were indeed given to management by two of Goldston's employees on May 7 and May 8.[7] The General Counsel also stipulated on the record that Goldston submitted a written statement concerning his employees' complaints on May 19, and that Blatzheim submitted his own written statement on May 22. All of this activity concerning the complaints occurred before Blatzheim or Goldston learned of the reprimandees' union activities, most of it before the reprimandees themselves even knew there was a union. There is no evidence in the record that, after they found out that Younger and Benitez had attended the union meeting, Blatzheim or Goldston participated in any way in the decision to issue the reprimands on June 6[8] or communicated their knowledge to Bufkin and Spikes during that period.

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The Board argues that other circumstantial evidence, relied on by the ALJ in finding that the reprimand was motivated by the union activities, supports the inference that Bufkin and Spikes knew that the reprimandees were union supporters. The ALJ relied most heavily on two statements that, he found, Blatzheim made to Younger on June 6. Younger testified that, after Blatzheim had read to her the reprimand written by Spikes, he told her, "Maybe [the reprimand] has something to do with your union activities." Younger claimed that Blatzheim made a similar statement to her and her husband later that day in the company parking lot. Blatzheim denied making either statement, but the ALJ discredited his testimony.

Although we think that the ALJ's reasons for rejecting Blatzheim's testimony are unpersuasive,[9] we

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[5] There was no evidence that anyone knew of Gallegos' union activities. Moreover, Gallegos did not attend the union meeting of May 25. Younger and Benitez testified, however, that Gallegos helped them distribute union cards.

[6] Nor was there any direct evidence that either Bufkin or Spikes was aware of the reprimandees' union activities. The only evidence on this issue was Bufkin's testimony denying knowledge. The ALJ failed to mention this testimony in his written decision.

[7] The documents themselves were not introduced into evidence and thus are not in the record.

[8] Younger did testify that Blatzheim told her that he went to Bufkin on June 2 "to talk him out of the allegations." Blatzheim denied this, testifying that he did not even know until June 5 that a decision to reprimand had been made. The ALJ noted Younger's testimony in his review of the evidence, but made no factual finding on this issue Even if Blatzheim did go to talk Bufkin out of the reprimand, however, this does not tend to prove that he communicated his knowledge of the reprimandees' union activities; on the contrary, it shows that he was making an effort to protect his employees from discipline.

[9] We have held that the reviewing court is "not compelled to respect" credibility choices "based on an inadequate reason, or no reason at all." *NLRB v. Moore Business Forms, Inc.,* 574 F.2d 835, 843 (5th Cir. 1978) The ALJ discredited Blatzheim's denials because he found Blatzheim's testimony "inconsistent and conflicting" when Blatzheim attempted to quantify the number of times he had had problems with the reprimandees. We question this basis for rejecting Blatzheim's testimony for two reasons. First, the purported "inconsistencies" in Blatzheim's testimony do not exist. The ALJ said that Blatzheim first testified that he had orally reprimanded Younger "about 12 times," and later testified that he had orally reprimanded her "6 or 7 times." Actually, what Blatzheim said the second time was that he had reprimanded Younger "6 or 7 times" *on his own initiative;* a few questions later, he made it clear that he had reprimanded her "several" other times because of complaints from other su-

Continued

accept his credibility determination. Even so, we do not see how

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the two statements tend to prove that Bufkin or Spikes knew of Younger's union activities. First, under Younger's own description of the statements, Blatzheim did not purport to know the reason for the reprimands, much less know whether Bufkin or Spikes knew of Younger's union activities; he merely suggested a possible explanation for Younger's reprimand. Second, according to the ALJ's findings, Blatzheim was the only individual who knew of Younger's union activities. He was the only one who could have communicated information about Younger's union activities to Bufkin and Spikes. Since, under Younger's version of the facts, Blatzheim was acting as her confidant in revealing Pioneer's possible motives, we think it unlikely that he would also be informing the company of her union activities. The ALJ drew no such inference, and we refuse to draw it on review.

Nor do we think that any of the other circumstances relied on by the ALJ in finding causation provide substantial evidence for the inference that Bufkin or Spikes was aware of the reprimandees' union activities.[10] Since the Board has not proved this element of its case, its conclusion that the reprimands violated § 8(a)(3) and § 8(a)(1) cannot be upheld.

B. *The Section 8(a)(1) Violations*

The Board concluded that, in three separate instances, Pioneer had engaged in activity that tended "to interfere with, restrain [and] coerce employees" in violation of § 8(a)(1), 29 U.S.C. § 158(a)(1). One instance concerned Blatzheim's statements to Younger; the other two concerned questions Goldston asked Benitez and another employee.

Blatzheim's Statements

To establish a § 8(a)(1) violation, the Board need not show actual restraint or coercion; it need only draw from the credited evidence the reasonable conclusion that the employer's conduct would tend to restrain or coerce employees from engaging in protected activities. *See NLRB v. Henriksen, Inc.*, 481 F.2d 1156, 1161–62 (5th Cir. 1973); *NLRB v. Varo, Inc.*, 425 F.2d 293, 298 (5th Cir. 1970). In reviewing the reasonableness of the Board's conclusion, the court "must recognize the Board's compe-

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tence in the first instance to judge the impact of utterances made in the context of the employer-em-

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pervisors about her dealings with employees under their supervision. The other inconsistency found by the ALJ was Blatzheim's first statement that Goldston complained about Blatzheim's employees "about a dozen" times, followed by a later statement that Goldston complained about Gallegos "about a dozen" times. Rather than inconsistent, this testimony was entirely consistent with Pioneer's supervisors' claims that the complaints were almost always made about the three reprimandees as a group. This testimony was also consistent with Blatzheim's statement that he never received a complaint concerning the other two of his five employees.

Second, and more importantly, we think that the ALJ's focus on a purported inconsistency in the use of round numbers stands in striking contrast with his disregard for the serious inconsistencies in Younger's story concerning this very issue and other substantial issues. On June 9, 1978, Younger circulated a letter among the supervisors denying the charges in the reprimand. At the same time or shortly thereafter, she circulated a second letter claiming that she was being discriminated against because of her union activities. In neither letter did she mention what one would think would be the crucial evidence supporting her complaint, Blatzheim's June 6 statements. On another of her claims—a frivolous charge that she had been "interrogated" by Pioneer's attorney in a phone conversation she had initiated—she changed her story several times, first swearing in an affidavit that she had "forgotten" that the man was Pioneer's attorney, then "clarifying" her story in a second affidavit swearing that she did not know at any time prior to the phone call that the man was Pioneer's attorney, and finally admitting at the hearing that she did know that the man was Pioneer's attorney when she called him. The attorney testified and further contradicted Younger's testimony in many important respects. Younger also denied ever making derogatory statements about Goldston's employees; this testimony was contradicted by co-reprimandee Benitez. Finally, Younger changed her testimony on other matters when confronted with the truth.

Despite the conflicts in her sworn statements, the ALJ found Younger's testimony "candid and consistent."

[10] The ALJ noted Blatzheim's admissions that the charges were "vague" and "individually" did not warrant more than an "oral" reprimand. The ALJ fails to note that management could easily have decided that "collectively" the charges were worthy of a reprimand, and that the evidence in the record, while not specific on dates and events, establishes that the three reprimandees had collectively committed the transgressions generically described in the reprimand. *See* note 2 *supra.*

The ALJ also found the "timing" of the reprimands suspect, pointing out that the reprimands were not issued until over a month after the date Pioneer claimed it had made the decision to reprimand. The record demonstrates, however, that Pioneer was taking time to make sure that the reprimands were accurate: for example, by obtaining written statements from the complaining employees on May 8 and 9, and by obtaining statements from Goldston and Blatzheim on May 19 and 22. The fortuity that the reprimandees joined a union on May 24 does not protect them from discipline imposed in good faith on the basis of complaints made before that time. We think the "timing" factor is little more than a makeweight.

Finally, the ALJ noted that Pioneer had not reprimanded Vera Isham, another "troublemaker" in the department. The reason for this "disparity" was obvious: Isham was one of the very employees who had decided to take their complaints about the reprimandees up the company's chain of command; no similar complaint had been pressed by the reprimandees (or anyone else) against Isham.

ployee relationship." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620, 89 S.Ct. 1918, 1943, 23 L.Ed.2d 547 (1969).

The ALJ concluded that Blatzheim's two statements on June 6 "would clearly tend to restrain and coerce employes [*sic*] from engaging in union activities." We do not think that this conclusion could reasonably be drawn from the credited evidence.

Blatzheim's first statement, as recounted by Younger, was made in Blatzheim's office after he had read the reprimand written by Spikes. Younger told Blatzheim that she didn't understand the charges. Blatzheim replied, "I don't understand them either, Kay. Maybe it has something to do with your union activities." If this incident were taken in isolation, perhaps the Board could reasonably have concluded that Blatzheim saw the reprimands as an opportunity to discourage Younger from further participation in the union campaign. The statement, however, must be taken in the context in which Younger claims it was made. Later that same day, Younger claimed that Blatzheim spoke to her and her husband in the parking lot. Blatzheim told Mr. Younger, "I don't know what's going on. I don't understand it. It's got to be something with Kay with her union activities. I think, Bob, *I would get a lawyer and I'd see if I could get something done on that*" (emphasis added). This second statement, rather than one that "would clearly tend to restrain and coerce," was a statement encouraging Younger to assert her rights. Indeed, the very picture that Younger attempted to paint with her testimony, which the ALJ credited, was that Blatzheim was on her side concerning the union issue: Younger testified that when she first mentioned the union to Blatzheim on May 24, Blatzheim replied that the union would be "a good thing for you"; that Blatzheim later told her that he had tried to talk Bufkin out of the reprimands on June 2; and that Blatzheim repeatedly told her on June 6 that he did not think that her reprimand was justified.[11] In fact, Younger believed that Blatzheim was such an ally and friend of the union cause that she asked him to testify for the union in this case.

We think it was unreasonable for the Board to conclude that two statements, which Younger herself considered to be sympathetic statements of support for her and her union activities, tended to restrain or coerce employees in the exercise of their rights. We think it even more unreasonable to find that the statements constituted unfair labor practices on the part of Pioneer, which demonstrated no anti-union animus, engaged in no active campaign of opposition to the union, and in fact encouraged its employees to listen to what the union had to say.

The Interrogations

Reprimandee Benitez testified that, on May 25, 1978, Goldston asked her if she was going to the union meeting that night, and pointed out that unionization "had its good points and its bad, you know, and I had to take it into consideration that Pioneer had good benefits." Another employee, Maria Escoto, testified that on June 1, 1978 Goldston asked her, after a conversation in his office on other subjects, whether she had signed a union card. When she did not respond, he said that "they would know who filled one out and who didn't."

In contrast to his conclusion concerning Blatzheim's statements, the ALJ did not expressly find that Goldston's two questions had a tendency to coerce. Rather, he merely described the two incidents and concluded, in effect, that they were *per se* violations of § 8(a)(1). This was error. "It is well established in this Circuit that interrogation of employees is not illegal *per se* * * * . "To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.' " *Delco-Remy*, 596 F.2d at 1309 (quoting *NLRB v. J. Weingarten, Inc.*, 339 F.2d 498, 500 (5th Cir. 1964)). In *Delco-Remy*, we made it clear that the Board must consider a number of criteria in determining whether the questioning "suggest[s] an element of coercion or interference":

> "(1) the history of the employer's attitude towards its employees; (2) the type of information sought or related; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose in obtaining the information; (7) if so,

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[11] Blatzheim denied making any of these statements.

whether this purpose was communicated to the employee, and (8) whether the employer assures employees that no reprisals will be taken if they support the union."

596 F.2d at 1309 (quoting *NLRB v. Aero Corp.*, 581 F.2d 511, 514 (5th Cir. 1978)). This list is not definitive, and the Board may find that other factors suggest an element of coercion, even when the listed factors "cut in favor of the employer." *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir.), *cert. denied,* 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1965). We made it clear in *Delco-Remy,* however, that the Board may not ignore these factors and find a § 8(a)(1) violation "in a conclusory fashion." 596 F.2d at 1309. As in *Delco-Remy,* that is exactly what the Board did here; and, as in *Delco-Remy,* we find that the record does not support the Board's conclusion. *See id.* at 1310–11.

Goldston's question to Benitez is the kind of casual question that this court has never held to be a § 8(a)(1) violation. *See Delco-Remy,* 596 F.2d at 1310; *Mueller Brass Co. v. NLRB,* 544 F.2d 815, 820–21 (5th Cir. 1977) (involving more intrusive questioning against a clear history of strenuous anti-union activity); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 203 (5th Cir. 1967). Certainly there is nothing inherently coercive about the lowest-level supervisor asking an employee, with whom, as the record clearly demonstrates, he engaged in friendly conversation on a daily basis, whether she was going to attend a union meeting, and observing that unionization has "its good points and its bad." "[I]nterrogation which is not in itself threatening * * * must meet fairly severe standards, normally including the showing of a background of employer discrimination and a demonstration that the circumstances of the interrogation would reasonably induce fear of reprisal." *O. A. Fuller Super Markets,* 374 F.2d at 203. Pioneer has no history of anti-union discrimination. The three-sentence conversation took place when Benitez wandered into another employee's office, where Goldston was already engaged in conversation with the other employee. Benitez had no hesitation in telling Goldston that she planned to attend the meeting. Finally, Goldston's "good points and bad points" remark negated any implication that Pioneer intended to take reprisals against those who attended the meeting.

Similar considerations apply to the Goldston-Escoto conversation. The Board points out that this conversation took place in Goldston's office, that Escoto declined to answer Goldston's question and that Goldston's remark—"they would know who filled [a card] out and who didn't"—could have been taken as a veiled threat of reprisal. Escoto, however, did not testify that she took the remark that way.[12] Goldston testified that he meant the remark as a joke, and Escoto did not contradict this testimony. Moreover, the conversation took place just two days after Bufkin had made a speech telling the employees to attend union meetings if they wanted to. On a record as barren as this one of any active opposition to the union, any systematic interrogation of employees, or any other circumstances suggesting an element of coercion, we cannot uphold the conclusion that this single incident is a violation of § 8(a)(1). *Cf. Delco-Remy,* 596 F.2d at 1306–11 (three interrogations, each more lengthy and intrusive than one at issue

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here, held not a § 8(a)(1) violation despite background of company opposition to union).

C. *The Discharge of Gallegos*

On Friday, June 22, 1979, eight months after the union campaign had ended, Velma Hall, a black employee, went to Goldston to complain about a problem. On Monday, June 25, Goldston had Hall put her problem in writing. Hall wrote in her own hand that, every single day from June 19 through June 22, Deborah Gallegos had repeatedly informed her that Helen Wilborn, another coworker, had said "that she didn't like to error check with me and that she just don't like niggers." Hall's written statement related that she had "error checked" with Helen several times that week and had had no problems with Helen. After each session, however, Gallegos would come to her and repeat the racial insults that Helen had allegedly made. On Wednesday, Hall wrote, "all [Gallegos] did was tell me what Hellen [*sic*] said." On Thursday, "she just kept on telling me things like this * * * ." Finally, on Friday morning, Hall reported, "I think that Deborah wanted me to have words

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[12] Escoto simply recounted the incident. She did not testify that she felt intimidated or even upset by Goldston's remarks.

with Hellen about what she had told me. But I just looked over it. That morning after I had finished [*sic*] error checking with Hellen, no problems at all, * * * Deborah * * * called me into [an office]. I went to see what she wanted not thinking it would something else Hellen said * * * . I told her that I was so tired of her telling me every day something about what Hellen had said and to just [have] Hellen tell me. I told her I was going to tell James [Goldston] about it because if I didn't know how to error check that he would see to it that I learn how, and she went on telling me that Hellen said this and Hellen said that so I just went right to James' office and told him about it" (emphasis added).

The day after Hall wrote this account, Bufkin called Gallegos into his office and asked if she had made these statements. Gallegos admitted that she had, but said that Wilborn had actually made the statements to her. Bufkin fired Gallegos on the spot, reminding her that this was the kind of conduct for which she had been reprimanded. That evening, Hall became so afraid that Gallegos would take reprisals against her that she had to have two police officers escort her home.

The ALJ concluded that Gallegos' behavior was "concerted activity" under § 7 of the Act, 29 U.S.C. § 157,[13] and that Gallegos was discharged for engaging in such activity in violation of §§ 8(a)(3) and 8(a)(1). The ALJ credited Gallegos' testimony[14] that she encouraged Hall to go to Goldston with "the Wilborn matter" because she "felt" that "that was the best way to go about it instead of us taking care of it ourselves. That way [Goldston] would know what was said and who said it and that way we can clear it up." The ALJ concluded that Gallegos' behavior was concerted activity because it related to "a matter of common concern"—an atmosphere of racial tension.[15]

It is unbelievable that Gallegos was at all concerned about the work atmosphere. When asked on cross-examination why she did not go herself to complain to a supervisor, Gallegos replied that Wilborn's alleged racial remarks—including remarks insulting Gallegos' own race and her husband's race—"didn't bother me that much." It was only after a week of harassing Hall, and after suggesting that Hall confront Wilborn, that Gallegos suggested that Hall go to a supervisor.[16]

Even if we accept the Board's finding that the work atmosphere was Gallegos' concern, however, we doubt that Gallegos engaged in any "concerted activity" protected by § 7. In the leading case of *Mushroom Transportation v. NLRB*, 330 F.2d 683 (3d Cir. 1964), the court held that advising another employee of his rights is not "concerted activity." In order for conversations between two employees to constitute "concerted activity," there must be "some element of collective activity or contemplation thereof." *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717 (5th Cir. 1973) (citing *Mushroom Transportation*). There is no evidence in the record that Gallegos ever proposed collective activity to Hall; the only evidence is that she told Hall to go to a supervisor. While Gallegos may have "felt" that this was the best way for "us" to handle it, there is no evidence that she ever expressed her "feeling" to anyone else or suggested that going to Goldston would be a collective effort.

Thus, the only ground on which we could hold that Gallegos engaged in concerted activity is that she "contemplated" group action. Even if we could hold that such personal "contemplation" is sufficient, however, we cannot uphold the Board's conclusion that Pioneer violated § 8(a)(3) and § 8(a)(1) by discharging Gallegos because there is no evidence that Gallegos' discharge was motivated by participation in the protected activities she "contemplated." Bufkin and Brotherton made the decision to discharge Gallegos. There is no evidence that either Bufkin or Brotherton knew that Gallegos had told Hall to go to a supervisor. All Bufkin and Brotherton had before them was Hall's written statement. This statement does not indicate that Gallegos ever suggested that Hall go to management to complain; the only suggestion recounted in the statement is that Hall directly confront Wilborn. Furthermore, there is no evidence that, when Bufkin called Gallegos in to ask her whether she had indeed made the statements that Hall attributed to her, Gallegos ever told Bufkin or Brotherton that she suggested that Hall go to management; she merely insisted that what she had said about Wilborn was true. Thus, there is no evidence to support the ALJ's conclusion that "Gallegos was discharged because she insisted that Hall go to her supervisor and 'clear it up.'" Since Bufkin and Brotherton did not know that Gallegos told Hall to go to her supervisor, they could not have fired her for that reason. Therefore, her participation in concerted activity could not have been a motivation for her discharge.

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[13] Section 7 provides in pertinent part:

> Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * 29 U.S.C. § 157.

[14] Gallegos' testimony was often incomplete or at odds with Hall's story. Gallegos testified that Wilborn made the racial insults on June 22, when Hall left work early, and that she told Hall about them on June 25, whereupon Hall went directly to Goldston. According to Hall's written statement, Gallegos had been reporting these remarks since June 19, and Hall went to Goldston on June 22 after five days of reports and after Gallegos' suggestion that Hall confront Wilborn. Gallegos also claimed that Hall "knew how Helen was on racial problems" and had heard derogatory comments from Wilborn in the past. Hall, however, testified that when she went to Goldston she did not believe that Wilborn had made the statements.

[15] The ALJ relied on *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975), as explained by the Board in *Diagnostic Center Hosp. Corp.*, 228 N.L.R.B. 1215 (1977). In those cases, the Board established the rule that actions taken by an individual employee are "concerted activity" if they relate to "a matter of common concern." We do not regard the *Alleluia Cushion* doctrine to be consistent with our decision in *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973). *See NLRB v. Datapoint Corp.*, 642 F.2d 123, 128–29 (5th Cir. 1981); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1083 (8th Cir. 1977) (concluding that *Alleluia Cushion* is inconsistent with *Buddies Supermarkets* and rejecting *Alleluia Cushion*); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980) (also rejecting *Alleluia Cushion*). The Board, however, does not attempt to defend the *Alleluia Cushion* doctrine in this case; instead, it argues only that Gallegos engaged in concerted activity under our case law.

[16] Moreover, Hall testified that the reason Gallegos gave her for going to Goldston was that Wilborn "never did anything. She [was] always coming out smelling like a rose."

ENFORCEMENT DENIED.

Vesuvius Crucible Company v. NLRB

668 F.2d 162 (3d Cir.), November 30, 1981—252 NLRB 1279

On petition to review Board Order

Before SEITZ, Chief Judge, and ADAMS and GARTH, Circuit Judges

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ADAMS, Circuit Judge: In this appeal, Vesuvius Crucible Company petitions for review of a final order of the National Labor Relations Board and the Board cross-petitions for enforcement of its order. The Board determined that the employer violated sections 8(a)(1) and (3) of the National Labor Relations Act when it refused to pay accrued vacation benefits to its striking employees. Because we conclude that there is insufficient evidence in the record to support the Board's decision, we grant the petition for review and decline to enforce the order.

I.

Vesuvius Crucible Company is a steel manufacturer with a facility located in Swissvale, Pennsylvania. For many years, Local 3730 of the United Steelworkers Union has represented the company's production and maintenance employees. The two parties have executed a number of collective bargaining agreements; the agreement at issue in this case extended from November 2, 1973 to October 31, 1976.

During September and October of 1976, the union and the company began negotiations for a new collective bargaining contract. When no agreement was reached prior to the October 31, 1976 expiration

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date, the union commenced a strike, which lasted until July 11, 1979.

On June 28, 1977, the union requested that the company pay accrued vacation benefits, based on work done for the ten months before the strike, to all eligible employees. The request, made pursuant to Section VII of the 1973–1976 agreement,[1] coincided with the customary date of the company's annual plant shutdown. At that time all eligible employees normally would have received at least a portion of their vacation pay, in accordance with the company's requirement that vacations be scheduled during the shutdown.

The company refused to grant the union's request. In a letter dated June 28, 1977, the company's counsel wrote to Caleb Scott, the union staff representative:

> We have carefully reviewed Section VII of the 1973–76 Labor Agreement and have concluded that no vacation pay is yet due to any Vesuvius Bargaining Unit employee.
>
> Section VII, B–1 reads as follows:
>
> "1. An eligible employee who has attained the years of continuous service indicated in the

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[1] That section is reproduced as an Appendix to this opinion.

> following table in any calendar year, on the anniversary of his employment with the Company, during the term of this Agreement shall receive a vacation corresponding to such years of continuous service as shown in the following table: * * *"
>
> As we interpret this Section there was vacation due for the three years which constituted the "term of this agreement." Unless and until a new agreement is reached specifying terms and conditions for vacation during its term, I do not believe that any payment is required.

Joint Appendix at 225.

On September 13, 1977, the union filed a charge with the NLRB, alleging that the refusal by Vesuvius to pay the vacation benefits in question violated sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) (1976).[2] After the NLRB issued a complaint, Vesuvius moved for deferral to arbitration. It argued that the determination of the validity of the union's claim for vacation benefits involved the interpretation of the expired 1973–1976 collective bargaining agreement, and that the parties were bound by Section X of that agreement to arbitrate disputes concerning "the interpretation or application of, or compliance with, the provisions of this Agreement." The company's motion was denied.

After a hearing, the presiding administrative law judge found that vacation benefits had not accrued and that therefore Vesuvius had violated neither sections 8(a)(1) nor (3). In a footnote, the administrative law judge noted that a "similar conclusion follows from the conclusion that the vacation pay obligation, even if it could be said to have accrued, was impossible of calculation in the absence of a new agreement." Joint Appendix at 331–32.

The Board disagreed. Finding that the employees' right to 1977 vacation benefits had accrued on the basis of work performed in the first ten months of 1976, the Board concluded that the company had violated sections 8(a)(1) and (3) of the Act. It ordered Vesuvius to "cease and desist" from the unfair labor practices found; to grant accrued vacation pay, plus interest, in accordance with the 1973–1976 agreement, to those striking employees who had worked in 1976; to make its payroll records available to the Board for determination of amounts due; and to post appropriate notices.

After the Board denied the company's motion to reconsider its decision, Vesuvius filed a petition for review in this Court. Shortly thereafter, the Board filed a cross-petition for enforcement of its order.

II.

In its brief filed with this Court, Vesuvius challenged both the merits of the NLRB decision and the failure of the Board to defer to arbitration. At oral argument, however, the parties informed the Court that vacation benefits for the time period in question eventually were awarded under the new 1979 contract. This effectively moots the deferral issue, as no arbitrable dispute now remains. We nonetheless are left with the question whether the refusal of the company to pay the benefits when they were first requested, in June of 1977, itself constituted an unfair labor practice under the Act.

Our analysis begins with the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967). There, the employer refused to pay vacation benefits to strikers—while continuing to pay such benefits to non-strikers—because it asserted "that all contractual obligations had been terminated by the strike and, therefore, none of the company's employees had a right to vacation pay." *Id.* at 29, 87 S.Ct. at 1795. The Court declared that this was "discrimination in its simplest form." *Id.* at 32, 87 S.Ct. at 1796. It then outlined the following principles:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must

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[2] Sections 8(a)(1) and (3) provide that:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157];

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

> be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. at 34, 87 S.Ct. at 1798 (emphasis in original).

In *Great Dane,* the Supreme Court concluded that it was unnecessary to decide whether the discriminatory conduct was "inherently destructive" or "comparatively slight" because the company had come forward with *no* evidence of legitimate motives for its discriminatory conduct. The Supreme Court thus held that the employer's refusal to pay the benefits violated sections 8(a)(1) and (3).

This Court has had two occasions on which to apply the *Great Dane* doctrine to situations similar to the one at hand. In *NLRB v. Frick Co.,* 397 F.2d 956 (3d Cir. 1968), the company's vacation plan provided that "[n]o vacation or vacation pay will be allowed or paid to any person who is not on the payroll of the Company on Wednesday preceding the week in which vacation pay is distributed." 397 F.2d at 959. After the employees went on strike, Frick removed them from the payroll and then informed them that, unless they returned to the job for the three days preceding the day in which the vacation pay was to be distributed, their vacation pay would be forfeited. Frick argued that, in conditioning vacation benefits on the employees' presence at work, it was merely applying the same longstanding rule to the strikers that it would have applied to any other employee who was absent for an unauthorized or unexplained reason. We rejected Frick's contentions. Noting that Frick could have authorized the strikers' absences, but chose not to, Judge Biggs stated:

> In the circumstances at bar it is undenied that Frick refused to pay vacation benefits to the strikers who were absent from work because of the strike when such benefits were paid to other employees.
>
> **166**
>
> This action is discriminatory on its face and the burden is on the company to demonstrate the nondiscriminatory and business reasons for such conduct.

Id. at 961.

Frick presented no evidence showing how the "unauthorized or unexplained" absence rule had been applied in the past, except for the statement of one management official "that it would apply to any employee." In addition, there was evidence that in demanding that its employees work for three days, rather than one, in order to be eligible for their vacation benefits, Frick was not strictly applying the company's vacation rule. For these reasons we concluded that Frick had not met its burden of justifying its conduct. *Id.* at 962 & n.13. Thus, under *Great Dane,* Frick was in violation of sections 8(a)(1) and (3); no showing of anti-union motivation was required. *Id.* at 963.

More recently, in *E. L. Wiegand Division v. NLRB,* 650 F.2d 463 (3d Cir. 1981), we faced once again the question whether an employer that withholds benefits from strikers has committed an unfair labor practice. There, however, our decision turned not on the validity of the employer's proffered business justifications but rather on the Board's finding of anti-union motivation. In *Wiegand,* the employer threatened that it would terminate disability payments to twenty-three employees then on sick leave if the union went on strike. When a strike was called, the employer carried out its threat, halting disability benefits to all the affected employees despite the fact that at least some of the disabled workers were not participating in the strike. The Board found, first, that the disability payments were accrued benefits rather than current wages, and second, "that these benefits were cut off by Weigand with the intention of coercing and restraining protected union activity with respect to the strike through the imposition of a sanction against certain employees if other employees engaged in strike activity." 650 F.2d at 467. We concluded that substantial evidence supported both of the Board's determinations.

III.

The present case comes to us in a procedural posture more closely analogous to *Frick* than to *Wiegand.* Here, there has been no finding of anti-union motivation. After determining that the employees' benefits had accrued, the Board simply concluded that "[i]n refusing to grant their benefits in 1977 because the employees struck rather than worked that year, Respondent unlawfully penalized the strikers for exercising their protected right to strike." Joint Appendix at 358. Vesuvius construes this decision as a determination that the denial of benefits was "inherently destructive" of employee rights. Brief for Petitioner at 22. The Board clarified its position in its brief to this Court, explaining that it had "concluded that the Company had failed to show *any* 'legitimate and substantial' business justification for its conduct" and that "it was unnecessary for the Board to decide whether the denial of benefits had an 'inherently destructive' or 'comparatively slight' effect on employee rights." [3] Brief for the NLRB at 14–15 n.11.

We are, of course, mindful of the fact that "[i]t is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378, 88 S.Ct. 543, 546, 19 L.Ed.2d 614 (1967) (quoting *Great Dane,* 388 U.S. at 33–34, 87 S.Ct. at 1797–98). Nonetheless, we cannot agree with the Board's conclusion that Vesuvius failed to meet its burden of proving a legitimate motive for its conduct.

The company asserts that it refused to pay vacation benefits to its employees because of its "legitimate and good faith interpretation of the expired contract." Brief for Petitioner at 26 n.18. The NLRB found not that Vesuvius lacked bona fides but rather that its interpretation of the contract was incorrect. Specifically, the Board rejected the company's contention that the vacation benefits had not accrued because, under company policy, an employee had to perform some work in the year he or she was to take a vacation in order to receive the vacation benefits.[4] Additionally, the Board dismissed Vesuvius' assertion that the benefits were dependent on the contract and were expressly limited to the term of the contract. The company argued that, in the absence of a new agreement specifying the terms and conditions for vacation during its term—and in light of past practice—there was no basis on which to compute the amount of vacation pay owed. The Board responded: "the amount-of-vacation formula and the vacation pay formula were inseparably intertwined; once the employees' 1976 service had met the test for regular vacation entitlement, the terms of the 1973–1976 contract determined with equal finality how many weeks of vacation each employee would receive in 1977, and with how much vacation pay." Brief for the NLRB at 17.

We need not decide on this appeal whether Vesuvius, or the Board, correctly interpreted the collective bargaining agreement at issue here. Indeed, we believe that in formulating its own interpretation of the contract, the Board overstepped its authority and seriously misperceived its role. The legitimacy of the company's conduct for purposes of the analysis prescribed by *Great Dane* depends not on the truth of its assertions regarding its contractual obligations but rather on the reasonableness and bona fides with which it held its beliefs. The mere fact that the NLRB construed the contract differently from the way Vesuvius did should not, without more, mean that Vesuvius ipso facto committed an unfair labor practice.

The First Circuit's decision in *NLRB v. Borden, Inc., Borden Chemical Division,* 600 F.2d 313 (1st Cir. 1979), is persuasive in this regard. In *Borden,* the employer withheld accrued vacation pay because of the employees' strike activity until after the contractual vacation period had expired. The Board rejected the employer's assertion that it was acting pursuant to a contractual obligation, *i.e.,* "employees shall not be paid vacation pay in lieu of vacation," and concluded that the denial of vacation benefits was inherently destructive of the employees' rights. The First Circuit remanded the case, declaring:

> Borden did come forward with evidence of a business justification for its conduct, namely, the terms of the collective bargaining agreement and past practice.
>
> The Board found this reason invalid because its interpretation of the contract differed from that of Borden's. *This, however, is not a question of contract interpretation. The Board had a duty to determine whether Borden was motivated by its reliance on the collective bargaining agreement or by anti-union animus when it withheld the accrued vacation benefits. We caution the Board that it is nei-*

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[3] For purposes of this opinion, we adopt the Board's characterization of its own decision. We note, however, that regardless of how the decision is characterized, the result in this case remains the same.

[4] *See* note 6 *infra.*

> *ther our function nor the Board's to second-guess business decisions.* "The Act was not intended to guarantee that business decisions be *sound,* only that they not be the product of antiunion motivation" (emphasis in original). *Liberty Mutual Insurance Co. v. NLRB,* 592 F.2d 595, 603 (1st Cir. 1979), quoting from *Stone & Webster Engineering Corp. v. NLRB,* 536 F.2d 461, 467 (1st Cir. 1976). *See NLRB v. Eastern Smelting & Refining Corp.,* 598 F.2d 666 at 670, 673 (1st Cir. 1979).

600 F.2d at 321 (emphasis added).

Here, as in *Borden,* the employer came forward with evidence of a business justification for its conduct: it did not believe that any vacation benefits were due and payable under the expired contract on June 28, 1977. To resolve the dispute, Vesuvius offered to submit the matter to arbitration, but the Board effectively closed that avenue when it declined to defer to arbitration.

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The employer was then faced with a dilemma—it could either accede to the union's request for the vacation benefits, or it could refuse and run the risk that its refusal would be grounds for an unfair labor practice charge.

We find this result untenable. There is no suggestion that Vesuvius' interpretation of its contractual obligations was unreasonable or made in bad faith; indeed, the administrative law judge who heard the case agreed with the company's interpretation and concluded that the employees were not entitled to vacation pay on June 28, 1977. The company pointed to the language in the collective bargaining agreement stating that "[t]o be eligible for a vacation in any calendar year *during the term of this Agreement,* the employee must have one year or more of continuous service." § VII(A). Admittedly, this provision is ambiguous, but it is at least arguable that the phrase "during the term of this Agreement" refers not to vacation eligibility but to the vacation itself. Even more convincing is the company's argument that "in 1974, as in 1971, when new contracts were agreed upon, the vacation rights of the employees were not determined under the predecessor expired agreements for 1970–73 and 1967–70, but under the new agreement then in effect which provided for different terms and conditions." Brief for Petitioner at 30. The Board dismissed this argument by noting: "That the parties agreed to compute 1974 vacations under the terms of the later contract does not rebut the fact that [the] employees earned vacation benefits in the year they performed the work." Joint Appendix at 357 n.17.

While we venture no opinion on the merit of the employer's contentions, we conclude that Vesuvius' construction of the contract, based both on the language of the vacation provision and on past practice, is reasonable and at least arguably correct. Accordingly, we hold that, in the absence of proof of anti-union motivation or a finding that the company's conduct was inherently destructive of employee rights, a non-discriminatory refusal to pay benefits to all employees based on a good faith interpretation of the labor contract is insufficient to make out a violation of the National Labor Relations Act.[5]

Frick does not counsel otherwise. In that case, the employer conditioned the payment of vacation benefits on the employees' willingness to quit the strike and return to work; this directly violated the rule that "[s]trikers must be treated uniformly with nonstrikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship." 397 F.2d at 962 (quoting *Great Dane Trailers,* 150 N.L.R.B. 438, 439 (1964), *rev'd sub nom. NLRB v. Great Dane Trailers, Inc.,* 363 F.2d 130 (5th Cir. 1966), *rev'd,* 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967)). Here, in contrast, the employer argued that no benefits had accrued to any employee—striking or non-striking—under the expired contract.

Nor are we persuaded that cases such as *NLRB v. Duncan Foundry and Machine Works, Inc.,* 435 F.2d 612 (7th Cir. 1970), and *NLRB v. Knuth Brothers, Inc.,* 584 F.2d 813 (7th Cir. 1978), compel a different result. In *Duncan Foundry,* the employer argued that, under the contract, only those employees who had been working on May 1, 1967 were entitled to vacation pay. Similarly, the employer in *Knuth Brothers* pointed to a provision in its collective bargaining agreement requiring that "an employee must be on the 'active payroll' on March 1 to be entitled to any vacation benefits for the previous 12 months," and argued that no vacation benefits were due to striking employees not present at work

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[5] The mere fact that the employer has treated all of its employees alike will not, of course, legitimize otherwise illegal conduct under sections 8(a)(1) and (3). It is well settled that an employer may not defend inherently destructive or improperly motivated conduct on the ground that it did not discriminate against one group of employees. *See Kansas City Power & Light Co. v. NLRB,* 641 F.2d 553, 556–57 (8th Cir. 1981); *Allied Industrial Workers, Local 289 v. NLRB,* 476 F.2d 868, 877 (D.C.Cir. 1973); *NLRB v. Jemco, Inc.,* 465 F.2d 1148, 1152 (6th Cir. 1972), *cert. denied,* 409 U.S. 1109, 93 S.Ct. 911, 34 L.Ed.2d 690 (1973).

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on March 1. In both cases, "the effect of the alleged active work rule [was] to deny strikers vacation benefits while granting such benefits to non-strikers and strikers who returned before the end of the strike." *Duncan Foundry,* 435 F.2d at 618. Thus, the work rule—cited by the employer as a business justification for its conduct—was itself discriminatory in effect, and could not be applied by the employer absent a legitimate and substantial business justification for its use. In the case at hand, in contrast, there was no suggestion that the contractual provisions relied upon by the employer worked to entice the strikers back to work or to favor those employees who chose not to strike. Here, Vesuvius' asserted justification for its conduct—its good faith belief that no vacation benefits were due to any employee under the expired contract—was not itself discriminatory in effect.[6] We conclude, therefore, that Vesuvius met its burden, under *Great Dane,* of showing a legitimate and substantial business justification for its conduct.

IV.

Our inquiry is not ended by concluding that Vesuvius has met its burden of establishing a legitimate and substantial business justification for its conduct. We now must address the question, unanswered by the Board in this case, whether the company's conduct was "inherently destructive" of the employees' rights or whether the adverse consequences were "comparatively slight."[7] If the conduct properly can be characterized as "inherently destructive," no proof of anti-union motivation is required; the Board can find an unfair labor practice despite the employer's proof of legitimate business justifications. If, however, the effects of the conduct are less severe, anti-union animus must be shown to sustain the unfair labor practice charge.

A.

The Supreme Court has stated that conduct is inherently destructive if it "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" *Great Dane, supra,* 388 U.S. at 33, 87 S.Ct. at 1797 (quoting *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 228, 231, 83 S.Ct. 1139, 1145, 1147, 10 L.Ed.2d 308 (1963)). Generally, those courts that have addressed the question have described "inherently destructive" conduct as that "with far reaching effects which would hinder future bargaining, or conduct which discriminates solely upon the basis of participation in strikes or union activity." *Portland Willamette Co. v. NLRB,* 534 F.2d 1331, 1334 (9th Cir. 1976). Put another way, "inherently destructive" conduct is "that which creates visible and continuing obstacles to the future exercise of employee rights." *Inter-Collegiate Press, Graphic Arts Division v. NLRB,* 486 F.2d 837, 845 (8th Cir. 1973) (citing Note, *Lockouts—Employers' Lockout with Tem-*

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porary Replacements Is an Unfair Labor Practice, 85 Harv.L.Rev. 680, 686 (1972)), *cert. denied,* 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed.2d 288 (1974).

There is no evidence in the record to support a conclusion that Vesuvius' refusal to pay vacation benefits in June 1977 was "inherently destructive," as that phrase has been defined. This is not a case in which the employer offered to non-strikers a benefit, such as super-seniority, that necessarily and permanently worked to the detriment of the strikers. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230–31, 83 S.Ct. 1139, 1146–47, 10 L.Ed.2d 308 (1963). Nor are we faced with the situation in which workers were permanently discharged because of their participation in collective action. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945); *cf. Radio Officers' Union v. NLRB*, 347 U.S. 17, 74 S.Ct. 323, 98 L.Ed. 455 (1954). Here, payment of the vacation benefits was made contingent not on the strikers' return to work but rather on the resolution of a dispute regarding the contractual obligation of the employer to pay the very benefits in question. In no way can it be said that this conduct bears its own indicia of improper intent. *See NLRB v. Borden, Inc., supra* at 321. Consequently, actual proof of anti-union motivation would be necessary to sustain the Board's determination that Vesuvius committed an unfair labor practice in this case.

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[6] The Board's decision that Vesuvius had committed an unfair labor practice rested in large measure on its finding that Vesuvius had "refused to grant vacation benefits to the strikers because, as a result of their strike, they were absent from work in 1977." Joint Appendix at 353. Indeed, Vesuvius does argue vigorously that "it is an established practice under the agreement that in order for an employee to be eligible for or entitled to vacation in a calendar year he must perform some work in that calendar year." Brief for Petitioner at 32. Had it been shown that any employee who abandoned the strike and worked for at least one day in 1977 received vacation benefits, while those who remained on the picket line forfeited their benefits, we might be constrained, under *Frick,* to hold that Vesuvius had not presented a legitimate business justification for its conduct. There was, however, no evidence to this effect. In fact, the record suggests that—notwithstanding its ex post facto legal arguments—Vesuvius' primary contention when it refused to grant the vacation benefits was that, whether or not the employees worked in 1977, under section VII(B)(1) of the contract, vacation pay was due only for the three years that constituted the term of the collective bargaining agreement. Joint Appendix at 225.

[7] Because we conclude that there is insufficient evidence on the record to support either a determination that the company's conduct was "inherently destructive" or a finding of anti-union motivation, we find it unnecessary to remand the case to the Board in this instance.

B.

Under the law of this Circuit, it is unnecessary for the Board to prove that the employer's conduct was motivated *solely* by anti-union animus. *NLRB v. Garry Manufacturing Co.*, 630 F.2d 934, 945 (3d Cir. 1980); *Gould Inc. v. NLRB*, 612 F.2d 728, 734 (3d Cir.), *cert. denied*, 449 U.S. 890, 101 S.Ct. 247, 66 L.Ed.2d 15 (1980); *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978). Nonetheless, a finding of anti-union motivation cannot be sustained unless there exists some specific evidence demonstrating that the employer intended, at least in part, to interfere with the employees' rights by withholding benefits.

A careful review of the record in this case reveals no evidence of anti-union motivation on the part of Vesuvius. There is no suggestion, for example, that Vesuvius conditioned the payment of benefits on a requirement that its striking employees return to work; indeed, the evidence suggests that one employee who abandoned the strike and returned to work did not receive vacation benefits in 1977. Joint Appendix at 199. *Cf. NLRB v. Frick Co., supra* (employer notified employees that if they failed to return to work, they would forfeit their vacation benefits); *NLRB v. Duncan Foundry & Machine Works, Inc., supra* (employer granted vacation benefits to non-strikers and strikers who abandoned the strike); *Allied Industrial Workers, Local 289 v. NLRB*, 476 F.2d 868 (D.C.Cir. 1973) (employer conditioned payment of accrued vacation benefits upon cessation of strike). Additionally, it is uncontroverted that in January, 1977, the company paid vacation pay to those employees who had scheduled vacations in November or December of 1976 but were on strike as of those dates. No attempt was made to deprive these employees of their accrued benefits merely because they were on strike. Nor does the record indicate that Vesuvius threatened to withhold the benefits prior to the strike in order to gain concessions from the union. *See Wiegand, supra*, at 470 n.3. Finally, Vesuvius expressed willingness to submit the question of 1977 vacation pay to an arbitrator. No evidence suggests that, had the dispute been arbitrated, and had the arbitrator found in favor of the employees, Vesuvius nonetheless would have refused to pay the benefits to those employees who remained on strike.

In short, we conclude that there is insufficient evidence on this record to support a conclusion that Vesuvius was motivated by anything other than its good faith belief that no right to vacation pay had accrued to its employees as of June 1977, and that entitlement to and amount of the 1977 benefits would be determined under the new collective bargaining agreement if and when that agreement was signed. Accordingly, we find it unnecessary to remand the case to the Board for a determination whether Vesuvius' conduct was improperly motivated.

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Thus, the Board's petition for enforcement will be denied, and the company's petition for review will be granted.

APPENDIX

SECTION VII. VACATIONS

A. *Eligibility*—To be eligible for a vacation in any calendar year during the term of this Agreement, the employee must have one year or more of continuous service.

B. *Length of Vacation and Extra Vacation Pay*

1. An eligible employee who has attained the years of continuous service indicated in the following table in any calendar year, on the anniversary of his employment with the Company, during the

term of this Agreement shall receive a vacation corresponding to such years of continuous service as shown in the following table:

Years of Service	*Vacation*
1 but less than 3	1 week
3 but less than 10	2 weeks
10 but less than 15	3 weeks
15 but less than 25	4 weeks
25 or more	5 weeks

2. A one week's vacation shall consist of seven consecutive days, a two weeks' vacation of fourteen consecutive days, and a three weeks' vacation of twenty-one consecutive days, etc., provided however that in the event the orderly operations of the business require, such vacations shall be subject to the provisions of the following Subsection C.

C. *Scheduling of Vacation*—Promptly after January 1 of each calendar year each eligible employee shall be requested to specify the vacation period he desires. Vacations will, so far as possible, be granted at times most desired by employees (longer service employees being given preference as to choice), but the final right to allot vacation period, and the right to change such allotments, is exclusively reserved to the Company in order to insure the orderly operation of the business.

1. Vacation season shall be from January 1 to December 31.

2. Vacation dates must necessarily conform to business requirements and shall be taken as scheduled by Management.

3. Vacation schedules may be changed by the Company if operating conditions make such change necessary.

4. A temporary shutdown in any department may be designated for vacations upon reasonable notice by the Management.

5. Excepting conditions listed above, whenever a Company scheduled vacation shutdown is planned, unless he is otherwise notified, such employee will take his earned vacation at shutdown time. Those employees who are due more than two weeks' vacation are required to take only two weeks of their earned vacation at shutdown time, providing the remaining vacation is taken as provided for above. All vacations must be taken by December 31 in any year. There shall be no pyramiding or carryover into subsequent years of vacation earned but not taken by an employee.

D. *Vacation Pay*—An employee granted a vacation will receive, for each vacation week, two percent (2%) of his earnings from January 1 to December 31 of the year previous. In the case of first year's employment, he will receive two percent (2%) of the first twelve (12) months' earnings. Vacation pay shall be shown separately on the employees' earnings.

Earnings are defined as all money received within the prescribed period except that money received for holiday pay, jury duty pay, cost-of-living adjustment, and death in family pay shall be excluded from the total earnings for computing vacation pay.

When an employee has been off from work for reasons of his ill health (but for no other reason) for more than one-half of the number of available working days between January 1 of any year and the subsequent December 31, such employee's vacation benefits shall be calculated as follows: (a) an employee having no earnings between January 1 of any year and the subsequent December 31 shall be entitled to a minimum of one week or one-half of his accumulated vacation benefits based on his basic hourly wage rate, and (b) in determining the amount of vacation pay, the two percent (2%) of his average hourly earnings between January 1 and the subsequent December 31 will be used. In such event, if this calculation (b) is less than the minimum defined above in (a), the employee shall receive the greater of the two calculations.

In the event employment is terminated between January 1 and July for the following reason:

Quit, provided two weeks' prior notice of such intent is given the Payroll Office in writing, the employee shall receive for each eligible week two percent (2%) times his earnings for the last four (4) consecutive closed quarters of work.

E. *Vacation Allowance in Lieu of Vacation*—While it is recognized that the purpose of the vacation provided by this Section is to grant the employees vacation with pay as annual periods of rest and recreation, the Company may require an employee to work during his vacation, in which event he shall be paid his vacation pay in addition to his regular pay.

Bay-Wood Industries, Inc. v. NLRB

666 F.2d 1011 (6th Cir.), December 1, 1981–249 NLRB 403

On petition to review Board Order

Before KEITH and MARTIN, Circuit Judges, and ALDRICH,* District Judge.

PER CURIAM: Petitioner, Bay-Wood Industries, seeks review of a National Labor Relations Board decision finding that it violated section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) when it discharged William Cederberg, a seasonal employee.

Cederberg was hired in August, 1978 as a laborer to work in its Bay City, Michigan wood fabricating plant. Assigned to the machine shop, Cederberg worked without complaint until mid-September when he complained of the dust and splinters spewing from the circular table saw he was operating. He requested and was given a mask and respirator to wear.

Several days later, on September 20, 1978, Cederberg was assigned to cut wood blocks on an overhead radial saw. After a set-up man demonstrated the saw, Cederberg took over and began to cut blocks as instructed. However, approximately forty-five minutes later, Cederberg complained to the foreman that the saw was unsafe. He stated that certain blocks cut poorly, causing his fingers to be jerked dangerously close to the blade. The foreman returned with Cederberg to the saw where he demonstrated again its proper operation. He left Cederberg with the admonition that if he, Cederberg, operated the machine in this manner and took his time, he would not need a safety guard. Furthermore, the foreman explained that the guard had been removed because it interfered with the saw's operation.

Cederberg again took up operation of the machine only to stop again a short time later because of his continuing fear for his fingers. Returning to the foreman's office, he stated he would not run the saw unless a guard was installed. There is some dispute as to the foreman's response but essentially Cederberg was told to go home. Cederberg returned the next day and briefly took up the issue with the plant supervisor. However, little was said and Cederberg left believing he had been discharged. The only further action Cederberg took was to register a complaint a short time afterwards with the local OSHA office.

The parties on review dispute whether the evidence indicates Cederberg was fired or quit. We need not resolve that question however, for assuming that Cederberg was fired, his dismissal did not violate the Act because it was not discriminatory of protected employee activities.

Section 7 of the Act grants employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" without fear of recrimination by their employers. 29 U.S.C. § 157. The purpose of this provision is to protect union activity in both its nascent and mature forms. The question then is whether the complaints and actions of Cederberg constitute "concerted activities" protected under section 7.

The uncontroverted evidence shows that Cederberg acted alone on his own behalf. He did not file a grievance concerning this matter as provided for in the collective bargaining agreement between his union and petitioner, nor did he notify the union steward of the problem. Furthermore he testified that when he complained, he was not attempting to enforce the safety provisions of the Union's contract, a document with which he was totally unfamiliar. Instead he stated that he was seeking solely to resolve a problem which he believed concerned him alone. He enlisted no other employees in this dispute nor did he attempt to represent any interests other than his own.

Faced with this absence of facts showing concerted activity, the administrative law judge employed in his decision a judicial fiction known as the "Interboro Doctrine." This principle arose in *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). There the NLRB held that complaints by an individual employee seeking to enforce provisions of

a collective bargaining agreement amounted to concerted activity under section 7 despite the absence of interest by his fellow employees in the complaint. The theory behind this principle is that the complaint of one individual necessarily implicates the interests of all employees when it is grounded in the agreement of which they are all a part. However, this court in *Aro, Inc. v. N.L.R.B.*, 596 F.2d 713 (1979), specifically considered and rejected the Interboro Doctrine's expansive construction of section 7. The test adopted there for determining what activities are "concerted" follows:

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*Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

Id. at 718.

There is no evidence in the record that shows Cederberg's complaint meets this test.

Consequently, the Board's cross-petition for enforcement of its order is denied.

NLRB v. Service Machine & Shipbuilding Corp.

662 F.2d 1125 (5th Cir.), December 3, 1981—253 NLRB 628

On petition to enforce Board Order

Before CLARK, Chief Judge, RUBIN and SAM D. JOHNSON, Circuit Judges

1125

PER CURIAM: The National Labor Relations Board (NLRB) has applied for enforcement of its order directing Service Machine & Shipbuilding Corp. (Service Machine) to reinstate and pay lost wages to four of its former employees whom the Company had discharged for refusing to operate electrical equipment in the rain. The NLRB's findings are supported by substantial evidence in the record considered as a whole, and its legal conclusions are correct. The Board's order is, therefore, enforced.

Service Machine is in the business of marine construction and ship repair. Nathaniel Buggage, Frank Dorsey, McCullem Williams, and Thomas Coleman were employed by the Company as welders. On September 19, 1979, Service Machine shut down the majority of its yard and boat landing operations because a light drizzle of rain was falling. Shortly before it shut down operations, however, it had loaded an eighty-six foot tall platform [1] onto a barge tied up to one of its boat landings in the bayou. The rains came before Service Machine could secure the platform to the barge. Fearing that the worsening weather conditions would rock the barge and cause the platform to slip off, Service Machine sought volunteers to work overtime to weld the platform into place. Eight welders, including the four complainants, and several fitters agreed to stay.

While the fitters performed some preliminary work on the cross braces which were used to fasten the platform to the barge, Buggage, Dorsey, Williams, and Coleman sought shelter from the rain in a shack near the boat landing. Before the fitters finished, welding foreman Milton Duval ordered these men out to the barge. Carrying their equipment and unprotected by rain gear, the men ran out to the barge and sought shelter under the platform's lower deck. This deck, however, stood fifty-six feet above the floor of the barge and provided little protection from the elements.

1126

After the fitters finished, Dorsey and Williams used their welding equipment to tack one of the braces into place. The welding equipment was powered by 440 volts of electricity and both Dorsey and Williams testified that they received small shocks while tacking the brace. As they finished tacking, the rains became heavier. Dorsey, Williams, Buggage, and Coleman then told Duval that they would not weld in the rain. When Duval ordered them to continue, they protested, saying that they had their families to consider and would not be paid if they became ill.[2] Duval told them to go home if they were not going to work.

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[1] The platform is actually a tower built of four large pipe pillars, braced by crossbeams, which support a lower deck about 56 feet above the floor of the barge and an upper deck yet another 30 feet above that. Equipment and smaller structures sit on the platform's decks.

[2] Our review of the record reveals that Dorsey, Coleman, and Williams all testified that they, at this time, expressed a fear of electrocution to Foreman Duval. The Administrative Law Judge (the ALJ), however, apparently overlooked Coleman's and Williams' corroboration of Dorsey's testimony to this effect, and chose not to credit Dorsey's testimony on this point "in view of neither Coleman nor Williams recalling such comments." The Board adopted this section of the ALJ's opinion without modification or dissent. This apparent error is, however, irrelevant in light of our agreement with the Board's conclusion that the danger of electrical shock was known to Duval.

It was raining harder still when the men were confronted by Supervisor Rudy Thibodeaux, who told them that they were fired if they did not return to work. Following this conversation, the men left the yard.[3] They returned to the yard the next day and spoke with Thibodeaux, who told them that they had been discharged when they left work the night before and directed them to collect their equipment and check out.

The ALJ found that these employees were discharged when they collectively exercised their right to refuse to expose themselves to the danger, of which all persons involved were aware, of a major electrical shock, and concluded that their discharge under these conditions violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). A three-member panel of the Board unanimously affirmed the ALJ's findings and conclusions on this point,[4] and adopted his order of reinstatement and back pay.

The facts in this case are in all significant respects identical to those of *Brown & Root v. NLRB*, 634 F.2d 816 (5th Cir. 1981), in which this Court held the employees' refusal to operate electrical equipment in the rain to be a concerted activity protected by section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and a discharge precipitated by this refusal to be a violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). The distinctions offered by Service Machine, that its employees, unlike those of Brown & Root, volunteered to work in emergency conditions, and that its employees failed to articulate expressly their fear of electrical shock prior to their walkout, are distinctions without a difference.

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The Company's argument that its employees lost their right to protest the dangers and discomforts inherent in emergency conditions by volunteering to work under such conditions is premised on a version of the facts at odds with that found by the Board. These employees did not, as the Company would have it, volunteer to weld in wet weather. At the time when they agreed to stay, the rain was only a drizzle, and their clothes were dry. *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) firmly established that an employee's waiver of his section 7 rights is not lightly to be implied from an earlier accession to less-than-optimal conditions. The employees of Washington Aluminum Company regularly worked in a Baltimore, Maryland machine shop which was not insulated, which frequently had to be opened to the weather, and which was heated primarily by an oil furnace located in an adjacent building. Even though the conditions which normally obtained in the shop during the winter were quite cold, the Supreme Court found a protected exercise of section 7 rights in the employees' walkout when the furnace broke down. The situation which confronted Buggage, Williams, Dorsey, and Coleman in its significant respects is strikingly similar to that which precipitated the employee walkout in *Washington Aluminum*. Their agreement to work in conditions which, while perhaps unpleasant, were not hazardous, did not preclude their refusal to continue to work when conditions worsened to present a danger of major electrical shock.

Nor is it relevant that the Board found that these men failed to state explicitly their fear of electrical shock before walking off the job. As stated by the Supreme Court in *Washington Aluminum*,

> We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made.

Id., 82 S.Ct. at 1102.

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[3] The record indicates that the remaining welders completed the job after Duval and Thibodeaux shielded the work area with plastic sheeting and gave the other welders dry gloves. The ALJ found that neither Duval nor Thibodeaux offered, in their exchanges with the complainants, to put up the plastic sheeting.

[4] The ALJ found as well an alternative ground for his order of reinstatement and back pay in his conclusion that, whether or not the welders were concerned for their safety, their simultaneous refusal to work in the rain constituted concerted activity and was therefore protected under the Act. On review of his order, one member of the Board dissented from this construction of "protected concerted activity." On appeal, Service Machine urges us to refute this conclusion, characterizing it as a *per se* rule protecting all refusals to work regardless of the conditions under which the refusal occurs. Because we find that the Board's order is amply supported by the ALJ's conclusion that the employees acted out of their fear of a hazard which was apparent to all persons involved, we express no opinion on this issue.

The objections offered by Service Machine are found to be without merit. The order of the Board is enforced.

ENFORCED.

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, etc. v. NLRB

California Dump Truck Owners Association v. NLRB

Larry Shepard v. NLRB

669 F.2d 759 (D.C. Cir.), December 4, 1981—249 NLRB 386

On petitions to review Board Order

Before McGOWAN and ROBB, Circuit Judges, and JAMESON*, United States Senior District Judge for the District of Montana

Opinion for the Court filed by Circuit Judge ROBB

ROBB, Circuit Judge: These cases are here on petitions to review the order of the National Labor Relations Board in *Building Material & Dump Truck Drivers, Teamsters Local Union No. 36, etc.*, 249 N.L.R.B. No. 38 (1980). The Board ordered the Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 and the Associated General Contractors, San Diego Chapter, Inc., the San Diego Building Contractors Association, the Engineering and General Contractors Association, and their employer members (the Contractors) to cease enforcing certain provisions of a Master Labor Agreement entered into by the Union and the Contractors in 1977. The Board found that the 1977 Master Labor Agreement required signatory employers to cease dealing with non-union dump truck operators who are independent contractors, thus violating section 8(e) of the National Labor Relations Act. 29 U.S.C. § 158(e) (1976).[1]

The Union has petitioned for review of the Board's order, arguing that the Board erred in finding that the truck operators in question are independent contractors. The Associated General Contractors have intervened in support of the Board's order. The California Dump Truck Owners Association, an association of independent dump truck owner-operators, and Larry Shepard, an individual dump truck owner-operator, were charging parties before the Board. They have also petitioned for review, arguing that the remedy awarded by the Board is inadequate. We affirm the Board's order in all respects.

The dispute arises out of the building and construction industry in San Diego County, California. The practice in that industry is that building contractors hire dump truck operators on a day-to-day basis to haul materials to and from construction sites. The contractors generally obtain the services of dump truck operators through brokers, who refer hauling jobs to individual operators, handle billing for services rendered, and generally coordinate arrangements between the contractors and the truck operators. The brokers receive a commission based on the amount billed. Larry Shepard, one of the petitioners, is a dump truck owner-operator who generally accepts referrals from the Terra Trucking Company, one of the brokers in the San Diego area. Petitioner California Dump Truck Owners Association is composed of owner-operators who operate through brokers.

Since at least 1965 the Union and the Contractors have negotiated master labor agreements to govern hauling work performed in the San Diego area. There has been a dispute during that same period between the Union and the non-union truck operators over the availability of hauling jobs for non-union truck operators. The Union sought terms in each new agreement to prohibit dealings with non-union operators. The 1977 Master Labor Agreement contained such terms. Section 4 of the Agreement required signatory contractors to transport "all materials * * * to or from or on the site of the work by workmen furnished by the appropriate craft UNION * * *." Under section 42(B)(1) of the Agreement only union truck operators were cleared by the Union for work with the Contractors. The Agreement also provided that signatory contractors could procure the services of truck operators only through a "person, firm, or corporation * * * signatory to an agreement with the Union". Section 42(B)(2). Other provisions of the Agreement required the Contractors to treat owner-operators as employees, section 42(B)(4), and penalized contractors who failed to comply with the Agreement. Section 42(B)(9)(12) & (13). In short, under the 1977 Agreement the Union enlisted the aid of the Contractors to insure that only signatory brokers received subcontracts and only union truck operators performed hauling services for building contractors in the San Diego area. The Board found that the Union and the Contractors enforced the Agreement against brokers and non-union dump truck operators.

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] Section 8(e) provides that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

In November 1977 the Kissinger Trucking Company, a broker, entered into a contract with the Penhaul Company to supply hauling services for a demolition project. Shortly after the project began, Kissinger's manager was informed that Kissinger would be replaced because it was referring non-union truck operators. Penhaul had signed the 1977 Agreement and could not, under the terms of that agreement, contract with a broker that referred non-union 763 truck operators. Kissinger Trucking lost the contract with Penhaul and subsequently signed the 1977 Agreement.

The Agreement was also enforced against Terra Trucking, Larry Shepard's usual broker. Terra Trucking has been a party to master labor agreements since 1974, and so was required by the 1977 Agreement to refer only union truck operators to building contractors. In August 1978 Terra Trucking's president, Fred ReCupido, received a letter from the Union stating that under the Agreement he must not deal with seven non-union truck operators, including Shepard. ReCupido informed the seven truck operators that they must join the Union or make other arrangements for brokerage of their services. Shepard joined the Union under protest. Some of the seven non-union truck operators did not join the Union but continued to accept referrals from Terra Trucking.

In December 1977 the Dump Truck Owners filed a charge with the Board alleging that the Agreement violated section 8(e) of the Act. The charge alleged that the Union and the Contractors had agreed to cease, and had actually ceased, doing business with the non-union dump truck operators. In October 1978 Larry Shepard filed a similar charge against the Union, alleging that the Union had violated sections 8(b)(4)[2] and 8(e) of the Act by pressuring Terra Trucking not to broker his services because he did not belong to the Union notwithstanding that he is an independent contractor. At the request of the Regional Director, Shepard filed a new charge containing only the 8(e) allegation.

In January 1979 the Regional Director consolidated the two charges and issued a complaint alleging only a violation of section 8(e) by the Union and the Contractors. After a full trial the Administrative Law Judge found that the truck operators are independent contractors and not employees under the Act. Thus, the Union and the Contractors violated section 8(e) by agreeing not to do business with the non-union truck operators and their brokers. The ALJ recommended that the Board order the Union and the Contractors to cease and desist from enforcing the unlawful provisions of the Agreement. The ALJ further recommended that the Union and the Contractors be ordered to make whole those truck operators who were compelled to join the Union and pay dues, initiation fees, assessments, and contribute to Union trust funds.

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[2] Section 8(b) provides that

> It shall be an unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or selfemployed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> * * * * *

29 U.S.C. § 158(b) (1976).

On exceptions and briefs the Board affirmed the ALJ's findings and conclusions, as relevant here, but deleted the make-whole remedy recommended by the ALJ. The Board ordered the Union and the Contractors to cease enforcing the unlawful portions of the Agreement and to post notices. The Union, Mr. Shepard, and the Dump Truck Owners petition for review and the Board petitions for enforcement of its order.

The first question presented by the petitions for review is whether the Board correctly found that the Union and the Contractors violated section 8(e) of the Act by agreeing not to deal, and ceasing to deal, with certain brokers and non-union truck operators. Section 8(e) prohibits "any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer". 29 U.S.C. § 158(e) (1976).[3] This section of the Act has been interpreted by the Supreme Court to prohibit agreements calculated to satisfy "secondary" union objectives, *i.e.*, those objectives which are not "addressed to the labor relations of the contracting employer *vis-a-vis* his own employees". *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 644–45, 87 S.Ct. 1250, 1268–69, 18 L.Ed.2d 357 (1967). Agreements which limit the employer, here the Contractors, to subcontracting with businesses that recognize the union or have a union contract violate section 8(e). *Truck Drivers, Local 413 v. NLRB*, 118 U.S.App.D.C. 149, 158, 334 F.2d 539, 548 (1964). Thus, a provision in an agreement which is designed to compel independent contractors to become union members as a condition of doing business with a party to the agreement is unlawful because it restricts the employer in his dealings with other businesses. *Local 814, International Brotherhood of Teamsters v. NLRB*, 167 U.S.App.D.C. 387, 389–90, 512 F.2d 564, 566–67 (1975), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977). It is not disputed that the Union and the Contractors may not lawfully enforce the provisions of the 1977 Agreement which restrict dealings with truck operators who are independent contractors. However, the Union contends that the Board erred in finding that the truck operators are independent contractors. The truck operators, says the Union, are employees of the brokers. We agree with the Board.

Section 2(3) of the Act, 29 U.S.C. § 152(3) (1976), defines "employee" as excluding "any individual having the status of an independent contractor". The Act does not define "independent contractor", but Congress intended the Board and the courts to "apply general agency principles in distinguishing between employees and independent contractors under the Act." *NLRB v. United Insurance Co.*, 390 U.S. 254, 256, 88 S.Ct. 988, 989, 19 L.Ed.2d 1083 (1968) (footnote omitted). In applying agency principles the Board and the courts look at all aspects of an individual's relationship with the putative employer. *Local 777, Democratic Union Organizing Committee, Seafarer's International Union v. NLRB*, 195 U.S.App.D.C. 280, 290–91, 603 F.2d 862, 872–73 (1978). Although no one part of the relationship is determinative, the degree of supervision over the means and manner of performing the task assigned is most important in determining whether a relationship is that of employee or independent contractor. *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); *see Joint Council of Teamsters No. 42 v. NLRB*, 146 U.S.App.D.C. 275, 279, 450 F.2d 1322, 1326 (1971). Under the familiar principles of agency law

> an employer-employee relationship exists when the employer reserves not only the right to control the result to be achieved, but also the means to be used in attaining the result. On the other hand, where the employer has reserved only the

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[3] Section 8(e) also contains a proviso excepting from its coverage all work performed on a construction job site. That proviso is not at issue in these cases.

right to control the ends to be achieved, an independent contractor relationship exists.

Seafarers International, supra, 195 U.S. App.D.C. at 290-91 n.24, 603 F.2d at 872-73 n.24, *quoting Twin City Freight Inc.,* 221 N.L.R.B. 1219, 1220 (1975). *Accord: City Cab Co. of Orlando, Inc. v. NLRB,* 202 U.S.App.D.C. 261, 264, 628 F.2d 261, 264 (1980). It is the Board which determines independent contractor or employee status in the first instance and we must affirm the Board's determination if it is supported by

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the record as a whole. 29 U.S.C. § 160(e) (1976); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-88, 71 S.Ct. 456, 463-64, 95 L.Ed. 456 (1951).

Given these legal principles, our task is limited to determining whether the Board's finding that the truck operators are independent contractors is consistent with the statute and the record. The Board found that the truck operators are not supervised in any manner by the brokers, who simply refer hauling jobs to them. While on the job only the building contractor's personnel tell the truck operators where to deliver a load, and this is done by hand signals. The Board found that the truck operators may accept referrals from more than one broker and are free to negotiate a job rate that is higher than a minimum rate set by a state commission. The truck operators own their trucks, and arrange licensing, insurance, repairs and maintenance. They are responsible for operating expenses, may subcontract job referrals, are personally liable for spillage, pay Social Security taxes as self-employed persons, and often receive payment based on tonnage or mileage as opposed to hourly wages. As the Board concluded, it is fair to describe these truck operators as independent businessmen, free to decide when, whether, and how to work. This being so the Union may not lawfully compel them to become members in order to carry on their business.

The Union challenges the Board's conclusion by pointing to certain facts which are said to indicate a close working relationship between Terra Trucking, a broker, and some of the truck operators that accept referrals from Terra. Specifically, the Union notes that Terra Trucking (1) rents trailers to some truck operators, (2) requires five days notice before a truck operator may cease renting a trailer, (3) insures its rented trailers under a policy that includes a two-hundred-fifty dollar deductible clause, (4) makes fuel available for purchase by the operators, (5) performs all billing and collection services for the truck operators, (6) pays the truck operators each month whether or not the bills are collected and (7) the truck operators are told when and where to report to begin work.

We think these facts and others relied on by the Union do not compel a finding that the truck operators are employees under the Act. None of the facts relied on by the Union establishes that the truck operators have given brokers the right to control their work. Taken together, the facts indicate that some of the truck operators have a close working relationship with a broker. This suggests that the truck operators have contracted away some aspects of entrepreneurial freedom and that certain risks have been shifted to the brokers; but the record taken as a whole does not compel a conclusion that the truck operators have surrendered control over their operations to the brokers. On the contrary, the record fully supports the Board's conclusion that the truck operators are independent contractors. Because the truck operators are independent contractors, the Union and the Contractors may not enter into an agreement which prohibits dealings with them unless they become union members. The 1977 Agreement was thus invalid and the Board's order against its enforcement is proper.

We turn to the attack on the Board's remedy by Shepard and the dump truck operators. As we have said, the ALJ recommended that the Union and the Contractors be ordered to reimburse the dues, contributions and fees paid by those truck operators who joined the Union. The Board declined to adopt this recommendation. In a footnote to its decision, 248 N.L.R.B. No. 38 at 3 n.2, the Board said "we find that the reimbursement of owner-operators ordered by the Administrative Law Judge would not effectuate the remedial policies of the Act. *See Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al.* [*Mechanical Handling Systems, Inc.*] *v. NLRB,* 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961)." The Board found "a reimbursement order, typically used to 'make whole' *employees* for violations of the Act, to be generally overbroad and inappropriate in the context of 8(e) violations." [Emphasis in original] *Id.*

The Board entered a cease and desist order against the Union, combined with notice posting.

Shepard and the dump truck owners complain that the Board failed to give an adequate explanation of its deletion of the make-whole order and that the cease and desist order is insufficient as a matter of law. We think, however, that the Board's explanation is adequate, and that given our limited authority to disturb the Board's exercise of discretion in such matters we may not interfere.

Section 10(c) of the Act provides that, upon finding that an unfair labor practice has been committed, the Board "shall issue * * * an order requiring * * * such affirmative action * * * as will effectuate the policies of this Act." 29 U.S.C. § 160(c). *See also NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S.Ct. 287, 288, 97 L.Ed. 377 (1953). The Board's remedial power "is a broad discretionary one, subject to limited judicial review". *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964). In fashioning its remedies, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 612 n.32, 89 S.Ct. 1918, 1939 n.32, 23 L.Ed.2d 547 (1969). As this court has observed in reviewing a petitioner's contention that a Board remedy did not go far enough:

> Just what remedies are necessary to insure that a decision and order of the Board is effective is a matter largely for the Board's discretion. To successfully attack the Board's remedy one must show that the remedies prescribed by the Board are clearly inadequate in the light of the findings of the Board.

I.U.E., Local 806 v. NLRB, 140 U.S.App. D.C. 199, 204, 434 F.2d 473, 478 (1970). Indeed, the Supreme Court has held that a Board remedial order may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943).

Section 8(e) of the Act makes it an unfair labor practice "for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby" an employer agrees not to handle products of, or agrees to cease doing business with, any other person. Such contracts or agreements, with certain exceptions not germane here, are unlawful *per se;* evidence of coercion is not necessary to prove a violation of the Section. In the absence of coercion and because union members receive benefits as well as assume burdens, the Board properly finds it inappropriate to order reimbursement of sums paid pursuant to agreements that violate section 8(e); obviously, reimbursement to union members who were not coerced into joining would result in an unjust windfall to them. It was for this reason that the Supreme Court, in the case cited by the Board, *Local 60, United Bhd. of Carpenters and Joiners v. NLRB*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961), held that the Board was not authorized to require the union to refund dues and fees when there was no evidence that any of the employees had been coerced.

Section 8(b)(4)(ii)(A) of the Act provides that it is unlawful for a union to engage in certain conduct if the object thereof is to force or require any employer or self-employed person to join any labor organization or to enter into any agreement prohibited by section 8(e). The Board has properly ordered make-whole remedies where employers or self-employed persons have been subjected to violations of this section. *See Local 814, Teamsters (Santini Bros.)*, 208 N.L.R.B. 184, 201 (1974), *enfc'd*, 178 U.S.App.D.C. 223, 546 F.2d 989 (1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977); *Sheet Metal Workers, Local 223*, 196 N.L.R.B. 55, 57 (1972), *remanded*, 162 U.S. App.D.C. 145, 498 F.2d 687 (1974), *modified*, 214 N.L.R.B. 786 (1974). In the case before us, however, no violation of section 8(b)(4)(ii)(A) was alleged. The Supreme Court has held that a make-whole order "in those circumstances become punitive and beyond the power of the Board." *Carpenters Local 60, supra*, 365 U.S. at 655, 81 S.Ct. at 877. The petitioners suggest that

the Board should have made a *sua sponte* finding of section 8(b)(4)(ii)(A) violations; but since no such violation was charged a *sua sponte* finding would have been improper.

We think the Board's explanation of its order, although terse, is a sufficient shorthand indication of its reasoning. Finally, we cannot say that the cease and desist order entered by the Board is insufficient to deter further wrongdoing. Both the unions and the contractors' associations will be subject to contempt proceedings for any future violations. We will not disturb the Board's judgment that the order is sufficient to effectuate the policies of the Act.

The petitions for review are denied and the Board's order will be enforced in full.

So ordered.

NLRB v. Sanford Home for Adults, and Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL—CIO

669 F.2d 35 (2d Cir.), December 7, 1981—253 NLRB 1132

On petition to enforce Board Order

Before FEINBERG, Chief Judge, OAKES, Circuit Judge, and CONNER, District Judge**

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PER CURIAM: Petitioner National Labor Relations Board seeks enforcement of an order finding that respondent Sanford Home for Adults (the Home) violated sections 8(a)(1), (2), and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1)(3), and that respondent Local 6 (the Union) violated sections 8(b)(1)(A) and (2) of the Act. 29 U.S.C. §§ 158(b)(1)(A), (2). The Board found, in essence, that the Home had coerced its employees into joining the Union to prevent them from becoming members of a rival organization, Local 144, the charging party. It also concluded, inter alia, that the Home and the Union had inappropriately entered into a collective bargaining agreement when a majority of the Home's employees had not signed valid membership cards and that the Union had improperly attempted to enforce the agreement's union security clause by demanding that two employees be discharged. The order required respondents to desist from further violations of the Act and to reinstate and make whole employees who were victims of their unlawful practices. The Home was also ordered to withdraw recognition from the Union as the collective bargaining representative of its service and maintenance employees.

Respondents argue that the Board improperly excluded two individuals from the bargaining unit in determining that the Union did not command majority support. One employee, Beverly Salmon, completed a tax form and union membership card, but she did not commence work nor was she ever paid. The other employee, Raymond Murcia, began his term of employment only four days before and completed it one day after the Union's recognition demand date. Although he was ostensibly hired as a kitchen helper, Murcia helped out in the kitchen only on the first day of his employment. The bulk of his time was spent organizing activities for the Union. Under the circumstances, the Board did not err in concluding that Salmon and Murcia did not qualify as employees in determining whether the Union had garnered majority support.

Respondents also claim that the Board erred in finding that Raul Alcides Echeverri's membership card was invalid because he was coerced into signing. At the hearing, the evidence showed that Harry Mayer, the Home's managing partner and administrator, and his wife, the assistant administrator, had been present at various times when Murcia solicited Echeverri to become a union member. Mr. Mayer also told Echeverri that everyone had joined and that anyone else who had not signed would be "thrown out." Mr. Mayer filled out the card for Echeverri, who then signed it. This showing amply supported the conclusion that Echeverri had been coerced into signing. Because exclusion of the cards signed by Salmon, Murcia, and Echeverri resulted in less than majority support for the Union, it is unnecessary to consider the Board's broader finding that all votes cast for the Union were tainted by coercion.

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Respondents also contend that the Administrative Law Judge (ALJ) should have been disqualified because he engaged in ex parte communication with the Board's general counsel. This contention must also be rejected. First, respondents did not

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**Honorable William C. Conner, United States District Judge for the Southern District of New York, sitting by designation.

comply with section 102.37 of the Board's Rules and Regulations, 29 C.F.R. § 102.37 (1981), which requires the parties to file a timely affidavit alleging the grounds for disqualification before an administrative law judge files his decision. In fact, when the ALJ informed the parties of the ex parte communication, respondents stated that they were satisfied with his explanation. They did not raise their objection until well after the ALJ's decision. Second, the ex parte communication here was entirely proper. Section 102.130 of the Board's Rules and Regulations, 29 C.F.R. § 102.130 (1981), permits an administrative law judge to engage in ex parte communication regarding settlement of a case. The conversation challenged here involved only information relevant to possible settlement and did not inappropriately deal with the merits of the case.

Finally, respondents argue that their right to due process was denied because the Board had predetermined the outcome of the case when it decided to seek an injunction under section 10(j) of the Act, 29 U.S.C. § 160(j). This claim is untenable. If it were accepted, the Board would preclude itself from fulfilling its obligation to review and decide whether unfair labor practices have occurred under section 10(c), 29 U.S.C. § 160(c), by meeting its obligation to seek an injunction under section 10(j). Such a result would be completely out of keeping with congressional intent to delegate these duties to the Board. In seeking an injunction under section 10(j), moreover, the Board does not decide the ultimate merits of a labor dispute, but need show only that "there is reasonable cause to believe that unfair labor practices have been committed." See *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 36 (2d Cir. 1975).

The Board's petition for enforcement is granted.

NLRB v. Wilhow Corporation d/b/a Town and Country Supermarkets

666 F.2d 1294 (10th Cir.), December 7, 1981—244 NLRB 303

On petition to enforce Board Order

Before HOLLOWAY and DOYLE, Circuit Judges, and KUNZIG, Court of Claims Judge

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WILLIAM E. DOYLE, Circuit Judge: The question in this NLRB enforcement proceeding is whether there is substantial evidence on the record as a whole of a violation by the respondent Wilhow Corporation of § 158(a)(1)—interference with organizing rights—, § 158(a)(3)—discharge of employees—and § 158(a)(5) of the Act—refusal to bargain.

Prior Proceedings

The problem in this proceeding is that Wilhow Corporation, which operates a chain of grocery stores owned by Shirley Williams and John Howard and known as Town & Country Supermarkets, allegedly engaged in unfair labor practices at one of their stores, in Columbus, Kansas, with respect to which complaints were filed before the Board.

The Board issued a complaint against the respondent on June 30, 1977. In it a claim was made that Wilhow had violated 29 U.S.C. §§ 158(a)(1), (3) and (5) in committing unfair labor practices during an organizing campaign by the Retail Store Employees Union, Local 322 of Southwest Missouri, an affiliate of the United Food and Commercial Workers International Union, AFL-CIO. Following a hearing before an Administrative Law Judge, Wilhow was found to have violated § 158(a)(1), (3) and (5). The judge ordered that the respondent cease and desist from further violations, reinstate employees wrongfully fired and make them whole for lost pay and bargain with Local Union 322.

The Labor Board adopted the findings, conclusions and recommended order of the Administrative Law Judge.

All of the proceedings mentioned above started to take form in April 1977 when Stanley Robinson, assistant manager at the Columbus, Kansas store, contacted a union representative of Local 322 and requested a meeting between store employees and the union to discuss union representation. Such a meeting was held on May 5th between eight employees of Town & Country Supermarkets and the Union representative. These eight employees signed authorization cards requesting that the Retail Clerks International Association, AFL-CIO, represent them "for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment or other conditions of employment in accordance with applicable law." Four additional store employees signed authorization cards on the sixth and seventh of May. On May 6 the Union sent a demand to Wilhow demanding recognition and bargaining. A claim was made that the Union represented a majority of employees in the grocery department of the Columbus store. Copies of the authorization cards were included with the letter. The Company received the Union's letter on May 7th and replied by a letter dated May 9th in which it refused to recognize the Union without a secret ballot. Wilhow did not believe that a majority of their grocery employees freely signed the authorization cards. On May 9 the Union filed an election petition with the Regional Director of the NLRB. On May 11 the Union filed an unfair labor practice charge with the Regional Director.

Evidence here is quite extensive. The hearing commenced September 29, 1977 and continued to December 1, 1977 before the Administrative Law Judge.

Testimony on Wilhow's Alleged Interference with the Employees' Right to Organize

The finding by the judge was that Roger Box, manager of the Columbus store, had questioned Mitchell Reese, an employee who had signed an authorization card. The questioning occurred during the week of May 9th having to do with his union activity but without using the term union in the conversation. More questioning about the attempted unionizing occurred through Paula Box, Roger's wife and the bookkeeper at the store. In February of 1977 Mrs. Box told Reese that John Howard, one of the owners, would close the store if the Union was successful and advised him to be wary of speaking about unionizing while at work. Later, on May 7th, Mrs. Box arranged a meeting with the mother of employee Alan McClure, who had signed an authorization card. She asked Mrs. McClure if she knew of the Union's recent activity. Paula Box advised Mrs. McClure that if the Union was successful some employees would lose their jobs because Wilhow would be forced to pay higher wages. This conversation was relayed by Mrs. McClure to her son. The following day Mrs. Box made similar statements to employee Debra Jackson, who had signed an authorization card. She told her that since she was the last one hired she would be the first to go. On May 10th Paula Box made a veiled threat to Alan McClure, who was a part-time employee. She said that, if unionized, the company would dispense with most part-time help in favor of permanent employees.

The owners of the store participated in soliciting complaints from employees subsequent to the Union's demand for recognition. The Administrative Law Judge found that on May 14th Shirley Williams, one of the owners, asked McClure if he knew there had been talk of unionizing. He told McClure that he would be around the store if employees wanted to discuss anything with him, including any problems they might have. On May 26th John Howard asked Stanley Robinson "how we got into this mess * * * and what can we do to get out of it." A further conversation occurred on May 31st between Howard, Williams and Robinson. Robinson volunteered information about the employees' unhappiness with Paula Box's power over them. Following this conversation, Mrs. Box's desk was enclosed from the main part of the store and a diagram of responsibilities was drawn up.

On May 7th Williams promised an enticement to some of his employees. He told them that there had been trouble in the store, an obvious reference to the Union's bargaining demand, and that he owned an auto race track that they could get into free by arranging a Sunday off through Roger Box.

The Evidence Having to do With the Discharge or Firing of Employees.

On May 7th Roger Box told Karlinger, the produce manager, that John Howard had fired him. Karlinger attended the Union meeting on May 5th, signed an authorization card, and on May 6th at the store asked a fellow employee if she knew about or was interested in the Union's efforts. At that time no warning was given to Karlinger that he was going to be terminated. The only reason given to him for his firing was that the gross profits of his department was five percent below the Company's average. At the hearing, however, John Howard testified that there were legitimate reasons for firing Karlinger unconnected with his Union activities: ordering problems, uncleanliness of his department, and displays in poor condition. The ALJ discounted Howard's testimony as vague and unresponsive. He found that it stretched credulity to believe that Karlinger's termination merely coincided with the receipt of the Union's bargaining demand (and was not connected with it).

Employee Jim Mogle was released from duty on May 7th. He had participated, as had Karlinger, in the Union activities. Roger Box kept notes for the prior six months on Mogle's shortcomings. He, however, received no advance warning that he would be fired. The Company claimed that he was fired for his poor job performance. Howard testified to this and claimed that Mogle had a poor attitude, that he had failed to follow directions and failed at his housekeeping tasks. The ALJ found Howard's testimony unbelievable and vague and lacking in substance. It was disregarded.

The Testimony Having to do With Refusal to Bargain

The Administrative Law Judge determined that the grocery employees who demanded collective bargaining through the Union's letter of May 6th comprised an appropriate bargaining unit. The Administrative Law Judge included seventeen employees in the unit. As of May 7th, when **1299** Wilhow received the Union's letter, twelve employees had signed authorization cards. Accordingly, a card-bargaining majority existed. However the Company questioned the manner in which the Union representative waived Union initiation fees for those signing cards. The judge found that there was no evidence that the Union told employees that only those who signed up before the election would receive the waiver. *See, NLRB v. Savair Mfg. Co.,* 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973) where the Court held that a bargaining order should not be enforced if the Union entices employees to sign authorization cards by telling them that only those who sign up before an election will have their initiation fee waived.

Wilhow complained that a letter dated September 2, 1977 sent to the Union, the Board and the Company by six of the twelve employees who had signed cards was probative. This letter stated that those employees no longer wanted an election, did not believe Wilhow had violated the National Labor Relations Act and did not wish to testify. The Administrative Law Judge disregarded this letter for it was written after the unfair labor practice had occurred. In determining that a bargaining order was appropriate, the Administrative Law Judge gave weight to the unlawful firings. These violations, together with the § 158(a)(1) violations, were considered to undermine the majority of the bargaining unit and impede the Board's election process. The judge ruled that the § 158(a)(1) violations were coercive enough to persist and because a majority of the bargaining unit had signed authorization cards, a bargaining order was consistent with *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969).

Review of Violations Found by the Board

We are called upon to review the record as a whole for the purpose of ascertaining whether there is substantial evidence supporting respondent's violations of § 158(a)(1), (3) and (5). Our scope of review pursuant to 29 U.S.C. § 160(e) is a limited one. We do not, of course, retry the proceedings before the Administrative Law Judge or those before the Board. We do not weigh the credibility of one witness against another and we do not search for contradictory inferences.[1] We are not authorized to make contrary alternative inferences from the record evidence where there is substantial evidence to support the Board's determination. *Montgomery Ward, supra.* We do not have a broad discretion to overturn the NLRB on factual issues. Indeed our authority is narrower than the Board's in its consideration of the findings of the Administrative Law Judge.[2] The fact that this court differs with the Board does not justify setting aside the findings of the Board where the facts lend themselves to conflicting inferences. This is true even though the court would have reached a different conclusion had the matter been before it at the trial level.[3]

As to the § 8(a)(1) violations, the Administrative Law Judge heard a good deal of testimony on the statements made by Roger Box, Paula Box, John Howard and Shirley Williams, to employees participating in the organizing effort. His conclusions based on the credibility of employees Reese,

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[1] *NLRB v. Montgomery Ward & Co.,* 554 F.2d 996, 999 (10th Cir. 1977); *NLRB v. Central Machine & Tool Co.,* 429 F.2d 1127, 1129 (10th Cir. 1970), *cert. denied,* 401 U.S. 909, 91 S.Ct. 870, 27 L.Ed.2d 807 (1971).

[2] *U. S. Soil Conditioning v. NLRB,* 606 F.2d 940, 944 (10th Cir. 1979).

[3] *NLRB v. Automotive Controls Corp.,* 406 F.2d 221, 226 (10th Cir. 1969). *See. NLRB v. Okla-Inn,* 488 F.2d 498 (10th Cir. 1973).

McClure, Jackson and Robinson were supported by substantial evidence in the record as a whole. Credibility determinations are particularly within the province of the hearing examiner and the Board, and

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these are generally entitled to affirmance on review.[4]

It is noted that the Administrative Law Judge's tendency was to find the testimony of the unionizing employees more believable and forthright than that of Williams and Howard. Wilhow has attacked the Board's decision claiming the Administrative Law Judge acted arbitrarily in refusing to give credence to the Company's testimony. "Merely because the Administrative Law Judge believed the employee's story does not furnish reasons to overturn his credibility determinations." [5] In order for the court to accept the findings of the Administrative Law Judge it is sufficient for this court that the judge advanced plausible reasons for his credibility findings.[6]

We are of the opinion that the Administrative Law Judge was fully justified in determining that the interrogations by the Boxes and the co-owners Williams and Howard were coercive, threatening and restrained unionizing activity.[7] It is primarily the Board's function to decide if interrogation violates the Act and where there is substantial evidentiary support this court will not disturb the ruling.[8] It is within the Board's competence to judge the impact of the statements made on behalf of the Company within the employer-employee relationship.[9]

It is the contention of the respondent that no violations can arise out of the interrogations by Paula Box for the reason that she is not a supervisor under § 2(11) of the Act but rather just another employee. The judge did not reach the question of Mrs. Box's supervisory status. He held that she was sufficiently allied with the Company's Columbus store management to make her its representative.[10] The Administrative Law Judge considered the small number of employees at this store, the fact that Paula Box was married to the store manager and her visibility and role in store operations in entering the determination. There is no necessity for formal supervisory status in order to have employer responsibility. The court will look to whether the employee had justifiable cause to believe that the individual was acting on behalf of management when he performed the acts complained of.[11] In this setting the court must pierce the doctrines of *respondeat superior* to determine whether there is present employer domination or influence.[12] In *Champa Linen* there was a question of

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whether the sons of the general manager were properly considered by the Board and this court to be agents of management in committing violations of § 8(a)(1). It is our determination that Mrs. Box's affinity with management was sufficient to attribute her actions to the respondent.

Turning now to the firings of Karlinger and Mogle, the respondent's complaint is that, contrary to the finding of the Administrative Law Judge, those employees were supervisors within the meaning of § 2(11) and are not protected under the Act.[13] The Board's decision on supervisory status is conclusive if supported by substantial evidence.[14] The decision here being factual, especially within the competence of the hearing examiner and the

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[4] *NLRB v. Wylie Manufacturing Co.*, 417 F.2d 192, 194 (10th Cir. 1969), *cert. denied*, 397 U.S. 913, 90 S.Ct. 915, 25 L.Ed.2d 94 (1970); *American Sanitary Products Co. v. NLRB*, 382 F.2d 53, 55 (10th Cir. 1967); *NLRB v. United Nuclear Corp.*, 381 F.2d 972, 976 (10th Cir. 1967).

[5] *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 271 (10th Cir. 1980).

[6] *NLRB v. Dillon Stores*, 643 F.2d 687, 692 (10th Cir. 1981); *Osteopathic Hospital Foundation Ass'n. v. NLRB*, 618 F.2d 633 (10th Cir. 1980).

In the case of *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2nd Cir. 1952) Judge Frank stated that a reviewing court will not upset the Board's decision:

> when it accepts a finding of an Examiner which is grounded upon (a) his disbelief in an orally testifying witness's demeanor or (b) the Examiner's evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony.

[7] *See, NLRB v. Gold Spot Dairy, Inc.*, 417 F.2d 761, 762 (10th Cir. 1969).

[8] *NLRB v. Miller Trucking Service*, 445 F.2d 927, 931 (10th Cir. 1971); *NLRB v. Thompson Transport Co.*, 406 F.2d 698, 702 (10th Cir. 1969).

[9] *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 479, 62 S.Ct. 344, 349, 86 L.Ed. 348 (1941).

[10] 244 NLRB 303, 306 (1979).

[11] *Betts Baking Co. v. NLRB*, 380 F.2d 199, 202 (10th Cir. 1967).

[12] *NLRB v. Champa Linen Service Co.*, 324 F.2d 28, 30 (10th Cir. 1963) (quoting *International Association of Machinists v. NLRB*, 311 U.S. 72, 80, 61 S.Ct. 83, 88, 85 L.Ed. 50 (1940)).

[13] See *NLRB v. North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 610 (8th Cir. 1971).

[14] *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 496 (5th Cir. 1980); *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1131 (5th Cir. 1971).

Board, it is entitled to even greater than usual weight.[15] The record shows that Karlinger worked alone as produce manager and had no authority over others. The same is true of Mogle as a stocker. He did not have the indicia of supervisory status. He could request that other employees help him when they were free, but he did not have authority over them beyond those occasions when they wished to be cooperative. Accordingly, the Board's view that neither of these men comes within the statutory definition of supervisor must be upheld.[16]

Wilhow also challenges the § 8(a)(3) violation on another ground. The claim is that Howard and Williams lacked any knowledge of Karlinger and Mogle's Union activities at the time of their termination. The contention is that they were fired for reasons other than Union activity, reasons having to do with their performance.

In the first instance the General Counsel has the burden of proving a violation of § 8(a)(3). This must be established by acceptable substantial evidence on the whole record that the discharge comes from the forbidden motive of interference in the employee's statutory rights.[17] Thus, if the employer comes forward with evidence of a motive for the firing devoid of Union animus, it is incumbent on the General Counsel to demonstrate explicitly that an improper motive contributed to the discharge.[18] To accomplish this burden it is necessary to have proof of an employer's knowledge of his employee's Union activity.[19] John Howard points out that the Company failed to receive the Union's letter requesting Town & Country Supermarkets to bargain until after the firing of Karlinger and Mogle on May 7th. However, the record as a whole contains sufficient circumstantial evidence that Howard knew of the Union activity of these employees on the 5th and 6th of May and along with any business-related complaints he had, their Union activities brought about their termination. It is unnecessary here for the Board to prove beyond a reasonable doubt that Howard was completely aware of the discharged employees' involvement, where, as here, the record in its entirety allows a fair inference of discriminatory motivation.[20] Circumstantial evidence of the employer's knowledge and motive is sufficient to prove a § 8(a)(3) violation. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602, 61 S.Ct. 358, 367, 85 L.Ed. 368 (1941). The testimony of Howard and that of Roger Box concerning the shortcomings of Karlinger and Mogle would be sufficient to support the Board had it failed to find a § 8(a)(3) infraction. However, we cannot substitute our judgment for that of the Board if there is a reasonable basis in the record as a whole for its determination. The inference of unlawful discrimination in the firing of employees involved in Union activity is sustainable on the record before the court.[21]

We conclude the employer's rationale for its action has included a pretext to mask anti-union motivation. Beyond the Union activity of Karlinger and Mogle, we are unable to ignore the fact that they were fired the day after the Union's collective bargaining request was sent and two days after the Union organizing meeting. Neither employee had ever been warned that they would be fired at any time prior to May 7th. Certainly the timing of events is an important factor in determining the validity of an inference that there has been a discriminatory firing.

Where, as in this case, the employer has committed unfair labor practices with respect to a majority of employees signing Union authorization cards, we have recognized the propriety of a bargaining order.[22]

A fundamental decision of the Supreme Court on the propriety of a bargaining order is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The Court in *Gissel* emphasized the wide discretion the Board has in fashioning its remedies and concomitantly the special respect reviewing courts must give the Board's choice of remedies. 395 U.S. at 612, n. 32, 89 S.Ct. at 1939, n. 32. "[T]he Board, through its expertise, must estimate the effects on the election process of unfair labor practices of varying intensity." *Id.* This court's function in reviewing the Board's orders is to uphold them "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943). In the Tenth Circuit we have indicated clearly that the Board has great latitude in determining whether an employer's unfair labor practice vitiates a fair election process, and thus, requires a bargaining order based on a majority of Union authorization cards.[23]

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[15] *NLRB v. Stark*, 525 F.2d 422, 431 (2nd Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1463, 47 L.Ed.2d 734 (1976).

[16] *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1089 (8th Cir. 1969).

[17] *NLRB v. Okla-Inn*, 488 F.2d 498, 506 (10th Cir. 1973); *NLRB v. McGahey*, 233 F.2d 406 (5th Cir. 1956).

[18] *M.S.P. Industries, Inc. v. NLRB*, 568 F.2d 166, 173 (10th Cir. 1977) (quoting *Cain's Coffee Co. v. NLRB*, 404 F.2d 1172, 1175–76 (10th Cir. 1968).

[19] *NLRB v. Dillon Stores*, 643 F.2d 687, 692 (10th Cir. 1981); *Bill's Coal Co. v. NLRB*, 493 F.2d 243, 246–47 (10th Cir. 1974).

[20] 488 F.2d at 506.

[21] *NLRB v. Automotive Controls Corp.*, 406 F.2d 221 (10th Cir. 1969).

[22] *Furrs, Inc. v. NLRB*, 381 F.2d 562 (10th Cir.), *cert. denied*, 389 U.S. 840, 88 S.Ct. 70, 19 L.Ed.2d 105 (1967). "[I]t is well established that an election is not the exclusive instrumentality by which a union's representative status may be established." *James H. Matthews & Co. v. NLRB*, 354 F.2d 432, 436 (8th Cir.), *cert. denied*, 384 U.S. 1002, 86 S.Ct. 1924, 16 L.Ed.2d 1015 (1966).

As to the § 8(a)(5) violation, Wilhow claims that it was justified in refusing to bargain; that it did not violate § 8(a)(5), and that a bargaining order is inappropriate because it in good faith doubted that a majority of its employees in the grocery department had signed authorization cards. Also challenged by Wilhow before the Regional Director, the hearing examiner and this court is the make-up of the bargaining unit. Our holding is that the Administrative Law Judge's inclusion of seventeen employees in the bargaining unit is within the informed discretion of the judge and the Board. We see no reason to disturb this finding.[24] Wilhow's alleged good faith is a subjective consideration which is no longer relevant in determining

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the propriety of a bargaining order. The Board had said in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), enforced, 185 F.2d 732 (D.C. Cir. 1950), that an employer's good faith doubt of majority status was a defense to a demand to bargain. The Board gave up this position by the time of *Gissel.* "[U]nder the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election." 395 U.S. at 594, 89 S.Ct. at 1930. The courts have upheld the Board's current position. *Linden Lumber Division v. NLRB,* 419 U.S. 301, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974); *NLRB v. American Cable Systems,* 414 F.2d 661, 667 (5th Cir. 1969).

Wilhow, again in this connection, reasserts its claim that Stanley Robinson was a supervisor under § 2(11) and that his participation in soliciting signatures for the authorization cards taints their usefulness. True, both the courts and the Board agree that if a supervisor is a moving force in obtaining authorization cards, they are invalid.[25] In this case, though, the Administrative Law Judge and the Board determined that Robinson was not a supervisor. There are numerous findings as to his duties with Town & Country Supermarkets. The judge held that Robinson's position was actually that of a grocery clerk. He had tasks of some responsibility assigned to him, but he was not authorized to use independent judgment in dealing with other employees or his job performance. The cases cited in regard to Karlinger's and Mogle's status, *supra,* uphold the Board's determination of Robinson's position. *See, NLRB v. Robin American Corp.*, 654 F.2d 1022 (5th Cir. 1981).

The Company complains that the authorization cards were signed only to get an election and are, therefore, invalid. In *Gissel* the Supreme Court recognized the Board's decision in *Cumberland Shoe Corp.,* 144 N.L.R.B. 1268 (1963), that if a card states that the signer authorizes the Union to represent an employee in collective bargaining and not to seek an election, the card will be counted. It is only if the employee was told the card was to be used solely to seek an election that it will be invalid. "There is nothing inconsistent in handing an employee a card that the signer authorizes the Union to represent him and then telling him that the card will probably be used first to get an election." 395 U.S. at 606–07, 89 S.Ct. at 1936–1937. The cards used by Local 322 in this case were unambiguous single-purpose cards for collective bargaining. The record does not reflect that there was any misrepresentation by the Union representative or by Stanley Robinson to any of the twelve signatories. No one was told the cards would be used *solely* to gain an election. Therefore, we find that there is no fault to be found with the cards evidencing the wish of a majority of the bargaining unit.[26]

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[23] *Ann Lee Sportswear, Inc. v. NLRB,* 543 F.2d 739, 743 (10th Cir. 1976); *NLRB v. Okla-Inn,* 488 F.2d 498 (10th Cir. 1973); *NLRB v. Wylie Manufacturing Co.,* 417 F.2d 192 (10th Cir. 1969), *cert. denied,* 397 U.S. 913, 90 S.Ct. 915, 25 L.Ed.2d 94 (1970).

[24] *Packard Motor Co. v. NLRB,* 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947); *Mountain States Telephone & Telegraph Co. v. NLRB,* 310 F.2d 478 (10th Cir. 1962).

[25] *NLRB v. Hawthorne Aviation,* 406 F.2d 428, 430 (10th Cir. 1969).

The Company also attacks the validity of the cards on the ground that the Union representative told the employees that the Union would waive the initiation fee if they signed authorization cards before the election. In the Supreme Court's decision in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), the Court stated that a bargaining order would not be enforced if the Union lured employees by telling them that only those who signed cards before an election would have their initiation fees waived. The record on this matter supports the conclusion that Union representative Conyers never told these employees that only if they signed before an election would the initiation fee be waived.

What is the Effect of Post Violation Occurrences on the Bargaining Order?

Six of the twelve employees who signed authorization cards sent a letter on September 2, 1977 to respondent, the Union and the Regional Director in which they retracted their desire to have the Union represent them in collective bargaining. The Board considered this letter to be of no significance in contemplating the bargaining order remedy. Respondent maintains that a bargaining order under these facts would be contrary to the § 7 rights of the current employees. The Board found that this employee retrenchment was a product of Wilhow's unlawful conduct and is not entitled to credence. This circuit has had this question before it in the past and concurs with the Board's views. *NLRB v. Wylie Manufacturing Co.*, 417 F.2d 192, 195 (10th Cir. 1969), *cert. denied*, 397 U.S. 913, 90 S.Ct. 915, 25 L.Ed.2d 94 (1970).

Wilhow finds fault with the bargaining order on another ground, to-wit: the order serves no purpose and injures the § 7 rights of the current employees when out of the twelve employees signing cards only one is presently employed.

The issue of employee turnover in determining whether to enforce a bargaining order is a question of timing—whether this court will look to the nature of the work force after a majority of employees in the bargaining unit have given the Union their support. The Board's position has been that employee turnover does not warrant withholding a bargaining order; the validity of such an order depends on evaluating the situation as of the time of the unfair labor practices.[27] The court in *Gissel* indicated that a bargaining order remains an appropriate remedy even when the Union has not been able to maintain its majority status. 395 U.S. at 610, 89 S.Ct. at 1938. *See NLRB v. Katz*, 369 U.S. 736, 748, n. 16, 82 S.Ct. 1107, 1114, n.16, 8 L.Ed.2d 230 (1962); *Franks Brothers Co. v. NLRB*, 321 U.S. 702, 64 S.Ct. 817, 88 L.Ed. 1020 (1944).[28] An unlawful termination of an employee under § 8(a)(3) may raise a question in determining whether a fair election can be held. In *NLRB v. Jamaica Towing Co.*, 632 F.2d 208, 214 (2nd Cir. 1980), the court stated that "employee turnover and lapse of time may * * * become major factors in close cases." Unlike the case that is cited, the § 8(a)(3) violations that Wilhow is guilty of do not make for the type of close case contemplated by the Second Circuit.

Is a Bargaining Order Proper on the Facts in this Case?

It is unquestioned that respondent refused to bargain with Local 322 when it received the Union's letter of May 6th. We have upheld the Administrative Law Judge's determination that as of May 7th a majority of grocery department employees supported the Union's effort. Accordingly, Wilhow's actions in refusing to bargain violated § 8(a)(5).

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[26] *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1003 (10th Cir. 1977); *J. P. Stevens & Co., Gulistan Division v. NLRB*, 441 F.2d 514, 523 (5th Cir.), *cert. denied*, 404 U.S. 830, 92 S.Ct. 69, 30 L.Ed.2d 59 (1971).

[27] *Highland Plastics, Inc.*, 256 N.L.R.B. No. 28 (May 26, 1981).

[28] In examining the views of other circuits the majority approve of the Board's position. *United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054 (3rd Cir. 1980); *Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503 (7th Cir. 1980); *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493 (5th Cir. 1980); *Chromalloy Mining and Minerals v. NLRB*, 620 F.2d 1120 (5th Cir. 1980); *NLRB v. Dixisteel Buildings, Inc.*, 445 F.2d 1260 (8th Cir. 1971); *J. P. Stevens & Co., Gulistan Division v. NLRB*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830, 92 S.Ct. 69, 30 L.Ed.2d 59 (1971); *NLRB v. Lou de Young's Market Basket, Inc.*, 430 F.2d 912 (6th Cir. 1970); *NLRB v. L. B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969), *cert. denied*, 397 U.S. 990, 90 S.Ct. 1124, 25 L.Ed.2d 398 (1970); *Superior Engraving Co. v. NLRB*, 183 F.2d 783 (7th Cir. 1950), *cert. denied*, 340 U.S. 930, 71 S.Ct. 490, 95 L.Ed. 671 (1951). Several courts, however, have struck the balance between the deterrent effect of a bargaining order and the wishes of the current employees on the side of those employees. *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C.Cir. 1980); *NLRB v. Peninsula Association for Retarded Children and Adults*, 627 F.2d 202 (9th Cir. 1980). Both of these cases are distinguishable on their facts from the case before us. It is significant that in neither of these decisions was there a § 8(a)(3) violation as is present here.

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We have upheld violations of § 8(a)(1)(3) and (5) in this matter and consider the appropriateness of a bargaining order on respondent. The Supreme Court's view in *Gissel* was that there must be a showing that at one point the Union had a majority and the Board must determine

> the extensiveness of employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

395 U.S. at 614, 89 S.Ct. at 1940.

In reviewing the present record it is noted that the Administrative Law Judge considered the possibility of erasing the effects of the violative actions and of ensuring a fair election in making his remedial order. This is not a case like *NLRB v. Miller Trucking Service,* 445 F.2d 927 (10th Cir. 1971), where the Board made no specific findings on the "extensiveness of the employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future."

However the behavior of the respondents here comes within the second category described in *Gissel* where there are less extraordinary and less persuasive practices than are sometimes found but still warrant a bargaining order under the Board's discretion. The unfair practices here might seem a close question to some but we cannot substitute our judgment for that of the Board. We recognize that a small plant is involved here and this helps tip the balance. *Ann Lee Sportswear, Inc. v. NLRB,* 543 F.2d 739, 743–44 (10th Cir. 1976). Certainly the individuals involved in this case were adamant in their attitude toward bargaining and they showed no indication to comply with the law. This to us is additional reason for upholding the order that was issued.

The Second Circuit in *Jamaica Towing* spoke of bargaining orders based on "hallmark violations," that is to say those practices which are highly coercive and which will support a bargaining order. The loss of employment due to union activity is such a hallmark violation, which has a residual effect on employees and taints the possibility of a free election. 632 F.2d at 212–13; *see also, Coating Products, Inc. v. NLRB,* 648 F.2d 108 (2nd Cir. 1981). The firing of Karlinger and Mogle lends support to the potentially lingering effects of the respondent's behavior and the difficulty of having a fair election.

There are two other brief points which have been raised by Wilhow. It is contended that the hearing examiner's failure to sequester Karlinger and Mogle during the hearing constituted reversible error. The answer to this is that the Administrative Law Judge has authority to sequester witnesses. The fact that he did not is not necessarily reversible error, where apart from the testimony of the unsequestered witnesses the hearing examiner is on solid ground in his credibility findings.[29]

Wilhow has also complained that the Administrative Law Judge was prejudiced and biased against Wilhow in his handling of the case. The Board found no evidence of this and neither do we. This claim is prompted by the fact that the Judge found the employees to be more credible witnesses. This claim will not support overturning these findings.[30]

The order of the National Labor Relations Board should be and the same will be enforced.

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[29] *NLRB v. Stark,* 525 F.2d 422, 431 (2nd Cir. 1975), *cert. denied,* 424 U.S. 967, 96 S.Ct. 1463, 47 L.Ed.2d 734 (1976).

[30] *NLRB v. Pepsi-Cola Bottling Co. of Topeka,* 613 F.2d 267, 271 (10th Cir. 1980).

Rockingham Machine-Lunex Company v. NLRB

665 F.2d 303 (8th Cir.), December 8, 1981;
rehearing en banc denied February 4, 1982;
certiorari denied June 7, 1982—255 NLRB 89

On petition to review Board Order

Before HEANEY and MCMILLIAN, Circuit Judges, and BENSON,* Chief Judge

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*The Honorable Paul Benson, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

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HEANEY, Circuit Judge: This matter is before the Court on the petition of the Rockingham Machine-Lunex Company to review and set aside a decision and order of the National Labor Relations Board. The Board has cross-applied for enforcement of its order. It found that Rockingham had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The Board's decision and order is reported at 255 N.L.R.B. 15 (1981).

Rockingham contends that the Board's decision denies the company due process. Initially, Rockingham argues that the administrative law judge (ALJ) used evidence for purposes other than those for which it was admitted. It asserts that the ALJ relied on a transcript of negotiation sessions in finding that the company had refused to bargain in good faith despite his earlier ruling that the evidence would not be used for that purpose. The Board agreed in part with this assertion. It stated:

> At the hearing, the Administrative Law Judge ruled that the unauthenticated transcripts of the post-strike negotiation meetings were hearsay evidence but admissible for the limited purpose of showing the "essence" of what occurred at those negotiations. In his Decision, however, the Administrative Law Judge relied on the transcripts to establish the truth of the matters asserted in the transcripts. Notwithstanding his misplaced reliance on the transcripts, the record shows that the facts concerning those meetings were established by Respondent's authenticated notes concerning the meetings.

We agree with the Board's assessment and add that there is other evidence in the record that is more than sufficient to support the Board's findings, particularly the testimony of the company's chief negotiator, James Hodges.

Rockingham also points out that the ALJ ruled that evidence of an employee discharge by the company occurring outside the Section 10(b) statute of limitations period would be admitted solely for "background" purposes. Rockingham argues that despite this ruling, the ALJ subsequently relied on that "background" evidence to find that the company committed unfair labor practices. We agree that the ALJ's reliance was improper. Nevertheless, we are again convinced that the other evidence in the record is sufficient to support the Board's findings.

Rockingham next contends that the ALJ and Board failed to mention or apply the adverse inference rule in violation of the company's due process rights. The rule provides that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to the party. *International Union, United Auto Workers v. N.L.R.B.*, 459 F.2d 1329, 1336 (D.C.Cir.1972).

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Rockingham argues that the General Counsel's failure to call as a witness union spokesperson Peter Kuchirka, who attended every negotiation session and filed the refusal to bargain in good faith charge, creates an inference that his testimony, presumably on the refusal to bargain issue, would be unfavorable to the union.

The adverse inference rule is an important one that should be applied by the Board whenever it is appropriate. *E. g., Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 174, 94 S.Ct. 414, 420, 38 L.Ed.2d 388 (1973); *International Union, United Auto Workers v. N.L.R.B., supra*, 459 F.2d at 1347. Rockingham, however, would expand the adverse inference rule to require that the failure to call Kuchirka obligates the Board to resolve all issues with respect to which he may have testified against the union. We do not believe that the rule reaches that far. The rule permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to call the witness. *See* McCormick, Evidence, § 272, at 656–662 (2d ed. 1972). If we accepted Rockingham's interpretation of the rule, the Board would have to call every witness on every conceivable issue relevant to establishing an unfair labor practice. This obviously is unnecessary.

Here, the Board called as its principal witness Hodges, who testified at length as to precisely what took place at the bargaining sessions. He testified in substance that Rockingham rescinded or modified over a dozen provisions to which the parties previously had agreed, offered only minimal concessions to the union, and had a predetermined intention not to reach agreement on dues checkoff—a mandatory subject of bargaining. On this record, even if we draw an inference unfavorable to the union from Kuchirka's failure to testify and draw every favorable inference to the company that can be drawn from Hodges' testimony, Hodges' testimony, together with the undisputed evidence, is sufficient to justify the Board's finding that the company violated sections 8(a)(1) and (5) of the Act by refusing to bargain in good faith.

Finally, Rockingham argues that apart from its due process challenges, the Board's decision must be set aside as to each of the unfair labor practices found because it is not otherwise supported by substantial evidence. We disagree. We have carefully reviewed the record and briefs, and find that there is substantial evidence on the record as a whole to support the Board's order as to each unfair labor practice.

Rockingham's petition to set aside the order is denied, and the Board's cross-application for enforcement is granted.

Classic Industries, Inc. v. NLRB

667 F.2d 205 (1st Cir.), December 10, 1981—254 NLRB 1149

On petition to review Board Order

Before CAMPBELL and BOWNES, Circuit Judges, and BONSAL,* Senior District Judge

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LEVIN H. CAMPBELL, Circuit Judge: Classic Industries, Inc., ("Classic") petitions for review of the decision of the National Labor Relations Board finding it in violation of sections 8(a)(1) and 8(a)(2) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (2),[1] and ordering it to withdraw recognition from and disestablish

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an illegally dominated union, the Shop Committee. The Board cross-petitions for enforcement of its order.

In its decision, the Board mainly affirmed the findings, rulings and conclusions of the Administrative Law Judge (ALJ), and adopted his recommended order. In the following statement of facts, we follow the findings of the ALJ unless otherwise noted. Contrary to Classic's contentions, we believe the ALJ's findings are supported by substantial evidence in the record, and we therefore accept them as, in such event, we must. 29 U.S.C. § 160(f).

Classic Industries, Inc., is a Pennsylvania corporation with its principal offices in Latrobe, Pennsylvania.[2] The company makes and sells custom plastic moldings and employs some 50–60 employees in production and maintenance work. Most of the relevant events took place in the Latrobe plant, which was non-unionized during the spring and summer of 1978.

In late March or early April of 1978, the International Association of Machinists and Aerospace Workers ("the Union") began organizing activities at the Latrobe plant.[3] At an employee meeting held at about this time or soon thereafter, the vice-president and co-founder of Classic, Joe Policastro, reportedly said that he had "heard rumors about a union being started" and that he was opposed to such a development, preferring, he said, to work with the employees directly rather than with "outsiders."[4]

On April 11 or 12, foreman John Huston, whom the ALJ found, with record support, to be acting in this regard as an agent of the Company, distributed ballots during work hours to the employees working under him. These ballots listed the names of everyone on the shift. Huston instructed the employees to check the names of two co-workers and explained that the two receiving the most votes would be representatives on a new employee committee. Other employees in the plant received similar ballots. This process was repeated the next day after it was discovered that some of the ballots were missing names. The record is uncontradicted that Policastro instructed his secretary to draw up, type and copy both the original and the corrected ballots and that he initiated their actual distribution.[5]

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*Of the Southern District of New York, sitting by designation.

[1] Section 8(a)(1) of the Act provides:

[2] Classic has alleged and the Board admits in its brief that Classic "does business" within this circuit. Jurisdiction in this court is therefore proper. 29 U.S.C. § 160(f).

[3] There is evidence that employee Laura Stewart contacted the Union and that the first organizing meeting took place at her house. At that meeting she and a number of other employees signed Union authorization cards. This was around the beginning of April. The Union was meeting with employees in April and May, but did not communicate with management until the end of May.

[4] Mr. Policastro denied having said this then. He testified that the first time he knew the Union was organizing his plant was on May 30, 1978, when he received a letter from the Union claiming majority status and demanding recognition. The ALJ did not credit Policastro's testimony in this regard, crediting instead the conflicting testimony of an employee. We have read the entire record and considered the Company's various arguments against acceptance of the ALJ's credibility determination. We conclude that the ALJ's choice is supported and not unreasonable; it must therefore stand. *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1112 (1st Cir. 1975).

One or two days after the election, foreman Huston asked employee Laura Stewart to leave her machine during her regular working time and go upstairs to the Company's conference room to help count the ballots. There she joined another employee, Policastro's secretary and Policastro himself and proceeded to tally the vote. Policastro did not actually count ballots, but he stated that he was in the conference room for about half an hour while the 50–60 ballots were counted. The election resulted in employees Stewart, Giesey, Keefe, Nicholson, Poole, Pratt, and Rudy being made the members of what came to be known as the Shop Committee. Four other employees were designated as alternates.

The Shop Committee met on six occasions between the election and June 9. It never met on its own initiative, but rather each meeting was apparently called by Policastro. Vice-president Policastro was present at every meeting, and he opened, closed and guided the discussion at most, if not all of them. He continued to meet and discuss various employee grievances with the Shop Committee even after he had received formal notice from the Union that they claimed to represent a majority of his employees. At the penultimate meeting on June 8, he urged the Shop Committee to intervene in the upcoming representation election and passed out typed ballots, produced prior to the meeting by the Company, which listed the names of all 11 Shop Committee members and alternates. He also offered the use of the Company lawyer if the Shop Committee decided to intervene.

Not surprisingly,[6] the Shop Committee balked at this suggestion and requested a day to poll their constituents. The next day they returned and voted 7–4 against intervening in the Union election. There is testimony that Policastro looked "really rejected" when the Shop Committee informed him of the result and that Policastro sought to speak with the four dissenting members of the Committee immediately after the vote, though in his testimony he denied this.

This vote marked the end of the Shop Committee as it was originally constituted. With Policastro's assistance and encouragement, however, the Shop Committee was resurrected around a nucleus of Rosemary Poole, a pro-intervention member of the original Shop Committee, and Kathy Amond, one of Poole's co-workers in the inspection department. When Poole asked Policastro what could be done to counter the Union, Policastro encouraged Poole to find out how the Shop Committee could get on the NLRB ballot,[7] allowed her to make long distance calls at Company expense to get this information, and prodded her to follow up on her first inquiries. These efforts eventually resulted in the Shop Committee's being included on the ballot for the July 20 representational election.

During the period between the dissolution of the original Shop Committee and the election on July 20, several events took place which the Board found to be violations of section 8(a)(1) and which tainted the election. These incidents also support the Board's finding that the Shop Committee was illegally dominated.

First, Policastro campaigned actively for the Shop Committee and against the Union. The ALJ found, with record support, that Policastro stated that the Company "would go bankrupt" if the Union were elected, that layoffs might result, and that another closely related company had suffered a shutdown due to high union wages. He also stated, falsely it could be found, that the Union would charge a $100 initiation fee for each employee if it won the election. At the same time, he said that the Shop Committee could use the Company lawyer if it won, reiterated his preference for working with the employees directly rather than with "outsiders," and granted Rosemary Poole permission to speak to the workers in the plant on behalf of the Shop Committee during her working time.

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[5] Policastro testifies that he performed these services at the behest of several employees. Classic failed to produce a single employee witness who would corroborate this important point, however. We think the ALJ was justified in drawing a negative inference, as he expressly did, from this absence of corroboration, and could reasonably conclude, on all the evidence, that Policastro acted on his own initiative. *Liberty Mutual Insurance Co. v. NLRB*, 592 F.2d 595, 601–02 (1st Cir. 1979).

[6] At least one of the Shop Committee members—notably Laura Stewart—was a Union activist. The results of the vote on the intervention question also suggests that a majority of the Shop Committee favored the Union at this time.

[7] The evidence showed that Poole was active in resurrecting the Shop Committee as well as Policastro. The record as a whole supports the conclusion, however, that the two worked very closely together in all phases of the job and that Policastro initiated actions and ideas on behalf of the Shop Committee when Poole did not. He also supported every action she took.

During this period, Policastro discriminated in favor of the Shop Committee in matters regarding employee discipline and grievances. On July 5, Policastro issued a warning slip to Laura Stewart for defective

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work and misconduct. Both Poole and Amond (the only active members of the Shop Committee) were present at the meeting where this occurred; they were shown material from Stewart's personnel file; and they were permitted to act in a mediating role both before and during this incident. There was testimony that Policastro even introduced Poole and Amond as being involved in the Stewart matter on behalf of the Shop Committee.

The election which followed all these events was close. The initial tally disclosed 24 employees for the Shop Committee and 24 for the Union. Four ballots were contested. After investigation, the final vote came to 28–24 in favor of the Shop Committee. Shortly after the election, Policastro suggested to Poole that she tell the employees the Shop Committee was active. With Policastro's permission and encouragement, she posted a notice to that effect on the Company bulletin board.

On January 19, 1979, the regional director of the Board notified Classic that he was withholding certification of the Shop Committee pending a final determination of an alleged section 8(a)(2) complaint filed by the Union. Notwithstanding, Policastro proceeded to negotiate and sign a rather comprehensive collective bargaining agreement with the Shop Committee which recognized the Shop Committee as the "sole bargaining agency" for all production and maintenance workers at the plant. This agreement took effect on April 16, 1979—only two weeks before the hearing on the section 8(a)(2) charge in this case took place. At no time during the period at issue here, however—either before or after the July 20 election, and continuing through the hearing in this case—did the Shop Committee have a constitution, bylaws, rules, elected officers, a dues system, or any formal structure whatever. Indeed, as of May 3, 1979, the Shop Committee had never received funds from any source.

We think the ALJ and Board were entitled to infer from the foregoing that the Shop Committee was illegally dominated. True, when the resurrected Shop Committee came to negotiate the collective bargaining agreement, it appears to have stood up to the Company and won some concessions. But this enhanced activity took place in the shadow of a serious unfair labor practice proceeding, when it was in the Company's interest to make it appear that the Shop Committee was genuinely independent. In these circumstances we do not believe the Board had to treat the semblance of arm's length bargaining as truly indicative that the Shop Committee was free from employer influence.

We therefore have little hesitation in holding that this record supports the Board's conclusion that the Shop Committee was an illegally dominated labor organization. The record fairly supports the conclusion that Policastro initiated the Shop Committee as an in-house labor organization, the purpose of which was to head off a union-organizing drive. He opened, closed and generally directed the Shop Committee meetings. He thereafter encouraged its growth and success by affording it material support and by discriminating in its favor during the election contest with the rival Union. He negotiated with the Shop Committee after the election while on notice that certification was in doubt. Finally, throughout the entire period at issue here, the allegedly independent Shop Committee had none of the indicia of independence (such as bylaws, rules for electing members, dues, a constitution, or independent sources of income) which mark truly autonomous organizations. The caselaw indicates that such a factual pattern denotes more than mere support; it warrants a finding of actual domination. *NLRB v. Clapper's Manufacturing, Inc.*, 458 F.2d 414, 418 (3d Cir. 1972); *NLRB v. Reed Rolled Thread Die Co.*, 432 F.2d 70 (1st Cir. 1970); *NLRB v. Dennison Manufacturing Co.*, 419 F.2d 1080 (1st Cir. 1969).

Our decision in *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979), to which Classic repeatedly refers, does not require a different result. In *Northeastern University* we reversed a Board finding of domination on the grounds that there was

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no evidence the employer had "actually" dominated a well-established university labor group which the ALJ had found to be an "effective" labor organization. Here there was substantial evidence of actual domination, and no finding, or evidence that would require a finding, of effectiveness. It is true that, in a given case, elements of domination such as assistance in election procedures, limited use of Company resources, and even the fact that the employer encourages establishment of the organization in the first instance, "does not a domination case make," *id.*, at 1214. But when, as here, all these factors and more are found in a single case, the Board may properly find domination. *NLRB v. Vernitron Electrical Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977).

We have considered all of Classic's other factual and legal arguments and find them to be without merit.

The order of the Board will be enforced. The petition for review is denied.

Consolidated Freightways v. NLRB

669 F.2d 700 (D.C. Cir.), December 11, 1981—253 NLRB 988

On petition to review Board Order

Before Bazelon, Senior Circuit Judge, and Wilkey and Wald, Circuit Judges

Opinion for the Court filed by Circuit Judge Wald

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Wald, Circuit Judge: Petitioner, Consolidated Freightways ("Consolidated"), seeks review of a decision of the National Labor Relations Board ("NLRB" or "Board"), 253 N.L.R.B. No. 137 (1981), ordering it to reinstate a former employee, Charles Hennessey, with full backpay. Because we find that the Board failed to address petitioner's argument that Hennessey's refusal of a prior reinstatement offer tolled petitioner's backpay liability, we remand for further proceedings.

I. *Factual Background*

Consolidated discharged Hennessey on March 22, 1979, after Hennessey refused to drive a tractor with faulty lights. Hennessey filed a grievance challenging his discharge. His case was brought before the Joint State Committee ("Committee"), an arbitration committee composed of three members of the union and three representatives of the trucking industry.[1] On May 1, 1979, the Committee ordered that Hennessey be reinstated with full seniority and health and welfare benefits, but with a final warning letter and no backpay. Consolidated proceeded to put Hennessey back on "the board" for work. Joint Appendix ("J.A.") 15. Hennessey, however, did not return to work, explaining to a supervisor that he would not return without backpay, Record ("R.") 61.[2]

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On July 11, 1979, Hennessey filed a charge with the NLRB asserting that he had been discharged for protected concerted activities in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). The Administrative Law Judge (ALJ) refused to defer to the Committee's award,[3] noting that the award "required

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[1] The parties to this action stipulated that the "entire grievance and arbitration procedure was fair and regular in all respects." Joint Appendix (J.A.) 15.

[2] This explanation came several days after Hennessey was told that he had his job back. According to the ALJ's findings, the union steward spoke to Hennessey immediately after the arbitrator rendered its decision, explaining that he could probably resume work that same night. J.A. 15; *see* Record ("R.") at 187. Hennessey's testimony, however, indicates that he was somewhat confused about when he could return to work. Although he received two phone calls to return to work between May 1, 1979, the date of the arbitrator's award, and May 4, 1979, Hennessey testified that he expected to receive "something in writing stating [that he] had been reinstated." R. 61. When the Operations Manager, Charles Schmalz, phoned Hennessey on May 4 to ask him if he was planning to return to work, this confusion was cleared up. But when asked whether he would resume work, Hennessey stated that he would not, explaining that "under the conditions that I didn't get the money that I deserved * * * I didn't see that I could come back to work." R. 61. Hennessey testified that he then agreed to send in a letter of resignation, but never did so. R. 61. Consolidated subsequently sent Hennessey a letter acknowledging his resignation, to which Hennessey did not respond. R. 262.

[3] The Board's policy of deference to arbitration awards was announced in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). Under *Spielberg*, deference to arbitration awards is justified if three criteria are satisfied: (1) fair and regular arbitral proceedings; (2) the parties agree to be bound by the arbitral award; and (3) the award is not clearly repugnant to the National Labor Relations Act. We have added a fourth requirement: that the statutory issue be congruent with the contractual issue, so that a resolution of one is a resolution of both. *See Banyard v. N.L.R.B.*, 505 F.2d 342, 348 (D.C.Cir.1974).

Hennessey to be reinstated but in effect to be under the gun of a warning letter." J.A. 15. Although the ALJ made no specific findings regarding the effect of a warning letter, his conclusion appears to be based on the terms of the labor agreement between Consolidated and Local Union No. 710 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. That agreement provides that no employee may be discharged or suspended before receiving at least one warning notice regarding the particular complaint against him. *See* Exhibit 6C-5 at 79-80. The ALJ concluded that a reinstatement offer conditioned on receipt of such a letter failed to remedy the alleged unfair labor practice and that, consequently, the Board need not defer to the arbitrator's award.[4]

On the substantive merits of Hennessey's charge, the ALJ found that Hennessey's refusal to drive the tractor was based on a reasonable belief that to do otherwise would be unsafe under legislatively approved safety standards. Despite the fact that Hennessey was acting alone, the ALJ concluded that absent any evidence that other employees disavowed Hennessey's actions, Hennessey's conduct constituted protected concerted activity,[5] J.A. 13, and his discharge was therefore a violation of § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). J.A. 16. As a remedy, the ALJ ordered that Hennessey be reinstated with full backpay up to the date of a valid offer of reinstatement. J.A. 13. Consolidated appealed to the Board, arguing that its offer of reinstatement following the arbitrator's award tolled its backpay liability and discharged its obligation to offer Hennessey reinstatement. The Board sustained the ALJ's order.[6]

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II. *Analysis*

Consolidated does not challenge the Board's finding that it violated § 8(a)(1) by discharging Hennessey, Brief for Petitioner 25; nor does it challenge the Board's refusal to defer to the arbitrator's award. *Id.* Instead, Consolidated argues that by offering Hennessey reinstatement in accordance with the terms of the arbitrator's decision it discharged its legal obligation and stopped the accumulation of backpay liability. In addition, Consolidated argues that since Hennessey refused reinstatement for an admittedly invalid reason (the denial of backpay), Hennessey is entitled to neither a second offer of reinstatement nor backpay which might otherwise have accrued after that refusal. In response, the Board argues that Consolidated's offer of reinstatement was invalid because it was conditioned on accepting a final warning letter. Such a letter, it contends, would have subjected Hennessey to continued discrimination for exercising protected rights. Since this offer was invalid, the Board further argues that there is no need to inquire into Hennessey's reasons for refusing to accept it. Finally, the Board contends that the question whether Hennessey refused reinstatement for invalid reasons was not raised before the Board and therefore cannot be raised on appeal.

A. *The Issues Before the Board*

As an initial matter, we must consider whether Consolidated's argument that Hennessey improperly refused reinstatement is barred by section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). Section 10(e) provides that:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C. § 160(e). This section furthers "the salutary policy * * * of affording the Board opportunity to consider on the merits questions to be urged

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[4] The ALJ suggested that his decision not to defer to the arbitrator's award was based, in part, on its failure to include backpay. J.A. 15. On appeal, the Board agreed that the warning letter placed an invalid condition on reinstatement, but reaffirmed its previous holding that an offer of reinstatement is valid even if it fails to include backpay. J.A. 21. Since we find that the Board should have considered Hennessey's reasons for rejecting Consolidated's offer, we do not reach the question whether the offer was in fact conditional.

[5] Consolidated suggests that our recent decision in *Kohls v. N.L.R.B.*, 629 F.2d 173 (D.C.Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1390, 67 L.Ed.2d 363 (1981), draws into question the ALJ's determination that Hennessey was engaged in protected concerted activity. Since Consolidated did not take exception to this determination in its appeal to the Board, this question is not before us. *See* 29 U.S.C. § 160(e).

[6] The Board noted that Consolidated did not take exception to the ALJ's refusal to defer to the arbitrator's award or to his ruling that Consolidated had commited an unfair labor practice by discharging Hennessey for engaging in protected concerted activity. J.A. 20.

on review of its order." *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256, 63 S.Ct. 585, 586, 87 L.Ed. 744 (1943). Cases interpreting section 10(e) look to whether a party's exceptions are sufficiently specific to apprise the Board that an issue might be pursued on appeal. Thus, a generalized objection to " 'each and every recommendation' " of an ALJ lacks the particularity needed to preserve objections to the Board's decisions. *Id.* at 255, 63 S.Ct. at 586; *see also N.L.R.B. v. Seven Up Bottling Co.*, 344 U.S. 344, 350, 73 S.Ct. 287, 290, 97 L.Ed. 377 (1953) (objection to trial examiner's recommendation as unsupported by evidence and contrary to law does not provide adequate notice). Similarly, a party who has limited his objections before the Board to one issue will not be allowed to raise a different issue on appeal. *See Dallas General Drivers v. N.L.R.B.*, 389 F.2d 553, 555 (D.C.Cir.1968) (union could not attack standard by which trial examiner determined whether to order reinstatement when objections before the Board were limited to issue of whether employees had been discharged discriminatorily). But when the issues implicated by an imprecisely drafted objection are made evident by the context in which it is raised, section 10(e) does not shield the Board's resolution of those issues from review. *See May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 386 n.5, 66 S.Ct. 203, 209, 90 L.Ed. 145 (1945) (vague exception to paragraph including cease and desist order as "not supported or justified by the record" sufficient to preserve issue of the proper scope of that order); *N.L.R.B. v. Blake Construction Co.*, 663 F.2d 272 (D.C.Cir. 1981) (objections regarding scope of complaint, substantiality of proof and ALJ's conduct of proceeding adequate to preserve due process objections); *Florence Printing Co. v. N.L.R.B.*, 376 F.2d 216, 222 (4th Cir. 1967), *cert. denied*, 389 U.S. 840, 88 S.Ct. 68, 19 L.Ed.2d 104 (1967) (objection to sufficiency of proof preserved objection to placement of the burden of proof). In each case, the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal.[7]

In this case, we find that Consolidated's objections before the Board were sufficient to permit it to argue on appeal that Hennessey's improper grounds for refusing reinstatement relieved Consolidated of any obligation to make a subsequent reinstatement offer and, correlatively, tolled Consolidated's backpay liability. In its exceptions to the ALJ's recommendations, Consolidated specifically objected to his failure to find "[t]hat the Charging Party refused the May 1, 1979 offer of reinstatement *because* it did not include an offer of backpay. * * *" Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Dated July 30, 1980 (emphasis added). In addition, Consolidated discussed Hennessey's grounds for refusing the reinstatement offer in its brief to the Board. It argued that "the fact that the warning letter did not enter into Hennessey's mind when he rejected [Consolidated's] unconditional offer of reinstatement" was "of great significance," and that it was "anomalous" for the ALJ to "void an otherwise valid offer of reinstatement because of what he perceived as a 'condition' to reinstatement when that alleged 'condition' (the letter) never entered the mind of the Charging Party when he rejected the offer." *See* Respondent's Brief in Support of its Exceptions to the Decision and Recommended Order of the Administrative Law Judge dated July 30, 1980 16–17.

The Board argues that this discussion was insufficient to satisfy section 10(e) because it appeared as part of Consolidated's argument that its offer was unconditional and was not accompanied by citations to any of the authorities that Consolidated is relying on in this appeal. Brief for Respondent 23.

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[7] The close factual inquiry required by this standard is illustrated by our decision in *Burinskas v. N.L.R.B.*, 357 F.2d 822 (D.C.Cir.1966). The Board, following remand from this court, had set aside an earlier order and adopted the trial examiner's original recommendations. These recommendations included ordering the employer to reinstate discharged employees with full backpay. The employer then appealed to this court, arguing that its backpay liability should be tolled for the time between the Board's two decisions. The Board countered by arguing, *inter alia*, that the employer had failed to make such a tolling argument before the Board, and was therefore barred from so arguing on appeal. In rejecting the Board's argument, this court first noted that the employer had objected to "the remedy" proposed by the trial examiner in its original objections to the Board. We then turned to the setting in which the Board approved that remedy and observed that there were a number of then recent Board decisions regarding the propriety of tolling backpay liability between inconsistent Board decisions. Finally, we concluded that it was "more likely than not that the Board, with its expert sensitivities alerted by some considerable past familiarity with the tolling issue in this context of a change in litigating fortunes took [the] more limited [backpay] objection to be comprehended within the broader exception." *Id.* at 825. We also noted that the Board's compliance officer had addressed the tolling question in a letter to the employer following the Board's second decision. *Id.* at 825–26.

The General Counsel's own brief, however, set the issue of Hennessey's grounds for refusal in the proper context. The General Counsel argued that "the fact that Hennessey declined the offer [should not] relieve

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[Consolidated] of its obligation to tender a valid offer of reinstatement." Answering Brief in Response to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Judge Dated July 30, 1980 6–7. He then proceeded to quote a recent Board opinion in which the Board ruled that an employer who had been ordered to reinstate certain employees was not excused from that order by letters from these employees " 'to the effect that they did not wish to return to [his] employ.' " *Id. at* 7 (*quoting Leroy W. Craw*, 224 N.L.R.B. 241, 242 (1979), *enf'd*, 622 F.2d 579 (3d Cir. 1980)). In addition, the question whether Hennessey's grounds for refusing Consolidated's offer have any independent legal significance was addressed by the ALJ who stated that:

> Having discharged Hennessey for unlawful reasons, it was and is Respondent's responsibility to remedy the unfair labor practices. The facts indicate that Hennessey made statements indicating that his reason for not going back to work was the lack of backpay in the award. Respondent's liability to reinstate Hennessey, however, continues until a proper offer of reinstatement is made.

J.A. 16. In the light of both Consolidated's emphasis on the significance of Hennessey's grounds for refusing Consolidated's offer, and the ALJ and General Counsel's arguments that those grounds were of no importance to the disposition of this case, we find that the Board had adequate notice of the issue raised here on appeal.

B. *Hennessey's Refusal of Consolidated's Offer*

Although the question whether Hennessey improperly refused an offer of reinstatement was before the Board, the Board did not address that question in its opinion, relying instead on the findings and conclusions of the ALJ.[8] The ALJ, however, had simply assumed that Hennessey's reasons for refusing Consolidated's offer were irrelevant to the determination of Consolidated's backpay liability. Consolidated argues that this assumption is not in keeping with Board precedent and that by failing to distinguish or overrule cases that require an inquiry into an employee's grounds for refusing reinstatement, the Board has acted arbitrarily. Because we find that the Board's policy as to unjustified refusals of reinstatement offers remains unexplained, we remand this issue to the Board to reconsider its opinion.

In stating that Hennessey's reasons for not going back to work were of no importance, the ALJ failed to take account of Board precedent that emphasizes the actual reasons why an employee refuses an offer of reinstatement even when the validity of the offer itself is challenged. In *Research Designing Service, Inc.*, 141 N.L.R.B. 211 (1963), for example, an employee who had been unlawfully discharged refused an offer of reinstatement because of the possibility of being laid off once again. *Id.* at 224. The trial examiner nonetheless ordered that the employee be reinstated with full backpay since, had he accepted the offer of reinstatement, he would not have been returned to his former status but would rather have been treated as a new employee for seniority and vacation pay purposes. *Id.* at 230. In reversing this ruling, the Board stressed that the employee "refused the offer of reinstatement *for other reasons.*" *Id.* at 216 (emphasis in original). The Board therefore ruled that the employer's liability for backpay was tolled by the discharged employee's refusal of an offer of reinstatement.[9] Similarly, in *L. Ronney & Sons Furniture Manufacturing Co.*, 97 N.L.R.B. 891 (1951), *enf'd as modified*, 206 F.2d 730 (9th Cir. 1953), *cert. denied*, 346 U.S. 937, 74 S.Ct. 377, 98 L.Ed. 425 (1954), the Board tolled an employer's back

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pay liability for a discharged employee who refused reinstatement because she was working at another job.[10] The Board noted that the reinstatement

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[8] *See* p. 9 *supra.*

[9] The Board also reversed the trial examiner's order with regard to another employee who had refused reinstatement because "he was working longer hours and making more money at his current job." Research Designing Service, Inc., 141 N.L.R.B. at 216. The trial examiner had not made any specific findings regarding the latter employee's reasons for refusing reinstatement.

[10] With regard to another employee, the Board in *L. Ronney* found that there was sufficient evidence that he would have accepted the employer's offer had it not been conditional. L. Ronney & Sons Furniture Mfg. Co., 97 N.L.R.B. at 893. In support of this ruling, the Board emphasized the

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offer was invalid because it was subject to an illegal union-security provision. It nonetheless tolled the employer's backpay liability because it "appear[ed] that [the discharged employee] would not have accepted [the employer's] offer, even had it been unconditional." *Id.* at 892. Other cases pursue this same inquiry into the reasons why a discharged employee rejected an offer of employment, holding that an employer's backpay liability is tolled when an employee rejects an offer of reinstatement without knowledge of the conditionality of the offer. *See, e.g., Hribar Trucking, Inc.,* 166 N.L.R.B. 745, 756 n.19 (1967), *modified on other grounds,* 406 F.2d 854 (7th Cir. 1969); *Eastern Die Co.,* 142 N.L.R.B. 601, 604 (1963), *enf'd,* 340 F.2d 607 (1st Cir. 1965), *cert. denied,* 381 U.S. 951, 85 S.Ct. 1804, 14 L.Ed.2d 724 (1965); *Ekco Products Co.,* 117 N.L.R.B. 137, 150 (1957).[11] In each case, the issue is whether the evidence clearly establishes that the employee would have turned down the offer of reinstatement even if it had not contained the invalid condition. *See, e.g., Atlantic Maintenance Co.,* 134 N.L.R.B. 1328, 1329 (1961), *enf'd,* 305 F.2d 604 (3d Cir. 1962); *id.* at 1329 n.1 (Member Rodgers, dissenting).

In ignoring the issue of Hennessey's reasons for declining Consolidated's offer, the Board may have relied on a recent case cited in the General Counsel's brief. Brief to the National Labor Relations Board In Answer To Respondent's Exceptions Thereto 7. The question in *Leroy W. Craw,* 244 N.L.R.B. 241 (1979), *enf'd,* 622 F.2d 579 (3d Cir. 1980) was whether a conditional reinstatement offer should be deemed to comply with an order of the Board[12] to reinstate employees who had engaged in an unfair labor practice strike when the employees either failed to respond to the offer or refused it for other reasons. The employer had sent out letters offering striking employees reinstatement, but indicating that returning employees would be subject to physical examinations and would only be paid at a substantially equivalent rate to the one they had originally earned. The Board found that both of these conditions were invalid—the physical examinations because they treated returning employees as new employees; and the rate of pay because it failed to include increases in wages that the employees would have received had the employer accepted their offers to return to work at the end of the strike. *Id.* at 242. After determining that the employer's offers of reinstatement were inadequate, the ALJ proceeded to consider whether the employer's backpay liability should be tolled in the case of employees who rejected those offers. He concluded that backpay was not tolled, stating that: "[the discharged employees'] replies to the effect that they did not wish to return to Respondent's employ do not obviate the need for Respondent to extend to them an unconditional offer of reinstatement, nor do their replies terminate their backpay periods."[13]

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Although *Leroy W. Craw* could signal a change of Board policy abandoning any inquiry into the reasons why a conditional offer is refused, the case might also be reconcilable with earlier Board precedent. The offer in *Leroy W. Craw* plainly stated its invalid conditions and employees who rejected that offer because they had procured "better jobs" might well have gone back to the company if faced with a valid offer. Thus, the ALJ's conclu-

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employee's "express awareness of the conditional nature of the * * * reinstatement offer." On appeal, the Ninth Circuit found that this portion of the Board's order was not supported by substantial evidence. *N.L.R.B. v. L. Ronney & Sons Furniture Mfg. Co.,* 206 F.2d 730, 737–38 (9th Cir. 1953), *cert. denied,* 346 U.S. 937, 74 S.Ct. 377, 98 L.Ed. 425 (1954). Concluding that the "evidence as a whole is inconsistent with the conclusion that [the employee] refused employment on account of the implicit condition in the offer," the court ruled that the employee was only entitled to backpay up until the offer of reinstatement. *Id.* at 738.

[11] Cases involving time conditions also support an inquiry into the employee's reasons for rejecting an offer of reinstatement. Time conditions on acceptance are somewhat different from conditions that go to the nature of an employee's work because they do not prevent the employee, if he accepts in a timely manner, from being made whole. Time conditions are therefore not really conditions on the offer, but rather limitations on the time for acceptance. As such, they must comport with the employee's "fundamental right to a reasonable time to consider whether to return." *Penco Enterprises, Inc.,* 216 N.L.R.B. 734, 734–35 (1975). *Accord, Murray Products, Inc.,* 228 N.L.R.B. 268, 268 (1977), *enf'd,* 584 F.2d 934 (9th Cir. 1978). Nonetheless, the inquiry in such cases is similar to that with invalid conditions on employment—that is, courts look to the reasons why an employee failed to accept the offer of reinstatement within the time imposed by the employer before inquiring into whether that time condition is unreasonable. *See N.L.R.B. v. Betts Baking Co.,* 428 F.2d 156, 158–59 (10th Cir. 1970); *N.L.R.B. v. Harrah's Club,* 403 F.2d 865, 871 (9th Cir. 1968).

[12] In *Leroy W. Craw,* 227 N.L.R.B. 601 (1976), *modified on other grounds,* 565 F.2d 1267 (3d Cir. 1977), the Board had held that a company had engaged in an unfair labor practice by not reinstating unfair labor practice strikers when they unconditionally applied for reinstatement. *Id.* at 609. The Board had therefore ordered the company to offer those employees immediate reinstatement.

[13] On appeal, the Board adopted the findings and conclusions of the Administrative Law Judge. *See Leroy W. Craw,* 244 N.L.R.B. at 241.

sion may be seen as consistent with an inquiry into whether an employee rejected an offer of reinstatement for reasons other than its invalid conditions.

In contrast, Hennessey's refusal of Consolidated's offer would seem an appropriate case for applying the rule of *Research Designing* and *L. Ronney.* The testimony regarding Hennessey's reason for refusing Consolidated's offer was uncontradicted; he would not return without backpay. R. 61. That reason was not valid under Board precedent because it violated Hennessey's duty to mitigate his damages. *See National Screen Products Co.,* 147 N.L.R.B. 746, 748 (1964). On the other hand, while Hennessey was present when the presumably invalid condition on his reinstatement—the final warning letter—was announced, R. 99, 184, Hennessey testified that he had no recollection of being told about that condition, R. 100, and did not learn about it until five weeks later.[14] Id. There is therefore no reason to believe that the invalid condition on Consolidated's offer even entered Hennessey's mind when he decided to turn down the offer of reinstatement. Looking to the actual reasons why Consolidated's offer was refused seems especially appropriate when there is every indication that Consolidated acted in good faith.[15] Unlike the employer in *Leroy W. Craw,* who made a conditional offer of reinstatement in violation of an express order from the Board, Consolidated offered Hennessey reinstatement in accordance with the terms of the arbitrator's decree; no Board precedent at that juncture specifically held that this offer would be inadequate; and Hennessey gave no indication that the warning letter bore any significance in his decision not to return to work. It was only after Hennessey filed his charge with the Board, which was several months after the arbitrator's decision, that Consolidated received notice that the warning letter presented any problem at all.

In view of the Board's failure to reconcile its decision in this case with its precedent, and its failure to explain its reasons for abandoning any inquiry into the reasons why a conditional offer is refused, we have no choice but to remand this case to the Board to explicate the circumstances, if any, under which an inquiry into whether an employee would have rejected a valid offer of reinstatement is

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[14] This testimony was given during questioning by the ALJ:

Judge Stone: * * * As best you can [,] tell me exactly what [the Joint State Committee] told you the results of the grievance hearing were?

Hennessey: Well, sir, they told me that the discharge had been overturned. That the pay claim had been denied. The company was responsible to pick up my pension and health and welfare benefits with full seniority rights.

Judge Stone: Now, was there anything else said to you at all?

Hennessey: No, sir, not that I remember.

Judge Stone: Did they give you anything in writing?

Hennessey: No, sir. I picked up a copy of the results of the grievance about five weeks later. And it was at that time when I finally realized there had also been a thing where the discharge had been reduced to a final warning letter.

Judge Stone: * * * Now, did you know at the time the grievance hearing was over, when you were orally told, did you know at that time there was anything about a warning?

Hennessey: No, sir, I did not.

R. 99–100.

The ALJ did not make any findings regarding Hennessey's awareness of the final warning letter, presumably because of his conclusion that Hennessey's reasons for refusing Consolidated's offer of reinstatement were of no importance.

[15] Consolidated also argues that its good faith reliance on the arbitration award provides an independent basis for overturning the Board's decision. It suggests that even in cases in which the Board properly refuses to defer to an arbitrator's award, the Board should nonetheless look to the award to determine the interim rights of the parties. Thus, it argues, Hennessey should have been required to accept employment as conditioned by the arbitrator's decree, even though the Board ultimately ruled that the arbitrator's award contained an illegal condition.

Because we are remanding this case to the Board to reconsider the significance of Hennessey's motives for refusing Consolidated's offer, we need not reach the question whether Consolidated's good faith reliance on the arbitrator's decree, in itself, would be sufficient to toll backpay liability. We note, however, that resolution of this question depends on whether the Board could properly further the strong national policy in favor of private settlement of labor disputes without abdicating its responsibility to remedy violations of national labor law. *See Local Union No. 2188, International Bth'd of Elec. Workers v. N.L.R.B.,* 494 F.2d 1087, 1091 (D.C.Cir. *cert. denied,* 419 U.S. 835, 95 S.Ct. 61, 42 L.Ed.2d 61 (1974); *Associated Press v. N.L.R.B.,* 492 F.2d 662, 667 (D.C.Cir.1974). Thus, the Board might well reach different conclusions regarding the employer's right to rely on an arbitrator's decree pending a Board decision on a charged unfair labor practice depending on the nature of the arbitrator's decision and the specific circumstances following its issuance. In this case, among the significant factors the Board would have to consider are (1) the arbitrator ordered reinstatement with a warning letter, (2) Consolidated conformed its offer to the terms of the decree and (3) Hennessey waited two and a half months after the decree before filing his charge with the Board. Although Hennessey filed his charge within the statutory period of six months, and the Board ruled that the offer was improperly conditioned, a more refined consideration of the policy in favor of private settlement might lead the Board to find that Consolidated's good faith reliance on the arbitrator's award should work to suspend its backpay liability. Different considerations would of course be implicated if the arbitrator's award had been plainly conditioned on a surrender of the employee's statutory rights, or if the arbitrator had upheld the discharge, thereby requiring no reinstatement offer at all. In these cases, the Board might find that allowing the arbitration award to reduce the remedy received by a wrongfully discharged employee would seriously compromise the remedial purposes of the Act.

proper.[16] *See generally Road Sprinkler Fitters Local No. 669 v. N.L.R.B.*, 600 F.2d 918, 923 (D.C.Cir. 1979); *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 1326 (D.C.Cir.1972); *Burinskas v. N.L.R.B.*, 357 F.2d 822, 827 (D.C.Cir.1966).

REMANDED.

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[16] We are especially hesitant to decide this question without the benefit of the Board's reasoning in the light of contradictory signals from the Board regarding the analogous situation in which an employer who has made no reinstatement offer at all seeks to reduce his backpay liability by proving that an offer would have been rejected. *Compare Roadway Express, Inc.*, 254 N.L.R.B. No. 26, 48-49 (1981) (evidence that employee intended to quit does not obviate need for a valid offer of reinstatement) *and Lyman Steel Co.*, 246 N.L.R.B. 712, 715 (1979) (employer must make a genuine offer of reinstatement to toll backpay liability) *with Marlene Industries Corp.*, 255 N.L.R.B. No. 192, 14 n.12 (1981) (even in the absence of an offer of reinstatement, employer may reduce liability by demonstrating that employee would not have accepted the offer if made) *and Abilities & Goodwill, Inc.*, 241 N.L.R.B. 27, 27 n.5, *enf. denied on other grounds*, 612 F.2d 6 (1st Cir. 1979) (same).

NLRB v. Custom Sheet Metal & Service Co., Inc.

666 F.2d 454 (10th Cir.), December 14, 1981—243 NLRB 1102

On petition to enforce Board Order

Before HOLLOWAY and DOYLE, Circuit Judges, and KUNZIG, Judge*

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KUNZIG, Judge: This matter comes before the court on application of the National Labor Relations Board for enforcement of its order[1] pursuant to section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. § 160(e). The Board has found Custom Sheet Metal & Service Co., Inc. in violation of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5),[2] based upon its refusal to sign a collective bargaining agreement negotiated by the Sheet Metal Contractors' Association of Oklahoma, Inc., and the Sheet Metal Workers, Local Union 124. The critical issue in the case is whether "unusual circumstances" existed such as to justify the Company's withdrawal from the Association shortly before agreement on the contract was reached. We conclude that unusual circumstances did exist, and therefore deny enforcement.

I. *Background*

In January of 1975, Billy Herron, a union member and journeyman sheet metal worker in Oklahoma City, Oklahoma, purchased the Stalcup and Kiser sheet metal shop and incorporated the business as the Custom Sheet Metal & Service Co., Inc. ("Company"). Shortly thereafter, the Company voluntarily agreed to abide by the terms of the collective bargaining agreement then in effect between Stalcup and Kiser and Sheet Metal Workers, Local Union 124 ("Union"). The Company soon became a member of Sheet Metal Contractors' Association of Oklahoma, Inc. ("Association"). At this time the Company was engaged principally in the sheet metal building and construction industry, as were most of the members of the Association. When the initial contract expired, a new contract was executed between the Association and the Union to be effective from July 1, 1975 to June 30, 1977. This agreement provided that only journeyman and apprentice union sheet metal workers would be employed to perform sheet metal work for the Company and that union membership was required within eight days of commencing employment.

During the two-year term of the contract the Company's business expanded, and its operation began to change from building and construction work to the assembly-line fabrication of sheet metal products. This trend continued to the point where 95% of

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the Company's business involved the inplant manufacture of sheet metal products (primarily restaurant equipment), and only 5% involved on-site installation.[3] In response to this change in its business operation, the Company president approached the Union business agent to negotiate some modifications in the contract then in effect. The two men met—Billy Herron for the Company, and Parker Sneed for the Union—and the net result of their discussion was a "Kitchen Equipment Addendum" which reduced the wage rate to be paid to assembly-line employees of the Company and which extended the time in which employees were to become members of the Union from eight to thirty days.[4] The Company was the *only* member of the Association allowed by the Union to take advantage of the cost-saving provisions of the "Kitchen Equipment Addendum."[5]

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*Honorable Robert L. Kunzig, of the United States Court of Claims, sitting by designation.

[1] The Board's decision is reported at 243 NLRB No. 142 (1979).

[2] These sections provide:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[3] The parties do not dispute the fact that the Company's business operation changed dramatically during the 1975-77 period. The Administrative Law Judge found that as of the time of the hearing, the Company "had not bid on any large or new construction jobs for over 2 years."

In March of 1977 the Union notified the Association of its desire to open negotiations for a new contract to succeed the 1975–77 agreement. The Association subsequently agreed to meet with the Union, and Billy Herron, the Company president, was appointed to the Association's bargaining committee as representative for those businesses involved in the assembly-line manufacture of restaurant equipment and specialty products.

The first negotiating session took place on May 10, 1977, and among the Association's proposals was a request that provisions similar to those included in the "Kitchen Equipment Addendum" be added to the new contract. The Union rejected this proposal at the meeting, and consistently rejected the proposal at bargaining sessions held on May 17 and 31, and June 7, 14, 21, 23, and 24. Despite the Union's refusal to incorporate the "Kitchen Equipment Addendum" into a new agreement, the parties did agree to a contract at the bargaining session on June 24, 1977, subject to Union ratification. At the membership meeting on June 30, 1977, the Union rejected the Association's offer and went on strike the next day.

During the next few days Billy Herron, the Company president, was contacted by the Company's major customer, Sonic Industries, regarding the availability of certain kitchen equipment which had been previously ordered by Sonic.[6] Herron informed Sonic that 30 of his 32 production employees were on strike, but that another bargaining session was scheduled for July 5. The Association and Union representatives met on July 5, but were unable to reach agreement despite the assistance of the Federal Mediation and Conciliation Service.

On July 6 Sonic Industries again contacted Herron and informed him that it intended to purchase the items it needed, and its future requirements, from other suppliers. Faced with the loss of a customer which

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provided fully 75% of its business,[7] and the apparent lack of meaningful progress in the bargaining sessions between the Union and the Association, the Company withdrew from the Association on July 6, thereby terminating the Association's bargaining authority for the Company. The Union was promptly informed of this action by telegram.[8] On July 7 the remaining members of the Association met again with the Union representatives, and after a 12-hour session an agreement was reached which was accepted by the Union membership on July 11, 1977.

Shortly thereafter, the Union representative contacted Herron to obtain the Company's adoption of the new agreement. Herron refused to sign the agreement which provided that only journeyman and apprentice sheet metal workers would be employed by the Company,[9] a provision which had been previously modified vis-a-vis the Company by the "Kitchen Equipment Addendum" so as to allow the Company to pay its assembly-line employees less than the journeyman pay scale.

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[4] The contract in effect during 1975–77 stated, "The employer agrees that none but journeyman and apprentice sheet metal workers shall be employed on any work described in Article 1." Article 1 was broadly drafted and covered both installation and manufacturing work. The ultimate effect of this provision was to require the Company to pay the wage scale applicable to journeyman and apprentice sheet metal workers to its assembly-line employees, even though the latter group performed only relatively simple tasks. Because the Company's operation had changed to the point where 95% of its work was in manufacturing and only 5% in installation, an accommodation in the contract was deemed necessary for the Company to be competitive against non-union manufacturers of restaurant equipment. The "Kitchen Equipment Addendum" allowed the Company to hire relatively unskilled employees for its assembly-line operation and to pay those employees at the initial rate of 60% of the journeyman's base pay salary.

[5] The "Kitchen Equipment Addendum" was apparently never reduced to writing, but was honored by both the Company and the Union.

[6] The Administrative Law Judge found that "as of July 6, between $80,000 and $125,000 worth of work for Sonic [was] in progress at Respondent's plant and the items being produced *for* Sonic could only be used *by* Sonic, so in that sense, these items were custom made."

[7] The Administrative Law Judge found that "[a]t this point in time Sonic was the purchaser of 75 percent of Respondent's production."

[8] The telegram stated, "Custom Sheet Metal and Service Co., Inc., permanently withdraws the authority of Sheet Metal Contractors Association of Oklahoma, Inc., to represent it in all collective bargaining matters effective immediately."

[9] The contract as negotiated also contained an eight-day Union security clause in contrast to the thirty-day clause provided for in the "Kitchen Equipment Addendum."

In response to the Company's refusal to sign the agreement, the Union filed an unfair labor practice charge with the Board on July 17, 1977. In a two-page order affirming the findings of the Administrative Law Judge, the Board found that the Company's withdrawal from the Association bargaining unit and its refusal to execute the contract for the 1977–79 period violated sections 8(a)(1) and (5) of the National Labor Relations Act. The Company has been ordered to provide various relief, and most notably has been ordered to execute the 1977–79 contract, but not to give effect to the provision requiring that the Company employ only journeyman and apprentice sheet metal workers (Article III) and the eight-day Union security clause (Article V). The Board's order does impose the wage scale applicable to journeyman and apprentice sheet metal workers on the Company, but leaves unresolved the exact job classification of the Company's assembly-line employees and the length of time in which Union membership is required as a condition of employment.

II. *The Right to Withdraw from Multi-Employer Associations*

The applicable rules governing multi-employer bargaining have developed on a case-by-case basis with little Congressional interference.[10] As enunciated by the Board in its seminal opinion in *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958), once negotiations between a multi-employer association and a union have begun, none of the parties may withdraw from such bargaining without the consent of the opposing party, absent "unusual circumstances." This formulation has been widely adopted by the circuits which have considered the question,[11]

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and is clearly the law in the Tenth Circuit. *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966). Thus, the central issue in this case is whether "unusual circumstances" justified the Company's withdrawal, and whether the Board's finding to the contrary is supported by substantial evidence.

The Courts of Appeal of the various circuits have recognized three situations which constitute "unusual circumstances" sufficient to justify an employer's withdrawal from a multi-employer association after bargaining has begun: (1) extreme financial hardship threatening the existence of the employer as a viable business entity,[12] (2) fragmentation of the multi-employer bargaining unit,[13] and (3) bargaining impasse.[14]

III. *Application of the "Unusual Circumstances" Standard*

We recognize at the outset of our analysis that a combination of events—a striking labor force, a threat from the Company's major customer to purchase ordered goods elsewhere, and an apparent lack of progress in negotiating a new "Kitchen Equipment Addendum"—left the Company in an extremely difficult financial situation. Suddenly faced with the imminent loss of a customer which purchased 75% of its production, and having lost other customers since the initiation of the strike,[15] the Company withdrew from the Association and gave prompt notice of this decision to its employees and the Union. We believe the evidence in the case justifies the Company's withdrawal on the first theory encompassed by the "unusual circumstances" standard—*extreme financial hardship* threatening the existence of the employer.

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[10] *See, e.g., NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 95–96, 77 S.Ct. 643, 647, 1 L.Ed.2d 676 (1957) ("The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation."); *Retail Clerks Union, No. 1550 v. NLRB*, 330 F.2d 210, 212 (D.C.Cir.), *cert. denied*, 379 U.S. 828, 85 S.Ct. 41, 13 L.Ed.2d 31 (1964). ("This later phenomenon [a multi-employer bargaining unit] is nonstatutory in character and thus lacks the definiteness in terms of nature and obligation which it might have if Congress had expressly dealt with it.")

[11] *See NLRB v. Acme Wise Works, Inc.*, 582 F.2d 153 (2d Cir. 1978); *NLRB v. Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *McAx Sign Co., Inc. v. NLRB*, 576 F.2d 62 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L.Ed.2d 75 (1979); *NLRB v. Siebler Heating & Air Conditioning*, 563 F.2d 366 (8th Cir. 1977), *cert. denied*, 437 U.S. 911, 98 S.Ct. 3104, 57 L.Ed.2d 1142 (1978); *Authorized Air Conditioning Co., Inc. v. NLRB*, 606 F.2d 899 (9th Cir. 1979), 606 F.2d 899 (9th Cir. 1978), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1598, 63 L.Ed.2d 785 (1980).

[12] *See NLRB v. Spun-Jee Corp.*, 385 F.2d 379 (2d Cir. 1967) (remand to NLRB); *Spun-Jee Corp.*, 171 N.L.R.B. 557 (1968) (adopts extreme financial hardship exception). *See also NLRB v. Siebler Heating & Air Conditioning Inc.*, 563 F.2d 366, 371 (8th Cir. 1977), *cert. denied*, 437 U.S. 911, 98 S.Ct. 3104, 57 L.Ed.2d 1142 (1978) ("While we do not view this as the principal grounds for withdrawal, the record reveals that non-union employers were getting a larger and larger share of the available residential work and genuine economic distress was only a step removed.")

[13] *See NLRB v. Southwestern Colorado Contractors Assn.*, 447 F.2d 968 (10th Cir. 1971).

[14] *See NLRB v. Independent Assn. of Steel Fabricators, Inc.*, 582 F.2d 135 (2d Cir. 1978), *cert. denied*, 439 U.S. 1130, 99 S.Ct. 1049, 59 L.Ed.2d 91 (1979); *NLRB v. Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170 (8th Cir. 1972); *NLRB v. Associated Shower Door Co., Inc.*, 512 F.2d 230 (9th Cir.), *cert. denied*, 423 U.S. 893, 96 S.Ct. 191, 46 L.Ed.2d 125 (1975); *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55 (10th Cir. 1966). *Contra, NLRB v. Bonanno Linen Serv.*, 630 F.2d 25 (1st Cir. 1980), *cert. granted*, 450 U.S. 979, 101 S.Ct. 1512, 67 L.Ed.2d 813 (1981).

[15] In his findings of fact, the Administrative Law Judge noted that "with the initiation of the strike, Respondent lost a number of its smaller customers."

The Board does not contest the determination that the Company was faced with the immediate loss of three-fourths of its business, but reaches the conclusion that such circumstances do not threaten the very existence of the Company. We disagree, for it appears to us that the impending loss of 75% of the Company's business *does* threaten its very existence, especially in an era of high interest rates and heavy debt financing.[16] The Board's decision does not indicate the percentage of business loss which would satisfy the "extreme financial hardship" test, but if 75% was deemed insufficient, one can only wonder as to the percentage the Board would have found sufficient—85%, 90%, 95% * * * 100%?

The timing of Billy Herron's decision to withdraw his Company from the Association, which came on the heels of Sonic's call informing him it had located other equipment suppliers, also indicates that Herron was motivated by vital economic considerations in his decision rather than anti-union sentiment. Indeed, there is *no* evidence that at the time of Herron's decision to withdraw he was motivated by considerations other than the financial position of the Company. We note that Herron had been a Union member himself, and voluntarily entered the Company into a collective bargaining agreement with the Union in 1975. The evidence indicates that the Company was willing to work with the Union in reaching agreement on a new "Kitchen Equipment Addendum." As the United States Court of Appeals for the Eighth Circuit recently noted, "[T]he soundness of a withdrawal from a multi-employer unit is to be tested by considering the *actual motivation* of the employer seeking to withdraw from the unit." *NLRB v. Custom Wood Specialties, Inc.*, 622 F.2d 381, 385 (8th Cir. 1980) (emphasis added). Such reasoning, applied to this case, dictates a result in favor of the Company in view of the perilous economic conditions facing the Company and the total lack of evidence of bad faith towards the Union.

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The facts in this case are distinguishable from those facing this court in *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55 (10th Cir. 1966), where the employer's "unusual circumstances" argument was rejected. In *Tulsa Sheet Metal*, the firm which withdrew from the multi-employer association had been a solid member of the association for twelve years at the time of its withdrawal. By contrast, the Company in the case at bar had been a member of the Association for only two years, during which time its business operation radically changed from on-site construction to inplant manufacturing. Even though Custom Sheet Metal was a party to the contract executed between the Association and the Union during the 1975–77 period, as a result of the transformation in its operation, the Company reached agreement with the Union on a "Kitchen Equipment Addendum" which significantly modified the wage, job classification, and union security provisions applicable to the other members of the Association. This modification of the contract, which applied to one member of a multi-employer Association consisting of approximately 44 members, indicates that the Union was aware of the unique position of the Company in the Association and suggests that the Company's withdrawal was indeed prompted by "unusual circumstances." [17]

Finally, and most significant, is the fact that the Company in this case was faced with serious economic difficulties due to the imminent loss of 75% of its business, a situation *not* present in the *Tulsa Sheet Metal* case. In summary, *Tulsa Sheet Metal* is simply a different case from the one now before the court. The facts are distinguishable—the rejection of the "unusual circumstances" argument not applicable to the case at bar.

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[16] The decision of the Administrative Law Judge recognized that "[r]espondent was concerned because it had borrowed money to finance its operations and was paying interest on the money borrowed." The record also reflects that the Company was particularly concerned with losing business to out-of-town manufacturers which were not shut down by the strike. The other members of the Association, all involved in the building and construction industry, were not similarly faced with this competitive threat.

[17] *Cf. Retail Clerks Union, No. 1550 v. NLRB*, 330 F.2d 210, 216 (D.C.Cir.), *cert. denied*, 379 U.S. 828, 85 S.Ct. 41, 13 L.Ed.2d 31 (1964) ("[T]he evidence showed a melange of group and individual negotiation and agreement, carried on over such a period of time, as to suggest a commonly accepted flexibility in the format of bargaining which would not automatically outlaw every departure from the fold.")

Apart from the issue of whether "unusual circumstances" existed, there is a serious question in this case as to whether the Board's remedy can properly be imposed upon the Company. Because the Company is no longer engaged in the building and construction industry, the Company would ostensibly violate section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), by executing a contract which limits employment to those with "minimum training or experience qualifications" (*i.e.*, journeyman and apprentice sheet metal workers—Article III) and which contains an eight-day union security clause (Article V). In recognition of the fact that the contract contains provisions which are illegal [18] as applied to a

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manufacturing concern, the Board has ordered the Company to execute the agreement, but not to give effect to the illegal provisions. The Board has cited our decision in *Tulsa Sheet Metal* as authority for this remedy, but here again we reject the Board's contention.

We recognize that the governing standard for determining whether a Company should be ordered to execute a collective bargaining agreement was enunciated by this court in *Tulsa Sheet Metal:* "Employment contracts should not be completely obliterated because some provisions are beyond the legal limits of the parties' bargaining power, unless such illegal provisions permeate the complete contract to such an extent as to affect its enforceability entirely." [19] The *Tulsa Sheet Metal* court, relying in part upon a "savings and severability" provision in the contract, went on to hold that provisions regarding subcontracting and union security were "not basic to the whole scheme of the contract." [20]

In this case, the illegal provisions regard union security and, more importantly, the minimum qualifications for commencing employment. The contract in question refers to only two classifications of workers who can be employed by the company—journeyman, and apprentice sheet metal workers—and other sections of the contract are entwined with this classification, including the wage scale to be paid by the Company. If any provision of a collective bargaining agreement is truly vital, it is a provision pertaining to the classification of employees, and this seems especially true when the wage scale in a contract is directly tied to the classification scheme. Moreover, the contract in the case at bar contains no "savings and severability" clause, unlike the agreement in *Tulsa Sheet Metal.* We seriously question the wisdom of ordering the Company to sign a contract, but not to give effect to a provision regarding minimum employee qualifications which forms the very foundation on which the agreement rests. As the Supreme Court recognized in *NLRB v. Rockaway News Supply Co., Inc.,* 345 U.S. 71, 78, 73 S.Ct. 519, 523, 97 L.Ed. 832 (1953), "[t]here may be cases where a forbidden provision is so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety." We believe that such a case is now before us,[21] in contrast to that facing the court in *Tulsa Sheet Metal.*[22]

In summary, we conclude that the Company's withdrawal from the Association was justified on the ground that it was faced with extreme financial hardship threatening its existence as an employer. Unlike *Tulsa Sheet Metal,* here there is ample evidence in the record of extreme financial hardship sufficient to invoke the "unusual circumstances" standard. Moreover, the Board has misread our decision in *Tulsa Sheet Metal* in formulating a remedy in the case at bar. We find the remedy proferred by the Board inapplicable on the ground that a provision of the contract which the Board has excused the Company from executing "permeate[s] the complete contract to such an extent as to affect its enforceability entirely." [23] Finally, we reiterate the lack of even a scintilla of evidence of antiunion sentiment on the Company's behalf at the time the decision was made to withdraw the Company from the Association. Although the Board's decision is entitled to considerable deference by a reviewing court, where the Board's order has "no reasonable basis in law" or is "fundamentally inconsistent with the structure of the Act" it should not be enforced. *NLRB v. Bartlett-Collins Co.,* 639 F.2d 652, 655 (10th Cir. 1981), citing *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979).

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[18] *See NLRB v. Tulsa Sheet Metal Works, Inc.,* 367 F.2d 55, 58 (10th Cir. 1966) ("The June 21 contract contains two clauses relating to union security and subcontracting, both of which are admittedly *illegal.*") (Emphasis added.)

[19] 367 F.2d at 59.

[20] *Id. See also NLRB v. Rockaway News Supply Co.,* 345 U.S. 71, 73 S.Ct. 519, 97 L.Ed. 832 (1953).

[21] *See, e.g., Stockhouse Oldsmobile, Inc. v. NLRB,* 330 F.2d 559, 560 (6th Cir. 1964) ("We cannot believe that Congress intended to make it an unfair labor practice for an employer to refuse to sign a collective bargaining agreement containing a union security clause which, by its literal terms, could require a violation of § 8(a)(3) and § 8(b)(2) of the Act.")

[22] Even our decision in *Tulsa Sheet Metal* concedes that "not all provisions of a collective bargaining agreement are severable." 367 F.2d at 59.

[23] *Id.*

For the reasons stated above, we hold on these facts that "unusual circumstances" clearly existed so as to justify the Company's withdrawal from the multi-employer association bargaining unit and the Company's subsequent refusal to execute the 1977–79 agreement. We find that the Board's decision to the contrary is not supported by substantial evidence on the record as a whole,[24] and therefore conclude that the Company did not violate sections (8)(a)(1) and (5) of the National Labor Relations Act as charged by the Board.

Enforcement of the Board's order is denied.

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[24] *See* 29 U.S.C. § 160(e).

Pittsburgh-Des Moines Corporation v. NLRB

663 F.2d 956 (9th Cir.), December 14, 1981—253 NLRB 706

On petition to review Board Order

Before Merrill and Nelson, Circuit Judges, and Sweigert,* District Judge

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Merrill, Circuit Judge: Pittsburgh-Des Moines Corporation (the Company) petitions for review of the order and decision of the National Labor Relations

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Board determining that the Company had failed to bargain in good faith with the collective bargaining representative of certain employees in violation of § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The Board cross-petitions for enforcement of its order. The Board affirmed factual findings of an administrative law judge from which the following facts appear.

For some time the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (the Union) has represented the Company's employees in two distinct units under two separate collective bargaining contracts. The latest contracts expired March 31, 1979, at which time the employees in both units went on strike. Prior to that date, the parties had engaged in seven or eight bargaining sessions without reaching an agreement.

On May 17, 1979 a bargaining session was held at which the Union was represented by its business representative Richard Parra and the Company by its district manager Floyd Bedwell. The Company proposed two year renewals of the former contracts without substantial change save in two respects. It proposed a new section on strikes and lockouts, Section XVII, which incorporated a no-strike clause from the former contracts with some elaboration and provided that the Company might fire any employee found to have engaged in a strike in violation of the section. Also the Company proposed to discontinue use of the Union's welfare and pension funds and to provide employee coverage by a qualified plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.,* utilizing "a reliable insurance company" as carrier.

After some bargaining, the parties caucused separately and thereafter communicated through a mediator. Parra testified that the mediator told him confidentially that there was "no problem" with the language of Section XVII, but that the Company was holding steadfast on medical coverage and pension provisions. Parra testified that he understood this to mean that the Company had withdrawn its proposed Section XVII. (Bedwell testified that no member of his team had ever stated that the Section was being withdrawn or deleted.)

On May 23, Parra got in touch with Ned Ware, a Company executive of a higher level than Bedwell who had not attended the May 17 bargaining session, and without success sought Ware's assistance in preserving use of the Union pension plan. Later that day, Parra telephoned Ware and stated that he would schedule a ratification vote by the employees on the Company proposal and wanted to confirm his understanding that the Company's proposed Section XVII had been dropped. Ware responded that he had no knowledge of the section having been dropped and would have to check it out and report back to Parra. Another conversation between the two occurred May 29 at which time the mechanics of returning employees to work were discussed but without any reference to the strike/lockout provision. Without having received any confirmation from Ware of his understanding with respect to the section, Parra proceeded to conduct a vote of the Union members in ratification of the Company's proposed contract, reporting to the employees that Section XVII had been depleted. The vote was favorable and the employees returned to work.

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*Honorable William T. Sweigert, Senior United States District Judge, Northern District of California, sitting by designation.

Parra then arranged with Company officials to prepare drafts of the contracts for execution. The Company prepared drafts incorporating Section XVII, and mailed them to the Union on June 10.

When Parra received the contracts, he immediately telephoned Ware to protest the inclusion of Section XVII. Ware denied any understanding that the section was to be dropped and suggested that the Company might consider further discussion towards a trade-off in contract language. Parra refused to consider any exchange, asserting categorically that an agreement had been reached and that the section had been deleted. Parra then re-authored the contract documents deleting Section XVII and sent these drafts signed by the Union

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to the Company. Ware responded that there had been no agreement to delete Section XVII and that the Company declined to execute the re-authored agreement.

On July 12, having heard nothing further from the Union, Bedwell wrote Parra to the following effect:

> It is clear that we are in disagreement regarding certain essential contract terms and have not been able to consummate an agreement.
>
> By this letter, we hereby withdraw our last contract proposal and suggest that we get together in the immediate future to continue negotiations to reach an agreement. We will review all matters and have a new proposal for your consideration.
>
> I hope to hear from you as soon as possible regarding the scheduling of a meeting for negotiations.

On July 16 the Union filed an unfair labor practice charge against the Company alleging that since about June 21 the Company had refused to execute a collective bargaining contract upon which the parties had agreed. In due course, after investigation of the charge, the Regional Director advised the Union that no complaint would be issued. On August 22, the Union withdrew the charge. It then resurrected the drafts of agreement sent by the Company on June 10, signed them and forwarded them to the Company. Bedwell responded:

> This contract proposal embodies terms of an offer which was unconditionally withdrawn by the Company by a letter dated July 12, 1979. Accordingly, the proposal we received is rejected by the Company. Enclosed is your copy of this rejected proposal which we have not signed.
>
> The Company remains ready and willing to meet with you to bargain in good faith in order to reach an acceptable agreement. I will be preparing a counter proposal from the Company which I will forward to you shortly.

After further exchange of correspondence with each party adhering to its position the Company drew up new proposed contracts and sent them to Parra on September 11. Bedwell stated:

> You will note that while certain language changes have been made, the Company's proposals contain the same economic provisions which were included in our previously withdrawn proposal.

He expressed hope for an early resumption of negotiations.

While the economic provisions affecting the employees remained the same, substantial changes were made respecting Union membership, check-off of Union dues, management prerogatives and grievance procedures. There was also an expansion of the substance of Section XVII.

On September 17, Bedwell wrote Parra again urging that a negotiating session be arranged and suggesting September 19 as a date. He stated:

> At this meeting, I hope to explain further the Company's current proposals and the circumstances which have contributed to those proposals. The Company will certainly consider any counter proposals the Union may have.

Parra responded by telephone that the Union was not willing to reopen negotiations. Bedwell immediately responded with a mailgram expressing regret over the Union's position and stating:

> The Company is anxious to meet with you for the purposes of negotiating the contract. Al-

> though we apparently have some differences, I believe that through negotiations, these differences can be resolved. We are ready to move in good faith to reach an agreement. You have not even given us a chance to explain our proposal, or to hear any counter proposals you may have.
>
> The Company remains ready and willing to negotiate with the Union at a time and place of your choice. We want to reach an agreement with you.

This brought a response from the Union attorney, Richard Macey, advising that "negotiations are not in order at this time" because a contract already existed, and that he had advised the Union not to meet with the Company representatives.

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On September 25, Bedwell wrote again denying that any agreement had ever been reached on the withdrawn proposal and stating, "I am still awaiting an opportunity to discuss [the new] proposal with you, and to consider any counter proposals the Union may have."

This brought forth a consent from the Union to meet to discuss what "minor variations" from the June 10 proposal "might be acceptable." On October 10, an unsuccessful negotiating session was held, the Union refusing to negotiate save on the basis of the June 10 proposal. On October 23, Bedwell wrote Parra offering to substitute the Union's proposed grievance procedure section for the Company's last proposal and to include a provision respecting the crossing of picket lines which was desired by the Union but had been eliminated from the Company's last proposal. He again urged further negotiations.

Macey responded:

> Your company has consistently ignored that * * * the Union is not and will not enter into any negotiations with your company other than on the basis of a compromise for an existing contract.

On the basis of these facts, the administrative law judge concluded that as to the contentions of General Counsel that Company conduct constituted "surface" or bad faith bargaining "there is utter lack of merit."

The Board concluded otherwise. It stated, "[W]e conclude that by withdrawal of its original proposals tentatively agreed upon and by the substitution without explanation of regressive proposals, Respondent has failed to bargain in good faith * * *."

We find ourselves in agreement with the administrative law judge.

The question is "whether or not the [Company] genuinely desires to reach an agreement." *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 29 (9th Cir.), *cert. denied*, 393 U.S. 914, 89 S.Ct. 237, 21 L.Ed.2d 199 (1968). Upon this question, the Board must consider the " 'totality of the circumstances' which are indicative of mental state," *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1227 (9th Cir. 1981), and it does not suffice to rely solely upon the terms of contract proposals, *id.* In *NLRB v. Pacific Grinding Wheel Co. Inc.*, 572 F.2d 1343, 1348 (9th Cir. 1978), this Court stated:

> This circuit has specifically held that the Board can look at the content of the bargaining proposals as part of its review of all the circumstances. *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972). In addition, however, the Board must show 'substantial evidence that the company's attitude was inconsistent with its duty to seek an agreement' before a finding of failure to bargain is warranted. *NLRB v. MacMillan Ring-Free Oil Co.*, [*supra*].

We hold that the Board has failed to show substantial evidence to this effect. The record to us demonstrates a desire on the part of the Company to reach agreement and the Union's unreasonable insistence to point of impasse that agreement had already been reached.

The withdrawal of the June 10 proposal followed the Union's flat and unequivocal rejection of that proposal and its insistence, with no support for its position, that Section XVII had been deleted. We cannot accept the proposition, implicit in the Board's conclusion, that in the face of such rejection the Company was somehow committed to all portions of the proposal as to which tentative agreement had been reached; that the Union could hold the Company to what the Union liked while rejecting that which it disapproved. As we stated in *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 883 (9th Cir. 1978):

> Absent abuse * * * it is perfectly legitimate for a party to retract a proposal before the other side has accepted it. It may do so because the offer was germane only to the context in which

it was made * * * or because it has further determined the relative bargaining strengths of the opposed sides. The law does not require that each offer and indication of possible acceptance be included in the final contract before a legal impasse is reached.

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The proposal, as a package, was the result of hard bargaining—bargaining hard enough to have included a strike. We must assume that the proposal, advanced in the course of the strike, was the result of compromise and that concessions may well have been tendered in some areas with the hope of securing agreement on those provisions which the Union chose to reject. " 'To bargain collectively' does not impose an inexorable ratchet, whereby a party is bound by all it has ever said." *Id.*

We conclude that following rejection of the proposal by the Union, its withdrawal by the Company was fully justified and that the proposal then ceased to exist and could no longer form the basis for an agreement.

As to the submission of the September 11 proposal, the Company at all times made it abundantly clear that all changes from the June 10 proposal were negotiable and that counter proposals would be welcomed. The Company justifies its proposal of those changes on the ground that its bargaining position had been strengthened since June 10: the Union had failed in its effort to secure from the Board an unfair labor practice complaint; its strike, in the course of which the June 10 proposal had been advanced, had been terminated.[1] The Company contends that its improved position, in the context of hard bargaining, warranted its decision to negotiate from scratch.

In our judgment, in the light of the Union's flat rejection of the June 10 proposal and the Company's reiterated willingness to negotiate the September 11 proposal, this effort on the part of the Company to secure renegotiation of the contract in the climate of its improved bargaining position cannot be said to be so unreasonable as to give rise to an inference that the Company intended that no agreement be reached, with the result that the Union was released from any further obligation to bargain. *See NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978).

As to the failure of the Company to explain its actions, it is abundantly clear from the record that the Company repeatedly sought the opportunity to explain and that its requests were rejected out of hand. If there was a breakdown in negotiations, it occurred in the face of urgings by the Company that negotiations continue. If there was any refusal to bargain, it was on the part of the Union.

The petition of Pittsburgh-Des Moines Corporation is granted. The Board's prayer for enforcement of its order is denied.

NLRB v. Rich's Precision Foundry, Inc.

667 F.2d 613 (7th Cir.), December 15, 1981—250 NLRB 1317

On petition to enforce Board Order

Before Pell and Cudahy, Circuit Judges, and Dumbauld, Senior District Judge*

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Pell, Circuit Judge: This case arises on the petition of the National Labor Relations Board (Board or NLRB) for enforcement of its order finding the Respondent, Rich's Precision Foundry, Inc. (Company), in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act *as amended*, 29 U.S.C. §§ 158(a)(1) and (3) (1976). The Company has cross-petitioned this court pursuant to 29 U.S.C. § 160(f) to review and set aside the order. The primary issues for our determination are whether the Board's findings that the Company violated §§ 8(a)(1) and (3) were supported by substantial evidence on the record as a whole and whether the employees allegedly discharged for union activities were supervisors excluded from the protection of the Act.

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[1] While the Union asserts that the strike was ended through misunderstanding on the part of Parra, there is nothing to suggest that the Company contributed to such misunderstanding. The only basis asserted by Parra for his conclusion that Section XVII was to be deleted was a confidential aside from the mediator which was never confirmed by the Company and which would seem to have been intended by the mediator only to aid the Union in further negotiation and not to represent that agreement had already been reached. Parra's reckless report to the Union members that the section had been deleted cannot be held against the Company.

*The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

The Board[1] found that the Company violated § 8(a)(1) of the Act by maintaining an overly broad no solicitation and no distribution rule, threatening employees with discharge and plant closure for union support, conveying to employees an impression of Company surveillance of union activities, interrogating employees about union activities, soliciting an employee to engage in anti-union activity, and inducing employees to abandon the union by granting an increased Christmas bonus. The Board also found that the Company violated §§ 8(a)(1) and (3) of the Act by discharging Felix Birt and Homer Acres for their union activities and by laying off Kurt Elder and Greg Schumacher temporarily for lack of work until replacements for Birt and Acres were arranged. The Board ordered the Company to cease and desist from the unfair labor practices, to reinstate Birt and Acres, to make whole Birt, Acres, Elder, and Schumacher for all wages lost as a result of their unlawful layoffs, and to post an appropriate notice to inform the employees of these actions.

I. THE FACTUAL BACKGROUND

A. The Company's Operations and Personnel

The Company manufactures and distributes brass and aluminum castings at its foundry in Yorktown, Indiana. The Company employed approximately 65 people at the time of the alleged violations. The management and supervisory personnel of the plant included Richard Reece, owner and president; Steven Bailey, plant manager; and several foremen, including Dewey Miller and David Bennett. One of the Company's shop rules subjected employees to discipline for "distribution of any literature of soliciting or selling of any kind during working hours."

Prior to their discharges, Felix Birt and Homer Acres were employed at the plant as senior molders. Acres and Birt, in the course of their duties, gave assistance and instruction to the other less experienced molders in their department. The Company **618** asserted that these instructional duties excluded Birt and Acres from the coverage of the Act as supervisors under 29 U.S.C. § 152(3) (1976). In support of its position, the Company introduced a December, 1978 organizational chart which included Birt and Acres in a list of foremen. President Reece testified their names were thus listed simply "because they're foremen"; a molder, Greg Schumacher, who worked with Birt, testified that Reece had once told him that Birt was a foreman.

B. Threats Against Union Organization

Birt testified that in mid-June Reece stated in a conference with the molders that there "definitely [would be] no union" and that "anyone caught talking about a union would be fired." Bailey and Miller, who were present at the meeting, testified that they had never heard Reece make such a statement. Reece did not testify as to the incident.[2]

In August or September, Birt and Acres began to talk to the other employees about organizing a union due to dissatisfaction with wages and working conditions. In November, Acres and Birt, along with the other molders, ceased work to protest the Company's failure to install a shield on an overhead hopper. As spokesman for the molders, Birt met with Reece, Bailey, and Miller to request the Company to install the shield and grant a future pay raise. Birt said he warned them at one point that "if they [the company] didn't * * * that we would get a union up." Approximately the last week in November, Birt and the other molders were discussing with foreman Miller the possibility of a union contract. Birt said that if the employees did not get a raise, they would "get a union," to which Miller replied they "couldn't do that" and "if [they] did, that they would close the door first." Miller did not deny making this statement.

C. The Locker Search

About December 1, Acres distributed to the employees a union pamphlet outlining examples of illegal conduct by an employer during a union campaign. On December 5, Miller and Bailey conducted a search of Birt's locker at the foundry. Birt testified that Miller and Bailey "said that they saw an employee from the cleaning room reading a piece of paper, and they have reason to believe that it had something to do with the union that could hurt the company, and they wanted to search my locker." Another witness corroborated that Miller had said that he was searching for a paper that an employee had been reading. Bailey testified that Miller had suggested the search because "he believed that Felix [Birt] had something that he should not have." He also confirmed that Miller had told Birt that he believed Birt had something "that would be a detriment to the company." Upon searching the locker, Miller pulled out a piece of paper which turned out to be a tardiness warning on the back of a copy of the shop rules. Bailey then apologized to Birt but indicated he was "very disappointed." There was testimony that an employee had been dismissed for drug problems one month earlier and that there had been some problems with employees drinking alcoholic beverages in the plant.

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[1] Inasmuch as the Board affirmed the "rulings, findings, and conclusions" of the administrative law judge and adopted his order without any significant change relevant to our review, the decision, order, and opinion of the administrative law judge will herein be referred to as the decision, order or opinion of the Board.

[2] There was also testimony by Birt that Reece had said in a May meeting that "he'd close the doors * * * before he'd go union." Bailey, who was present at the meeting, denied hearing Reece make such a statement. Although the May incident occurred outside the six-month statutory limitaion period, the administrative law judge considered it only as background evidence shedding light on matters within the period.

D. The Questioning of Anna Caldwell by Manager Bailey

Between December 5 and 7 Birt arranged a union organizational meeting for the evening of December 7. Both Birt and Acres publicized the meeting to the employees. In the morning of December 7, Bailey called a cleaning lady at the plant, Anna Caldwell, into his office. He asked her the nature of her discussion with other employees, including Acres, in the lounge, to which she replied that she had been talking with Acres about "bootlegging." According to Cald-

well, Bailey responded, "Now, come on Anna, what were you talking about?" She replied that that had been all they were talking about, but if he "was asking about the union" she would be "the first to sign the card." She then left Bailey's office without any further discussion.

E. The Discharges of Birt, Acres, Elder, and Schumacher

A union organizational meeting was held on December 7 in which several employees, including Acres, Birt, Caldwell, Elder, and Schumacher, signed cards in support of the union. The next day, Reece instructed the plant manager Bailey and foreman Miller to discharge Birt and Acres but to say they were being laid off for lack of work so that they could draw unemployment benefits. Birt and Acres testified that around one o'clock in the afternoon Miller and Bennett told them to clean out their lockers and go to Bailey's office. Acres also testified that he had work to do when he was approached by Miller and Bennett. When Acres and Birt arrived to meet with Miller, Bennett and Bailey in Bailey's office, they were told by Bailey they were being "laid off." When Birt and Acres asked if they were being fired, Miller explained they were being laid off so they could draw unemployment. Birt also testified that Miller told them, "I warned you I would get you sooner or later." Acres and Birt then obtained their paychecks and left the foundry.

Their discharges resulted in shutdown of two production lines. Kurt Elder and Greg Schumacher, who worked with Birt and Acres on these production lines, were temporarily laid off when they ran out of work to perform as a result of Birt's and Acres' discharges. Elder and Schumacher were recalled approximately one week later after Birt's and Acres' positions had been filled.

F. The Unemployment Claims

Both Birt and Acres filed claims for unemployment compensation. In response to a notice of the claims from the Indiana Employment Security Division, Bailey certified on an Eligibility Information Report that Birt and Acres were ineligible for unemployment. The reason given on the form was that they had been laid off "partially due to lack of work" but would not be re-employed due to their "insubordination, poor performance, refusal to accept supervision, and in general * * * defiant attitude." The Company does not appear to have otherwise contested their eligibility.

G. The Company's Statements and Conduct After the Discharges

On December 15, Acres went to the foundry to pick up his last paycheck. Reece's secretary told Acres that he could have his paycheck after he had talked to Reece. According to Acres, Reece told Acres to "go out and tell the people that the damn union wasn't no good," and to ask Miller for his job back. Reece also asked how many people were at the union meeting the day before. When Acres replied that Reece "didn't have to ask because he already knew," Reece asked Acres to meet with Bailey, Miller, and himself that afternoon. Acres did so, and during the meeting Reece said that "before he would have a union he would close the damn doors." Acres said that Reece then told him he "was the highest paid man that he had, and why was I in on this, I was the leader of the whole group, I was following Mr. Birt and everybody else was following me." Acres also testified that Reece advised him that he could come back to work "if [he would] just put the union down."

The same afternoon Geraldine Cook, who shares an apartment with Acres that they rent from Reece, went to the foundry to pay Reece the monthly rent. According to Cook, Reece asked her "what was the trouble" with Acres. When Cook replied that she did not want to get involved, Reece said, "I don't want a union in here, and I want things straightened out." He also told her it was "not necessary to be late with the rent" and that "all he [Acres] has to do is come back and ask Dewey [Miller] for his job back, and talk the union down." Cook's and Acres' testimony as to their encounters with Reece on December 15 were uncontroverted.

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Approximately one week later, the Company gave its employees $50.00 cash bonuses instead of a ham, turkey, or fruit as had been done in the past. In the Christmas party, Reece made a speech during which, according to employee Otis Cherry, he stated that he "couldn't afford to have a union in the place and pay discrimination wages; if he did, he'd have to close the doors."

In January of 1979, Acres returned to the plant to pick up his W-2 forms. Acres testified that Reece again asked him to "put down the union, and ask Mr. Dewey Miller for [his] job back."

The original charge alleging unfair labor practices on the basis of these events was filed with the NLRB on December 11, 1978. The parties entered into a settlement on May 22, 1979 which was set aside by the Regional Director on June 29, 1979 due to the Company's refusal to comply with the terms of the settlement. In its post-trial brief after the conclusion of the hearing before the administrative law judge, the Company justified its refusal to comply as follows:

> Formal settlement was once effected in this matter and subsequently withdrawn upon Respondent's realization that the Complainant [Birt] and Acres were guilty of conduct which constituted legitimate defenses to the charges and constituted just cause for the discharge of Birt and Acres.

The Board contends that this statement demonstrates that the purported grounds for the discharges of Birt and Acres were merely after-acquired pretexts for the retaliatory discharges.

H. The Company's Evidence of an Intentional Slowdown by Birt and Acres

The first time that the Company advanced what it claimed to be its actual reason for laying off Birt and Acres was in the testimony in the administrative hearing. Reece stated that Birt was laid off due to "evidence from several papers and data that we fill out every day that there was an automatic slowdown" and that Acres was similarly laid off for an "intentional slowdown." Reece said that he had based his decision on their production data. He later identified the data as "several years' experience, production slips * * * [and] scrap tickets," although he later testified that the scrap tickets had "not that much" to do with his decision to lay off Birt. He admitted that the slowdown had come to his attention a couple of months prior to December 8, but claimed that he did not take any action until then because he wanted to "straighten it out * * * through morale and management." The only evidence of any action taken by management prior to December 8 is Reece's testimony that foreman Miller and manager Bailey had talked to Birt and Acres. Neither Bailey nor Miller testified as to any such discussions with Birt or Acres having taken place.

However, Reece subsequently testified that a comparison between Birt and Acres and the other molders could not be made from the production records from September to December 8 because all the molders were involved in the slowdown. In contrast to his earlier testimony, Reece claimed that he had chosen to lay off Birt and Acres because they were "leaders * * * responsible for training" the other molders, although he conceded they were only responsible for training when foreman Miller was absent from the floor. When the apparent contradiction in his testimony as to the reason for the discharges was brought to Reece's attention, Reece again revised his position to state that Birt and Acres were laid off for not being leaders in terms of maintaining the morale of the other molders.

There was testimony in the hearing from Company employees that Birt and Acres had made statements to them in October and November to the effect that they were intentionally going to slow down production. Greg Schumacher, who poured metal for both Birt and Acres in November and December of 1978, testified that he had noticed an absence of molds from their production lines although there did not appear to be any shortage of the necessary materials at that time. The availability of adequate materials was substantiated by both Miller and Bennett. Other employees testified that, during this time, some cores used in the molding process had stacked up in the core room because they were not being used by the molders at the usual rate. One of the core room employees remarked that the back-up of cores began to disappear after Acres had been replaced. Acres and Birt both denied any statements as to a threatened slowdown.

The documentary evidence introduced by the Company to manifest the slowdown consisted of daily production records for September to October and a summary of the Company's gross sales for 1978. The Company's gross sales for September were $45,762.66; for October $117,694.59; for November, $107,237.96; and for December, $70,968.64. Plant Manager Bailey asserted that gross sales were a direct reflection of the molders' production. The production records, according to both parties, showed that Acres had averaged 111 pieces per day from a commonly used mold and that Birt had averaged 80 per day from the same mold for the months of October, November and December. There was some testimony that the Company had had problems with this specific type of mold in late 1978 and, as a result, had made some changes in production methods both before and after the discharges. The records also showed that Birt's scrap rate in December exceeded his scrap rate and that of other molders in previous months. The Company also introduced evidence that a molder with relatively little experience, who had been hired for the molder position after the discharges, averaged 116 pieces per day in February and March of 1979 from the mold upon which Birt's and Acres' averages were also based.

II. THE § 8(a)(1) VIOLATIONS.

A. Solicitation of Acres for Anti-Union Activities and Conditioning His Re-Employment on Such Activities

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights to organize and bargain collectively through representatives of their own choosing. 29 U.S.C. § 158(a)(1) (1976). Initially, we note that the Company has not contested in its brief or oral argument that it violated § 8(a)(1) by soliciting Acres to engage in anti-union activity and by conditioning his re-employment upon his engaging in such activity. It is well established that an employer violates § 8(a)(1) by soliciting employees to engage in anti-union activity, and by conditioning the re-employment of discharged employees upon engaging in such activity. *TRW-United Greenfield Division v. NLRB,* 637 F.2d 410 (5th Cir. 1981); *NLRB v. Wagner Iron Works,* 220 F.2d 126 (7th Cir. 1955), *cert. denied,* 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 850 (1956). Accordingly, the Board's finding that the Company violated § 8(a)(1) by soliciting Acres for anti-union activities and conditioning his re-employment on these activities is supported by substantial evidence on the record as a whole and is enforced without the necessity for further discussion. *Dreis & Krump Manufacturing Co., Inc. v. NLRB,* 544 F.2d 320 (7th Cir. 1976).

B. The No Distribution and No Solicitation Rule

The Board, relying on *Essex International, Inc.*, 211 N.L.R.B. 749 (1974)[3] and *C&W Mining Co., Inc.*, 248 N.L.R.B. 270 (1980), found that a shop rule prohibiting solicitation or distribution of any kind during working hours, without further refinement or definition by the employer and notice thereof to the employees, infringes on the employees' right to engage in union solicitation and distribution on their breaks and lunchtime, as set forth in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

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Although our attention has not been directed to a case in this court explicitly addressing the specific issue of whether a prohibition of solicitation during working hours is impermissibly broad, we hold that the rule, in the absence of evidence that it was narrowly enforced and the employees were informed of such enforcement, is unlawfully broad. The rule is susceptible to an overly broad interpretation that would unlawfully infringe employees' rights by prohibiting solicitation and distribution of union materials from the beginning to the end of the workshift, including breaks and lunchtime. *See generally W.W. Grainger, Inc. v. NLRB*, 582 F.2d 1118 n.3 (7th Cir. 1978), *enforcing* 229 N.L.R.B. 161 (1977). The existence of an overly broad rule may violate § 8(a)(1) even without a showing that it had been enforced because its mere existence may chill the exercise of § 7 rights. *Utrad Corp. v. NLRB*, 454 F.2d 520, 523–24 (7th Cir. 1971). Accordingly, the Board's finding that the rule violated § 8(a)(1) is enforced by this court.

C. Threats of Discharge and Plant Closure for Union Activity

For the remaining § 8(a)(1) violations, the Board's order must be enforced if the Board's findings are supported by substantial evidence based on the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893 (7th Cir. 1981). Moreover, absent exceptional circumstances, credibility determinations made by the administrative law judge ordinarily will not be disturbed on review. *Sarkes Tarzian v. NLRB*, 374 F.2d 734 (7th Cir. 1967), *cert. denied*, 389 U.S. 839, 88 S.Ct. 64, 19 L.Ed.2d 102 (1967).

Again we note that the Company did not contest before the Board or before this court the administrative law judge's finding and conclusion that Reece had threatened in June to discharge anyone caught talking about a union. Nor did the Company contest the administrative law judge's finding and conclusion that Miller had threatened Birt that the Company would "close the door" before it would have a union. Under § 10(e) of the Act, 29 U.S.C. § 160(e) (1976),[4] the Company's failure to object to these findings precludes review in this court absent a showing of extraordinary circumstances excusing its failure. NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691 (7th Cir. 1976). Under these circumstances, the Board is entitled to summary enforcement of that part of the order finding that Miller's threat and Reece's threat in June violated § 8(a)(1). *Id.*

As to Reece's alleged threats of plant closure in the Christmas party and on December 15, the Company first argues that the general testimony of several Company witnesses that they had never heard Reece make such threats should be credited over that of Acres as to the December 15 incident and that of Otis Cherry, Birt's brother-in-law, as to the Christmas party incident. Reece did not testify whether he made any of the alleged threats.

The administrative law judge specifically pinned his findings of these § 8(a)(1) violations on his evalution of the credibility and demeanor of the witnesses. The administrative law judge determined that Reece's failure to deny the statements supported both Acres' and Cherry's credibility. As further support of Cherry's credibility, the administrative law judge noted that Cherry continued to work for the Company, and concluded, "the undenied testimony of an employee whose livelihood is controlled by the employer against whom he testifies should be given credence." We see no exceptional circumstances which would warrant or reversal of the administrative law judge's credibility determination.

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[3] The Board has since overruled *Essex* in part, on grounds that do not affect the present case. In *Essex*, the Board concluded that a prohibition against solicitation during working hours was presumptively invalid, but a prohibition against solicitation during working time was not. IN *TRW Bearing Division v. Anderson*, 257 N.L.R.B. No. 47 (July 3, 1981), [1980–81] Lab.L.Rep. (CCH) ¶ 18,164, the Board concluded that a prohibition against solicitation during working time was also presumptively invalid.

[4] Section 10(e), 29 U.S.C. § 160(e) (1976), provides in part:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

Credibility determinations aside, the Company, relying on *Singer Co. v. NLRB,*

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429 F.2d 172 (8th Cir. 1970), contends that the uncorroborated testimony of a single witness cannot constitue substantial evidence on the record as a whole. However, *Singer* merely stands for the proposition that "the uncorroborated testimony of an untrustworthy and interested witness, who stands to profit from a back pay award, may be held under such facts and circumstances not to constitute substantial evidence on the record as a whole." *Singer Co. v. NLRB,* 429 F.2d 172, 180 (8th Cir. 1970), *quoting NLRB v. Barberton Plastics Products, Inc.,* 354 F.2d 66, 69 (6th Cir. 1965). In light of all the circumstances in this case, we do not regard either Cherry or Acres as an untrustworthy witness. As the Board's opinion noted, Cherry had little to gain and much to lose from his testimony. Nor did he stand to gain personally from any back pay award. There is also sufficient indicia of Acres' trustworthiness as a witness for his testimony to constitute substantial evidence on the record as a whole. The Company advanced no basis for finding Acres untrustworthy other than his interest in the back pay award. Acres, as was the case with the witness in *Singer,* was a veteran, highly valued employee until the incidents leading to his discharge. He had no history of false statements or other misconduct. Accordingly, there was substantial evidence on the record as a whole for each of the Board's findings that the Company violated § 8(a)(1) by threats of discharge and plant closure for union activities.

Alternatively, the Company contends that, in any event, any alleged threats of plant closure made by Reece in the Christmas party were not threats but predictions of the economic consequences of union organization which fall outside the ambit of § 8(a)(1). *See, e.g., NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). Cherry testified that Reece had stated "he couldn't afford to have a union in the place and pay discrimination wages; if he did he'd have to close the doors." An employer's prediction, however,

> must be carefully phrased on the basis of objective facts to convey * * * demonstrably probable consequences or * * * a management decision already arrived at. * * * If there is any implication that an employer may * * * take action solely on his own initiative for reasons unrelated to economic necessity * * *, the statement is * * * but a threat of retaliation.

NLRB v. Gogin, 575 F.2d 596, 600 (7th Cir. 1978), *quoting NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618, 89 S.Ct. 1918, 1942, 23 L.Ed.2d 547 (1969).

The Company made no effort in the hearing[5] to show that Reece's statement that "discrimination wages" would necessitate closing the plant, the only statement even arguably some form of economic prediction, was anything other than a threat. In this petition and before the Board, the only evidence of economic consequences asserted to justify Reece's statement is a statement in the Board's opinion that the Company was in difficult financial circumstances. Substantial evidence demonstrated that the intent and purpose of all three statements were, and were correctly determined by the Board to be, threats of retaliation.

Nor does the case of *NLRB v. Larry Faul Oldsmobile Co.,* 316 F.2d 595 (7th Cir. 1963), cited by the Company, affect our decision. In *Faul,* a manager's statement that "he might as well as throw the place up for grabs" was made in response to a direct question as to the future of the company by an employee who had already been discharged. Under those circumstances, the court determined that the statement could not in any sense be interpreted as a threat against unionization to current employees. In this case, Reece's statement was made in a speech to current employees shortly after a union organizational drive. The Board

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was thus warranted in finding that the statement was coercive and thus violated § 8(a)(1).

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[5] In its brief, the Company relied on testimony by Reece that the Company had been delinquent in payment of withholding taxes. Reece's statement, however, was not made in relation to his statement that unionization would force the plant to close; it was in response to General Counsel's introduction of a plea of guilty on July 30, 1979, to delinquency in payment of withholding taxes in order to impeach Reece's credibility.

D. Coercive Interrogation of Employees

Section 8(a)(1) does not *per se* prevent any employer from questioning employees about unionization efforts. *NLRB v. C&P Plaza Department Store,* 414 F.2d 1244 (7th Cir. 1969), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 756, 24 L.Ed.2d 754 (1970). Employee interrogation only becomes a § 8(a)(1) violation if the questions asked, when viewed and interpreted as the employee must have understood the questioning and its ramifications, could reasonably coerce or intimidate the employee with regard to union activities. *NLRB v. Gogin,* 575 F.2d 596 (7th Cir. 1978). In determining the effect of an employer's interrogation on an employee, the court should consider, *inter alia:* (1) the background of the employer-employee relationship; (2) the questioner's identity; (3) the nature of the information sought; (4) the place and method of the interrogation; and (5) the truthfulness of the reply. *First Lakewood Association v. NLRB,* 582 F.2d 416 (7th Cir. 1978).

The Board based its finding of coercive interrogation on three separate incidents: the questioning by Bailey of Anna Caldwell on December 7, and the two episodes of Reece questioning Acres on December 15. On this petition and before the Board, the Company did not object to the Board's finding and conclusion that Reece's questioning of Acres constituted coercive interrogation in violation of § 8(a)(1). Once again, review in this court is precluded by 29 U.S.C. § 160(e) and that portion of the Board's order not contested is summarily enforced. *NLRB v. Colonial Haven Nursing Home, Inc.,* 542 F.2d 691 (7th Cir. 1976).

The Company's only objection to the Board's findings of coercive interrogation relates to the interrogation of Anna Caldwell. The Company asserts that the questioning of Caldwell was not coercive and that the Board's inference that the questioning related to union activities was purely speculative.

We do not agree with either contention. The record demonstrates the presence of factors which fully justify the Board's finding of coercive interrogation in relation to union activities. Caldwell's reference to the union showed that she viewed the interrogation as related to union activities. As the Board's opinion noted, the interrogation occurred only one day after the search of Birt's locker, and one day before the union organizational meeting. The questions revolved around Caldwell's conversation with Acres, a leader of the organizational movement. The Company has never advanced any legitimate reason for the inquiry. From this evidence, the Board could justifiably infer that the questioning was for the purpose of obtaining information on union activities.

Regarding the coerciveness of the questioning, the questioning was conducted by Bailey, the plant manager, in his office and of an employee in a position with which he would ordinarily have no direct contact. After Caldwell's initial response, he pressured her to tell him what she and Acres had "really" been discussing. Under these circumstances, there was substantial evidence on the record as a whole for the Board to find that the questioning of Anna Caldwell was coercive interrogation in relation to union activities.

E. Surveillance of Union Activities

An employer violates § 8(a)(1) when it conveys to employees the impression that it is engaged in surveillance of their union activities. *First Lakewood Association v. NLRB,* 582 F.2d 416 (7th Cir. 1978). The Board's findings of surveillance were based on the locker search on December 5, the interrogation of Anna Caldwell on December 6, Miller's statement to Birt on December 8 that the Company knew about the union meeting the evening before, and Reece's conversation with Acres on December 15 in which he stated that he knew Acres and Birt were the union leaders.

For the reasons stated in the Board's opinion and previously in this opinion, we agree that Caldwells' interrogation conveyed to her a sense of surveillance of union activities and thus violated § 8(a)(1). As to the statements of Miller and Reece, we see no exceptional circumstances for overturning the Board's credibility determinination that these statements were in fact made. The Company, nevertheless, urges that none of these statements was sufficient to convey a sense of surveillance. Taking into consideration our limited scope of review, we must disagree. Miller's statement that the Company knew about the union meeting could create an impression of surveillance in that there was no showing how Miller knew about the meeting or whether it was general knowledge. Similarly, Reece's claim that he knew who the union leaders were could convey an impression of surveillance. Although our decision on Reece's and Miller's statements might have been different from that of the Board had our review been *de novo*, the Board's findings of improper surveillance based on these incidents is enforceable as supported by substantial evidence.

The Company voiced two objections to the Board's finding that the locker search violated § 8(a)(1). It argued that the search was not union related because it was necessitated by narcotics and alcohol problems and because it had occurred prior to the union organizational meeting. The administrative law judge expressly discredited the vague testimony of alcohol and drug problems, and we see no reason to overturn that determination. The Company's argument that the search could not be union related because it occurred prior to the meeting is frivolous. The Company clearly knew of Birt's union involvement prior to the actual meeting. For the reasons stated in the Board's opinion, therefore, there was substantial evidence demonstrating that the object of the search was a union-related document. Therefore, we find that there was substantial evidence for each of the Board's findings of improper surveillance.

F. The Christmas Bonus

The Board concluded that the "change to cash above the value of previous gifts during a union campaign, and at a time Respondent apparently was in difficult financial circumstances, without reasonable explanation thereof and in the context of other efforts to discourage union activity, persuades us that the Respondent was utilizing the occasion to impress on its employees that it was the source of benefits to them and gave the the cash bonus as an inducement to abandon union support." An employer violates § 8(a)(1) by conferring a benefit upon his employees to induce them to abandon union activity. *NLRB v. Exchange Parts, Inc.*, 375 U.S. 405, 84 S.Ct. 457, 11 L.Ed.2d 435 (1964); *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976). The determination of whether the granting of benefits stems from unlawful economic motives or is intended to discourage employee interest in organization is the kind of inference which is primarily for the Board. *NLRB v. Colonial Haven Nursing Home, Inc.*, 542 F.2d 691 (7th Cir. 1976). The question on this review is not whether we would have interpreted the employer's intention as did the Board in the first instance but whether the Board's resolution of this factual issue is supported by substantial evidence on the record as a whole. *Universal Camera v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

We cannot say that substantial evidence does not support the finding that the bonus was intended to induce employees to abandon the union. In finding an unlawful purpose, the Board may properly rely on such factors as the employer's knowledge of union activity, manifestations of anti-union animus, suspicious timing, and departures from past practice. *Russel Newman Manufacturing Co. v. NLRB*, 407 F.2d 247, 252 (5th Cir. 1969). There was evidence of each of these factors to demonstrate anti-union motivation. The Company's primary contention against enforcement is that there could be no disparate value and thus benefit between the Christmas bonus and past gifts because no cash value was assigned to prior gifts. It was certainly a reasonable inference from the evidence, and within the competence of the Board, to conclude that a bonus of $50.00 would exceed the value of a gift of fruit or a gift of a ham or a turkey. Although we think this issue is a close one, our limited scope of review requires us to uphold the Board's decision.

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III. THE § 8(a)(3) VIOLATIONS

A. The Discharges of Birt and Acres

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." 29 U.S.C. § 158(a)(3) (1976). The crucial determination behind the fining of a § 8(a)(3) violation must be that the employer's discharge or layoff of employees was discriminatorily motivated. *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (7th Cir.), *cert. denied*, 439 U.S. 911, 99 S.Ct. 280, 58 L.Ed.2d 256 (1978). Motivation is a question of fact to be determined by the Board from consideration of all the evidence and in making this determination the Board is free to rely on circumstantial, as well as direct evidence. *NLRB v. Gogin,* 575 F.2d 596 (7th Cir. 1978); *W. W. Grainger, Inc. v. NLRB,* 582 F.2d 1118 (7th Cir. 1978).

The Board concluded that Birt and Acres were discharged for their union activities and that the alleged slowdown was merely a pretext for the discriminatory discharges. The facts upon which the Board relied are set forth in detail in the opinion and need not be repeated at length here. The Board properly relied on evidence in the record of manifest hostility toward unionization combined with knowledge of the discharged employees' union activity, *NLRB v. Tom Wood Pontiac, Inc.,* 447 F.2d 383 (7th Cir. 1971); coincidence in time between the employees' union activity and their discharges, *Borek Motor Sales, Inc. v. NLRB,* 425 F.2d 677 (7th Cir.), *cert. denied,* 400 U.S. 823, 91 S.Ct. 45, 27 L.Ed.2d 52 (1970), the employees' good work records, *NLRB v. Henry Colder,* 416 F.2d 750 (7th Cir. 1969), and implausible or shifting explanations for the employees' discharges, *Satra Belarus, Inc. v. NLRB,* 568 F.2d 545 (7th Cir. 1978). Of these factors, the last mentioned was the one most compellingly demonstrated by the evidence. No reason was given to Birt and Acres for the layoffs at the time. They were told they were being laid off for "lack of work" although they had work to do. The Company's contention that this reason was given so that Birt and Acres could draw unemployment was belied by the Company's initial attempt to defeat their claims for unemployment compensation. More importantly, a purported explanation for the admittedly false reason for the discharges fails to answer the question of the actual motivation for the discharges.

The first time that any potentially nondiscriminatory reason for the discharges was advanced by the Company was in the hearing before the administrative law judge. The reason advanced at that time was the purported slowdown conducted by Birt and Acres. Reece admitted he knew of this purported slowdown several months prior to December 8, and his explanation that he wanted to correct the problem through management is highly unconvincing in light of the lack of evidence from Miller or Bailey that any management action was actually taken by them as Reece contended. The administrative law judge explicitly discredited Reece's testimony on this point and there is no reason for overturning that determination.

Also, regardless of the legal status of the Company's representation,[*] the Company's refusal to comply with the terms of the settlement reinforces the Board's findings of illegal motivation. The Company claims that, although the slowdown was the cause for the discharge at the time it was made, it entered into a settlement not knowing it was a valid defense to the charges and withdrew when it found that it was a defense. It is inconceivable to this court, as it apparently was to the Board, that the Company believed if an employee, in fact, was discharged for an intentional slowdown, the intentional slowdown could not be valid grounds for dismissal. We must agree with the Board's interpretation of the evidence as demonstrating the Company's belated discovery of a hoped-for defense to the charges it was facing.

None of the evidence of this alleged slowdown serves to diminish the substantial evidence of discriminatory motivation behind the discharges or to support Reece's credibility as to his motivation. The testimony of the core room employees that cores were backed up in October and November cannot in and of itself establish that Birt and Acres were engaged in an intentional slowdown. Nor is there any evidence that any of these employees reported their observations to management personnel. Similarly, evidence that an employee with less experience than Birt and Acres had better production records in February and March of 1979 can, at best, be corroborative of other independent evidence of a slowdown. Such evidence of production in 1979 records is inconclusive in light of the many variables in production, most notably the several changes in production methods for the months in question.

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[*] The parties devoted much of their argument to defining the nature of the Company's representation during the settlement proceedings. The Company contends it had no "legal counsel" until the hearing before the trial examiner. The Board, on the other hand, states that the Company had a "legal representative" from the time the charge was filed with the NLRB. We note only that the Company did have a "legal representative" from the time the charge was filed with the NLRB in the sense that it had permissibly designated someone to represent it throughout the proceedings. The precise nature of the representative's expertise is not before this court and is irrelevant to our determination in that we do not believe that the assistance of an attorney was necessary for the Company to realize that an employee could be lawfully discharged for an intentional refusal to work if that were, in fact, the cause of the discharge. Moreover, the Company's objection to Acres' and Birt's applications for employment benefits based on their "poor performance" indicates that the Company was aware that a slowdown could be just cause for discharge.

The Company's only direct evidence of the alleged slowdown were the gross sales figures for the final months of 1978 and Birt's scrap records for December. Noticeably, the Company does not point to anything in Acres' production records which showed any slowdown on his part. The significance of Birt's scrap records can be dismissed in that Reece admitted Birt's scrap records had "not much" to do with the decision to discharge him. From the records of gross sales, the figures show that the Company had relatively high sales and thus production in October and November, the two months of the purported slowdown. The lower sales in December are, at best, inconclusive, as they are also attributable to the closing of the foundry for Christmas and the closing of two production lines as a result of the discharges.

The only remaining items of evidence of the slowdown which merit discussion are the various threats supposedly made to other employees by Birt and Acres of a slowdown. Needless to say, evidence of threats of a slowdown is not tantamount to evidence of a slowdown having taken place. There is no evidence that these threats were conveyed to management prior to the discharges nor did Reece testify that he relied on these threats in making his decision. Yet, even if Birt and Acres did engage in a slowdown, Reece admitted that he believed all the molders participated in the slowdown. Reece's shifting justifications for the selection of Birt and Acres, the union organizational leaders, for discharge failed to convince the administrative law judge of Reece's credibility on this point, and we ultimately see no reason to overturn that determination. Our conclusion is reinforced by the undisputed fact that Reece offered Acres his former job if he would abandon the union.

For these reasons, we conclude that there was substantial evidence on the record as a whole for the Board's findings that

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the discharges of Birt and Acres were discriminatorily motivated and that the slowdown was merely an after-acquired pretext to obfuscate the actual anti-union motivation for the discharges.

C. The Discharges of Schumacher and Elder

It is agreed by the parties that the discharges of Birt and Acres cut off production on the molding lines to which Elder and Schumacher were assigned. As a result, Schumacher and Elder were temporarily laid off for lack of work until the Company was able to renew production on the molding lines. The administrative law judge concluded that Elder and Schumacher were laid off in violation of §§ 8(a)(1) and (3) because their layoffs were "part and parcel of Respondent's discriminatory acts."

Although the ostensible reason for Schumacher's and Elder's layoffs was lack of work, the direct proximate cause of the layoffs was the Company's unlawful discharges of Birt and Acres for their union activity. If it had not been for the unlawful discharges of Birt and Acres, Elder and Schumacher would not have been laid off. The two molding production lines were set up with Birt on one line and Acres on the other as molders. Elder and Schumacher's sole responsibility was to assist Birt and Acres in pouring the molds and shaking the molded pieces out of the mold. Thus, it was directly foreseeable that there would be no work for Elder and Schumacher at least temporarily if Birt and Acres were discharged.

The present issue of the Company's liability for Schumacher's and Elder's layoffs can best be analogized to the issue of liability in which innocent employees are laid off in mass with employees discharged for their union activities. In those cases, it is well established that a showing that the Company discharged each employee for union activities is not necessary for finding §§ 8(a)(1) and (3) violations if the cause of the discharges is anti-union activities. *Dillingham Marine & Manufacturing Co. v. NLRB,* 610 F.2d 319 (5th Cir. 1980); *Merchants Truck Line, Inc. v. NLRB,* 577 F.2d 1011 (5th Cir. 1978); *Majestic Molded Products, Inc. v. NLRB,* 330 F.2d 603 (2d Cir. 1964); *NLRB v. Tesoro Petroleum Corp.,* 431 F.2d 95 (9th Cir. 1970); *M. S. P. Industries, Inc. v. NLRB,* 568 F.2d 166 (10th Cir. 1977).

Our holding on this very issue is a very limited one. Only when, as here, a directly foreseeable layoff would not have occurred but for the unlawfully discriminatory action, can the resultant layoff also constitute a violation of §§ 8(a)(1) and (3).

For the foregoing reasons, we conclude that the Board's findings and conclusions in their entirety were supported by substantial evidence on the record as a whole. Accordingly, the decision and order of the Board is

ENFORCED.

Pease Company v. NLRB

666 F.2d 1044 (6th Cir.), December 16, 1981; certiorari denied May 17, 1982—237 NLRB 1069

On petition to review Board Order

Before KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge

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NATHANIEL R. JONES, Circuit Judge: The Pease Company (the Company) petitions this Court to review and set aside an order of the National Labor Relations Board (the Board) directing the Company (1) to cease threatening employees that it would be futile to have a union represent them, (2) to cease its refusal to bargain collectively in good faith with the Ohio Valley Carpenters District Council, United Brotherhood of Carpenters and Joiners of America (the Union), and (3) to offer strikers, whom the Board found to be unfair labor practice strikers, immediate reinstatement and back pay upon their unconditional application.[1] The Board has filed a cross-application for enforcement of its order. We find that the Board's order is not supported by substantial evidence in the record as a whole. We therefore grant the Company's petition and deny enforcement of the Board's order.

I.

The Company, an Ohio corporation, manufactures and sells prefabricated doors, houses and building products. The Union has represented the Company's production and maintenance employees since 1945. Until 1969 the Company operated with a single plant in Hamilton, Ohio. In that year a second plant was added in Fairfield, Ohio, and in 1974 a third plant was added in Hamilton, Ohio. The Union's representative status was extended to the new plants

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and employees in the three plants constitute a single bargaining unit.

The most recent contract between the Company and the Union was effective from March 1, 1974 through February 28, 1977. On November 1, 1976, the Union requested negotiations for a new contract and the parties agreed to begin negotiations on December 15. Since the Company is alleged to have engaged in mere surface bargaining, it is necessary to give the highlights of the eighteen bargaining sessions from December 15 to March 13, when the case was heard by the Administrative Law Judge (ALJ).[2]

At the first meeting, the Company made no substantive proposals, but proposed a six-point format for the negotiations: 1) the parties should be free to make proposals at any time; 2) they could change proposals at any time; 3) they could not trade language for money; 4) they should straighten out contract language first; 5) they should keep negotiations moving, without the necessity of a last-minute rush; and 6) they should regard all agreements as tentative until total agreement was reached. The Union went through approximately half of the 1974 contract and indicated proposed changes.

The day before the second meeting, on January 14, Operations Manager William Schnitzler attended a grievance meeting with the Union President, Jesse McVey, and the Union's Chief Negotiator, Edwin Swope. According to testimony by McVey and Swope before the ALJ, Schnitzler remarked at the close of the meeting that he would not have to hear any more grievances in eight weeks, when the present contract was due to expire. They also testifed that in December Schnitzler had made a derogatory remark to a subcontractor about union help, followed by the comment that in a couple of months he would not have to worry about it. These remarks were interpreted as an indication that the Company did not intend to reach agreement with the Union on a new contract.

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[1] 237 N.L.R.B. 1069 (1978).

[2] Reconstruction of the course of negotiations was made unduly difficult by the failure of the ALJ to provide a chronological account of the meetings. Though the ALJ stated that a "session-by-session, blow-by-blow recitation of the negotiations" would have served no useful purpose, 237 N.L.R.B at 1074, such a recitation would be the better practice where an allegation of surface bargaining has been made.

At the second session, on January 5, the Union introduced a proposal to limit the Company's right to subcontract. The Company made three major proposals: to limit seniority to the plant rather than the unit; to reduce the period of layoff status without loss of seniority from eighteen months to six months; and to increase the probationary period for new employees from thirty to ninety days. The parties did not reach agreement on any of these proposals.

On January 19, a third meeting was held. The Union modified its position on subcontracting, proposing that an employee displaced by subcontracting receive severance pay or be given the right to transfer to another Company plant without loss of seniority or other contractual rights. The Company modified its stance on the plant seniority issue with an offer to retain unit seniority for employees hired before April 1, 1969. The Company also sought equalization of overtime. Again no agreement on these proposals was reached.

Further meetings were held on February 1, 8, 18, 23 and 24. Subcontracting continued to be a major source of disagreement. The Company presented revisions of its proposals to establish plant seniority, to reduce the period of employee status on layoff and to reduce the role of seniority in the assignment of overtime. On February 18, the Company proposed a job reclassification scheme, and separate meetings were held to discuss its application to each of the three plants. On February 27, the Company proposed to delete the shop rules from the contract. The Union did not agree to any of these Company proposals. A federal mediator joined the negotiations on February 24 and urged the parties to present their economic proposals notwithstanding the extensive disagreements over contract language.

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On February 25, the Union held a meeting to inform its membership of the progress of the negotiations and to take a strike vote. The employees voted to strike, and actually went out on strike on March 1, after an unproductive session on February 28.

The Union and the Company continued to meet after the strike. The Union submitted a wage proposal which called for a 42 percent wage increase over the term of the contract. The Company's proposal provided no wage increases and placed a cap on the cost of living adjustment clause contained in the previous contract. There was some movement on the probationary period issue. The Union suggested a forty-five day period, and the Company responded by lowering its suggested period from ninety to sixty days, but no agreement was reached. Similarly, on the issue of employee status during layoff, the Company proposed a one-year retention of employee status for senior employees and nine months for junior employees. The Union, however, would accept no reduction of the eighteen month retention period provided by the previous contract, having originally sought extension of the period to twenty-four months. On April 13, six weeks after the strike began, the Company tightened its previous positions. It withdrew its cost-of-living adjustment proposal, proposed that the Union security clause for employees hired after March 1 be eliminated, and proposed that supervisors be permitted to do unit work.

On April 29, the parties met, but agreed to meet again only if the mediator thought it necessary. By mid-June, the Company had hired about 220 replacements and all three unionized plants were in operation.

The Board, in agreement with ALJ, found that the Company had violated §§ 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing to bargain in good faith with the Union. The Board, in disagreement with the ALJ, found that the statements alleged to have been made by Schnitzler also violated § 8(a)(1) of the Act by threatening that union representation would be futile. The Board further found the strike an unfair labor practice strike from its inception.

II.

The Company contends that the Board's finding of a § 8(a)(1)[3] violation based on the two remarks attributed to Operations Manager Schnitzler is unsupported by substantial evidence. We agree.

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[3] Section 8(a)(1) provides that:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

Section 7 provides that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Jesse McVey, the Union President, and Edwin Swope, the Union's Chief Negotiator for a new contract, testified that in December 1976 Schnitzler made a derogatory remark about union help to an independent contractor working in the plant, followed by the comment that in a couple of months he would not have to worry about it. Schnitzler admitted making the derogatory remark but asserted that it was made in September and denied stating that soon he would not have to worry about union help. The ALJ credited Schnitzler's account. The Board nonetheless held that Schnitzler's derogatory remark, coupled with the statement that soon he would not need to worry about union help, which the ALJ found was not made, conveyed the message that the Company did not intend to engage in good faith bargaining and that bargaining therefore, would be futile.

The Board is free to find facts and draw inferences different from those of the

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ALJ, but the reviewing court has an obligation to examine more carefully the evidence in cases where a conflict exists. *Larand Leisurelies, Inc. v. NLRB,* 523 F.2d 814 (6th Cir. 1975). Here McVey and Swope both testified that Schnitzler's statement was made after December 15. But as the ALJ noted, this testimony was clearly in error because the independent contractor to whom the statement was made did not work for the Company after December 3. The ALJ credited Schnitzler's testimony that the statement was made in September, was limited to a derogatory comment about union help, and made no reference to the upcoming negotiations. 237 N.L.R.B. at 1073 n.2. Yet the Board, without explanation, reversed the ALJ and credited the testimony of Swope and McVey that Schnitzler stated that he would not have to worry about the Union after a couple of months anyway. This determination is unsupported by substantial evidence, because the evidence conclusively establishes that Schnitzler's derogatory remark was made from three to six months before the expiration of the contract, at a time when a further remark about not having to worry about union help in a couple of months would have been nonsensical.

Schnitzler's second statement was made on January 4, 1977. As he left a conference room at the end of a grievance meeting, Schnitzler remarked that in a couple more months he would not have to hear any grievances. Schnitzler testified that this statement only reflected his belief that someone other than he would listen to grievances under the new contract, because he was spending an increasing amount of time at the Company's new Denver facility. The ALJ, while finding that the statement implied that there would be no new union contract, did not find that Schnitzler implied a Company determination not to negotiate a contract in good faith. The Board, however, found a § 8(a)(1) violation, holding that the statement implied that bargaining, and thus union representation, would be futile.

This statement does not support a § 8(a)(1) violation. This was an isolated remark made to the Union President and its Chief Negotiator. The statement was ambiguous; an innocent interpretation is clearly consistent with the words used, while a threat is present only by a strained interpretation. Where, as here, there is no background of antiunion animus by an employer, trivial and ambiguous conversations between a company official and an employee cannot form the basis of a § 8(a)(1) violation. *St. Louis Car Division v. NLRB,* 439 F.2d 1145, 1148 (8th Cir. 1971); *Broadway Motors Ford, Inc. v. NLRB,* 395 F.2d 337, 340 (8th Cir. 1968). We therefore conclude that the Board's finding of a § 8(a)(1) violation on the basis of this statement is unsupported by substantial evidence.

III.

The ALJ began his discussion of the eighteen bargaining sessions with the observation that:

> General Counsel does not contend, nor does the evidence show, that the Company ever refused to meet at reasonable times or with reasonable frequency, or that the Company ever failed or refused to discuss a proposal. During the first five or six sessions, which extended into February, the parties met from 1 p. m. to 3:30 p. m., when the first shift ended, at which time the Union representatives indicated that they wished to leave. As the contract expiration date approached, the parties met with increased frequency. All issues eventually were discussed between

> the parties, and the principal issues were discussed at length.

237 N.L.R.B. at 1074. Nonetheless, the ALJ and the Board concluded that the Company had failed to bargain in good faith, in that the Company had, in the Board's words:

> Determined that it would not negotiate a contract except on its own terms, which it knew would be unacceptable to the Union and would force the Union to strike.

237 N.L.R.B. at 1069.

The Company contends that the ALJ and the Board erred in not finding that the

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Company simply was engaged in lawful hard bargaining. We agree.

The Company correctly notes that the "acceptability" of its proposals to the Union is the touchstone from which all the Board's findings of bad faith emanate. This approach has led the Board astray, because good faith bargaining does not require that Company to make proposals that are acceptable to the Union. Rather, the Company's duty to bargain is defined by § 8(d) of the Act, which states that:

> To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Thus the Company may insist on a proposal, however unacceptable to the Union, and if the insistence "is genuinely and sincerely held * * * it may be maintained forever though it produce a stalemate." *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960). A lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable, but rather may be found only from "conduct clearly showing an intent not to enter into a contract of any nature." *NLRB v. United Clay Mines,* 219 F.2d 120, 125 (6th Cir. 1955).

The Board also errs when it predicates a finding of bad faith bargaining on the view that the Company's proposals forced the Union to strike. First, there is no indication that the Company would not have allowed the bargaining unit employees to keep working after the contract expired whlie negotiations continued. The Union's decision not to seek an extension merely reflected a determination that its interest would best be served by exerting economic pressure on the Company. Moreover, the decision by the Union to strike provides no evidence that the Company bargained in bad faith:

> [T]here is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes.

American Ship Building v. NLRB, 380 U.S. 300, 313, 85 S.Ct. 955, 965, 13 L.Ed.2d 855 (1965). Thus employees have no right to insist that company proposals be acceptable to them without the need to resort to a strike to attempt to gain desired concessions.

The proper standard, then, is not whether the Company made proposals which were acceptable to the Union, but rather, whether the Company desired "to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents,* 361 U.S. 477, 485, 80 S.Ct. 419, 425, 4 L.Ed.2d 454 (1960). Our examination of the specific indicia relied on by the ALJ and the Board leads us to conclude that neither the proposals nor the tactics of the Company, nor the sum of its conduct, amounts to substantial evidence of bad faith.

The ALJ found that the six-point format proposed by the Company was used "as a means of thwarting and frustrating agreement," that the Company acted in bad faith by disclosing its proposals "bit by bit over the course of negotiations," and that the time spent in negotiations prior to the strike "was grossly inadequate to enable the parties to arrive at a contract." 237 N.L.R.B. at 1074. We disagree. The ALJ conceded that the Union agreed to the proposed format, and no contention is made that the Union ever requested a departure from that format. The ALJ found the prohibition against trading contract language for better economic terms particularly offensive, but again, there is no indication that the Union desired to do so or would have been prevented from making such a proposal. As regards the alleged inadequacy of time, the record clearly establishes

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that the Company had disclosed what the ALJ termed its "principal objectives" by the fifth session on February 8. 237 N.L.R.B. at 1072. The Company's only other major proposal, the job reclassification scheme, was introduced on February 18. This permitted sufficient time for separate meetings at each plant and the formulation of the Union's response, which was to reject the Company's proposals. Thus the fact that no agreement had been reached by March 1 cannot be attributed to unlawful tactics of the Company, but must instead be acknowledged as the result of each party exercising its right not to agree to the proposals of the other party.

The ALJ also faulted the Company for not making enough concessions on issues of substance and for not making those concessions the Company was prepared to offer at an earlier stage of the negotiations. The ALJ stated that:

> [A]lthough the Company submitted the plant-seniority proposal on January 6, it did not include a cutoff date until January 19, when it did so ostensibly to meet the Union's demand for protection of senior employees. This alleged concession was in any event more cosmetic than real, because employees with a seniority date prior to April 1, 1969, had such great seniority that they were virtually immune from economic layoff. Similarly, the Company made no real movement toward compromise on its proposal to reduce layoff status without loss of seniority from 18 months to 6 months. On March 14, 2 weeks after the strike began, the Company proposed a cutoff date of April 1, 1969, which would accord the senior employees layoff status for 1 year. In view of the Company's ostensible concen for senior employees and their virtual immunity from layoff, it is difficult to see why, if the Company were acting in good faith, it did not submit this cutoff date in its initial proposal, or soon thereafter. The Company made no movement in the direction of compromise on the real issue, i.e., layoff status of employees who faced a real possibility of layoff, until well after the strike began, when it verbally suggested the possibility of 9 months' layoff status for the junior employees with more than 18 months' seniority.

237 N.L.R.B. at 1074. This passage demonstrates the extent to which the ALJ wrongfully passed judgment on the timing and quality of the Company's concessions. As this Court has noted:

> Nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position; good faith bargaining is all that is required.

McCourt v. California Sports, Inc., 600 F.2d 1193, 1200 (6th Cir. 1979). The ALJ's notions of good faith notwithstanding, a party is not required to lead with its best offer; it is free to bargain. *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). Furthermore, there is nothing in the record to indicate that earlier concessions on these issues would have led to an agreement in light of the other substantial issues separating the parties.

Several substantive proposals made by the company were deemed to be indicative of its bad faith. These included the reduction of employee layoff status, the switch from unit to plant seniority, a longer probation period for new employees, modification of the method for assigning overtime, and the continuance of the Company's existing right to subcontract production. While unusually harsh and unreasonable proposals may support a finding of bad faith bargaining, *NLRB v. Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979), the Company proposals challenged here do not meet this description.[4] The ALJ apparently believed that

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[4] In *Wright*, the company's proposals supporting a finding of bad faith included (1) a guarantee of an "open shop," limiting the union's right to secure members and check off authorizations, (2) a management rights clause, not subject to the grievance procedure, which gave the company exclusive control over hours, work rules, and production, and allowed the company to shut down its business without regard to the effect on employees, (3) a no-strike, no-lockout clause which required the union to fine any employee who engaged in a prohibited work interruption, granted the company the right to seek an injunction and damages against the union without arbitrating the claim, made all union members liable individually and collectively for damages, and required the union to waive its legal right to remove a suit from state to federal court, (4) an article on arbitration providing only limited and permissive arbitration, and (5) a provision allowing the company to set hourly wage rates and to grant promotions at its sole discretion. 603 F.2d at 608 n.5.

In *Continental Insurance Co. v. NLRB*, 495 F.2d 44 (2d Cir. 1974), a finding of bad faith was predicated in part on (1) the company's refusal to recognize the union as the sole and exclusive bargaining representative unless the union agreed not to organize or represent other company em-

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since the Company offered no concessions in the area of subcontracting it was obliged to offer better concessions in the other areas. 237 N.L.R.B. at 1076. But the law is well settled that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Insurance Co.*, 343 U.S. 395, 404, 72 S.Ct. 824, 829, 96 L.Ed. 1027 (1952). *See also Gulf States Mfrs., Inc. v. NLRB*, 579 F.2d 1298, 1318 (5th Cir. 1978), *rev'd in part on other grounds*, 598 F.2d 896 (5th Cir. 1979) (en banc); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 877 (9th Cir. 1978).

The ALJ also found that the Company withdrew its prior cost-of-living proposal after the strike to ensure that no agreement was reached. We disagree. The offer was not withdrawn at a time when agreement was imminent; even if the offer had not been withdrawn, substantial disagreement would remain over both economic and non-economic issues. Moreover, the offer was not withdrawn until six weeks after the strike began. An employer has a right to withdraw proposals made before a strike to reflect the changed economic background. *Omaha Typographical Union, No. 190 v. NLRB*, 545 F.2d 1138 (8th Cir. 1976); *NLRB v. Alva Allen Industries, Inc.*, 369 F.2d 310 (8th Cir. 1966).

Though we have reviewed *seriatim* various factors relied on by the Board for its determination that the Company has engaged in bad faith bargaining, we recognize that the ultimate finding of bad faith is based upon the totality of the circumstances. *NLRB v. Milgo Industrial*, 567 F.2d 540, 545 (2d Cir. 1977). We conclude, however, that this is simply a case of hard bargaining between two parties who used their respective economic power to their best advantage. We hold that there is not substantial evidence on the record as a whole to support the Board's finding that the Company failed to bargain in good faith in violation of § 8(a)(1) and (5) of the Act.

The Board also found that the strike was an unfair labor practice strike. Inasmuch as we have determined that no unfair labor practice was committed by the Company, it follows that the strike was and continued to be an economic strike from its inception.

Accordingly, the Company's petition to review the Board's order is granted, and the Board's cross-petition for enforcement is denied.

Central Florida Sheet Metal Contractors Association, Inc. v. NLRB

664 F.2d 489 (5th Cir.), December 21, 1981—234 NLRB 1238

On petition to review Board Order

Before GODBOLD, Chief Judge, TUTTLE and HILL, Circuit Judges

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GODBOLD, Chief Judge: This is another labo
dispute concerning union efforts to secure collec
tive bargaining contracts in the sheet metal indus
try that provide for employer contributions to
trust fund for the benefit of employees. It is deci
ed together with *Mobile Mechanical Contractors A*
sociation, Inc. v. Carlough, 664 F.2d 481 (5th C
1981). We review a decision by the National Lab
Relations Board that a union did not commit
unfair labor practice by striking to obtain the tr
fund.

Petitioner, Central Florida Sheet Metal Contra
tors Association, Inc., is a nonprofit Florida cor
ration that conducts multi-employer collective b
gaining on behalf of its employer members. T
first contract negotiated by the association w
Local 493 of the Sheet Metal Workers Internati
al Association expired by its terms July 31, 1974
early July the association and the local commen
negotiations for a new contract. At the urging
intervenor Sheet Metal Workers International
sociation ["the international"] and Edward J.

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ployees, (2) the company's insistence that arbitrators of grievances be picked exclusively by the company and (3) wage, vacation and severance pay proposals substantially less generous than the benefits provided to employees before the union was certified. 495 F.2d at 49.

In *NLRB v. Johnson Manufacturing Co.*, 458 F.2d 453 (5th Cir. 1972), a finding of surface bargaining was based on the Company's insistence that the Company retain complete and exclusive control of wages and working conditions, with the Union required to relinquish its right to bargain prior to any change.

In *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717 (9th Cir. 1972), the court found substantial evidence of bad faith where the Company, after months of bargaining leading to the Union's acceptance of its proposals, raised spurious objections to its own proposals, and then stated that it would only sign a contract of seven weeks duration.

The Company's proposals in the instant case, unlike the company proposals discussed above, are not harsh, vindictive or unreasonable.

lough, president of the international, the local insisted upon inclusion in the contract of the National Stabilization Agreement for the Sheet Metal Industry, which provided for a trust fund for the benefit of employees funded by employer contributions.

The association resisted the local's demand, and the local struck. After a month the association surrendered and agreed to a contract containing the trust fund. The union membership ratified the proposed contract and returned to work. The association and the local formally executed a three-year agreement incorporating the trust fund retroactively to August 1, 1974, the date of the strike. Thereafter the association filed unfair labor practice charges that form the basis for this case, alleging that the local, the international and Carlough violated §§ 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(b)(1)(B) and 158(b)(3), by insisting to impasse on incorporation of the trust fund into the contract.[1]

The trust fund was established by the international in 1973 to provide supplemental economic assistance to "under-employed" union members. The Board found that the international's intention was "to achieve a rough approximation in disposable income and fringe benefits between union members who were fully employed and those who were unemployed, due to local economic conditions, for a substantial portion of the year." The trust fund was to be funded by contributions at 3% of total payroll wages from all sheet metal contractors who agreed to incorporate it into their collective bargaining agreements. The Sheet Metal Contractors Association of San Francisco was the first employer association to include the trust fund in a collective bargaining agreement, and, accordingly, it selected the first employer trustee. The portions of the trust fund agreement relevant to this proceeding are set forth in the margin.[2]

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The Administrative Law Judge found that the provisions of the trust fund agreement precluded the association from "equal" representation in the administration of the fund, and the trust fund therefore violated § 302 of the Labor Management Relations Act ["LMRA"], 29 U.S.C. § 186.[3] The ALJ looked at other cases in

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[1] The association also charged, and the Administrative Law Judge found, that the local, the international and Carlough violated §§ 8(b)(1)(B) and 8(b)(3) by insisting to impasse on incorporation of Article X, § 8 of the international's Standard Form Union Agreement, which provides that in the event the association and the local are unable to reach agreement on the terms of any future contract such terms will be submitted to arbitration by the National Joint Adjustment Board. This board is comprised of representatives of the international and the National Sheet Metal and Air Conditioning Contractors Association, to which the Central Florida association and its employer-members do not belong. This finding is not challenged.

[2] Section 1. UNION AND EMPLOYER TRUSTEES. The operation and administration of the fund shall be the joint responsibility of one Trustee appointed by the Employers and one Trustee appointed by the International Union. The number of Trustees may be changed from time to time but there shall always be an equal number of Employer and Union Trustees.

* * * * *

Section 4. TERM OF TRUSTEES. Each Trustee above named, and each successor Trustee shall continue to serve as such until his death, incapacity, resignation, or removal as herein provided. Employer Trustees may be removed and replaced at will by a majority of the then Employer Trustees and Union Trustees may be removed and replaced at will by the General President of the International Union.

* * * * *

Section 6. DESIGNATION OF EMPLOYER TRUSTEES BY EMPLOYER PARTIES. Any Employer who is or may become a party to this Agreement and Declaration of Trust agrees irrevocably to designate as its representative in the operation and administration of the Fund such Trustees as are named in said Agreement and Designation of Trust as Employer Trustees, together with their successors selected in the manner provided herein, and agrees to be bound by all the actions taken by the said Employer Trustees Pursuant to this Agreement and Declaration of Trust.

[3] Section 302, 29 U.S.C. § 186, provides in relevant part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him with respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Continued

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which the Board had considered conduct that violated statutes other than the NLRA in finding an unfair labor practice[4] and reasoned that "[i]f it is right for the Board to consider violations of laws other than this entire statute, and in part predicate unfair labor practice findings upon such misconduct surely it may, and ought, take like heed of violations of related provisions of the very statute it is charged with enforcing." The ALJ concluded that by bargaining to impasse for a trust fund that violated § 302 of the LMRA, the international and the local had committed an unfair labor practice in violation of § 8(b)(3) of the NLRA.[5] The ALJ recommended that the Board order the international and local to delete the provisions for the trust fund from the 1974 contract or at the option of the association to void the entire agreement and renew the collective bargaining process; to refund any contributions made by members of the association to the trust fund; and to cease and desist from demanding the trust fund.

The Board did not adopt the ALJ's findings of fact and conclusions of law on the grounds that it lacked jurisdiction to interpret § 302 and that Congress had granted the federal district courts exclusive jursidiction to determine the structural validity of trust funds under § 302. As a general rule, the Board posited, it does not enforce other statutes except at the express direction of the Supreme Court as in *Scofield v. NLRB,* 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969), where the Court held that the Board must assess union rules to determine if they frustrate the overriding policy of all federal labor law, not just the NLRA.[6] The Board pointed out that when considering other statutes at the Court's direction it only evaluates facial compliance with the statutes. In contrast the Board said neither the Court nor Congress had directed the Board to enforce § 302, which in the present case would require interpretation of complex multiemployer trust agreements.

The Board distinguished an earlier decision, *John F. Boyle Co.,* 222 NLRB 1309

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* * * * *

(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families, and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon * * *; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities, * * *.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of [the Norris-LaGuardia Act].

The ALJ stated:

No employer except employers who participated in the initial establishment of SASMI may participate in the selection of any employer trustees; by contrast, the International Association retains such a right to remove and select union trustees from time to time. There is an inequality of representation in that the General President of the International may remove and replace the union's trustees at will, whereas the employers have no comparable right. Thus, the removal and replacement of employer trustees may be had only by a majority vote of the preselected "employer trustees" and not by any action whatsoever of the employers themselves. Thus, there is basis for concluding the increase in the number of trustees can be so manipulated by the union president as to control the majority of trustees. All the International President need do is refuse to agree to an increase in the number of employer trustees unless he approves the person advanced by the "employer trustee."

Section 6 of [SASMI] concerning the selection of trustees to the Fund on the part of employers makes a mockery of the idea that the Florida employers could have the least voice in any selection of who should represent them as employers. For them to be bound "irrevocably to designate" the trustee already named in the original Trust Agreement back in 1973 means McKenzie, the man put on the trustee board in California, forever pre-empts the entire matter. The reality is that they never had any choice and it was intended that they should never have any choice.

[4] *Alleluia Cushion Co.,* 221 NLRB 999 (1975) (Occupational Safety and Health Act); *Carpenters Local Union No. 22,* 195 NLRB 1 (1972) (Labor Management Reporting and Disclosure Act). *See also Southern Steamship Co. v. NLRB,* 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246 (1942) (Board must consider policy of mutiny laws in formulating remedy for unfair labor practice).

[5] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(3) to refuse to bargain collectively with an employer * * *.

[6] As a result of the *Scofield* mandate, the Board explained, it found that the union in *Carpenter Local Union No. 22,* 195 NLRB 1 (1975), had restrained and coerced a member in retaliation for his complaining about the conduct of an intraunion election in violation of his right to participate freely in internal union affairs guaranteed by the LMRA.

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(1976), from its decision in the present case. In *Boyle* the employer had refused to appoint a trustee to administer a trust fund, even though he had agreed to the collective bargaining agreement that provided for the trust fund. The Board did not adopt the ALJ's finding that the employer had refused to bargain in good faith or his recommendation that the employer be compelled to comply with the trust provisions. Instead, because the proposed trust fund violated § 302(c)(5)(C) by mixing pension benefits with other fringe benefits, the Board held that the employer had not refused to bargain in good faith. In the present case the Board explained that it had merely used § 302 as an aid in *Boyle* to determine whether the employer had refused to bargain collectively in violation of § 8(a)(5). However, in *Central Florida*, the Board had the view that it would first have to determine the validity of the trust fund under § 302 and then predicate an unfair labor practice finding upon any such violations.

The Board acknowledged its obligation to accommodate other statutory policies in administering the NLRA. It discerned an intent by Congress to compel compliance of trust funds with the requirements of § 302 without depriving the employees of their benefits. This intent the Board said could only be achieved by the district courts, which have the equitable powers to correct technical defects in a fund without disturbing employer contributions and employee benefits. By contrast, the Board only has the power to jettison the whole trust fund from the collective bargaining agreement. Therefore, the Board concluded, it would not extend its jurisdiction to determine the validity of the trust fund under § 302.

The Board also decided the association's other claims, which the ALJ had found unnecessary to address.[7] The Board found that the employer-appointed trustee of the trust fund was not a collective bargaining agent of the employer within the meaning of § 9 of the NLRA, 29 U.S.C. § 159, and that the trustee's sole responsibility is to the employees as a fiduciary. Thus, although the association had been denied the choice of a trustee, who had been appointed by the first participating employers association, by striking for the trust fund the union local had not coerced the members of the association in violation of § 8(b)(1)(B).

Second, the Board held that the general counsel had not sustained the burden of proving that the trust fund authorizes strike benefits. The Board reviewed the trust documents and found no mention of strike benefits and no evidence that the trustees interpreted the trust agreement to authorize such benefits.

Finally, the Board held that the trustee designation clause was a mandatory subject of bargaining. The Board noted that the payments from the trust fund were clearly wages within the meaning of § 8(d),[8] and concluded that the trustee designation scheme was "inextricably interwoven and subservient" to the trust fund as a whole because multi-employer, industrywide trust funds, which cannot add a trustee for every employer who participates, afford greater financial benefits to the employees.

The association raises the following as error:

1. The Board erred in deciding it lacked jurisdiction to rule upon the validity of the trust fund under § 302. To the contrary, the Board has the statutory authority and obligation to assess the legality of a trust under § 302(c)(5) in determining whether

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the fund is an illegal subject of collective bargaining.

2. The Board erroneously concluded that trustees are not collective bargaining agents of the parties who appointed them.

3. In holding that the trust fund did not authorize strike benefits, which would render it a nonmandatory subject of bargaining, the Board ignored the evidence and contrary federal law under § 302(c)(5)(A).

4. The Board erred in finding the trustee designation clause a mandatory subject of bargaining.

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[7] The association raised three other claims: (1) the trust fund, which denied the association the right to select its own trustee, coerced the association in its selection of a collective bargaining representative in violation of § 8(b)(1)(B); (2) the trust fund is a nonmandatory subject of bargaining over which the union cannot strike because it permits payment of strike benefits; and (3) the trustee designation clause is a nonmandatory subject of bargaining because it pertains solely to the relationship between a party and its representative.

[8] "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *."

Even though the benefits payments from the fund are a mandatory subject of bargaining the trustee selection mechanism is an independent clause that does not relate directly to the employer/employee relationship.

We affirm the Board's decision.

I. Jurisdiction of the Board to determine validity of a § 302 trust.

We are reviewing the Board's decision that the union did not commit an unfair labor practice under § 8(b)(3) by bargaining to impasse for a trust fund alleged by the association to violate § 302 of the LMRA. This issue presents problems of the interplay between the NLRA, which the Board administers, and the LRMA, which the district courts enforce. The issue can be divided as follows: Did the Board interpret § 8(b)(3) correctly and did it properly accommodate § 302 in its interpretation? When presented with a question of statutory construction of the NLRA this court defers to the interpretation given the statute by the Board as the agency charged with its enforcement if that interpretation is reasonable and consistent with prior holdings, *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 304, 97 S.Ct. 576, 581, 50 L.Ed.2d 494 (1977); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

Sections 8(a) and (b) respectively define employer and union unfair labor practices. In addition to prohibiting specific acts § 8 also incorporates the rights and requirements of §§ 7 and 9 of the NLRA, 29 U.S.C. §§ 157 and 159.[9] Section 8(b)(3) makes it an unfair labor practice for a union to refuse to bargain collectively with an employer representative who has a concomitant duty to bargain under § 8(a)(5). Section 8(d) defines collective bargaining as meeting and conferring in good faith with respect to "wages, hours and other terms and conditions of employment," the so-called mandatory subjects of bargaining.

The Board has consistently held that a violation of § 302 of the LMRA is not ipso facto an unfair labor practice. *Cheney California Lumber Co.*, 130 NLRB 235, 240 (1961); *affirmed*, 319 F.2d 375 (9th Cir. 1963); *Baggett Industrial Contractors*, 219 NLRB 171, 172 (1975). This is a reasonable interpretation of § 8, and the association does not challenge it. That section contains the exclusive acts that constitute an unfair labor practice while a violation of § 302 is a criminal act, a misdemeanor, § 302(b).

The association contends, however, that the union's insistence on the inclusion of an illegal contract provision, in this case the trust fund, within the collective bargaining agreement amounts to a refusal to bargain in good faith. In this manner, the association argues, the Board would be enforcing the NLRA and not § 302.

The proposition that striking for an illegal contract provision is a refusal to bargain in good faith is not beyond dispute. It has generally been applied in cases where the illegal contract provision violates another part of § 8.[10] The right of an employer to be free from economic coercion by the union to implement an illegal contract term is at least within the realm of protection afforded in § 8. However, if the Board were to extend such protection whenever a contract provision is alleged to violate any statute, two problems might arise. First, the Board would be interpreting and, in effect enforcing, statutes in areas outside of its expertise.[11] Second, the Board's limited method of enforcement might conflict with another statute's enforcement scheme.

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[9] For example, neither employers nor unions may interfere with an employee's exercise of rights guaranteed in § 7, *see* §§ 8(a)(1) and 8(b)(1)(A). A union may not force an employer to bargain with one union when another union has been certified under the provisions of § 9, *see* § 8(b)(4)(C).

[10] *See Associated General Contractors v. NLRB*, 465 F.2d 327, 334 (7th Cir. 1972), *cert. denied*, 409 U.S. 1108, 93 S.Ct. 907, 34 L.Ed.2d 689 (1973) (bargaining to impasse for an arbitration clause that coerced employer in selection of collective bargaining representative); *NLRB v. Amalgamated Lithographers*, 309 F.2d 31 (9th Cir. 1962), *cert. denied*, 372 U.S. 943, 83 S.Ct. 936, 9 L.Ed.2d 968 (1963) (violation of the hot cargo provision of § 8(e)); *In Re Maritime Union*, 78 NLRB 971, *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954, 70 S.Ct. 492, 94 L.Ed. 589 (1950) (violation of § 8(b)(2)); *International Typographical Union, Local 38 v. NLRB*, 278 F.2d 6 (1st Cir. 1960), *rev'd in part and aff'd in part*, 365 U.S. 705, 81 S.Ct. 855, 6 L.Ed.2d 36 (1961) (violation of §§ 8(b)(2) and 9(a)); *but see Brennan v. Emerald Renovators, Inc.*, 410 F.Supp. 1057, 1061 (S.D.N.Y.1975) (bargaining to impasse for wage provisions that violate the Equal Pay Act would be an unfair labor practice, relying upon the cases cited above).

[11] In *NLRB v Amax Coal Co.*, —— U.S. ——, —— n. 21, 101 S.Ct. 2789, 2798 n. 21, 69 L.Ed.2d 672, 685 n. 21, the Court noted that if the administration of trust funds were considered "collective bargaining" within the meaning of § 8(d), the Board would have to review the actions of the trustees to determine if they were bargaining in good faith under § 8(a)(5). This, said the Court, would force the Board to regulate areas not committed to it by Congress.

The Board's decision in the present case that it has no jurisdiction to determine the validity of a § 302 trust fund is not entirely consistent with its past decisions addressing allegations of § 302 violations. In *Cheney California Lumber Co., supra,* a union struck to compel the employer to agree to a health and welfare trust proposal contended by the employer to violate § 302. The Board did not adopt the trial examiner's finding that the proposal did not provide the safeguards required by § 302 because the evidence showed that the union was striving for a legal trust and further negotiations on the trust were contemplated. The Board observed that it did not have direct responsibility for enforcing § 302 and stated that, in the absence of a determination of the trust proposal's illegality by the agency charged with enforcing § 302, it was "not prepared to say that [the union's] insistence thereon constituted a refusal to bargain in good faith." 130 NLRB at 241–42. In *John F. Boyle Co.,* 222 NLRB 1309 (1976), the Board rejected the ALJ's finding that the employer had refused to bargain in good faith when it would not appoint a trustee to administer the trust proposed in the collective bargaining agreement it had signed. The Board pointed out that the trust proposal, which contemplated one fund for both pension and welfare benefits, violated § 302 on its face.[12] Therefore, the Board concluded, it would not order employer compliance with the collective bargaining agreement that would result in establishing a clearly illegal trust fund.

By speaking in terms of jurisdiction the Board throws its past decisions into doubt. Jurisdiction is either present or absent. Lack of jurisdiction is inconsistent with *John F. Boyle Co.,* where the Board examined the trust fund documents to determine if the proposed trust comported with § 302 requirements. The problem is properly addressed in terms other than jurisdiction. We instead focus on the Board's authority to define a refusal to bargain as including union insistence upon a contract provision that may violate a statute other than the NLRA. The Board might have adopted two extreme positions: premising a refusal-to-bargain charge upon union insistence on a contract term that violates any statute, or restricting a refusal-to-bargain charge solely to union insistence upon a contract term that violates the NLRA. It appears to us that the Board has chosen a compromise between the two extremes—that a union may bargain to impasse over a trust fund that may violate § 302 unless a court has already determined the fund's illegality or the illegality is evident on the face of the documents.

In this case the Board stressed that the alleged violation of § 302 hinged upon an

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in-depth analysis of a complex multi-employer trust fund. At the time of the Board's decision there had been no finding of a trust fund's illegality by a district court, except for findings of fact made pursuant to the issuing of a preliminary injunction in *Mobile Mechanical Contractors Association, Inc. v. Carlough,* 382 F.Supp. 1134 (S.D.Ala. 1974). These findings, the Board held, were provisional and had no collateral estoppel effect in other judicial proceedings. Record 489 n. 10.

Several factors make the Board's decision reasonable and consistent with past decisions. *Bayside Enterprises, Inc. v. NLRB, supra.* First, because management and union are equally represented the trustee selection process does not clearly or obviously violate § 302(c)(5)(B). The disparate means of replacing trustees permit employers to contribute without sacrificing stability of administration. If this structure is invalid the invalidity is not readily discernible on the face of the documents. Second, the trust fund is a multi-employer fund that was already functioning and to which the association members were contributing when the complaint was brought. Given the difficulty of the question involved, the Board was understandably reluctant to declare this large trust fund illegal, interfere with the bargaining process, and deprive employees of their benefits based upon its own interpretation of a law in which it has no special expertise.

Our finding that the Board's interpretation of § 8(b)(3) was reasonable does not end the inquiry. The Supreme Court has cautioned the Board to accommodate its administration of the NLRA to other statutory schemes in light of the entire scope of Congressional purpose in labor law. *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed.2d 1246 (1942) (Board's reinstatement of striking seamen unlawfully discharged ignored Congressional mandate to punish seamen who disobey their employer for mutiny). The association argues that by refusing to determine the validity of the trust fund under § 302 the Board undermined the purpose of that section because its non-action would permit the union to coerce the employer to make illegal payments to union representatives.

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[12] Section 302(c)(5)(C) requires pension benefits to be kept in a separate trust.

The Board's decision does not frustrate either the purpose or enforcement scheme of § 302. Courts have recognized Congress' intent with respect to existing trust funds to ensure the continued flow of benefits to the trust beneficiaries despite structural flaws in the trust. *National Stabilization Agreement of the Sheet Metal Industry Trust Fund v. Commercial Roofing & Sheet Metal,* 655 F.2d 1218 (D.C. 1981), *pet. for rehearing denied,* June 17, 1981 (unpublished) (employer cannot raise the invalidity of the trustee selection process as a defense to a collections action brought in district court for refusing to contribute to the same trust fund in the present case; employer may still bring an action in district court to cure structural defects). As the Board observed, its cease and desist powers to remedy an unfair labor practice cannot cure defects in the trust fund but can only enjoin payments and further demands for the fund. In comparison, a district court can enforce compliance with § 302 by eliminating the invalid provisions of the trust. *Associated Contractors of Essex County, Inc. v. Laborers Int'l Union,* 559 F.2d 222, 225 (3d Cir. 1977).[13]

Nothing in the Board's ruling before us prevents or discourages the association from seeking relief in the district court. The Board simply refused to relieve the

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members of the association from their obligation to contribute to the trust fund or to impose cease and desist sanctions against the local for demanding the trust fund.[14]

Where the Board has predicated in part an unfair labor practice upon a violation of another statute the Board found that the other statute's policies would be frustrated if, for example, an employer action has the effect of discouraging access to another agency to file complaints, *see, e.g., Alleluia Cushion Co.,* 221 NLRB 999 (1975) (discharge of employee for complaining to the Occupational Safety and Health Administration is a restraint on concerted activity even though the employee had not acted with other employees because the purpose of OSHA is to benefit all employees). A union fine against a member for complaining about an intraunion election procedure frustrated the policy of the LMRA that permits employees to participate freely in internal union affairs, *Carpenters Local Union No. 22,* 195 NLRB 1 (1972).

We defer to the Board's interpretation of § 8(b)(3) that the strike by the union for the trust fund was not a refusal to bargain in good faith. The Board's application of the statute is reasonable and consistent with past decisions. *NLRB v. Pipefitters,* 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed.2d 1 (1977).

II. Trustees as collective bargaining agents

NLRB v. Amax Coal Co., ——— U.S. ———, 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), disposes of the association's argument that by striking for the trust the union coerced the employer's choice of a collective bargaining agent. In *Amax,* an employer who ran deep-shaft coal mines participated in a national multi-employer trust fund, the employer-appointed trustee of which had been selected by a coal operators association to which the employer belonged. The employer subsequently opened a surface mine with respect to which its membership in the association did not apply. The employer refused to contribute to the trust fund on behalf of the surface mine employees and the union struck. The operators association had already been chosen by the management trustee. The employer charged the union with an unfair labor practice, contending that the union was coercing it in its selection of a collective bargaining agent in violation of § 8(b)(1)(B). The Court unequivocally rejected this argument by holding that a trustee acts solely as a fiduciary and cannot administer the trust fund in the interest of the party who appointed him. ——— U.S. at ——— - ———, 101 S.Ct. 2794–95,

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[13] The Board's decision in *John F. Boyle Co., supra,* which did not compel an employer to establish a trust fund that clearly did not comport with § 302, also accommodated § 302. Congress did not intend to force employers to contribute to trust funds not yet established. *Bricklayers, Masons and Plasterers Int'l Union v. Stuart Plastering Co.,* 512 F.2d 1017 (5th Cir. 1975); *NLRB v. St. Louis Cordage Mills,* 424 F.2d 976 (8th Cir. 1970). Where a trust fund has not been established there is no interest in continued benefits, although in *St. Louis Cordage Mills,* the court ordered the Board to fashion a remedy requiring the employer to pay the amount due into a fund not administered by the decertified union to ensure the employees would derive benefits. 424 F.2d at 981.

[14] Whether the district courts can enjoin a strike for a trust fund that violates § 302 has never been properly brought to this court. *See Mobile Mechanical Contractors Ass'n v. Carlough,* 566 F.2d 1213 (5th Cir. 1977) (issue moot).

69 L.Ed.2d at 680–81. Bargaining to impasse to compel the employer to join the trust fund where the employer cannot choose the management trustee was not an unfair labor practice.

The association contends that *Amax* is not controlling because the Court's holding that an employer-appointed trustee is not a collective bargaining agent is premised on a valid trustee selection process. The association brings forward several reasons which it says demonstrate that the trustee selection process in the present case is not valid. First, in *Amax*, although the individual employer could not appoint the trustee, the operators association to which it belonged had the opportunity to choose the trustee, while in this case the association had no voice in selecting a trustee because the first participating employers association already had chosen the sole management trustee. Second, the international president, Carlough, had helped select the sole management trustee.[15] Finally, Carlough himself serves as the union-appointed trustee and, the association says, cannot divorce his union responsibilities from his fiduciary obligations when administering the trust fund.

We hold that these asserted differences do not cause the trustees of the trust fund in this case to function as collective bargaining agents. A trust fund could not operate if each late-joining employer or association of employers could upset an earlier choice of a management trustee on the ground it had no opportunity to participate in the selection. Although Carlough was appointed by the union, he is required to administer the trust as a fiduciary and in the sole interest of the employees. With respect to union participation, through Carlough, in the selection of the management trustee, even if the participation is to a degree prohibited by § 302, the trustee must still serve as a fiduciary with his sole obligation running to the employees. As we pointed out in Part I, the proper remedy for alleged unequal representation in the selection mechanism is for the association to bring an action in district court. The asserted defects that are said to distinguish this case from *Amax* do not diminish the duty of trustees, whether management-appointed or union-appointed, to serve as fiduciaries nor do the defects permit the trustees to act as collective bargaining agents. One violation of § 302 cannot justify another.

III. Strike benefits as a nonmandatory subject of bargaining

The trust fund pays benefits to "involuntarily underemployed" workers. The association argued that striking union members could receive benefits for being involuntarily underemployed. A union cannot bargain to impasse for strike benefits because they do not come within the scope of wages or other mandatory subjects of bargaining listed in § 8(d), *Operating Engineer, Local 12*, 187 NLRB 430, 432 (1970). Payment of strike benefits from an employer-funded trust violates § 302, which lists the type of permissible payments. *See Carpenters v. Delaware Contractors Ass'n*, 344 F.Supp. 1281, 1285 (D.Del.1972), *aff'd*, 477 F.2d 564 (3d Cir. 1973) (Congress impliedly prohibited payments to union representatives not specifically excepted).

After reviewing the trust fund documents and other evidence presented to the ALJ the Board found that the documents did not explicitly provide for strike benefits and the trustees had not so interpreted them. The possibility that trust payments could be made to strikers under the guise of involuntary underemployment did not transform the trust fund into a nonmandatory subject of bargaining. Thus the general counsel had not met his burden of proving an unfair labor practice.

The association also contends that the Board erroneously placed the burden of proof on the general counsel instead of the union, which has the burden of establishing a trust's strict conformity with § 302 requirements. Further, the association asserts that the Board ignored Congressional intent to eradicate even the possibility that an employer would contribute to "union war chests." *See, e.g., United Marine Division v. Essex Transportation Co.*, 216 F.2d 410, 412 (3d Cir. 1954).

Consistent with our findings in Part I, absent a prior court determination or explicit violation it is reasonable for the Board to refuse to premise an unfair labor practice on the fact that the payment structure might violate § 302. This holding does not end the inquiry because the Board must still determine whether the trust fund contemplates strike benefits, rendering it a nonmandatory subject of bargaining under § 8(d). It is appropriate for the Board to look to § 302 as an interpretive aid for detecting whether strike benefits are contemplated just as it looked to § 302 to determine if the trustees could be considered collective bargaining agents as that term is used in § 8(b)(1)(B). But the Board need not apply § 302 evidentiary standards (which determine when a trust fund is invalid for not safeguarding against the payment of strike benefits) to § 8 proceedings to determine if the union is bargaining for strike benefits, particularly when those standards conflict with established § 8 evidentiary standards. The possibility that a fund may be used to provide surreptitious strike benefits is sufficient for a court to **501** find the fund violates § 302, *Carpenters v. Delaware Contractors Ass'n, supra,* but it is not a sufficient basis upon which to premise an unfair labor practice. Section 8 places the burden of establishing an unfair labor practice on the general counsel who must prove an actual, not a potential violation. *Chevron Oil Co. v. NLRB,* 442 F.2d 1067, 1069 (5th Cir. 1971).

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[15] The district court so held in the companion case, *Mobile Mechanical Contractors Association, Inc. v. Carlough*, 456 F.Supp. 310 (S.D.Ala.1978), *affirmed on other grounds*, ——— F.2d ——— (5th Cir. 1981). We accept this finding as correct for purposes of the present case.

Under this standard we find adequate support in the record for the Board's decision. The only tangible evidence that strike benefits were contemplated comes from a representative of the international who told an association member that funds would be disbursed during a strike only if the strike occurred during the two annual disbursement periods.[16] Before making this statement the representative assured the member that payment would be made in strictest compliance with federal law.[17] The Board's conclusion that this evidence did not establish an unfair labor practice was reasonable.

IV. Trustee selection process as a mandatory subject of bargaining

Only contract provisions that pertain to the employer-employee relationship are considered mandatory subjects of bargaining over which a union may strike. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 178, 92 S.Ct. 383, 397, 30 L.Ed.2d 341 (1971). The association contends that the employer's selection of a trustee does not affect the benefits paid out, or any other term or condition of employment, and cannot be considered a mandatory subject of bargaining.

The Board's judgment as to what constitutes a mandatory subject of bargaining is entitled to considerable deference, *Ford Motor Co. v. NLRB,* 441 U.S. 488, 495, 99 S.Ct. 1842, 1848, 60 L.Ed.2d 420 (1979), and we find its reasoning persuasive. A multi-employer trust fund can provide greater benefits from a larger pool of money. But the size of the fund may present problems of administration. To provide an efficient yet stable administration the trustee selection process must be carefully structured. If all employers could select and remove trustees the trust fund could not function. Thus the record supports the finding by the Board that a sufficient nexus existed between the trustee selection mechanism and the benefits. The Board's decision is consistent with its earlier decisions in *United States, etc., Local No. 220,* 177 NLRB 632 (1969) (union's demand that an employers association participate in a regional trust fund in which the association could select only two of the six employer trustees is a mandatory subject of bargaining); *Carpenters, Local 964,* 181 NLRB 948 (1970), *enforced,* 447 F.2d 643 (2d Cir. 1971) (union demand that employer trustees of a welfare fund be selected from an explicit class of employers was beyond mandatory scope of bargaining where the union had not articulated any connection between the trustee selection and benefits).

The Board's interpretation of § 8(d) does not conflict with or fail to accommodate § 302 by permitting the union to participate in the selection of the employer-appointed trustee. In *Amax,* ——— U.S. at ———, 101 S.Ct at 2800–01, 69 L.Ed.2d at 688, the Supreme Court declined to hold that § 8(b)(1)(B) limits the freedom of a union to try to induce an employer to select a particular trustee, because the NLRA and the LMRA have different purposes and standards to enforce. The Court also noted that to prevent the union from striking to obtain an employer's participation in a multi-employer trust fund when the employer objects to the trustee selection mechanism would hinder Congressional policy in favor of multi-employer trust funds. *Id.* ——— U.S. at ——— n. 22, 101 S.Ct. at 2799 n. 22, 69 L.Ed.2d at 686 n. 22. If the selection process violates § 302 the association can seek relief in a district court.

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[16] Record 283. The member testified that the "Administrator of the trust fund" from Washington, D.C., whose name he could not remember, was also present at this meeting.

[17] Record 283.

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In summary, we affirm the Board's decision that the strike to obtain the trust fund was not a refusal to bargain in good faith despite alleged structural defects in the trust; that the union did not attempt to coerce the employer's choice of a collective bargaining representative; that the union did not strike over strike benefits that are a nonmandatory subject of bargaining; and that the trustee designation clause was a mandatory subject of bargaining.

The order of the Board is AFFIRMED.

Joint Council of Teamsters, No. 42, et al. v. NLRB

NLRB v. Building Material and Dump Truck Drivers, Local 420

California Dump Truck Owners Association v. NLRB

671 F.2d 305 (9th Cir.), December 21, 1981;
rehearing denied March 2, 1982; certiorari granted
February 22, 1983

On petition to review Board Order

Before ELY and NORRIS, Circuit Judges, and
COPPLE,* District Judge

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NORRIS, Circuit Judge: We are called upon in this case to review an order of the NLRB declaring a provision in a collective bargaining agreement to be an unfair labor practice under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976). The Board invalidated article XIII of the Master Labor Agreement between unions and contractor-employers in the Southern California construction industry because it prohibited general contractors from hiring non-union dump-truck owner-operators. The unions petition to deny enforcement of the Board's order, and the Board seeks a judgment of enforcement.[1] The owner-operators seek an order directing the Board to grant a make-whole remedy requiring the unions to reimburse them for initiation fees and dues paid to the unions, and for income lost by those truck owners who were denied work. We enforce the Board's order, but remand with directions to the Board to fashion a make-whole remedy or show cause why a make-whole remedy is inappropriate.

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I.

Section 8(e) prohibits agreements between unions and employers that require a self-employed person to join the union in order to work for the employer.[2] A construction industry proviso to § 8(e) carves out an exception for "work to be done at the site of the construction." Our inquiry is whether the Board erred in ruling that the operation of the owner-operated dump trucks in question is not on-site work within the meaning of the § 8(e) proviso.[3]

The facts are not in dispute. The dump truck operators haul materials from construction sites to remote dump sites, from "borrow" pits to construction sites, and from one construction site to another construction site. The truck owners spend most of their time on public roads away from the construction site. The only time spent at the construction site is during loading and unloading, when the dump truck operator ordinarily remains in his vehicle. *See Joint Council of Teamsters No. 42, et al.*, 248 N.L.R.B. 808, 816–17 (1980).

On these facts, the Board found that the owner-operators are delivery persons, not construction site workers, and therefore their work is not covered by the on-site proviso. That finding is consistent with Board findings in similar cases involving delivery of goods to a construction site. *See Drivers Local 695 v. NLRB,* 361 F.2d 547, 552 n.19 (D.C.Cir.1966). In doubtful situations, we give weight to the Board's application of the Act, *NLRB v. Denver Building and Construction Trade Council,* 341 U.S. 675, 692, 71 S.Ct. 943, 953, 95 L.Ed. 1284 (1951); where, as here, the situation is not doubtful, we readily enforce the Board's order.

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*The Honorable William P. Copple, United States District Judge for the District of Arizona, sitting by designation.

[1] The general contractors intervene in support of the Board's position; they are represented by the Associated General Contractors of California, Inc., the Building Industry Association of California, the Engineering Contractors Association, and the Southern California Contractors Association. The unions include the Joint Council of Teamsters No. 42, et al. The truck owners are represented by the California Dump Truck Owners Association and the Associated Independent Owner-Operators, Inc. The proceedings below are reported at *Joint Council of Teamsters No. 42, et al.*, 248 N.L.R.B. 808 (1980).

[2] Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) (1976), provides that: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract * * * whereby such employer * * * agrees to * * * cease doing business with any other person * * * *Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."

[3] As a preliminary matter, the unions argue that the dump-truck owner-operators are not self-employed independent contractors, as the Board held, but employees of the general contractor. This argument is foreclosed, however, by *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271 (9th Cir. 1977), in which this court held that these same dump truck owners are independent contractors.

None of the unions' arguments against the Board's order is persuasive. First, they cite this circuit's recent interpretation of the on-site proviso in *Pacific Northwest Chapter of the Associated Builders and Contractors, Inc. v. N.L.R.B.,* 654 F.2d 1301 (9th Cir.) (en banc), *cert. granted,* ——— U.S. ———, 102 S.Ct. 90, 69 L.Ed.2d ——— (1981). That case is not on point. The only issue decided in *Pacific Northwest* was whether the § 8(e) proviso "renders lawful clauses in collective bargaining contracts forbidding the employers to subcontract work *at any construction site* to a firm not having a contract with the signatory union." 654 F.2d at 1304 (emphasis added). In *Pacific Northwest,* where it was undisputed that the workers were engaged in on-site work, the court recognized that "the construction industry proviso narrowed the geographical scope of the [rule allowing secondary tactics] by introducing the jobsite limitation." 654 F.2d at 1313.

Second, the unions compare the on-site proviso in § 8(e) to an on-site proviso in the Davis Bacon Act (concerning minimum wages for construction workers on government contracts), arguing that the Federal Wage Appeals Board has held that it includes transportation between a construction site and a remote dump site. *See T. L. James & Co.,* Wage Appeals Board Case No. 69-2 (Aug. 13, 1969). We question the unions' reading of *T. L. James.* The Wage Appeals Board only held that a remote dump site or borrow pit is a part of the construction site. Slip op. at 6. The Board did not explicitly address the issue of transportation between the main site and the remote site. Moreover, we reject the unions' comparison of the two Acts. Neither

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the legislative history nor the text of the statute suggests that Congress intended § 8(e) to parallel the Davis Bacon Act.

Third, the unions rely on a Ninth Circuit affirmance of an arbitration award where, in the process of interpreting a provision in a collective bargaining agreement, the arbitrator determined that transportation between a construction site and a supply site was on-site work within the meaning of § 8(e). *See La Mirada Trucking, Inc. v. Teamsters Local Union 166,* 538 F.2d 286, 288 (9th Cir. 1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977). That decision has little bearing on the case before us. In *La Mirada,* the court did not interpret the on-site proviso to § 8(e); the court merely held reasonable the arbitrator's interpretation of a provision in a collective bargaining agreement, which the parties had stipulated to be identical to the on-site proviso of § 8(e). 538 F.2d at 289. Thus, the *La Mirada* court did not hold as a matter of law that transportation between a supply site and a construction site fits within the construction industry proviso.

II.

The truck owners claim that the Board's cease and desist order is an inadequate remedy. They contend that the Board should also order reimbursement of initiation fees and dues that the truck owners had paid to the union plus compensation for income lost to those truck owners who were denied work.

Although § 10(c) of the Act[4] vests broad discretion in the Board to fashion remedies that effectuate the policies of the Act, *see Fibreboard Paper Products Corporation v. N.L.R.B.,* 379 U.S. 203, 216, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964), that discretion is not unlimited. *See Acco Construction Equipment, Inc. v. N.L.R.B.,* 511 F.2d 848, 852 (9th Cir. 1975). In cases where money has been collected illegally, the Board should order a refund, absent some rational ground for not doing so. *Id.* We hold that the Board has failed to offer a rational ground for refusing to order reimbursement in this case.

A.

The Board's principal reason for denying reimbursement is that the unions neither directly coerced the dump truck owner-operators to pay union fees nor illegally coerced the general contractors to accept article XIII in the collective bargaining agreement.[5] Either form of coercion would have constituted a violation of § 8(b)(4) of the Act.[6] Although the Board ruled that article XIII violated § 8(e) of the Act, it reasoned that reimbursement is inappropriate in the absence of a § 8(b)(4) violation.

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[4] Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), provides that "the Board shall * * * take such affirmative action * * * as will effectuate the policies of this subchapter."

We reject the Board's reasoning that the purposes of the Act are effectuated by reimbursement for violations of § 8(b)(4), but not for violations of § 8(e).[7] To be sure, reimbursement is inappropriate in the absence of coercion. *See Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 655–56, 81 S.Ct. 875, 877–78, 6 L.Ed.2d 1 (1961).[8] But when an unlawful collective bargaining agreement is itself coercive, there is no logical reason for denying reimbursement because of the absence of a technical § 8(b)(4) violation. Article XIII presented the truck owners with the grim choice of joining the union or foregoing work with the signatory employers. Although the unions may not have employed coercive tactics, violative of § 8(b)(4), the inclusion of article XIII in the collective bargaining agreement would necessarily have had the effect of coercing otherwise reluctant truck owners to join the union.[9] *See Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1357 (9th Cir. 1970).

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We are unable to distinguish this case from two cases in which the Board ordered restitution to parties who joined unions pursuant to illegal collective bargaining agreements.[10] *See Sheraton-Kauai Corp.*, 177 N.L.R.B. 25 (1969), *enforced*, 429 F.2d 1352, 1357–58 (9th Cir. 1970). *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974), *enforced*, 546 F.2d 989 (D.C.Cir. 1976), *cert. denied*, 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

In *Santini Brothers*, by staging a walkout, the union coerced the employer to accept a restrictive collective bargaining agreement; enforcement of that agreement, in turn, coerced independent truckers to join the union. The Board found violations of both § 8(b)(4) and § 8(e), and ordered reimbursement to the independent truckers.

We are not persuaded that the § 8(b)(4) violation in *Santini Brothers* justifies granting restitution in that case, while denying it here. The Board would have restitution turn on the union's use of a coercive tactic, violative of § 8(b)(4), to persuade the employer to accept a restrictive provision. The relevant inquiry, however, is whether the truck owners, irrespective of any coercion of the employer, were coerced into union membership by an unfair labor practice.

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[5] The Board offered the following explanation for its denial: "We hereby deny the Charging Party CDTOA's request that we require Respondent Unions to reimburse any owner-operators for payment of initiation fees and dues, deducted contributions to union benefit funds, or income lost by reason of the enforcement of unlawful terms in MLA art. XIII. The Board has on one occasion adopted without comment an administrative law judge's recommended Order containing such a remedy. *Local 814, Teamsters (Santini Brothers, Inc.)*, [208 N.L.R.B.] at 201. In the present case, however, no evidence has been introduced with respect to alleged losses directly attributable to actual coercion by Respondent Unions, nor has the remedial issue been expressly litigated. Furthermore, we find a reimbursement order, typically used to "make whole" *employees* for violations of the Act, to be generally overly broad and inappropriate in the context of 8(e) violations. We note that aggrieved owner-operators engaged in business as independent contractors may pursue a damage claim under Sec. 303 of the Act. For the foregoing reasons, we find that the reimbursement of owner-operators requested by CDTOA would not effectuate the remedial policies of the Act. *See Local 60, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, et al. v. N.L.R.B.*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961)." 248 N.L.R.B. at 817 n.34.

[6] 29 U.S.C. § 158(b)(4) (1976).

[7] The NLRB claims that the Board has "consistently" declined to grant make-whole remedies in cases involving only violations of § 8(e). For support, the NLRB relies on *Newspaper and Periodical Drivers and Helpers Union v. N.L.R.B.*, 509 F.2d 99 (9th Cir. 1974), *cert. denied*, 423 U.S. 831, 96 S.Ct. 51, 46 L.Ed.2d 48 (1975). In that case, however, the court merely held that the Board did not abuse its discretion in denying back pay to independent contractors terminated in violation of § 8(e). Moreover, the Board's own decision in *Newspaper Drivers* offers no explanation for denying a make-whole remedy. *See Newspaper and Periodical Drivers' and Helpers Union Local 921*, 204 N.L.R.B. 440, 448 (1973). Thus, neither the Board's decision, nor the Ninth Circuit's brief affirmance, provides support for a *per se* rule denying reimbursement in § 8(e) cases.

[8] In *Local 60*, the Board had ordered reimbursement of union fees and dues paid while an illegal closed-shop preferential hiring agreement remained in effect. The Court refused to enforce the Board's order because it found no evidence that union membership had been coerced. The Court emphasized that persons affected by the order were already union members when employed on the job in question, and that no one had joined the union specifically to obtain work on that job. 365 U.S. at 654, 81 S.Ct. at 877. Thus, *Local 60* is readily distinguishable from the case before us.

[9] The Board stated that "no evidence has been introduced with respect to alleged losses directly attributable to *actual* coercion by Respondent Unions." 248 N.L.R.B. at 817 n.34 (emphasis added). We read the Board's statement as merely a finding that the unions did not directly confront truck owners and force them to join the union. Admittedly, the statement might be interpreted as an evidentiary ruling that the truck owners offered no proof that individuals had joined the union as a result of article XIII, as was the case in *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1 (1961). We doubt, however, that the Board intended that meaning, since the record shows that at every available juncture the truck owners fought the unions' attempt at unionization. *See Associated General Contractors of California, Inc. v. N.L.R.B.*, 564 F.2d 271 (9th Cir. 1977).

[10] The Board cannot arbitrarily impose different remedies in similar situations. *See Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C.Cir. 1966) ("nor can [the Board] treat similar situations in dissimilar ways").

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The Board implicitly recognized this principle in *Sheraton-Kauai.* In that case, the employer and union illegally extended a union security clause in a collective bargaining agreement to employees of a new hotel, thus denying the employees an opportunity to resolve the question of union representation for themselves. The union did not coerce the employer in violation of § 8(b)(4); nor did the union directly coerce the employees. Nonetheless, the Board ordered restitution after finding that, by "submitting [the employees] to the terms and conditions of the * * * agreement," the union effectively coerced the employees into union membership. 177 N.L.R.B. at 29.

Reimbursement in this case, as in *Sheraton-Kauai* and *Santini Brothers,* would effectuate the policies of the Act by returning to the truck owners money paid to support a union they did not freely choose to join, and by depriving the unions of the benefit of their unfair labor practice. *See Virginia Electric and Power Company v. N.L.R.B.,* 319 U.S. 533, 541, 63 S.Ct. 1214, 1219, 87 L.Ed. 1568 (1943); *Graphic Arts International Union Local 280 v. N.L.R.B.,* 596 F.2d 904, 910 (9th Cir. 1979).[11]

B.

We find unpersuasive the other reasons offered by the Board for denying reimbursement.

First, we are confused by the Board's contention that the remedial issue was not expressly litigated. The truck owners raised the remedy issue in their brief to the Board as charging party. To the extent that factual issues remain—such as the amount of damages—they can be resolved in an NLRB proceeding. *See N.L.R.B. v. Local 776, Film Editors,* 303 F.2d 513, 521 (9th Cir.), *cert. denied,* 371 U.S. 826, 83 S.Ct. 47, 9 L.Ed.2d 65 (1962).

Next, the Board said that the truck owners had an alternative remedy under § 303. It would be wasteful and unfair to force the truck owners, who have opposed unionization in legal proceedings for ten years, *see Associated General Contractors of California, Inc. v. N.L.R.B.,* 564 F.2d 271 (9th Cir. 1977), to renew the battle in a § 303 proceeding. Moreover, we see no reason to burden a federal district court with § 303 litigation, when reimbursement can be ordered in an NLRB proceeding. *Cf. Sheraton-Kauai Corporation v. N.L.R.B.,* 177 N.L.R.B. 25 (1969) (by implication) (ordering reimbursement where a § 303 remedy might have been available), *enforced,* 429 F.2d 1352 (9th Cir. 1970); *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974) (same), *enforced,* 546 F.2d 989 (D.C.Cir.1976), *cert. denied,* 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977).

Finally, the Board noted that reimbursement orders are typically used to "make whole" *employees.* We note, however, that the Board has also ordered reimbursement for employers and independent contractors when to do so would effectuate the policies of the Act. *See, e.g., Graphic Arts International Union Local 280,* 235 N.L.R.B. 1084, 1085 (1978), *enforced,* 596 F.2d 904 (9th Cir. 1979) (employer); *Local 814, Teamsters (Santini Brothers)* 208 N.L.R.B. 184 (1974), *enforced,* 546 F.2d 989 (D.C.Cir.1976), *cert. denied,* 434 U.S. 818, 98 S.Ct. 56, 54 L.Ed.2d 73 (1977) (independent contractors).

For these reasons we remand to the Board to fashion a make-whole remedy[12] or to show good cause why a make-whole remedy would not effectuate the purposes of the Act.[13] *See Acco Construction Equipment, Inc. v. N.L.R.B.,* 511 F.2d 848, 852 (9th Cir. 1975).

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Order ENFORCED IN PART and REMANDED for consideration consistent with this opinion.

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[11] Counsel for the NLRB suggested that reimbursement would result in unjust windfalls to the truck owners who may have benefited from becoming signatories to the union. To the extent that the truck owners received actual benefits in return for their fees and dues, the value of these benefits may be deducted from the amount of reimbursable damages. We see no reason, however, to deny the truck owners the opportunity to show that they paid fees that did not lead to benefits. The issue whether fees and dues created comparable benefits remains to be litigated.

[12] We express no opinion at this stage of the proceedings as to whether the Board should order compensation for lost income resulting from enforcement of article XIII. The Board shall consider this claim of the owner-operators on remand.

[13] We note that the D.C. Circuit recently affirmed the Board's denial of a make-whole remedy for dump truck owner-operators in *Building Material and Dump Truck Drivers v. N.L.R.B.,* 669 F.2d 759 at 765–767 (D.C.Cir.1981). For the reasons expressed in text, we reach a different conclusion.

Lorraine B. Pratte v. NLRB

530 F.Supp. 461 (N.D. Ill.), December 22, 1981

On petition for injunctive relief

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SHADUR, District Judge: Lorraine Pratte ("Pratte") has sued the National Labor Relations Board ("NLRB"), its General Counsel and the Regional Director of its Region 13 (headquartered in Chicago), seeking injunctive and declaratory relief because of NLRB's claimed unlawful revocation of Pratte's appointment as a staff lawyer. By agreement of the parties, their written submissions (the verified Complaint and affidavits) constitute the evidentiary record for this Court's ruling under Fed.R.Civ.P. ("Rule") 65(a). In accordance with Rule 52(a) this memorandum opinion and order reflects the Court's findings of fact and conclusions of law.

Findings of Fact

Pratte is a June 1981 graduate of Harvard Law School, where she established a fine record (among other things, as Articles Editor of the *Civil Rights-Civil Liberties Law Review*). Because she decided on labor law as a field of interest, she applied to NLRB's national office and the Chicago Regional Office.[1] In mid-January 1981[2] NLRB offered her employment as a Law Clerk-Trainee (Grade GS-9) at an initial salary of $18,585 a year. Pratte accepted the offer with alacrity, turning down a higher-paying position as an Assistant District Attorney in Philadelphia and abandoning any other placement efforts.

On February 3 (just a week after Pratte's prompt acceptance) the same NLRB person who had extended the offer[3] wrote to say NLRB was "unable to honor the written commitment which was made to you after November 5, 1980." That action was occasioned by President Reagan's January 20 announcement of an immediate hiring freeze for all civilian employees of government agencies. But the letter went on:

> We regret the necessity for this action; however, we will place your application in the group who will be given first priority for positions with this Agency when we are able to renew our hiring program. The instructions from the Office of Management and Budget provide that agency heads may request exemptions from the freeze where they believe that circumstances warrant such action. We intend to submit such a request to OMB concerning your situation and we will advise you of the results once they are received from OMB.

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> We sincerely regret any inconvenience that the hiring freeze has placed on you, and we hope that your interest in working for the NLRB will continue.

True to its word, NLRB wrote Pratte March 17:

> In my letter of February 3, 1981, I regretably [sic] had to advise you that this Agency could not honor the written offer of employment which had been made to you after November 5, 1980. I am now pleased to inform you that the National Labor Relations Board has recently received its new authorized personnel ceilings for Fiscal Year 1982 from the Office of Management and Budget. We are now able to extend offers of employment for professional positions.

It therefore offered employment on the same terms as before. Just as with the initial offer the Toback letter said:

> You will be assigned to our Chicago Regional Office, and we will expect you to enter on duty on or about October 5, 1981, which is the beginning of Fiscal Year 1982. If our budget permits, some new employees may be able to enter on duty prior to October 5, 1981. If you accept our offer, please indicate when you will be available to commence work.

Toback's letter was confirmatory of the telephone call that had been made to Pratte by NLRB's Deputy General Counsel March 10. At that time she was told to "hold on" if she could because NLRB had been informed by the Office of

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[1] Pratte sought to work for NLRB as an entree into the field of labor relations law. Work in the Region 13 office was particularly desirable because of the extensive trial experience she was told to expect early in her career, experience that would serve her well in future career opportunities in the labor relations field.

[2] Because all relevant dates occurred during 1981, no further year designations will be made in the statement of facts.

[3] B. Fred Toback ("Toback"), Executive Assistant in the Division of Operations Management, was the author of each of the letters offering and withdrawing offers (January 16, February 3, March 17, August 5 and September 29) discussed in this opinion.

Management and Budget that "the money would be coming through." Just three days after receiving the new Toback letter Pratte visited his office in Washington and drafted and delivered a handwritten acceptance letter. She had already forwarded the requested security clearance forms at the time of the original offer, so that she understood all systems were "go."

By letters dated August 5 and August 31 NLRB confirmed Pratte's appointment. Its August 5 letter spoke in future terms ("You will be appointed as a Law Clerk-Trainee * * * effective October 5, 1981"). August 31 converted that to the present:

> This will confirm your Accepted Appointment as Law Clerk (Trainee), GS-904-09, $18,585 per annum. Assignment is in our Chicago Regional Office located at the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois.
>
> This is a sensitive position and the appointment is subject to a Full Field Investigation under Executive Order 10450. It is also subject to an Administrative Trial Period of One year. All other conditions will remain as stated in Mr. Toback's letter to you dated 8-5-81.
>
> * * * * *
>
> A tentative reporting date of October 4, 1981, has been set pending receipt and approval of your medical certificate.
>
> We look forward to your joining the National Labor Relations Board staff.

All the conditions referred to in the August 5 and August 31 letters have been satisfied.

If Pratte had been advised that the appointment was subject to any other conditions (most specifically, possible rescission on the basis of potential future budget reductions) she would not have accepted the appointment. But understanding the appointment to be unconditional (except for the purely ministerial acts that offered no problem) she did accept, and her reliance on the appointment was extensive and uncontradicted:

(1) Of course she ceased to seek other employment.

(2) Based on NLRB's requirements for lawyers, Pratte took the bar examination in the District of Columbia, which would permit her to practice as a government lawyer anywhere. That necessarily made her a less marketable commodity (particularly in the litigation area in which her primary interests lie) in the private practice in Illinois, where she found herself compelled to look for employment after NLRB's later attempted revocation.

(3) Having been advised of the need for NLRB regional office staff lawyers to travel as part of their work, Pratte purchased an automobile.

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(4) On September 26 Pratte drove to Chicago. After checking with the Region 13 office and receiving confirmation of her official October 5 reporting date, she signed a one-year apartment lease in Chicago.

One day after NLRB's confirmation of her official reporting date, and the same day on which she had signed her lease, Pratte received a telephone call from NLRB's Washington office stating her appointment was being "revoked" as a result of a September 24 speech by President Reagan in which he announced he would ask Congress to approve additional budget reductions for certain federal agencies for fiscal year 1982. On September 30 she received a billet-doux from Toback predicated on the proposed cut in appropriations and stating:

> Therefore, we must inform you that we must rescind our offer of employment in which you were asked to report for duty on October 5, 1981.

This "Dear John" letter concluded in much the same tone as the earlier February 3 "unable to honor the written commitment" letter:

> We very much regret the necessity for this action. Please be assured that you will be placed in the group of individuals who will be given priority consideration for positions with this Agency when we are again in a position to permit additional applicants to report for duty.
>
> We sincerely regret any inconvenience which this current hiring situation has caused you, and we appreciate your interest in working for the National Labor Relations Board.

Finding herself unemployable as an Illinois lawyer, Pratte was able to obtain a temporary paralegal job. As soon as she was able to confer with counsel and prepare a Complaint and supporting documents she instituted this action.

Conclusions of Law

There is of course no dispute as to the familiar criteria to be employed in deciding on the propriety of preliminary injunctive relief. They were again repeated by our Court of Appeals this month in *Machlett Laboratories, Inc. v. Techny Industries, Inc.*, 665 F.2d 795 (7th Cir. 1981), and require a plaintiff to show that (adapted to this case):

> (1) [she] has at least a reasonable likelihood of success on the merits,
>
> (2) [she] has no adequate remedy at law and will otherwise be irreparably harmed,
>
> (3) the threatened injury to her outweighs the threatened harm the preliminary injunction may cause the defendants, and
>
> (4) the granting of the preliminary injunction will not disserve the public interest.

At the threshold the Court must inquire into the reasonable probability of plaintiff's success on the merits. Though many of our Court of Appeals' decisions list the factors in a different sequence, *O'Connor v. Board of Education*, 645 F.2d 578, 580 (7th Cir. 1981) has made that priority plain.

On that threshold issue the government's presentation does it little more credit than its actions as to Pratte. Its responsive memorandum (G.Br. 10–15) deals with the arcane mysteries of "appointment" by the federal government (a necessary condition of becoming an "employee" as defined in 5 U.S.C. § 2105(a)) and concludes by explaining why *Beacom v. EEOC*, 500 F.Supp. 428 (D.Ariz.1980) is distinguishable, or if not, should not be followed. But it fails utterly to discuss or even mention, in that context,[4] the most recent decision by a Court of Appeals, *National Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C.Cir.1981), which discusses, distinguishes and rejects each of the several authorities on which the government seeks to rely.

It is unnecessary to repeat the analysis in *National Treasury Employees*. For the reasons there stated at length, the Court finds that the Form 50 on which the government relied there as here (a form self-characterized as a "*Notification* of Personnel Action") is not itself the personnel action—the document constituting the "appointment." Indeed Form 50's title itself tends to confirm that (though that is but one of the factors pointing to the Court's conclusion).

National Treasury Employees is a thoughtful, well-reasoned and comprehensive opinion. This Court will not essay to reinvent the wheel, but will instead quote the persuasive and relevant portion of the opinion stating (at 245-246):

> It appears to us that the federal government played hide-and-seek with job-seekers, assuring them that jobs awaited them and only later—on occasion, after the prospective employee had acted on the assurance of a job—reversing itself. Not one of the approximately 20,000 members of the class which is the subject of these cases [in our case, Pratte] received a letter stating that he had been conditionally selected, subject to budgetary factors. Not one received a letter stating that he had been conditionally selected, subject to the discretion of the appointing officer to change his mind at any time prior to the completion of the Standard Form 50. All class members received letters stating that they had been selected for employment and should report for work on a certain date in the future.
>
> Underlying this system of apparent government indifference to the consequences of its actions has been the fiction of the Form 50, backed by predictions of the dire consequences that would follow if the fiction were to be retired. A fiction supported by speculation cannot, however, bear the burden urged upon it by the Government. On the basis of our analysis of the appointment procedures in use in these cases, as established by the Personnel Manual and the other evidence, we believe that the completion of the Form 50 was not the "last act" required of the appointing authorities within the meaning of *Marbury*. The members of the class before us were appointed to the positions for which they were unconditionally selected.

Just so Pratte received a letter from NLRB saying in essence, "You are hired. You are one of our lawyers," without the slightest reference to any aspect or condition of budgetary restraints. For the reasons so well expressed in *National Treasury Employees* and fully applicable here, the Court holds that Pratte was in fact "appointed" by her acceptance of the August 5 Toback letter and the August 31 confirmation of appointment.

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[4] True enough the government's memorandum later mentions *National Treasury Employees*, but in a different section and on a different issue.

That however brings Pratte only part-way home. Because Pratte had not entered into "performance of the duties of [her] position" before NLRB reversed its field and told her not to report, she was not technically an "employee" within the definition of 5 U.S.C. § 2105(a). That meant that she was lacking the statutory protection afforded "employees." *Baker v. United States,* 614 F.2d 263, 266 (Ct.Cl.1980) so teaches, and *National Treasury Employees* confirmed that proposition and went on to define the nonstatutory protection of an appointee. It said (at 247), "An appointee remains appointed, of course, until [her] appointment is properly revoked." And it continued (*id.* n.13), "It would appear that a properly authorized refusal to allow [an appointee] to enter on duty on the date previously selected would be an effective revocation."

Certainly NLRB's September 29 letter was such a "refusal." Thus the question was whether the refusal—the revocation—was "proper" as *National Treasury Employees* would require.

National Treasury Employees provides no answer beyond that stage of the inquiry. At that point the opinion went on to deal with the class issues. It did however recognize quite specifically that (at 253), "It is possible that there exists a third group of class members: those whose appointments were not properly revoked and who did not enter onto duty."

Accordingly this case resolves itself to the question of the propriety of the attempted revocation, really a question of timeliness. Its answer depends on whether detrimental reliance of the type that would give rise to an estoppel, occurring before an attempted revocation, precludes the revocation from being timely and thus proper.

Our Court of Appeals is not among those that use the simplistic terminology that the government may never be estopped. Instead it recognizes estoppel against the government in appropriate circumstances, although it urges great caution. *Gressley v. Califano,* 609 F.2d 1265, 1267–68 (7th Cir. 1979); *United States v. Fox Lake State Bank,* 366 F.2d 962, 965–66 (7th Cir. 1966).

This opinion has already identified Pratte's substantial reliance on her appointment. She ceased seeking other employment. She took the District of Columbia bar examination in reliance on NLRB's requirements, rather than taking the bar in the jurisdiction where she contemplated working—this made her much less employable locally in private practice. Because of the travel requirements for an NLRB staff attorney she bought an automobile. She signed a one-year apartment lease *after* speaking with NLRB personnel just a week before she was due to report—and after having been given no warning.

Reliance then is established. Estoppel however requires that reliance be *reasonable.* On that score it seems to the Court that it is bizarre in the extreme for the government to say on the one hand that *Pratte* should have been on notice of a possible repeat performance of the original offer and withdrawal, and on the other hand that the *government* was not. What the government really advances is the extraordinary notion that the agency had no reason to believe that the budgetary state of affairs would change so drastically in September, yet may hold Pratte to a more strict standard than that. Which of the parties really knew the facts? Had NLRB stated the risk or had it included any caveat when it renewed the offer and later confirmed Pratte's appointment, she would not have taken the job. Instead NLRB's only reference to budget was not in restrictive, but rather in expansive, terms. Its March 17 offer effectively said, "Maybe if we get more money you can report earlier." It gave her every reason to believe that the original problem that had caused the withdrawal of its initial offer had been resolved. Indeed it was NLRB and not Pratte that was on notice of the potential of reduction by June 1981, when Congress enacted a final budget for fiscal 1981 rescinding $1 million out of NLRB's prior approval. Nevertheless it sent her a confirmation of appointment nearly three months later.

Frankly the Court considers the government's position somewhat disingenuous. NLRB induced action by Pratte when that suited its needs. This Court's many years as a law firm hiring partner make plain what NLRB did here: When hiring is done it is done pursuant to the employer's contemplated needs, and with the firm expectation that the hired associate will in fact report for work. Any defeated expectation can create serious disruption for the employer in a seller's market. Today however we are in a buyer's market for young law graduates, and it appears quite obvious that NLRB has seriously disadvantaged Pratte.

It is however not necessary to decide the ultimate issue of whether estoppel will lie. At this point in the proceedings the only question is whether Pratte has demonstrated a reasonable likelihood of success on that issue. That, it seems to the Court, cannot be gainsaid in light of the Seventh Circuit decisions on estoppel, the *Beacom* case and the holding in *National Treasury Employees.*

Determination of the reasonable likelihood of success also controls the question of what constitutes the status quo, an issue on which each party's argument is somewhat circular. NLRB's assertion that the status quo is non-appointment hinges on its argument that Pratte was never "appointed." In much the same way Pratte's contention that the government is seeking to change the status quo, while she is trying to preserve it, hinges on her argument that she was "appointed."

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With the threshold having been crossed, we turn to the "adequate remedy at law" or "irreparable harm" issue. In this case, that is peculiarly within the ken of lawyers: We are dealing with the impact on a lawyer of this kind of conduct. Many of the major burdens on Pratte, it is true, are financial, though incidentally some might pose difficulties in terms of recovery. Though she wouldn't otherwise have bought a car, presumably she got value for what she paid. Much the same applies to her apartment lease. Presumably her lost earnings during the employment period would be recoverable if she succeeds on the merits.

But how do remedies at law deal with the long-term career impact, the loss of placement opportunities,[5] the loss of valuable experience and of promotion opportunities? Law students with top records from top-ranked national law schools are highly salable commodities, but that is much less true of a law graduate forced into a market at a time when hiring generally has become more uncertain and in an unseasonable period in relation to the normal hiring season. All those factors, amplified as they are by Pratte's decision as to which bar exam to take (a decision made in reliance on NLRB), satisfy the second condition for preliminary injunctive relief. This is much like the familiar situation in which a wrongdoer is not heard to assert that the plaintiff can't show harm, where it is really the wrongdoer's own conduct that created the difficulty in doing so.

As to the third factor, the balancing of harms, the government argues that the harms just outlined as to Pratte are outweighed by harms to the government. That contention is without merit. First, neither side has focused on one significant factor, though Pratte does argue that the government predicates its decision not on *present* harm (at this point NLRB still has the funds needed to honor its hiring commitments in hand[6]) but on possible *future* effects. More to the point is that if Pratte is successful on the merits, NLRB is liable for her salary in damages in any case. Thus any harm to NLRB arising out of an injunction is really no different from the damages it confronts by reason of the claim. Second, the current decision is of very limited scope. Circumstances applicable to Pratte may well not apply to *anyone* else, let alone to the entire group of appointees NLRB has now sought to reject. In any balancing of harms the Court then concludes Pratte must prevail.

Finally the Court turns to consideration of the public interest. There is a paramount public interest in government responsibility—a quality singularly lacking on the uncontroverted facts here. What countervailing public interest does the government advance? Teaching young lawyers to watch out when they deal with government? If the public interest lies in promoting the orderly operation of the agency, NLRB might better address its arguments to the administration and to Congress rather than to Pratte or this Court.

All criteria for issuance of a preliminary injunction have been met. One last comment may nevertheless be in order. In substantial part the government seeks to rely on authorities that deny preliminary injunctive relief where complete retroactive relief is available in administrative proceedings, or in judicial review of such proceedings. But Pratte occupies the no-man's-land[7] between appointment and service: She doesn't have the benefit of administrative proceedings, precisely because she is *not* an "employee." Consequently the Court concludes that the otherwise-existing right to a preliminary injunction is not lost for the reason advanced by the government.

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[5] Parenthetically Harvard's placement service is much less useful to alumni than to students, because it is geared to serve the latter and the prospective employers seeking to hire them upon graduation. Because this particular piece of information derives from the Court's knowledge outside the record, it has not been taken into account in arriving at the Court's decision.

[6] There is a question as to an agency's right to husband currently appropriated funds against contingent future needs.

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Rule 65(a) has been dealt with, but Rule 65(c) remains. Because Pratte could not provide the funds necessary for any significant bond required under that Rule, and NLRB has not made any showing of damages in any case, the Court determines that no bond should be required under Rule 65(c) and waives the provision of such a bond.

Counsel are requested to prepare and submit a draft order granting a preliminary injunction as prayed in the Complaint and approved in this opinion.

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[7] No pun or chauvinistic purpose is intended.

Montgomery Ward & Co. v. NLRB

668 F.2d 291 (7th Cir.), December 30, 1981—253 NLRB 196

On petition to review Board Order

Before SPRECHER and WOOD, Circuit Judges, and BROWN, Senior District Judge*

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HARLINGTON WOOD, Jr., Circuit Judge: Montgomery Ward & Co., Inc. ("Wards" or the "Company") has appealed to this court for review of a Decision and Order issued by the National Labor Relations Board (the "Board") on November 4, 1980. The case arises from an attempt by the employees at a Greensburg, Pennsylvania, Montgomery Ward Credit Service Center to gain representation by the Amalgamated Food Employees Union, Local 590 (the "Union"). The Administrative Law Judge (the "ALJ") found that the Union obtained authorization cards from a majority of employees and that the Company, after receiving the Union's demand for recognition, committed numerous violations of the National Labor Relations Act in an effort to undermine the Union. He further found that a bargaining order was necessary to remedy the unfair labor practices. The NLRB affirmed the ALJ's findings.

The Union solicited authorization cards from employees at the Greensburg Credit Service Center beginning on July 2, 1979. The Union representative distributed cards to a number of employees to give to their fellow employees. On the afternoon of July 9, 1979, the Union representative presented a written demand for recognition as the bargaining representative of the em-

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ployees at the Greensburg Credit Service Center. On July 10, 1979, Wards acknowledged the request and informed the Union that it would not recognize it as the bargaining representative.[1]

On July 13, 1979, the Union filed a petition for an election. On the same date, the Union filed an unfair labor practice charge[2] alleging that Wards had, since July 9, 1979, restrained, coerced and interfered with employee rights. On September 10, 1979, the Union filed an amended unfair labor practice charge, which alleged a violation of section 8(a)(5) and which had the effect of blocking the election that was scheduled to be held on September 13, 1979. Subsequently, on November 1, 1979, the Union withdrew its election petition.

Following the issuance of a complaint on the basis of the Union's amended unfair labor practice charge, a hearing was held before Administrative Law Judge Maloney. He found that Wards had committed violations of section 8(a)(1) of the National Labor Relations Act. Specifically, the ALJ found that Wards' supervisors improperly discussed the Union during the pendency of the Union's election petition and that the Company granted a wage increase on July 11, 1979.[3] The ALJ also found that Wards violated section 8(a)(5) by refusing to recognize and bargain with the Union as the representative of the majority of the Greensburg employees.

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*The Honorable Wesley E. Brown, Senior District Judge of the District of Kansas, is sitting by designation.

[1] The Regional Labor Relations Manager at Wards explained to the Union representative, "In our opinion, your Union does not enjoy a majority status among the employees described and in any event, without proof of that allegation we could not take further action." The written demand did not claim that the Union had obtained authorizations from a majority of the employees. Lack of majority status can be a defense to the bargaining obligation. *Grismac Corp.*, 205 N.L.R.B. 1108 (1973), *enforced*, 87 L.R.R.M. 2154 (7th Cir. 1974).

[2] Notwithstanding the pendency of the unfair labor practice charge, the Union entered into a Stipulation for Certification upon Consent Election Agreement with Wards that was approved by the Regional Director on August 2, 1979. The Agreement provided for an election on September 13, 1979, in a unit described as, "All full-time and regular part-time employees employed by Montgomery Ward & Co., Incorporated at its Greensburg, Pennsylvania Credit Service Center; excluding all other employees and guards, professional employees and supervisors as defined in the Act."

The ALJ concluded that the Union represented a majority of the employees based on authorization cards procured by the Union's organizers. At the hearing, 41 cards were placed in evidence by the General Counsel. Two of the cards were not signed until July 10, the day after the Union made its recognition demand. The ALJ expressly found that it was unnecessary for him to consider the significance of those cards in determining the Union's majority status.

The ALJ also determined that Donita Pierce and Linda Ohr were employees on July 9 when the Union made its recognition demand. Pierce and Ohr were clerical employees at the Greensburg facility when the Union began its solicitation of authorization cards in early July, 1979. Pierce's last day of work was Tuesday, July 3. She had worked eight hours as scheduled on Monday, July 2, and Tuesday, July 3. She failed to show up for work as scheduled on Thursday, July 5; Friday, July 6; Monday, July 9; or at any time thereafter. As a result of her absence on July 5, she forfeited holiday pay for July 4.

Ohr's last day of work was also July 3. She had worked 6 hours on Friday, June 29; 6.8 hours on Saturday, June 30; 6.1 hours on Monday, July 2; and 4.2 hours on Tuesday, July 3. Like Pierce, Ohr forfeited her July 4 holiday pay when she failed to work on July 5. Neither woman ever contacted Wards to explain her absence.

Although the two women did not return to Wards after July 3, 1979, the ALJ reasoned that they were still employees of Wards on July 9. A Wards administrative personnel rule provided that employees who did not call in when absent would be carried on the personnel rolls for three days before

being officially terminated. Moreover, the ALJ rejected the Company's contention that five of the 39 cards signed prior to July 9 were invalid. Wards argued that the five employees had been misled regarding the purpose of the cards. The ALJ concluded that Wards waived its right to object to the validity of three of the cards (signed by Wunderley, Ghrist, and Corn) when it failed to object to their introduction into evidence. He further found that statements made to the remaining two employees (Falkosky and Robinson) were not such as to invalidate their cards.

Consequently, the ALJ concluded that, as of July 9, the Union had acquired 39 valid cards. The ALJ further found that the office and clerical unit consisted of 74 employees. Thus, on the basis of his findings, the ALJ concluded that the Union had 39 signed cards out of the 74 employees, more than the number needed to establish majority status.

Having found that Wards violated section 8(a)(5) of the National Labor Relations Act by refusing to recognize the Union as the representative of the majority of the employees, the ALJ granted the General Counsel's request that Wards be ordered to bargain with the Union on the basis of the authorization cards. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The ALJ relied on the granting of the wage increase as the basis for concluding that it was unlikely that a fair election could be held.

In establishing the Union as the sole bargaining representative of the Greensburg employees, the Judge gave no weight to an employee petition prepared after the wage increase. Addressed to the Union and Wards, the petition stated:

> We the undersigned are employees and eligible voters of Montgomery Ward Credit Office in Greensburg, Pa. We employees are petitioning a right to an election to determine if we choose to be represented by Local Union No. 590. This petition is in no way a commitment determining anyone's individual position on a vote.
>
> We, therefore, strongly urge that our rights be restored, and an election be agreed upon by Local Union No. 590, and Montgomery Ward Credit Management. cc: National Labor Relations Board—Pittsburgh, Pa. General Counsel of

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[3] The ALJ applied a presumption that the increase was granted in order to undermine the Union's organizing effort. He found that Wards did not adequately rebut that presumption.

National Labor Relations Board—Washington, D.C.

The petition was signed by 47 of the 72 employees in the unit. Of the 47 employees who signed the petition, 18 had also signed union authorization cards. The petition was presented to the Union representative at a meeting called by the employees. He declined to accept the proffered petition. Copies of the petition, in addition to requests for an election, were sent to the Regional Office in Pittsburgh and the General Counsel in Washington. Nevertheless, the ALJ concluded, "[T]here is no reason to give any weight to this petition in determining the appropriateness of a bargaining order." Wards filed exceptions to portions of the ALJ's decision and recommended Order.

The Board affirmed the ALJ's decision and adopted his recommended Order, with few exceptions. The Board agreed that there were 74 employees in the unit when the Union demanded recognition on July 9. The Board joined the ALJ in not considering the significance of the two cards signed on July 10 and accepted the ALJ's finding that Pierce and Ohr were employees of the unit. Thus, the Board also concluded that the Union had at most 39 cards as of July 9.

Wards acknowledged the validity of 34 cards, but contended that the cards signed by Wunderley, Ghrist, Corn, Falkosky, and Robinson were invalid because of Union misrepresentations about the cards' purpose. The Board affirmed without discussion the ALJ's ruling with respect to the validity of the cards signed by Falkosky and Robinson. With respect to the validity of the cards signed by Wunderley, Ghrist, and Corn, the Board agreed with Wards that Administrative Law Judge Maloney had erroneously ruled that the Company's objections had been waived. Nevertheless, the Board found that the cards of Wunderley

and Ghrist were valid notwithstanding certain statements that had been made to them concerning the cards' purpose. Because this meant that at least 38 of the 39 cards were valid, a bare majority of the 74 employees, the Board found it unnecessary to pass on the validity of Corn's card. Accordingly, the Board found that by July 9, the date that the Union demanded recognition, the Union had obtained 38 valid authorization cards in a unit of 74 employees. The Board adopted the ALJ's decision concerning the bargaining order, but made no independent findings concerning the appropriateness of the order.

In seeking review, Wards does not contest the Board's findings that certain conduct of its employees violated section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1). Instead, the Company contends that the Union did not possess valid authorization cards from a majority of the employees at the time it demanded recognition from Wards. Therefore, Wards argues that the Board erred and exceeded its statutory authority by issuing a bargaining order which establishes the Union as the exclusive representative of the Greensburg employees.

Specifically, Wards challenges the validity of three of the signed authorization cards. It alleges (1) that two of the employees who signed cards (Pierce and Ohr) were no longer employed with the Company on July 9, and (2) that one of the five cards (Falkosky's) was signed on the basis of representations that it would be used only by the Union for the purpose of obtaining an election. Wards also contends that the Board failed to show that the "possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–15, 89 S.Ct. 1918, 1940, 23 L.Ed.2d 547 (1969).

The National Labor Relations Act provides that the labor organization designated by a majority of employees in an appropriate bargaining unit shall be the exclusive bargaining agent for those employees.[4] Although the most widely used method of designating a union as the bargaining representative of a group of employees is through the Board's election procedures, bargaining status may also be established through the employer's voluntary recognition after the union claims majority status. A third method of establishing union representation is through a Board-ordered recognition without an election.

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[4] Section 9(a) provides *inter alia:*

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), the Supreme Court set forth the standards for approving bargaining orders issued by the Board to remedy unfair labor practices committed by an employer during a union campaign. Under *Gissel*, a bargaining order may issue (1) without a showing that the union at one point represented a majority of the employees, if the employer's "outrageous" and "pervasive" unfair labor practices have eliminated the possibility of holding a fair election, or (2) in "less extraordinary cases marked by less pervasive practices," if the union at one point represented a majority of the employees, the employer's unfair labor practices "have the tendency to undermine majority strength and impede the election processes," and "the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies though present, is slight * * *." In the instant case, the Board determined the Company's misconduct fell within the second standard outlined in *Gissel*.[5] Thus, before **298** we can consider enforcing the bargaining order issued by the Board, it is necessary to determine whether the Union represented a majority of employees at the time it made its demand.

We begin by examining whether Pierce and Ohr were employees of Wards on July 9 since their votes were necessary to maintain a majority. Although the Board normally has wide discretion in supervising the election process and in resolving questions arising during the course of representation proceedings, *see, e.g., NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330–31, 67 S.Ct. 324, 327–28, 91 L.Ed. 322 (1946); *National Van Lines, Inc. v. NLRB*, 273 F.2d 402, 407 (7th Cir. 1960), no particular deference is due the Board's conclusion here. In *Choc-Ola Bottlers, Inc. v. NLRB*, 478 F.2d 461 (7th Cir. 1973), this court reviewed a person's eligibility to vote in a Board election.

> [T]he question of . . . eligibility . . . is a pure question of law, dependent entirely on whether a person in [the employee's] situation can be said to be an employee within the meaning of the Act. Therefore, there is no occasion for the Board to exercise its discretion in this matter.

478 F.2d at 464. Although the Union never held an election in this case, the eligibility requirements for voting in an election are analogous to the eligibility requirements for counting signed authorization cards.

In the absence of special circumstances,[6] an employee is eligible to vote in an election if that employee holds a full-time position within the appropriate bargaining unit and is on the company payroll both at the end of the payroll period preceding the ordering of the election and on the date on which the election is held. *NLRB v. New England Lithographic Co.*, 589 F.2d 29 (1st Cir. 1978), R. Gorman, *Labor Law* 43 (1976). When an employee is off the job on the date of the election, however, this court and the Board have stated that "whether one is an employee is a question to be determined by his reasonable expectation of employment within a reasonable time in the future." *Choc-Ola Bottlers, Inc. v. NLRB*, 478 F.2d 461 (7th Cir. 1973); *Lake City Foundry Co. v. NLRB*, 432 F.2d 1162 (7th Cir. 1970); *Whiting Corp. v. NLRB*, 200 F.2d 43 (7th Cir. 1952); *Western Union Telegraph Co.*, 32 N.L.R.B. 210, 215 (1941); *Massillon Aluminum Co.*, 27 N.L.R.B. 165, 168 (1940). Thus, a person who has no reasonable expectation of future employment as of the date of a union recognition demand cannot be considered to be an "employee" within the meaning of the National Labor Relations Act for purposes of determining majority status.

The "reasonable expectation of employment" standard includes two elements that must be satisfied before an employee's card may be counted: a subjective element—the employee's intent or expectation—and an objective element—the reasonableness of the expectation. The personnel policy at Wards, which provided that employees who did not call in when absent would be carried on the personnel rolls for three days before being terminated, relates only to the objective element or reasonableness of the expectation. Such a policy may restrict a person's "reasonable expectation" where that person in fact has some interest in returning. *See Lake City Foundry,* 432 F.2d 1162, 1170 (7th Cir. 1973). For example, in *Walter Packing Inc.,* 241 N.L.R.B. 131 (1979), the company policy was to fire employees who were absent and failed to call in sick. The employee was scheduled to work on the day of the election beginning at 6 a.m. He did not report for work, nor did he call in to explain his absence. He appeared to vote and cast a ballot. The Board concluded that he continued to be an employee until the expiration of the time allowed for an employee to call in sick (8:30 a.m.). Although the employee later appeared and had an expectation of continued employment, the Board considered him terminated because of the company policy.

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[5] The Supreme Court in *Gissel* made it clear that it is the Board's task to determine which of the three categories of severity embraced the employer's coercive and discriminatory conduct. 395 U.S. at 612 n.32, 89 S.Ct. at 1939 n.32.

[6] When other circumstances exist, such as striking, laid-off or part-time employees, the standard is modified. This is especially true when an employee is not at work on the day of the election or demand.

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The policy at Wards, however, cannot create "expectations" in the case of an employee who has no intention of returning. At issue in this case is whether Ohr and Pierce expected to return to their jobs. The General Counsel and, ultimately, the Board, must show that Ohr and Pierce intended to return since they bear the burden of proving that the Union represented a majority of employees in order to sustain the imposition of the bargaining order. *See, e.g., NLRB v. West Sand and Gravel Co.,* 612 F.2d 1326 (1st Cir. 1979); *G.P.D., Inc. v. NLRB,* 406 F.2d 26 (6th Cir. 1969); *Crawford Mfg. Co. v. NLRB,* 386 F.2d 367 (4th Cir. 1967). Regardless of where the burden lay, however, we must examine the entire record and ascertain whether there was substantial evidence for the Board's finding that the Union represented a majority of the employees. *National Can Corp. v. NLRB,* 374 F.2d 796, 804 (7th Cir. 1967).

In the past, the Board has been able to meet its burden of showing employee status in cases where the employee communicated some continuing interest in his job. In *Lake City Foundry Co. v. NLRB,* 432 F.2d 1162 (7th Cir. 1970), the employee ceased work prior to the date on which the union claimed a card majority. This court, contrary to the Board, found that he should have been considered an employee as of the date of the recognition demand. The company supervisor's testimony indicated that the employee had some expectation of returning.

> Now, on Monday [Foster] didn't come in and he called me up and said his wife was in an accident or had fallen and was in the County Hospital and he was taking care of her. And he said he didn't know when he would be in, but he *would be in as soon as he could.*

432 F.2d at 1169 (emphasis in original). Neither Pierce nor Ohr ever contacted Wards to suggest that her absence was anything other than a total abandonment of her employment as of the close of business on July 3.

An employee who is known to be absent from work because of illness or is on leave of absence is presumed to have the requisite expectation of future employment. For example, in *NLRB v. Staiman Brothers,* 466 F.2d 564 (3d Cir. 1972), the employee whose vote was disputed was hospitalized and had not returned to work at the time of the election. Nonetheless, he frequently visited the company's premises, and told the foreman that he did not know when he would return to work. In finding that the employee was eligible to vote, the court relied on the fact that the employee expressed a continuing interest in his job. Similarly, in *Elvin Salow Co.,* 209 N.L.R.B. 833 (1974), the Board reversed a finding that the employee had abandoned his employment. The employee feared retaliatory action by striking workers and made numerous telephone calls indicating he would return to work after the strike ended. *See also Trailmobile Division, Pullman, Inc. v. NLRB,* 379 F.2d 419 (5th Cir. 1967) (leave of absence); *NLRB v. Atkinson Dredging Co.,* 329 F.2d 158 (7th Cir. 1964) (temporary sick leave).

There was some evidence that Ohr might have been absent from work because of illness. The testimony indicates that she "cut her hand doing dishes or something and she had stitches" some time prior to July 3. Ohr came to work the day that she got stitches, but later called in sick. Her supervisor testified that she "would get phone calls * * * saying that Linda had a doctor's appointment and she would call," but never heard from Ohr again. The General Counsel presented no further evidence that the absence of either woman was caused by illness or by leave of absence. In fact, since Ohr had a pattern of calling Wards in the past when she was ill, the fact that she did not do so after July 3 may reasonably indicate that she had no expectation of continuing employment.

Employees who quit or abandon their job lose their employee status because they no longer have the requisite expectation of future employment. *Whiting Corp.*

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v. NLRB, 200 F.2d 43 (7th Cir. 1952); *John A. Thomas Crane & Trucking Co.,* 224 N.L.R.B. 214 (1976); *Roy Lotspeich Publishing Co.,* 204 N.L.R.B. 517 (1973); *Atlantic Coast Fisheries,* 183 N.L.R.B. 921 (1970). In *Roy Lotspeich Publishing,* an employee gave notice of resignation before the election and did not work on the day of the election. Although he was paid for the election day and technically still employed that day, he was ineligible to vote. The Board held that "when an employee quits his employment and stops working at a date prior to election day, he is not eligible to vote." *See also Walter Packing, Inc.,* 241 N.L.R.B. 131 (1979).

In *Whiting,* this court set aside a Board order requiring the company to bargain where the employee who had cast the deciding vote in the representation election had quit prior to the balloting. This court placed great weight on the fact that the employee ceased work prior to the date of the election and never returned to work thereafter. Although the General Counsel sought to sustain its burden of proof by calling the employee to testify concerning his intentions, this court found that the burden had not been met and that he had quit and lost his employee status.[7]

Both Ohr and Pierce ceased work for unexplained reasons and never returned. The party seeking to establish a person's continuing "employee" status must present credible evidence that the employee had a reasonable expectation of employment in the future. The General Counsel did not come forward with any witness to testify, or any documentary evidence to establish that either woman expressed an interest in coming back to work after leaving on July 3. Neither woman called Wards to explain her absence or to suggest that she might return. Since the General Counsel proferred no evidence to support its contention that either of these women had a reasonable expectation of returning to work, the only conclusion is that both employees quit work as of the end of the day on July 3 with no apparent intentions ever to return.

In *Atlantic Coast Fisheries,* employee Bonaviri stopped reporting for work and did not notify the employer why he was absent, or that he was coming back. Bonaviri's explanation at trial was that he had developed an arm infection and was instructed by his physician to stay home. His testimony was not corroborated and, in fact, was contradicted by others. He made no report of injury, presented no doctor bill, and made no claim for Workmen's Compensation. When Bonaviri applied for unemployment compensation, the Massachusetts Division of Employment Security found that Bonaviri abandoned his job because he had failed to notify the employer that he was absent due to illness and had failed to notify the employer when he was able to return to work. On appeal, the Board affirmed, holding that he was not an employee eligible to vote in the representation election.

The fact that an employee who has abandoned his job is still carried on the employer's records is not sufficient to make that person an "employee" as a matter of law.[8] If such were the case, an employer

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could easily manipulate the employee count for its own benefit. Moreover, entries in an employer's records are often no more than an administrative matter. In fact, a supervisor at Wards testified that although Pierce was terminated as of July 5, her actual paperwork was not filed until the twenty-second of August. In apparent recognition of this rule, the ALJ properly gave no weight to the fact that Wards did not remove Ohr and Pierce from the company payroll records until some time after July 9, 1979.

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[7] Similarly, in *John S. Barnes Corp.,* 180 N.L.R.B. 911 (1970), an employee failed to report for work just before the Memorial Day holiday. After the second day of his absence, his father called and stated that the company "could assume he was no longer an employee." Although it was not until June 3 or 4 that his termination papers were complete, he was not counted toward the majority required for the demand made on June 2. The Board found that since he left the company's employment prior to June 2 and never returned, he should not be included in the unit.

[8] In *Whiting Corp.,* 200 F.2d 43 (7th Cir. 1952), this court found that the worker in question had quit and had lost his status as an employee notwithstanding the fact that at the time of the union's demand for recognition, he was carried on the company's records as "suspended on account of illness." Similarly, the Board found that an employee was not eligible to vote in *Roy N. Lotspeich Publishing Co.,* 204 N.L.R.B. 517 (1973), even though he was still considered by his employer to be on the payroll and was paid for the election day because the Board found that he had quit two days before. Finally, in *John S. Barnes Corp.,* 180 N.L.R.B. 911 (1970), an employee who was technically on the payroll, was not included in the unit since the employee left the company's employment and never returned. *See also Lake City Foundry Co. v. NLRB,* 432 F.2d 1162 (7th Cir. 1970).

Furthermore, both the ALJ and the Board ignored the fact that, under the Company's policy, when Ohr and Pierce failed to appear or contact the company on July 9, they were deemed to have been terminated effective July 5, the first day of their absence. Thus, if the Wards policy has any significance, it supports the conclusion that these women cannot be found to have been employed as of July 9.

The Board also argues that it was improper to consider the fact that neither woman ever returned to her job or was ever heard from again. The Board contends that developments which occur after the demand "cannot color the picture as it stood on the critical date." *NLRB v. Jessie Jones Sausage Co.*, 309 F.2d 664, 666 (4th Cir. 1962); *NLRB v. Belcher Towing Co.*, 284 F.2d 118, 121 (5th Cir. 1960). These cases, however, may be distinguished. In *Jessie Jones*, the company experienced seasonal fluctuations in its work force and had a practice of reducing its work force during the slack season. The company discharged sixteen workers, eight of whom voted in the election. Of the eight, several had been laid off before, but had eventually been recalled to work. The critical issue was whether they had a reasonable expectation of reemployment at the time of the election. The court found that they did have such an expectation and were therefore eligible to vote. The court further held that it was irrelevant whether they were in fact eventually reinstated. Since the employees had a reasonable expectation of reemployment, subsequent changes in the corporation's personnel requirements which made it impractical to rehire employees did not invalidate their votes. In *Belcher*, the court held that a part-time employee was ineligible to vote because he did not share a sufficient interest in the terms and conditions of employment to warrant participation in the election of a collective-bargaining agent. Although the employee did, in fact, later become a full-time employee, such later actions did not validate his ballot.

In both *Jessie Jones* and *Belcher*, the status of the employee after the election was controlled by the employer. Moreover, in both, the later action did not change the employee's status at the time of the election: the employees in *Jessie Jones* still had an expectation of future employment at the time of the election and the employee in *Belcher* was still working on a part-time basis at the relevant time. In this case, however, the fact that neither Ohr nor Pierce ever returned to her job sheds light on whether either woman had any expectation of employment. Since they never returned, we can infer that they abandoned their job as of July 5 and thus were not employees on the date of the Union demand.

Moreover, there is support for the proposition that employee behavior after the relevant date may be viewed in order to shed light on the status of the worker at the time of the demand. In *Whiting*, this court noted that the employee "left at that time and never returned" and never asked for reemployment. 200 F.2d at 45. Similarly, in *John S. Barnes Corp.*, the Board found that the employee should not be included in the unit since he "left the Company's employment prior to June 2 and never returned. . . ." 180 N.L.R.B. at 932. Finally, in *Elvin Salow Co.*, the Board found that "the very fact that [the employee] did return to work * * * and continued working **302** for the employer for a month thereafter negate[d] any abandonment intent." 209 N.L.R.B. at 834.

The authorization cards signed by Pierce and Ohr should not have been counted in determining whether the Union had the support of a majority of employees on July 9. Therefore, if Falkosky's card is valid, there were, at most, 36 valid cards in a bargaining unit of 72 employees. Since 36 cards is not a clear majority of the unit of 72 employees, it is necessary to examine the Company's contention that Falkosky signed her authorization card on the basis of a misrepresentation.[9]

A union may gather, from a majority of employees in a bargaining unit, authorization cards naming that union as the exclusive bargaining representative. Although cards are commonly used to make a "showing of interest" to the Board in support of a petition for a representation election, they may also be used to demonstrate majority support and thus to induce the employer to bargain without an election. In spite of the acknowledged superiority of the election process, cards may be a more reliable indicator of employee preference when employer unfair labor practices disrupt the election process and make a future fair election impossible. If the employer, however, can show that a card was gathered by misrepresentations as to the purpose of the card, the value of the card is greatly diminished.

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[9] It is necessary to determine whether Falkosky's card is valid since if it is invalid, there would be 35 valid cards in a unit of 72 employees. Even if the Board, at a future time, determines that Corn's card is valid (raising the number of valid cards to 36 in a unit of 72), there still would be no majority. Therefore, if Falkosky's card is invalid, there would be no reason to remand.

Wards contends that Falkosky signed her card as a result of statements by the Union's organizers that the cards would be used for the sole purpose of obtaining a Board election. The authorization card which Falkosky signed stated:

> I hereby request membership in and also authorize the Amalgamated Food Employees Union, Local 590 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, to represent me and bargain collectively with my employer in my behalf to negotiate and conclude all agreements concerning wages, hours, fringe benefits and other terms and conditions of employment.

The wording of the card leaves little room for ambiguity and the testimony clearly indicates that Falkosky read the authorization before signing the card.[10]

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606, 89 S.Ct. 1918, 1936, 23 L.Ed.2d 547 (1969), the Supreme Court adopted the Board's *Cumberland Shoe* rule. *Cumberland Shoe Corp.*, 144 N.L.R.B. 1268 (1963). If the card states on its face that the signer authorizes the union to represent the employee for collective bargaining purposes, and not merely to seek an election, it will be counted unless the employer can show that the unambiguous language on the card has been "deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." *Gissel,* 395 U.S. at 606, 89 S.Ct. at 1936; *Red Oaks Nursing Home, Inc. v. NLRB,* 633 F.2d 503, 507–08 (7th Cir. 1980); *Texaco, Inc. v. NLRB,* 436 F.2d 520, 523–24 (7th Cir. 1971). Thus, in *Area Disposal, Inc.,* 200 N.L.R.B. 350 (1972), the Board counted unambiguous cards where employees were told that the "principal purpose" of the cards was to obtain an election. In *Colonial Lincoln Mercury Sales, Inc.,* 197 N.L.R.B. 54 (1972), *enforced,* 485 F.2d 455 (5th Cir. 1973), the Board counted unambiguous authorization cards signed by employees allegedly believing that they were only for the purpose of obtaining a union meeting. And, in *Unarco Industries, Inc.,* 197 N.L.R.B. 489 (1972), unambiguous cards were counted where employees were told the union needed "so many more cards before they could go ahead and get an election." *See also Red Oaks Nursing Home, Inc. v. NLRB,* 633 F.2d 503 (7th Cir. 1980) (card counted where union representative stated that card was needed to "form a committee so there could be an election"); *Peerless of America v. NLRB,* 484 F.2d 1108 (7th Cir. 1973) (cards counted where employees told cards were to be used to petition for an election and that the cards would be used to show interest in the union and get a union representative to come to talk about the union).

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Where an employer is able to prove that authorization cards were represented as being solicited for the *sole* purpose of obtaining an election, such cards will not be valid for purposes of determining the union's majority status. *Fort Smith Outerwear v. NLRB,* 499 F.2d 223 (8th Cir. 1974). A finding of misrepresentation is not confined to situations where employees are expressly told that the "sole" or "only" purpose of the card is to obtain an election. It is not the use or nonuse of certain key or "magic" words that is controlling. The inquiry must focus on "whether or not the totality of circumstances surrounding the card solicitation is such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election." *Gissel,* 395 U.S. at 608 n.27, 89 S.Ct. at 1937 n.27; *Medline Industries Inc. v. NLRB,* 593 F.2d 788, 794 n.6 (7th Cir. 1979).

We find that the Board's decision to count Falkosky's card was supported by substantial evidence. The language on the card was neither canceled nor negated. Moreover, since Falkosky's testimony vacillated, it was within the ALJ's discretion to find that no misrepresentations were made to her.[11] Finally, even if Falkosky overheard statements that the cards were being used only to obtain an election, she could not remember whether "union adherents" made the statements.[12]

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[10] Of course, an employee who signs a card may not understand all the legal ramifications that may follow. But as the Supreme Court noted in *Gissel,* "We cannot agree . . . that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else." 395 U.S. at 607, 89 S.Ct. at 1939. Since Falkosky read the card, she must have been aware that she was effectuating the authorization the card declares.

It appears that Falkosky's recollection of the employees' comments was based more on her impressions and assumptions than upon any specific recollections of conversations. As the Supreme Court noted in *Gissel*, "[E]mployees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8(a)(1)." 395 U.S. at 608. Moreover, we attach significance only to what the employee was told by either the solicitor or the card itself and disregard her subjective understanding.

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"[A]n employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant cannot negative the overt action of having signed a card * * *." *Levi Strauss & Co.*, 172 N.L.R.B. 732, 734 (1968) (quoting *Joy Silk Mills v. NLRB*, 85 N.L.R.B. 1263, *enforced*, 185 F.2d 732 (D.C.Cir.1950), *cert. denied*, 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350 (1951)). In these circumstances, "to open up avenues of proof of subjective intent would create strong temptations for employers to induce employees to assert a retroactive disavowal * * *." *Levi Strauss & Co.*, 172 N.L.R.B. at 734.

We, therefore, find that the Union had 36 valid cards in a bargaining unit of 72 employers. Since *Gissel* requires that the Union attain majority support before issuing a bargaining order, we cannot enforce the bargaining order at this time.[13] We remand the case for purposes of allowing the parties to consider any remaining cards which were not considered below. Since Wards did not contest the Board's findings that certain conduct of its employees violated Section 8(a)(1) of the National Labor Relations Act, the Board's order with respect to these violations should be enforced.

Therefore, enforcement is, in part, denied and, in part, enforced and the case is remanded for further proceedings consistent with this opinion.

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[11] Her response to the same questions fluctuated:

> Q. Were you ever told that the purpose of this card was just to obtain an election?
>
> A. No, I can't really say that[.] I was asked if I would sign the card.
>
> Q. No one ever said to you that this card would be just used to obtain an election?
>
> A. I don't remember my being told that, I assumed that, I thought that's what it was for.

Later, on cross-examination, she testified as follows:

> Q. If I understand your testimony it was, you also heard the employees who were soliciting others to sign these cards, say that these cards would be used to obtain an election, is that correct?
>
> A. Yes.
>
> Q. Did you hear those employees making those statements before you signed the card.
>
> A. Yes, I believe it was before.
>
> Q. And did you sign the card with that understanding?
>
> A. Yes.

In response to a question which suggested that the card solicitors said that the card would only be used to get an election, Falkosky responded, "I can't really remember whether they did. I guess that's probably what they were talking about when I heard—yes, I'd have to say yes."

[12] JUDGE MALONEY: What I want to know is who was the employee or employees who stated to you, that prior to the time, you signed the card, the purpose of the card, was solely to get an election, if you remember?

> A. I don't truthfully remember. I worked in a different group at that time, and it was the people that worked around me. They were talking about it, you know.

[13] Since the Union does not have majority support, we do not reach the question of whether the order should be denied enforcement because the Board did not carry out the detailed analysis mandated in *Red Oaks*, 633 F.2d 503, and did not establish that "the possibility of erasing the effects of past practices and ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel*, 395 U.S. at 614, 89 S.Ct. at 1940.

ORDERS WITHOUT DECISIONS

Singalong, Inc.; NLRB v., 652 F.2d 609 (6th Cir.), January 6, 1981, enfg. 239 NLRB 1156.

Associated Truck Lines v. NLRB, 653 F.2d 241 (6th Cir.), January 9, 1981, enfg. with modification 239 NLRB 917.

Colonial Stores Division of the Grand Union Company v. NLRB, 642 F.2d 447 (4th Cir.), January 9, 1981, enf. denied 248 NLRB 1187.

Sewell Plastics, Inc.; NLRB v., 642 F.2d 448 (4th Cir.), January 9, 1981, enfg. 247 NLRB 236.

Taylor Hospital v. NLRB, 642 F.2d 444 (3d Cir.), January 12, 1981, enfg. 249 NLRB 137.

Staco, Inc.; NLRB v., 647 F.2d 162 (2d Cir.), January 14, 1981, enfg. 248 NLRB 1329.

Agricom Oilseeds, Inc.; NLRB v., 639 F.2d 789 (9th Cir.), January 15, 1981, enfg. 245 NLRB 616.

St. Regis Paper Co. v. NLRB, 642 F.2d 449 (4th Cir.), January 15, 1981, enfg. 247 NLRB 745.

Bolsa Drainage, Inc.; NLRB v., 639 F.2d 789 (9th Cir.), January 16, 1981, enfg. 242 NLRB 728.

Five Star Air Freight Corp.; NLRB v., 642 F.2d 443 (3d Cir.), January 19, 1981, enfg. 245 NLRB 173.

Hoover, Thomas, and Loy, Dennis, d/b/a The Players Restaurant; NLRB v., 639 F.2d 789 (9th Cir.), January 21, 1981, enfg. 246 NLRB 863.

Simmons, Lee, and Simmons, Beverly McKinstry, a partnership, d/b/a Elmendorf & Fort Richardson Barber Concession; NLRB v., 639 F.2d 789 (9th Cir.), January 21, 1981, enfg. 247 NLRB 667.

Gallet, Louis, Inc.; NLRB v., 642 F.2d 443 (3d Cir.), January 27, 1981, enfg. 247 NLRB 63.

Phelan, H.C. v. NLRB, 638 F.2d 246 (5th Cir.), January 27, 1981, enfg. 248 NLRB 802.

Nelson Electric, Gary C. Nelson, Inc. and Gary C. Nelson Electric v. NLRB, 106 LRRM 2393 (6th Cir.) January 27, 1981, enfg. 241 NLRB 545.

Hydro Conduit Corp.; NLRB v., 108 LRRM 2344 (10th Cir.), February 3, 1981, enfg. 240 NLRB 48.

Local 525, Meat, Food and Allied Workers Union v. NLRB, 644 F.2d 39 (D.C. Cir.) February 8, 1981, enfg. 242 NLRB 132.

Retail Store Employees Union Local 214, a/w United Food and Commercial Workers International Union AFL-CIO-CLC and Pick-N-Save Warehouse Foods Inc.; NLRB v., 659 F.2d 253 (D.C. Cir.), February 9, 1981, mtn. for temporary injunctive relief granted 252 NLRB 547.

Patino, Victor, and Patino, Nydia; NLRB v., 642 F.2d 456 (9th Cir.), February 9, 1981, enfg. 241 NLRB 774.

Quad C. Corporation and Associated General Contractors of California; NLRB v., 639 F.2d 789 (9th Cir.), February 9, 1981; rehearing denied March 18, 1981; certiorari denied October 5, 1981; enfg. 246 NLRB 463.

Childers Products Company v. NLRB, 653 F.2d 242 (6th Cir.), February 19, 1981, enfg. 242 NLRB 1280.

Enidine, Inc.; NLRB v., 652 F.2d 54 (2d Cir.), February 19, 1981, enfg. 251 NLRB 1262.

Plumbers and Steamfitters Local No. 40 United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada AFL-CIO; NLRB v., 642 F.2d 456 (9th Cir.), February 19, 1981, enfg. 242 NLRB 1157.

Portsmouth Lumber Treating, Inc. v. NLRB, 644 F.2d 881 (4th Cir.), February 19, 1981, enfg. 248 NLRB 1170.

Willmar Bank Employees Association v. NLRB 644 F.2d 40 (D.C. Cir.) February 19, 1981, enfg. 245 NLRB 389.

Tenneco Chemicals, Inc.; NLRB v., 642 F.2d 443 (3d Cir.) February 24, 1981, enfg. 249 NLRB 1176.

Norton Concrete Company of Longview, Inc. v. NLRB, 640 F.2d 383 (5th Cir.), February 25, 1981, enfg. 249 NLRB 1270.

High Performance Tube, Inc. v. NLRB, 640 F.2d 382 (5th Cir.), February 25, 1981, enfg. 251 NLRB 1362.

Tartan Marine Co., Inc. v. NLRB, 644 F.2d 882 (4th Cir.), February 26, 1981, 1981, enfg. in part, denying in part 247 NLRB 646.

Clark & Hinojosa, Attorneys at Law, a Professional Corporation v. NLRB, 640 F.2d 383 (5th Cir.), February 27, 1981, denying enfg. 247 NLRB 710.

Fluid Packaging Company, Inc.; NLRB v., 649 F.2d 860 (3d Cir.), March 4, 1981, enfg. 247 NLRB 1469.

Johnson Controls, Inc.; NLRB v., 647 F.2d 160 (1st Cir.), March 4, 1981, enfg. 248 NLRB 1362.

N.B.O. Stores, Inc. and its wholly-owned subsidiary National Brands Outlet of New Jersey, Inc.; NLRB v., 649 F.2d 860 (3d Cir.), March 5, 1981, enfg. 249 NLRB 1012.

Patrick & Company v. NLRB, 644 F.2d 889 (9th Cir.), March 5, 1981, rehearing denied June 22, 1981; enfg. 248 NLRB 390.

General Warehouse Corporation; NLRB v., 106 LRRM 2729 (3d Cir.), March 10, 1981, enfg. 247 NLRB 1073.

Saloon, Inc., The; NLRB v., 647 F.2d 171 (9th Cir.) March 16, 1981, enfg. 247 NLRB 1105.

Union Savings and Trust Company, Inc. v. NLRB, 106 LRRM 3061 (6th Cir.), March 17, 1981, enfg. 242 NLRB 176.

Fun Striders, Inc.; NLRB v., 647 F.2d 170 (9th Cir.) March 19, 1981, enfg. 248 NLRB 182.

Libbie Convalescent Center a/k/a Libbie Rehabilitation Center, Inc. v. NLRB, 649 F.2d 863 (4th Cir.), March 19, 1981, enfg. in part 251 NLRB 817.

Mr. A's Restaurant; NLRB v., 647 F.2d 171 (9th Cir.) March 20, 1981, certiorari denied October 5, 1981; enfg. 248 NLRB 990.

Burns Motor Freight, Inc.; NLRB v., 649 F.2d 864 (4th Cir.), March 26, 1981, rehearing denied April 24, 1981, enfg. 250 NLRB 276.

Local Union No. 5163, United Steelworkers of America, AFL–CIO; NLRB v., 654 F.2d 725 (7th Cir.), April 7, 1981, enfg. 248 NLRB 943.

Local 394, Laborers' International Union of North America, AFL–CIO v. NLRB, 659 F.2d 252 (D.C. Cir.), April 7, 1981; certiorari denied October 5, 1981, enfg. 247 NLRB 97.

Appalachian Power Company v. NLRB, 660 F.2d 488 (4th Cir.), April 8, 1981; rehearing denied June 4, 1981; certiorari denied October 13, 1981, enfg. 250 NLRB 228.

Axton Candy and Tobacco Company; NLRB v., 645 F.2d 555 (6th Cir.), April 8, 1981, enfg. in part, denying in part 241 NLRB 1034.

Overnite Transportation Company v. NLRB 660, F.2d 492 (4th Cir.), April 8, 1981, enfg. 251 NLRB 1009.

Shield-Pacific, Ltd., and West Hawaii Concrete, Ltd. v. NLRB, 647 F.2d 172 (9th Cir.), April 9, 1981; rehearing denied June 4, 1981, enfg. as modified 245 NLRB 409.

Allis-Chalmers Corporation; NLRB v., 642 F.2d 766 (5th Cir.), April 13, 1981, denying enforcement 252 NLRB 775.

Beverly Times-Division of Essex County Newspapers, Inc.; NLRB v., 657 F.2d 259 (1st Cir.), April 13, 1981, enfg. 245 NLRB 522.

DECA, a limited Partnership d/b/a American Health Care Center of Decatur; NLRB v., 645 F.2d 69 (5th Cir.), April 13, 1981, enfg. 245 NLRB 730.

Eckerd Drugs of Georgia, Inc.; NLRB v., 645 F.2d 69 (5th Cir.) April 13, 1981, certiorari denied October 5, 1981, enfg. 248 NLRB 151.

Tobey Fine Papers of Kansas City, Division of Distribix, Inc. v. NLRB, 659 F.2d 841 (8th Cir.), April 20, 1981, enfg. 245 NLRB 1298.

Land Equipment, Inc. and Equipment Service Rentals, a Single Employer; NLRB v., 649 F.2d 685 (9th Cir.), April 20, 1981, enfg. 248 NLRB 685.

New England Lumber Division of Diamond International Corporation v. NLRB, 646 F.2d 1 (1st Cir.) April 21, 1981, enfg. 252 NLRB 95.

Fourco Glass Company, Rolland Division; NLRB v., 646 F.2d 863 (4th Cir.), April 22, 1981, denying enf. 250 NLRB 953.

Genova Transport, Inc.; NLRB v., 659 F.2d 1069 (3d Cir.) April 22, 1981, enfg. 245 NLRB 229.

Heatilator Fireplace, Division of Vega Industries, Inc.; NLRB v., 646 F.2d 1210 (8th Cir.), April 22, 1981, enfg. 249 NLRB 544.

Seneca Environmental Products, a Division of Seneca Sheet Metal, Inc.; NLRB v., 646 F.2d 1170 (6th Cir.), April 23, 1981, enfg. 243 NLRB 624.

Flair Molded Plastics, Inc.; NLRB v., 654 F.2d 727 (7th Cir.), April 28, 1981, denying enf. 250 NLRB 202.

Hankamer Ready Mix Concrete Company; NLRB v., 108 LRRM 2560 (10th Cir.), April 30, 1981, enfg. as modified 234 NLRB 608.

WGAL–TV, Inc.; NLRB v., 659 F.2d 1069 (3d Cir.), May 21, 1981; rehearing denied June 3, 1981, enfg. 250 NLRB 223.

Utlaut, Edward A., Foundation, Inc., d/b/a Utlaut, Edward A., Memorial Hospital and Fair Oaks Nursing Home v. NLRB, 657 F.2d 272 (7th Cir.) May 27, 1981, enfg. in part, denied in part 249 NLRB 1153.

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Local 48 v. NLRB, 656 F.2d 901 (D.C. Cir.), May 11, 1981, enfg. 249 NLRB 180.

Presnell & Stowe Tank Company, and Presnell & Stowe Welding Company, Inc. v. NLRB, 661 F.2d 925 (4th Cir.), May 15, 1981, enfg. 250 NLRB 1275.

Pilgrim Life Insurance Company v. NLRB, 659 F.2d 1070 (3d Cir.), May 21, 1981, enfg. 249 NLRB 1228.

Petroleum Electronics, Inc., and/or Cook Enterprises, Inc.; NLRB v., 659 F.2d 1069 (3d Cir.), May 26, 1981, enfg. 250 NLRB 265.

Illinois Health Service, Inc., d/b/a Barclay Hospital v. NLRB, 657 F.2d 271 (7th Cir.), May 7, 1981; certiorari denied December 14, 1981, enfg. 247 NLRB 1023.

Campo Slacks, Inc., and J & E Sportswear, Inc., 659 F.2d 1069 (3d Cir.), May 27, 1981; certiorari denied October 19, 1981, enfg. 250 NLRB 420.

Billings Chrysler-Plymouth, Inc. v. NLRB, 652 F.2d 61 (9th Cir.), May 15, 1981, rehearing denied August 28, 1981, enfg. 249 NLRB 1189.

Adams Insulation Co., Inc. v. NLRB, 652 F.2d 61 (9th Cir.), June 2, 1981, enfg. 248 NLRB 313.

Alexander, Rosa M., d/b/a A & B Janitorial Service v. NLRB, 661 F.2d 917 (4th Cir.), June 2, 1981, enfg. 253 NLRB 508.

B. K. Restaurants Orlean, Inc., d/b/a Burger King Restaurant; NLRB v., 661 F.2d 909 (2d Cir.), June 2, 1981, enforcing with exception 252 NLRB 465.

Nissin Foods Company, Inc. v. NLRB, 515 F. Supp. 1154 (D.C. Pa.), June 2, 1981, mtn. to reconsider denied.

Farmingdale Iron Works, Inc. and Jerry Cardullo Iron Works, Inc.; NLRB v., 661 F.2d 910 (2d Cir.), June 3, 1981, enfg. 249 NLRB 98.

Owen Joist Corporation; NLRB v., 661 F.2d 924 (4th Cir.), June 4, 1981, enfg. in part, denied in part 248 NLRB 589.

International Allied Industrial Workers of America (AFL-CIO) and its Local No. 657 and Truck Transport, Inc. v. NLRB, 659 F.2d 252 (D.C. Cir.), June 5, 1981, enfg. 245 NLRB 796.

Reinauer Fuel Transportation Corporation; NLRB v., 661 F.2d 910 (2d Cir.), June 5, 1981, enfg. 251 NLRB 1573.

Acme Wire Works, Inc.; NLRB v., 661 F.2d 909 (2d Cir.), June 8, 1981, enfg. 251 NLRB 1567.

International Business Systems, Inc. v. NLRB, 659 F.2d 1068 (3d Cir.), June 8, 1981, enfg. 247 NLRB 678.

Center for Laboratory Medicine, Inc.; NLRB v., 659 F.2d 1069 (3d Cir.), June 8, 1981; certiorari denied November 2, 1981; enfg. 248 NLRB 728.

International Business Systems, Inc.; NLRB v., 659 F.2d 1069 (3d Cir.), June 9, 1981, enfg. 250 NLRB 1289.

Stroehmann Brothers Company v. NLRB, 659 F.2d 1071 (3d Cir.), June 9, 1981, enfg. 252 NLRB 988.

Aquilar, Richard, d/b/a Ric's Best Auto Painting; NLRB v., 652 F.2d 64 (9th Cir.), June 11, 1981, enfg. as modified 248 NLRB 1028.

Lawrence, Marcus J., Memorial Hospital; NLRB v., 652 F.2d 64 (9th Cir.), June 11, 1981, enfg. in part, denied in part 249 NLRB 608.

Honeywell, Inc. v. NLRB, 659 F.2d 1067 (3d Cir.), June 12, 1981; rehearing denied July 8, 1981; enfg. 251 NLRB 382.

Local 1017, Lumber and Sawmill Workers a/w The Western Council, Lumber, Production & Industrial Workers v. NLRB, 654 F.2d 730 (9th Cir.), June 16, 1981, denying ptn. to review 246 NLRB 476.

Nestle Co., Inc., The v. NLRB, 659 F.2d 252 (D.C. Cir.), June 16, 1981, enfg. 251 NLRB 1023.

Inta-Roto, Incorporation v. NLRB, 661 F.2d 922 (4th Cir.), June 17, 1981; rehearing denied July 22, 1981; enfg. 252 NLRB 764.

Local Union No. 10, International Association of Machinists and Aerospace Workers v. NLRB, 661 F.2d 922 (4th Cir.), June 17, 1981, enfg. 252 NLRB 764.

Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO v. NLRB, 659 F.2d 253 (D.C. Cir.), June 19, 1981, enfg. 251 NLRB 1293.

Gaylord Broadcasting Company v. NLRB, 651 F.2d 775 (5th Cir.), June 26, 1981, enfg. 250 NLRB 1357.

Cumberland Nursing & Convalescent Center; NLRB v., 661 F.2d 924 (4th Cir.), June 29, 1981, enfg. 251 NLRB 290.

Paxton, Frank, Lumber Company v. NLRB, 108 LRRM 2344 (10th Cir.), June 29, 1981; rehearing denied January 15, 1982; enfg. 235 NLRB 582.

Wismer and Becker Contracting Engineers, IBEW, Local Union 497; NLRB v., 654 F.2d 731 (9th Cir.), June 29, 1981, denying enforcement 251 NLRB 687.

Werner-Continental, Inc. v. Emil C. Farkas, RD, 661 F.2d 935 (6th Cir.), June 31, 1981, affg. denial of attorney's fees claimed by plaintiff under FOIA.

Hink, J.F., and Son v. NLRB, 654 F.2d 729 (9th Cir.), July 9, 1981; rehearing denied September 25, 1981; enfg. 252 NLRB 1187.

Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO v. NLRB, 661 F.2d 909 (2d Cir.), July 10, 1981; rehearing denied September 11, 1981; certiorari denied March 8, 1982; enfg. 247 NLRB 1042.

American Petrofina Company of Texas; NLRB v., 652 F.2d (5th Cir.), July 15, 1981, denying enforcement 247 NLRB 183.

Bruce Cartage, Inc.; NLRB v., 654 F.2d 456 (6th Cir.), July 17, 1981, adjudging respondents in civil contempt of ct's decree of Sept. 21, 1981.

Foundation for Comprehensive Health Services; NLRB v., 654 F.2d 731 (9th Cir.), July 17, 1981, remanding 251 NLRB 161.

United States Postal Service; NLRB v., 652 F.2d 998 (5th Cir.), July 17, 1981, enfg. 250 NLRB 1195.

Facet Enterprises, Inc. v. NLRB , 654 F.2d 719 (5th Cir.), July 24, 1981; rehearing denied September 10, 1981; enfg. 253 NLRB 1127.

Richardson Engineering Company; NLRB v., 661 F.2d 914 (3d Cir.), July 24, 1981, enfg. 248 NLRB 702.

Canter, Lewis, d/b/a Century Printing Company, et al.; NLRB v., 661 F.2d 914 (3d Cir.), July 29, 1981, enfg. 242 NLRB 659.

Petroleum Contractors, Inc.; NLRB v., 108 LRRM 2344 (3d Cir.), August 3, 1981, enfg. 250 NLRB 604.

Sameric Corporation v. NLRB, 108 LRRM 2344 (3d Cir.), August 4, 1981, enfg. 253 NLRB 345.

Hawthorne Mazda, Inc.; NLRB v., 659 F.2d 1089 (9th Cir.), August 10, 1981, enfg. 251 NLRB 204.

Hoosier Energy Division, Indiana Statewide Rural Electric Cooperative; NLRB v., 663 F.2d 1076 (7th Cir.), August 10, 1981, denying enforcement of 247 NLRB 59.

Baylor University Medical Center v. NLRB, 662 F.2d 56 (D.C. Cir.), August 20, 1981, denying enforcement and remanding 247 NLRB 1323.

P.A. Incorporated; NLRB v., 656 F.2d 698 (5th Cir.), August 20, 1981; rehearing denied October 6, 1981; enfg. 248 NLRB 491.

Industrial Personnel Corporation v. NLRB, 657 F.2d 226 (8th Cir.), August 21, 1981; rehearing denied October 5, 1981; certiorari denied January 11, 1982; enfg. 250 NLRB 1139.

Furr's Cafeterias, Inc. v. NLRB, 656 F.2d 698 (5th Cir.), August 24, 1981, enfg. 251 NLRB 879.

Bedford Cut Stone Co., Inc.; NLRB v., 663 F.2d 1077 (7th Cir.), August 25, 1981, enfg. 235 NLRB 629.

Louisville Plate Glass Company, Inc.; NLRB v. 657 F.2d 106 (6th Cir.), August 28, 1981, enfg. 243 NLRB 1175.

Crown Cork & Seal Company, Inc. v. NLRB, 108 LRRM 24 (10th Cir.), September 1, 1981; rehearing denied October 13, 1981; certiorari denied January 11, 1982; enfg. 247 NLRB 24.

ITT Lighting Fixtures, Division of ITT Corporation v. NLRB, 658 F.2d 934 (2d Cir.), September 1, 1981; certiorari denied May 14, 1983; remanding 252 NLRB 328.

Brown Company; Brown Company, Livingston-Graham Division; etc. v. NLRB, 663 F.2d 1078 (9th Cir.), September 2, 1981, enfg. in part, remanding in part 243 NLRB 769.

Kraft Plumbing & Heating, Inc., an Arizona Corp. v. NLRB, 661 F.2d 940 (9th Cir.), September 3, 1981, affg. 252 NLRB 891.

Sunnyland Refining Co., Inc. v. NLRB, 657 F.2d 1249 (5th Cir.), September 4, 1981, enfg. 250 NLRB 1180.

Perko's Enterprises, Inc.; NLRB v., 661 F.2d 941 (9th Cir.), September 8, 1981, enfg. 251 NLRB 522.

Welco Industries, Inc. v. NLRB, 653 F.2d 231 (6th Cir.), September 9, 1981, enfg. 237 NLRB 294.

CAS Walker's Cash Stores Inc., and Independent Union of Grocer's Employees; NLRB v., 108 LRRM 316 (6th Cir.), September 14, 1981, enfg. 249 NLRB 316.

Jacques Syl Knitwear, Inc., Biquette, Inc.; NLRB v., 672 F.2d 904 (3d Cir.); certiorari denied 455 U.S. 946; enfg. 247 NLRB 1525.

Albertson's, Inc. v. NLRB, 661 F.2d 939 (9th Cir.), September 17, 1981, remanding 252 NLRB 529.

Digital Paging System of Toledo, Inc.; NLRB v., 659 F.2d 3141 (6th Cir.), September 17, 1981; rehearing denied October 23, 1981; enfg. 244 NLRB 127.

East Side Santitation Service, Inc.; NLRB v., 653 F.2d 235 (6th Cir.), September 17, 1981, enfg. 234 NLRB 1099.

Earle Industries, Inc.; NLRB v., 664 F.2d 293 (8th Cir.), September 22, 1981, enfg. 252 NLRB 126.

Maietta, Dennis G., and Maietta, Frank t/a Maietta Contracting; NLRB v., 672 F.2d 904 (3d Cir.), September 22, 1981, enfg. 251 NLRB 177.

Pipeline Local Union No. 38 a/w The Laborers' International Union of North America, AFL–CIO v. NLRB, 673 F.2d 552 (D.C. Cir.), September 29 1981, enfg. 247 NLRB 1250.

Penn-Dixie Steel Corporation, Joliet Bar Mil Division v. NLRB, 110 LRRM 2739 (7th Cir.) September 30, 1981, enfg. 253 NLRB 91.

Propellex Corporation v. NLRB, 110 LRRM 2739 (7th Cir.), September 30, 1981, enfg. 2 NLRB 42.

North Suburban Blood Center v. NLRB, 6 F.2d 632 (7th Cir.), October 1, 1981, denying e forcement 251 NLRB 733.

MCC Pacific Valves, a unit of Mark Contr Corporation v. NLRB, 108 LRRM 2059 (9th Ci October 2, 1981; certiorari denied November 1981; enfg. in part, remanding in part 244 NL 931.

Central Virginia Electric Cooperative v. NLRB, 672 F.2d 907 (4th Cir.), October 9, 1981, enfg. 254 NLRB 417.

Discotron Equipment Inc., d/b/a Xenon; NLRB v., 110 LRRM 2346 (2d Cir.), October 9, 1981, enfg. 250 NLRB 806.

Maywood Do-Nut Co., Inc.; NLRB v., 108 LRRM 2710 (9th Cir.), October 13, 1981, enfg. 248 NLRB 529.

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Texaco, Inc.; NLRB v., 108 LRRM 2850 (9th Cir.), October 16, 1981, enfg. 251 NLRB 633.

Local 336, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 672 F.2d 895 (D.C. Cir.), October 19, 1981, ptn. for review denied.

B. E. & K., Inc. v. NLRB, 672 F.2d 906 (4th Cir.), October 20, 1981, enfg. in part, setting aside in part 252 NLRB 256.

Local 412, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. NLRB, 672 F.2d 895 (D.C. Cir.), October 20, 1981; rehearing en banc denied November 23, 1981; affg. 250 NLRB 863.

Mid America Media, Inc., WTRX-AM v. NLRB, 663 F.2d 17 (6th Cir.), October 20, 1981, enfg. 248 NLRB 1253.

General Drivers & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; NLRB v., 676 F.2d 703 (8th Cir.), October 22, 1981, enfg. 253 NLRB 1.

Waterford Park, Inc. v. NLRB, 672 F.2d 898 (D.C. Cir.), October 26, 1981, affg. 251 NLRB 874.

Methodist Home, The v. NLRB, 672 F.2d 911 (4th Cir.), October 27, 1981, enfg. 253 NLRB 458.

Sheet Metal Workers Union Local No. 3, NLRB v., 662 F.2d 513 (8th Cir.), October 30, 1981, enfg. 253 NLRB 330.

S. Freedman Electric, Inc. v. NLRB, 679 F.2d 873 (2d Cir.), November 4, 1981, enfg. 256 NLRB 432.

Waycross Molded Products, Inc.; NLRB v., 664 F.2d 295 (10th Cir.), November 5, 1981, enfg. 251 NLRB 727.

Wysocki, Lawrence W. v. NLRB, 673 F.2d 1296 (1st Cir.), November 9, 1981, affg. finding of no violation in 255 NLRB 708.

U.S. Utilities Services Corporation v. NLRB, 673 F.2d 1304 (3d Cir.), November 9, 1981, enfg. 254 NLRB 480.

Ducane Heating Corporation v. NLRB, 108 LRRM 3059 (4th Cir.), November 13, 1981, enfg. in part, denying in part 254 NLRB 112.

Local 889, Laborers' International Union of North America, AFL-CIO; NLRB v., 673 F.2d 1301 (3d Cir.), November 16, 1981, enfg. 251 NLRB 1579.

Young Movers, Inc.; NLRB v., 635 F.2d 539 (6th Cir.), November 17, 1981, enfg.

Cornell University; NLRB v., 679 F.2d 873 (2d Cir.), November 18, 1981, enfg. 251 NLRB 409.

Unitog Company; NLRB v., 676 F.2d 704 (8th Cir.), November 18, 1981, enfg. 253 NLRB 614.

Dravo Corporation, Engineering Works Division v. NLRB, 673 F.2d 1299 (3d Cir.), November 20, 1981, enfg. 255 NLRB 584.

Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO v. NLRB, 672 F.2d 897 (D.C. Cir.), November 25, 1981, enfg. 253 NLRB 337.

International Longshoremen's and Warehousemen's Union, Local No. 10 v. NLRB, 672 F.2d 894 (D.C. Cir.), November 27, 1981, affg. 254 NLRB 540.

Home Insulation Service, a Division of Sunstate Wholesalers v. NLRB, 665 F.2d 452 (10th Cir.), December 1, 1981, enfg. 255 NLRB 311.

Transport and Local Delivery Drivers, Local 104 v. NLRB, 672 F.2d 897 (D.C. Cir.), December 1, 1981; rehearing denied February 9, 1982; certiorari denied October 4, 1982; enfg. 253 NLRB 31.

East Wind Enterprises; NLRB v., 664 F.2d 754 (9th Cir.), December 4, 1981, enfg. 250 NLRB 685.

Providence Hospital; NLRB v., 673 F.2d 1314 (4th Cir.), December 8, 1981, enfg. 251 NLRB 1071.

Tomy Corporation, a wholly owned subsidiary of Tomy Kogyo, Inc. v. NLRB, 667 F.2d 1032 (9th Cir.), December 9, 1981; rehearing denied January 29, 1982; certiorari denied April 19, 1981; enfg. 255 NLRB 1.

National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO; NLRB v., 673 F.2d 1314 (4th Cir.), December 10, 1981, enfg. 248 NLRB 631.

Local 1106, International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 672 F.2d 895

(D.C. Cir.), December 11, 1981, affg. 251 NLRB 737.

Magnesium Casting Company, Inc.: NLRB v., 668 F.2d 2429 (1st Cir.), December 11, 1981, enfg. 250 NLRB 692.

Robbins and Myers, Inc. v. NLRB, 653 F.2d 237 (6th Cir.), December 11, 1980, enfg. 241 NLRB 102.

International Medication Systems, Ltd.; NLRB v., 667 F.2d 1031 (9th Cir.), December 14, 1981; rehearing denied March 8, 1982; certiorari denied June 14, 1982; enfg. 253 NLRB 863.

Loose Leaf Hardware, Inc. v. NLRB, 666 F.2d 1036 (6th Cir.), December 14, 1981, denying enf. and remanding 251 NLRB 168.

Maremont Corporation, World Parts Division v. NLRB, 666 F.2d 1037 (6th Cir.), December 15, 1981, setting aside 251 NLRB 1617.

Tennessee Cartage Company, Inc. v. NLRB, 666 F.2d 315 (6th Cir.), December 17, 1981, enfg. 250 NLRB 112.

Five Star Air Freight Corporation v. NLRB, 673 F.2d 1299 (3d Cir.), December 18, 1981; rehearing denied January 18, 1982; enfg. 255 NLRB 275.

Heat Research Corporation; NLRB v., 666 F.2d 590 (5th Cir.), December 18, 1981; rehearing en banc denied January 22, 1982; enfg. 243 NLRB 206.

Pabco Insulation, Division of Louisiana Pacific Corporation; NLRB v., 666 F.2d 590 (5th Cir.), enfg. 249 NLRB 1131.

Desper, Donald; Anderson, Betty; and Perry, Edward v. NLRB, 672 F.2d 893 (D.C. Cir.), December 21, 1981, affg. 250 NLRB 1451.

Groendyk, Roger v. NLRB, 672 F.2d 894 (D.C. Cir.), December 21, 1981, affg. 253 NLRB 935.

International Union of Operating Engineers, Local Union No. 132, AFL-CIO; NLRB v., 673 F.2d 1314 (4th Cir.), December 22, 1981, enfg. 255 NLRB 351.

American Sunroof Corporation; Automobile Specialty Corporation; American Sunroof Manufacturing Co.; NLRB v., 667 F.2d 20 (6th Cir.), December 23, 1981, enfg. in part, denying in part 248 NLRB 748.

Nevada County Publishing Company, d/b/a 'The Union'; NLRB v., 672 F.2d 923 (9th Cir.), December 28, 1981, enfg. 251 NLRB 1030.

Keeshin Charter Service, Inc.; NLRB v., 673 F.2d 1335 (7th Cir.), December 31, 1981, enfg. 250 NLRB 780.

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